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SENATE

ECONOMICS LEGISLATION COMMITTEE

**Reference: Corporations Amendment (Repayment of Directors'
Bonuses) Bill 2003**

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WITNESSES

BAXT, Professor Robert, Chairman, Law Committee, Australian Institute of Company Directors 1

BURROW, Ms Sharan, President, Australian Council of Trade Unions 1

DIXON, Mr Arthur James, Director, Accounting and Audit, CPA Australia..... 1

DWYER, Mr Michael, National President, Insolvency Practitioners Association of Australia 1

NEILD, Mr Stanley, Manager, Legislation Review, Australian Accounting Research Foundation..... 1

RAWSTRON, Mr Michael, General Manager, Corporate Governance Division, Department of the Treasury 1

ROFE, Mr Alfred Edward Fulton, Chairman, Australian Shareholders Association Limited..... 1

ROGERS, Mr Scott, Analyst, Governance and Insolvency Unit, Corporate Governance Division, Department of the Treasury 1

UPTON, Ms Gabrielle, Senior Policy Officer, Australian Institute of Company Directors 1

WIJEYWARDENE, Ms Kerstin, Manager, Accounting Policy Unit, Corporate Governance Division, Department of the Treasury 1

SENATE
ECONOMICS LEGISLATION COMMITTEE
Thursday, 6 March 2003

Members: Senator Brandis (*Chair*) Senator Collins (*Deputy Chair*), Senators Chapman, Murray, Watson and Webber

Participating members: Senators Abetz, Boswell, Buckland, George Campbell, Carr, Cherry, Conroy, Cook, Coonan, Eggleston, Evans, Faulkner, Ferguson, Ferris, Forshaw, Harradine, Harris, Kirk, Knowles, Lees, Lightfoot, Ludwig, Lundy, Mason, McGauran, Murphy, Payne, Ridgeway, Sherry, Stott Despoja, Tchen and Tierney

Senators in attendance: Senators Brandis, Collins, Conroy, Murray, Watson and Webber

Terms of reference for the inquiry:

Corporations Amendment (Repayment of Directors' Bonuses) Bill 2002.

Committee met at 4.35 p.m.

BAXT, Professor Robert, Chairman, Law Committee, Australian Institute of Company Directors

BURROW, Ms Sharan, President, Australian Council of Trade Unions

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ACTING CHAIR (Senator Watson)—Welcome. The chair of the committee, Senator George Brandis, will be here shortly. I am familiar with all the issues. We are here today to take evidence relating to the Corporations Amendment (Repayment of Directors' Bonuses) Bill 2002. Provisions of the bill were referred to the Senate Economics Legislation Committee following the report of the Selection of Bills Committee which was presented on 11 December 2002. The committee is required to report by Wednesday, 19 March 2002. The committee is to hear evidence today from a number of organisations and government offices with direct interest in matters dealing with corporate governance legislation. Mr Michael Dwyer from the Insolvency Practitioners Association of Australia is joining the hearing via

phone link-up with Adelaide. I thank all the witnesses for making themselves available to attend this meeting.

Before we commence the taking of evidence, I reinforce for the record that all witnesses appearing before the committee are protected by parliamentary privilege with respect to the evidence that is provided. Parliamentary privilege refers to the special rights and immunities attached to the parliament, its members and others necessary for the discharge of parliamentary functions without obstruction or fear of prosecution. Any act by any person which operates to the disadvantage of a witness on account of evidence given by that witness before this committee is treated as a breach of privilege. These privileges are intended to protect witnesses. I must also remind witnesses, however, that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate.

ACTING CHAIR—Thank you. The hearing will take the form of a roundtable discussion. Committee members may direct a question to a specific witness or ask a general question to which anybody at the table is invited to respond. At the end of the discussion the committee will invite a general summary of views, and you should limit your statement to just a few minutes. I now welcome Senator George Brandis, who will take the chair for the proceedings.

CHAIR—Thank you. I am sorry I was delayed, ladies and gentlemen. As none of the witnesses have indicated that they want to make brief opening remarks, I will give the call to Senator Conroy.

Senator CONROY—The one issue which most submissions seem to agree on is that the bill was too narrow, as it failed to address executive remuneration. Would the participants like to expand on that?

Mr Rofe—You have put my view in a nutshell. As I tried to say in our letter—and I also emailed a brief summary of our views earlier today—I think it is the wrong answer to the wrong question. In the media there tends to be confusion about directors' remuneration and executives' remuneration. I think most of the public concern we hear expressed relates to remuneration and retirement payments for senior executives who, in most cases, are also directors—the chief executive officer or something like that—but it is really the payments they receive as executives rather than the payments they receive as directors. I will qualify that in one degree: we are certainly opposed to the payment of retirement benefits to non-executive directors and, to that extent, we were very pleased to see Stan Wallis hand his back the other day.

Essentially, we are saying that the bill is called the 'repayment of directors' bonuses' bill and is obviously focused on the payments made by One.Tel, but it is not retrospective, so it does not help at all with those payments. I think it introduces rather complicated provisions into the act instead of trying to fix the existing provisions. I have mentioned some of them in the written memo which I sent today—for example, section 300A on the provisions dealing with termination payments and the provisions dealing with related party transactions. My view is that if those could be fixed we would stop these excessive payments before they were made. It is too late to wait until the company goes into liquidation before you try to get the money back. That is not helping the shareholders or the policyholders in AMP or Southcorp or any of the other companies. That is a summary of our position.

Senator CONROY—Would anyone else like to say something?

Prof. Baxt—I think that the question and the answer emphasise the thrust of what the institute is saying in relation to this specific legislation. When this specific legislation was announced by the Prime Minister at the fall of One.Tel and the very dramatic exposure of

certain things that happened there, we were concerned—and we remain concerned and will continue to be concerned—at the fact that the response was ad hoc, knee jerk and without reflection on the broader issues. This is where I agree with Ted Rofe. There are significant problems in the way in which corporate law operates in this country. They need to be addressed comprehensively. To do so in what I have called before in many articles I have written on this issue—both independently and on behalf of the association—a scattergun approach, without reference to the fundamentals of the corporations legislation, is simply going to add to our woes and not help us.

Ted Rofe commented on the issues that he wants changed to pick up questions that have nothing to do with the problem which the Prime Minister addressed when he dealt with this matter and which is the main focus of this legislation. It is going to add a range of complexity to the already very complex legislation that we have in this area which has been introduced over many years. It is through no fault of any particular party or parties; it is the fact that we tend to do this law reform exercise on the run. Let me give you an example of where we have failed to grapple with a problem that is inherent in this legislation—I think it has been picked up by one of the later amendments, but perhaps not—and that is to look at the corporate group. One of the problems that we had with the first version of this legislation was that it did not seem to catch the situation where payments were made not to the directors of a particular company but to another company that was related. Whilst the definition of associate might arguably pick this up, arguably it does not.

The government has already before it a report from CASAC or CAMAC, as it is now known, dealing with corporate groups and the way in which that particular area should be dealt with. It has not responded to that report and it has not dealt with those issues in the broader sense, so we have these problems spreading out as we get more and more complexity in the way in which the law is developing. The institute does not condone gross overpayment to directors, executives or others in relation to their failure to carry out their responsibilities properly. What it is concerned about is the fact that this legislation will add to the costs of very many honest companies and honest people who behave properly in relation to this legislation. It will add considerably to the costs of the regulator. It is amazing how often we do not think about the impact this increased regulation has on ASIC and other regulators. They have got to get on top of this legislation. Financial services legislation recently introduced has put an enormous burden on that body and even with the extra funds they have been voted they cannot deal with all of these issues. It puts an enormous burden on organisations such as my firm and others which have to respond to this and deal with it and the costs have to be passed on.

My plea and the plea of the institute is, if there is an urgent problem that can be dealt with very quickly by a specific piece of legislation because there is a glaring gap in the legislation that needs to be addressed, let us deal with that. This particular piece of legislation does not deal with that. It will turn out to be many years before we get any decisions in relation to this legislation. It will turn out to be many years before we get decisions in relation to the employment entitlements legislation and other legislation. What we will have is just a proliferation of act upon act, building until we have a massive piece of legislation. The Corporations Act now is so thick that you lose the whole thread of it. We totally support the concern in the community that we need to do something about the capture of payments that are improper, illegal et cetera. We believe that the appropriate way to deal with that is to arm the regulator with appropriate resources so that they can bring the kinds of cases they have brought. The Adler case is a classic example of where the regulator has moved swiftly and

effectively and ensured that the courts dealt with this matter effectively. That is the appropriate way to deal with it.

What we have done in addition to that is to provide some instances of where the legislation is defective. We have done that with all the goodwill in the world but we are very concerned at the way in which this legislative initiative is being developed. We have said this about other legislation and other initiatives that have occurred. I can give you another example of that that has just recently occurred. Another committee of the parliament called for a review of our insolvency law. They gave people six weeks over Christmas to come back with responses. That is, with respect, not a very positive and sensible way of dealing with these issues. I think we do need to start to take stock of the fact that, if we want to review these laws and we want to have proper laws, we have to do this properly. Let us stop the very bad practices by ensuring that ASIC brings appropriate action and, where necessary, passing particular legislation. I do not believe that this legislation is going to achieve the aims that underpin the critical issues that arise in these particular areas.

Chair—Senator Conroy, I wonder if I might jump in—

Senator Conroy—You might jump in and apologise for the short timetables—

Chair—that arise from your questions. Both you, Mr Rofe, and Professor Baxt have touched upon this issue. You both use the expression ‘excessive remuneration’. I think the reaction of the community generally and instinctively to some of the remuneration packages that we have heard of in the recent past is understandable. But it seems to me, without for a moment condoning those excessive payments, that there are two problems which are almost problems of definition before you decide what is an excessive remuneration package. The first is this: there are some of these packages that are calculated or embody a performance based formula. I think Mr Cuffe’s package is an example of this. They are a function of the share price and there is a multiplier. If the share price performs exceptionally well under the stewardship of the executive concerned then it simply is a matter of arithmetic. There will be a very large payment upon termination. In the intermediate time there will be tremendous benefits to the shareholders in terms of the increase in the value of their assets.

The second problem, as it seems to me is that, for large companies, the market for executives is an international market. If those companies want to secure the best and most talented executives, they are going to have to bid for them in Europe and America not just in Australia where notions of remuneration may be very different.

When one looks at this in isolation by reference to Australia, it might seem a lot of money. When one looks at it in an international market perhaps it does not seem as excessive as it looks in isolation. Those are two problems that strike me. I would like to invite you and others—perhaps you, Ms Burrow, from the ACTU—to comment on those issues.

Ms Burrow—Do you really want me to comment on those issues as opposed to the bill?

CHAIR—Those two issues, yes.

Ms Burrow—I know that I was smiling in that sense, but I have heard this argument about market and market relativities for CEOs now for more than a decade. If you weigh up the companies who have underperformed, had major collapses, not put aside workers’ entitlements—let us look at the shame file—some of those overseas giants that we have paid a fortune to have actually not performed themselves. That is our point.

At one level, if a company genuinely performs—provided, from our perspective, its shareholders endorse the remuneration packages, including benchmarks for bonuses—that is a democratic decision for the shareholders. But where they do not perform, let us not keep this

going. Why would we continue to argue that when we have talented Australian leaders who do very well in the corporate sector and who would work for a lot less, I can assure you, than the six months salary that the ex-leader of BHP Billiton took away or, indeed, Trumble took from AMP—a noted American; we were going to bring him in and fix the world?

That has not happened. I think it is a tired argument and it is one that, whether you are in America, in Europe or in Australia, the community no longer wears. They simply do not accept that excessive remuneration is necessary, frankly, even where you do a good job. How much do people need to earn—44 times the minimum wage? The increase alone last year in the bonuses of the top 100 CEOs was, in fact, 44 times the minimum wage. At 38 per cent that is their bonus—a \$10,000 a week increase. At some point we have to say that this is nonsense. We are not creating a society that is fair and just even on the basis of affording corporate rewards that denote the performance of directors or, indeed, senior executives. I would much rather address some positive issues around this bill that we and the government can hopefully take on board and do something about and gain community recognition and support.

CHAIR—Mr Rofe or Professor Baxt, can I invite you to comment on those two issues—that is, performance based formulae that inflate a payout or a package and the international market for the services of these?

Mr Rofe—Firstly, I agree that the global market argument has been overdone. Certainly some of our larger companies are competing in a global market. We have a lot of very able executives right here in Australia that I think we should—

CHAIR—Why shouldn't an Australia company be able to recruit the person it considers to be the best in the world?

Mr Rofe—I have no problem with that, but I think if they looked hard enough sometimes they would find that person in Australia. Secondly, going back to the performance argument, if we look at some of these people who have been imported, particularly from the United States, at vast remuneration packages, they have not performed all that well at all. If you look at some of the packages in the United States, you will see that some US companies that have paid those packages have performed a lot better than some Australian companies. I think you have to look at this question of pay versus performance. You mentioned Chris Cuffe at Colonial. I am not so worried about his payment because I think the company did very well.

CHAIR—That is really my point.

Mr Rofe—So I am not arguing about Chris Cuffe's payment. But if we hear that Paul Batchelor gets \$20 million for doing what has been done to AMP shareholders, I will be very upset there.

Senator CONROY—Mr Cuffe's payments were not tied to profitability; they were tied to funds under management, as in revenue coming in. I would argue that the performance hurdles there were faulty.

Mr Rofe—Yes.

Senator CONROY—So I am not as comfortable with the argument that says, 'He grew the business.' He did not necessarily get paid for profitability of the company; he got paid on funds coming in. It is not much different to One.Tel's situation and their saying, 'We'll get paid on market cap.' There is no real performance hurdle issue there.

Mr Rofe—One of the problems there is that we really do not know all the details of his contract, and perhaps this is the next point that should be looked at—disclosure.

CHAIR—That is the transparency issue.

Mr Rofo—That is right.

Ms Burrow—We would agree with that, if there were transparency and both the remuneration packages and the benchmarks for performance were disclosed so that shareholders could know what they were taking on. We would go further and say that shareholders should probably be given a vote on the benchmarks and the like in general terms. That would be reasonable, but that is not the case. It is all very secret. Last week I heard a CEO being interviewed who said that all CEOs now know that the volatility is in the timing of the end of the contract. I would have thought that contracts were fixed term, but it seems that there is a mentality where CEOs go into the business and the biggest negotiation hurdle, according to this corporate leader, is the exit package. It seems a little on the strange side. But that is why, in all seriousness, this is a very big issue for government generally. If all parties could support that sort of transparency around performance benchmarks and the rights of shareholders to understand and endorse that, then you would get a lot of support from the community.

Senator MURRAY—In answering the chair's questions, is the panel making a distinction between executives who are part of a takeover package and are part of the total deal—such as the Cuffe and perhaps the BHP Billiton examples, as I see it—and a company which simply constructs its own mechanism for its own executives? I just want to know in answering that question whether you distinguish between those two types of circumstance.

Prof. Baxt—I would not make a distinction. I agree entirely with the proposals that we have transparency and disclosure so that the shareholders can make the kinds of decisions that Ted Rofo wants them to make. My regret has been that the history of shareholder action in Australia has been, until quite recently—and the Shareholder Association has been one exception—very passive and very unresponsive to these sorts of things. So it does not matter what you tell the shareholders; it does not matter what is out there in the marketplace, they do not do anything about it. And, on top of that, you had a regulator that was either inept or inadequately resourced to pursue these matters. We are now seeing a change in that particular context, and what we have to have is a system whereby directors, executives and wrongdoers know that, if they cleverly try to get around the way in which the law operates, they are going to get caught. They are going to get caught by shareholders bringing actions which are going to seek remedies where there are breaches of duty, or they know that the regulator is going to bring an action in order to bring them to account in relation to these. So I am all in favour, and the institute is in favour, of sensible disclosure and transparencies so that these things can be assessed.

It seems to me that it is up to the shareholders, the owners of the business, to decide. If they want to give someone a reward for doing something because he or she has done something quite remarkable and it is disclosed, then that is for them. It seems a bit strange to have legislation that says, 'Four years later or whatever if something goes wrong but it looks like it was good and something goes wrong later but things do not work out'—because of a war against Iraq or whatever it might be—'we're going to start revisiting these situations,' when there has been full disclosure and the people have done the best they can but incidents have occurred that have impacted on that. It seems a bit strange that we should be worrying about those sorts of situations. So I am totally in favour of openness, and we have not had as much in this society as we should have.

I come to back to the point I made earlier: we are talking about issues that have nothing to do with this legislation. We are wandering so far afield that we might as well be talking about principles of corporate law and principles of disclosure and so on or CLERP 9. Mike

Rawstron is here. He can tell us all about CLERP 9 and what that is going to contain because that is going to have a lot of this stuff in there. We are going to have powers with ASIC et cetera.

Senator CONROY—Can I just correct you there. CLERP 9 contained not one reference to executive remuneration up until recently, as in the last two weeks, when the government decided to mention something about executive remuneration.

Prof. Baxt—That is true. But the point is that there are issues in CLERP 9 in relation to disclosure that get into that particular area, whether they deal with it directly or indirectly. It is there, and it is there in a way which ASIC, with the new infringement power notices which Treasurer Peter Costello has said he is going to introduce—and that is another issue—is going to be able to deal with it. But that again comes back to my point: we cannot look at this by looking at one point here today and then tomorrow looking at something else. Surely we have to look at this as a global issue because if we do not—if we do not marry the different parts of the jigsaw together—we are going to have a terrible mess on our hands. We found that with so many of the corporate law reforms that were introduced in the 1980s which had to be dismantled and put away and so on. They did not work and it was shown that they did not work and we had corporate collapses.

The cost to the community is significant; the cost to you, ladies and gentlemen, is significant, in the work that you have to do in parliament; the cost to all of us is significant. I think we are all *ad idem* that we want to change things so that we have a better system but I do not think this is the right way to go about it.

Ms Burrow—I think these are critical issues for this bill because the bill as it stands does not go far enough in our view. But to answer your question, Senator Murray, I would not make the distinction. If shareholders had known what Brian Gilbertson would get on an exit deal after six months, on top of what Paul Anderson had concocted, then there would have been a very big debate about the value of the merger. Whether it is a merger or whether it is normal performance in terms of the viability and the profit base of the company does not matter.

There is another reality, too. I agree, Professor Baxt, we cannot do much about it in this legislation. But it is also the reality of an environment that says that we have to continue to add shareholder value to the point where last year everybody got shocked at the downturn in the equities market. Most sensible managers could have seen that the bubble would burst at some point. We used to be content in the good old days of BHP with profits of four per cent, five per cent or six per cent. It was seen to be a very sustainable company. Yet now if companies are not making enormous profits, not just in the half-yearly reports but going back to even quarterly reports now and overall in a year, then there is some notion that this is not good news. I do not believe that is the view of shareholders. What shareholders want is long-term sustainability with a decent profit base and a decent value base for their share. But they do not want the roller-coaster. I do not think anybody wants the roller-coaster and the volatility of pretending that the world out there is going to continue to see double-digit profits.

On the legislation itself—I apologise for being late—it is a bill that clearly is headed in the right direction but it is certainly not tough enough. Since it was actually constructed, in the wake of One.Tel primarily, we have seen all manner of other evidence. Yesterday, when the community responded—at least the media responded, but the community did as well, I am sure—so positively to Stan Wallis's gesture we saw that there has to be a lot more encouragement, if not persuasion, if not legal requirement, for directors and senior executives to act in a decent way. They do not; they are not; they are not going to—except for the odd

person like Stan Wallis—unless the legislation sets some rules in place. From our perspective, there are simply no rules for the big end of town. Yet we fight every year for minimum wages of \$431, on which we are seeking \$26.40, and it is seen as some outrageous largesse for the poorest workers in Australia.

We want to add four points. Firstly, we want to require the boards of public companies to establish remuneration committees comprised of independent directors. It seems to us that, if you use the BHP Billiton exercise again, Paul Anderson and Brian Gilbertson did a terrific deal—for themselves; not, potentially, for the company. Independent directors would give a lot of confidence, we believe, to shareholders and indeed probably the rest of the board.

Senator MURRAY—Genuinely independent.

Ms Burrow—Absolutely, Senator Murray. The second point is that we would seek to have the legislation require that all options packages be subject to performance benchmarks, which would be disclosed to shareholders. That is not a big ask. Personally, I do not hold out a great deal of support for the performance bonus system; I think it is open to all sorts of rorts. I have never been on a board that has not picked a number between X and Y and said, ‘That will do.’ Nevertheless, if we can be scientific about performance benchmarks, it is the right of shareholders—and employees, I would argue—that they be disclosed to the shareholders.

The third point is that we would hope that the legislation would require performance benchmarks to be applied to all bonuses or other payments exceeding \$40,000 in a year when the recipient’s base remuneration exceeds \$100,000. A whole lot of the corporate world will gasp at that, but it seems to us a very reasonable base on which to say that, if someone is earning a higher than average annual salary and they are going to get up to 40 per cent of that salary by performance bonus, there ought to be some transparency at a benchmark that seems reasonable to the community.

The fourth point is to remove the tax deductibility for that portion of remuneration packages which exceed \$1 million. We were surprised and quite pleased when Peter Costello called for the remuneration packages to make transparent all stock options, but we were shocked that he might offer tax deductibility for the same. I do not understand why the taxpayers should have to fork out for exorbitant remuneration packages, inclusive of stock options and bonuses, that the average Australian could never see themselves even dreaming about, let alone affording. We believe that those four simple but serious amendments would gain great credibility throughout both the Australian working community and the shareholder community.

Prof. Baxt—If that is the way the bill is to go—and I do not have any difficulty with those sorts of issues being part of a law reform package—then those things should be done properly and in the context of a properly structured law reform package that goes out for comment et cetera so that we can share the comments. I do not know enough about tax law these days to pick up Sharan’s points, and they are probably correct. I do not know whether they are; I just wonder what impact they would have. I think that is what we need. If we are going to start to widen this bill in the way in which she suggested, it may well be appropriate. The thrust of my point is that we should be doing this in a way which allows us to deal with these issues comprehensively. Maybe we cannot wait for that, because we have a crisis on our hands, but I do not believe this bill deals with that crisis. As Ted Rofe says, it is closing the door after the horse has bolted.

I am very concerned about, and would be interested to hear David Knott’s comments on, the ability of ASIC to deal with these sorts of issues in a comprehensive and satisfactory way through the courts with the delays and all of the problems that the courts throw up in catching

these sorts of nasty activities that go on. Whilst I am saying that, I think that the parliament needs to have brought before it—I have said this publicly, and I do not know that the institute necessarily support my view; I have not raised it with them—the fact that the penalty regime under the Corporations Act is inadequate. You have to send a real message. If you want compliance with Corporations Law, you have to have a penalty regime that is meaningful in today's terms—and I do not think it is.

Ms Upton—I will just add to Professor Baxt's comments. I think it is important that these legislative provisions be taken in the context of a lot of other work that is going on in the community at the moment. As members would be aware, there is the Corporate Governance Council, which is shortly going to publish its corporate governance principles. I believe that it will address the issue of disclosure in relation to executive packages. The Institute will also be making comment on a legislative amendment to the Corporations Legislation Amendment Bill, which does make provision for disclosure, I believe, of the top five remunerated executives, including their options packages. The point is that, if there is a bill like this, it needs to be placed in the context of all the other requirements that have been made of companies.

Another point I would like to make, which again supports a matter which Professor Baxt raised, is that there has been a lack of meaningful consultation on this bill. AICD has been disappointed at the level of consultation on this bill. In fact, the greater level of discussion we are having here today is the kind of thing we would have liked to engage in at an earlier stage, when this bill was in its formation. We have noticed a trend at both state and federal levels towards a decrease in the period of consultation on legislative initiatives, and that is of great concern to us. Often the period in which we are asked to respond on a major legislative initiative may be a month or six weeks. In this case, it has been worse than that. We called for copies of the bill at an earlier period, and we were rebuffed. We had one very preliminary meeting post the Prime Minister's announcement in June 2001 with a representative from Treasury and a representative of Joe Hockey, the Minister for Financial Services and Regulation at the time. But that has been the extent of our ability to put our views on both the issues that are the subject of this piece of legislation and the broader issues that are the subject of our discussion today. We are bitterly disappointed that that discussion could not have taken place before today.

Prof. Baxt—I would like to make one additional short point, because Ms Upton reminded me about the date. It is nearly two years since the Prime Minister made the announcement, so what is so urgent about this now? We have waited two years for this, and we are now being told that this has to be done straightaway. I do not understand it.

Senator CONROY—I am trying to remember the context—perhaps you could help me, Professor Baxt. When and where was it that the Prime Minister made the announcement?

Prof. Baxt—It was after One.Tel

Ms Upton—It was a doorstep.

Senator CONROY—Was it a doorstep, or was he on talkback radio? I am just trying to remember which it was at the time.

Ms Upton—It was very informal. I am not entirely clear which it was.

Prof. Baxt—That does not mean that what he said was not correct in terms of the issue. I am not denying that, but I am worried about this legislation being introduced in this fashion. Ms Upton's point is very valid. We are not given enough time to deal with these issues.

Senator CONROY—Can I put that to Treasury. I understood that some consultation was taking place, which is one of the reasons we kept getting told that the bill had taken two years to turn up. Would Treasury like to comment on how much consultation went on beforehand?

Mr Rogers—There was consultation undertaken in late 2001, after the Prime Minister's announcement. Between that time and now there has been a federal election, and it was a matter of the bill being reintroduced through the government's legislative program; it has now come to the part where it has been introduced.

Senator CONROY—I know we are going back a long way, but do you remember who you consulted with then?

Mr Rogers—I think it was the AICD. I believe it was also IFSA, the funds management people. I cannot recall if there were any further consultations.

Senator CONROY—Are you feeling consulted now, Ms Upton?

Prof. Baxt—We had one brief discussion about a much narrower piece of legislation than the one we have here. It was very quick, and we were told that it was confidential and we could not talk about it and so forth. It was not consultation in the proper sense.

Mr Rofe—I must say that the first time I became aware of it was when I received a letter from this committee inviting submissions.

Senator WATSON—The statement has been made, Professor Baxt, that this is shutting the door after the horse has bolted—and a few other issues. Don't you think it is necessary, in the light particularly of what has happened in the last few days as well, that this parliament send a message to corporate Australia that we want to try to stop people and to put impediments in their way? I take on board what you said. Maybe we might not be able to pick up too much in relation to what happened in the past, but somewhere along the line we have to make a stand and send some powerful messages out to corporate Australia that this sort of behaviour is not good enough. The second question I would like to take up with you relates to the cost to companies and honest executives that you mentioned. Where is the cost to those who do the right thing?

Prof. Baxt—I will deal with both questions. If there is a major gap in legislation—and sometimes we do have major gaps in legislation—or if there are major defects in the way in which we behave as a community, I do not have any difficulty, as I said, in a statement being made and the matter being dealt with urgently. Had the Prime Minister and the parliament introduced legislation immediately to deal with this issue, we still would have taken the same position we take now—that is, it would be better to look at this in the context of the overall—but if you feel that we are bleeding and we need to stop then let us stop the bleeding. If that is the case we are dealing with, we should stop the bleeding in some form. However, this bill is not going to do it. Even amendments along the lines that Ms Burrow talks about are not going to do it, in my view.

There is a cost. Every time we introduce a piece of legislation that changes the act and the way in which the act is to be dealt with, organisations which do behave themselves—and that is the great majority—have to go through and work out how that legislation operates and how they need to reorganise and restructure things in order to comply, because otherwise they might be committing technical breaches. The cost to the community of responding to the financial services legislation, which is different legislation, has been enormous and the cost to ASIC has been enormous and they still have not got it right.

Senator WATSON—That is a different bill.

Prof. Baxt—But it is the same principle. It is the same issue. There is a perception by politicians—and please do not misunderstand the thrust of my comments—that what they have to do is make a broad statement about the way in which the law should be complied with. They make the statement, they get the Mike Rawstrons of the world to draft the legislation and they assume that everything will fall into place. It does not. It takes years for these things to work their way through. It takes years for the courts to deal with these issues. When it is black-letter law, the courts will read this legislation very narrowly and they will throw out case after case—you will see it in so many areas—and then you will have to come back and redraft the legislation and it will be more cost and more cost to the community. Companies do not just pick up those costs and say, ‘Okay, we’ll just have to wear it.’ They have to pass it on.

Mr Rofe—Senator, could I just comment on your first point. I would say that this bill sends the wrong message and a confused message. If we want to send the right message about remuneration and retirement benefits, we have to fix section 300A, we have to fix division 2 of part 2D, and we have to fix chapter 2E. We need a reasoned and considered approach, not just a shotgun approach that introduces a complicated piece of legislation which does not fix the problem.

Senator MURRAY—But the issue surely is our starting point. The principles that surround this area have not been established. Ms Burrow approached those principles to an extent, and so has Professor Baxt, but the principles that surround the area are not established and the legislation does not set itself against them.

Mr Rofe—To give you the Irish answer to that: if I wanted to get there, I would not start from here. We really need to address the real problem, and that is excessive remuneration and retirement benefits and not a particular transaction that a particular company entered into with two executives a couple of years ago, which this bill does not fix anyway.

Senator MURRAY—The real problems surely are a few: firstly, a lack of independence—there are conflicts of interest in the way in which these things are struck, because the very people that strike them are the people that benefit from them; secondly, the lack of a proper financial impact statement and disclosure so that shareholders are properly informed; thirdly, the ability of shareholders to vote on an informed basis and to take responsibility for their actions; and, fourthly, a proper appraisal by companies of what adding value really means. Those are big issues. There probably are a number of others. Right at the top, I would put the lack of independence and the massive conflict of interest in the way in which these things are structured and devised by the people who benefit from their own internecine structure.

Mr Rofe—I think all four points you mentioned are important—the second two as well as the first two. I think proper transparency and an opportunity for shareholders to play a role are important. I do not think this bill deals at all with any of those four issues you mentioned.

Senator MURRAY—I agree.

CHAIR—Mr Dwyer, you have been waiting patiently on the telephone and have not had your two bob’s worth. Would you like to speak to any of the issues that have been discussed thus far?

Mr Dwyer—I have been listening with great interest. I was told by my father to speak when I was spoken to, so thank you for the invitation. The IPAA supports the bill in general. We hear the concerns of all the associations here today and do not necessarily disagree with anything that has been said. In fact, the IPAA has been very vocal about the lack of movement in pushing forward the old CASAC, now CAMAC, recommendations on corporate groups.

We are also concerned about the timeframe that was given for the joint parliamentary committee's insolvency law review and the lack of outcome that that will probably generate given that short timeframe.

However, we do believe that this is a step in the right direction. Despite what I am hearing, it does insert in the bill a section which gives a clear and unambiguous message to officers and management of companies and does provide liquidators with the necessary legal framework to pursue unreasonable, direct or related transactions, albeit in the future and not retrospectively. It was possibly politically motivated and a knee-jerk reaction in relation to One.Tel, but nevertheless it does ensure that in the future, if it does occur, there is a framework to attack these transactions which, despite the fact that there are a number of other long overdue amendments to the law, and many other concerns have been aired today by the associations represented, we do feel that it is a step in the right direction and we support the bill on that basis.

Mr Dixon—We would be concerned that there would be a great extension in the amount of law. We think that this bill is going in the right direction. However, as a number of speakers have said, including Senator Murray, one of the critical issues is increased transparency. The accounting profession is playing a role here in terms of trying to develop a standard—ED 106—in relation to director and executive remuneration. The problem we have is that we also have to harmonise with international accounting standards, so if we harmonise with what is available at the moment in terms of disclosures or what is coming, that would be considerably less than what we are proposing here in Australia. That is another sleeper sitting at the back of this issue.

CHAIR—Could you elaborate on that, Mr Dixon? What would be the discrepancy or the shortcoming?

Mr Dixon—The international standard is set in a broad based context. When you are setting anything internationally you have to make sure that it in fact services all the communities it is going into. Hence, it can only be couched in the broadest of terms. The Australian proposals under exposure draft No. 106 go into considerable detail in terms of director and executive benefits being disclosed. It may not be to the satisfaction of everyone here, but it would certainly be a significant move in the right direction. That is one thing that needs to be looked at as to whether or not, from periods beginning 1 January 2005 going forward, we have an improved standard in relation to director and executive disclosures. I think if we had this greater transparency then we could have shareholders voting with the knowledge of what is happening behind the scenes—voting on the substance of the situation. I am a little bit concerned about proposals that would involve capping remuneration in any way. We should not always equate high rewards with evil or wrongdoing. If you look at the way that our current legislation is set up—

CHAIR—It would be unfair to say that the point being made by, for example, Ms Burrow and others is that they necessarily equate higher awards with wrongdoing. As I heard the evidence, the issue is more one of inappropriateness. Perhaps it is wrongdoing in some cases, but inappropriateness seems to be the allegation.

Ms Burrow—It is a good idea.

CHAIR—It seems to you to be a good idea, Ms Burrow, but you do not advance it. Is that right?

Ms Burrow—We know when we would be defeated.

Mr Dixon—To build on what was perhaps being implied and to make it explicit, I would not like to see caps out there being imposed via the legislation. If you look at the way the law is structured at the moment, provided that the shareholders are given the full opportunity to vote on what is happening, we believe that that should be the end of it. In other words, the company should be able to make such payments provided that they have not been made in bad faith and provided that there has not been a fraud on the minority. That is already encapsulated in our legislation. In other words, the fundamentals are already there. Hence, while it might not be a perfect proposition, what is being focused on at the moment is a critical issue. We would not like to see rafts of legislation trying to cover every possible misdemeanour. Indeed, the concept of what is unreasonable would be a real challenge to try to put into law.

Senator CONROY—The bill tries to do that, though, doesn't it?

Mr Dixon—Yes. It tries to do that but we are hoping that, in terms of the general situation, we have in our democracy the opportunity for shareholders to vote on what they think is reasonable or is not reasonable at the time. To the extent that a payment has not been voted on by the shareholders, we would support the ability of that to be a voidable transaction and to be clawed back by a liquidator. But, once the shareholders had voted on it, as far as we are concerned that would then protect that particular person whether they are a director or not. At the moment it just focuses on directors. That is another issue: should this extend to executives? But we believe that parliaments and courts should also stay out of what are good and bad business decisions.

CHAIR—I suppose you would also go on to say that that addresses Senator Murray's concern about a conflict of interest, because if there is transparency to an independent third party that removes the conflict of interest issue.

Mr Dixon—Exactly.

CHAIR—Can I be the devil's advocate? What about the suggestion that in large corporations there are large cross shareholdings with other large corporations and institutional shareholders so that putting the package to the company in a general meeting just means having a small number of large institutions sign off on it, leaving the small shareholders whistling in the dark?

Mr Dixon—There is a change in the culture here. We are going to see, for example, a change in relation to the large superannuation funds, which represent an increasing percentage of our population becoming more and more active. Organisations like Ted's are going to become more active and ask for the information. We have to acknowledge that there is this cultural shift. Large institutions like the superannuation funds are going to have an increasing impact, as is happening in the United States community.

Senator MURRAY—Do you think they should require them to vote on their shares?

Mr Dixon—We should be looking at how to make them more responsible for the people that they are representing.

Ms Burrow—This is probably not on the bill, Senator Murray, but we agree with you. I hope there is a cultural shift on the way, but I do not think that excuses us from making good law, so I agree with some of the points made and not some of the others. I would say to Senator John Watson that the answer is yes and yes. If we do not send a message to corporate Australia—indeed if the nations of the world, and you have seen the debates in the US and Europe, do not send messages to the corporate world—we are going to have an increasing lack of confidence and trust in the business community. It seems a little strange for me to

defend them but there are some good business folk out there who actually have some ethics. We need them to succeed, to perform and to be sustainable because otherwise there would be no jobs for our members, so there is a self-interested coalition here of decent folk. I do not think that anybody should walk away from making good law that underpins the ethics that a community believes should be the norm.

On the accounting standard issue, I have never known a situation where harmonisation was determined by the lowest common denominator. On the contrary, if you meet and exceed the requirements, then you can hold the high moral ground, and that is what we would hope the accounting profession would do. But we saw them scream when the call was for the US equivalent standards to be put into legislation and we saw the Treasurer and the Prime Minister duck that issue. To the extent that they have been prepared to go somewhere here on directors—and we believe it should be senior executives too—that is a good thing, but we do have to be more specific. I agree about the question of what is reasonable but I would argue—and we do argue—that you relate that to performance. That is why we say that as a minimum standard we should put performance benchmarks in place and make them transparent for shareholders. Then, hopefully, shareholders can vote on their shares, Senator Murray, and make the running on an issue. I would not say I am relaxed about institutional shareholders converging on points of self-interest but I would say that, where small shareholders and groups like Ted's can actually raise the issues, the community debate becomes strong enough, in my view, to assist the shift in culture that Jim referred to and which I hope is well on the way.

CHAIR—Before you proceed, Mr Dixon, I have just been reminded that Professor Baxt and Ms Upton have to leave in about 15 minutes, so could you make your point very quickly? I will then invite members of the panel who have particular issues for the Institute of Company Directors to use the time to direct those questions to Professor Baxt and Ms Upton.

Mr Dixon—I have two quick points. Accounting standards are already enshrined in the law. The latest question has been whether auditing standards are in fact enshrined in the law, so there is a difference.

Ms Burrow—But it is the work of accountants, yes; that is fine.

Mr Dixon—Yes. The second point, in terms of the lowest common denominator, is that the accounting profession is, in fact, working to get the higher standards through exposure draft 106, but we are feeling somewhat stymied by the fact that we will have to harmonise with international accounting standards.

CHAIR—Senator Conroy, do you have questions for the Institute of Company Directors?

Senator CONROY—Thank you, and I so enjoy an activist chair.

CHAIR—I was trying to simply facilitate the discussion, Senator Conroy.

Senator CONROY—You certainly took the discussion, Senator Brandis. Professor Baxt, I want to follow up a comment that you made a little earlier about what was captured. I think you specifically said payments made not to the director but to a related group. Would you expand on that? I know you mentioned the CAMAC report.

Prof. Baxt—What I am concerned about is that we tend in our law to try to do two things. At times, because we are concerned about the need for us to act responsibly in a social context, we would like our laws to reflect that directors—and not just directors for the shareholders but for the investors in the company—owe a responsibility to a broader group within the community. That may be the other companies in the group, because the law takes a very narrow approach as to where the directors owe their duty: they owe their duty to the

company. That means that, if there is a partly owned subsidiary, for example, and its shares are linked, then there may be a problem in driving home the issue that the directors have a duty to the shareholders et cetera in relation to that group company.

We have had a report from CASAC, now CAMAC, about the way in which we should treat groups of companies. We have had that report sitting gathering dust now for a couple of years. It is a great pity because I think it was a very good report. Unlike so much else that is done in law reform, it was the subject of enormous consultation. We had two or three years of consultation. There are some issues in it which I would like to see you ladies and gentlemen, our elected representatives in parliament, debate. It seems to me that they are critical issues which pick up many of the points that are being made here.

That comes back to the issue in relation to this bill. The way this bill is drafted, I think that if a payment were made to a director of a partly owned subsidiary it might not be caught by this legislation. I do not know; I would have to go into it. But my initial reaction—and I think there is a submission to that effect somewhere in these papers—is that those sorts of payments would not be caught. If we are talking about evil here—if I can be a bit colourful—then that evil exists in that extended scenario. It would be terrible if we found that someone got off. We see so many cases of people getting off because there is a technical flaw in the legislation and the court says, ‘Sorry, there is no case to answer.’ We saw that recently in a tax issue.

Senator CONROY—That was Mr Petroulias.

Prof. Baxt—I am not arguing the pros or cons of that, but it seems to me that so much publicity has been generated about that case. For a case to be thrown out on a technicality—this is where Sharan Burrow’s constituents have every right to say that the law is ridiculous and does not work. I worry about it because, as a lawyer, I get the blame. They are coming to me and to high-paid corporate lawyers in order to get companies off on a technicality. I do not want that to be the way in which our law is administered. It is the wrong way for our law to be administered. I agree with Ted Rofe that we need to deal with these issues properly so that when we do introduce this legislation it will work effectively. I may not agree with the fundamental principles underneath all of our laws, but if that is the wish of the people then let us make the laws work appropriately. I have not studied this, but Mike Rawstron and his people have done some work on it, and their submission is very interesting. There have been a few cases on related provisions dealing with unreasonable payments et cetera and some of them have been thrown out because of the evidence. It seems to me—and I think Ted said it—that we are dealing with an area that is not that clear. These are not issues where you will say, ‘This is a clear case of where we are going to catch this particular payment.’

Senator CONROY—What are your views on when a transaction is unreasonable? I think you suggest that it is going to lead to a proliferation of litigation, perhaps for the reasons you have outlined, but if there is anything else you would like to add, I would be interested in that.

Prof. Baxt—Some of the language used in this provision is different from the language used in others. For example, in our submission we use the terms ‘unreasonable’ and ‘extortionate’.

Ms Upton—There is a similar provision in relation to unfair loans. The term that is used there is ‘extortionate’ rather than ‘unreasonable’. We make a submission along the lines that ‘extortionate’ may be a more appropriate test to apply to these payments.

Prof. Baxt—I am suggesting to you, Senator Conroy, that when a clever barrister gets this in a court and starts to make those comparisons, the court starts to say, ‘What the hell is going

on here?’ That is when cases fall through the cracks. They do, and I can tell you that they do, because when it is appropriate law firms will argue cases along those lines.

Senator CONROY—A number of submissions have suggested carving out certain payments from the operation of the bill. Could you explain the rationale behind your thinking there?

Prof. Baxt—We agree with the comments by Ted Rofe and others that, if matters are disclosed to shareholders, the shareholders have the right to vote on those issues. If there is full disclosure and there is no conflict, it seems a bit odd to say four years later—because a company may, as a result of events beyond its control, have suffered losses et cetera—that we now have the ability to seek a repayment of sums that have been voted by the shareholders. If there is a failure of disclosure and if there is fraud in the minority et cetera, I would agree that that is the basis for challenging that. Even though we are changing our culture and we are getting more and more shareholder interest and it is going to be years before we get sufficient momentum amongst shareholders to really tackle some of those cases, I cannot see the shareholders in some of those companies tackling some of the directors for the alleged improper payments. I cannot see ASIC having the resources or the will to do so either.

Senator CONROY—There seems to be some misunderstanding. I know that Mr Rofe and Senator Murray know that there now is actually a requirement to disclose the value of executive remunerations. It has been in the Corporations Law since 1998. Let us not pretend that the Treasurer has made an announcement that there is suddenly a new initiative to disclose executive remuneration—it is actually a legal requirement. For four and a half years the accounting profession has been unable to provide us with a valuation method. On that basis, ASIC has decided to do nothing. For three years I have been asking ASIC when they are going to start enforcing this section of the law. They say, ‘We can’t do it. There will be too much legal argument’—the sorts of arguments that you have described, Professor Baxt. They say they cannot do it until the accounting profession comes up with a valuation method. We have had some progress on that recently, and now there is the further confusion about international harmonisation. There seem to be arguments about what the standards are and about vesting. I understand that that is a contentious point between the international and the domestic valuation methods. But let us be clear that it is required now in law to disclose these matters.

Mr Dixon—Yes, but one of the problems you have mentioned is the valuation, and there is—

Senator CONROY—People trade in their options at the moment. It is remarkable: options are the only commodity I have come across that are traded on a market and which accountants cannot value.

Mr Dixon—It depends on what those options are. The options that are given to employees are not necessarily tradable at the time they have them. You can have escrow—

Senator CONROY—The ones I am talking about are not escrow. The argument may be that you cannot trade them until they are vested—that is a possible argument. The international standard, though, does not give a stuff whether they are vested or not. It says that you can value them, and they value them from the day they are issued.

Mr Dixon—It suggests that, but you will note that it leaves the method you can use open. The reason it has been left open is that there is still no agreement as to whether the Black-Scholes model or the binomial method is the more appropriate. There is ongoing debate as to what is appropriate and what is not.

Senator CONROY—That is what has been put to us by the Australian accounting industry for the last five years. Frankly, it is not good enough. I have said this before at conferences of accountants, so it is not something new.

Mr Dixon—Could you find someone in the community who has the answer to what is—

Senator CONROY—I just find it extraordinary that things that can be traded on the open market all of a sudden cannot be valued by the smartest accountants in Australia. There are incredibly smart accountants in the US who seem to have found a method to value options that are disclosed in the US legislation. It is extraordinary that we have such an incapacity to match our US colleagues.

Senator MURRAY—One of the things you have suggested, Professor Baxt, is that a number of exemptions should be allowed in the bill. One of those exemptions was for remuneration paid to a director in accordance with the relevant company's constitution. I would like your reaction to two concerns I have about that. Firstly, many listed companies have very old constitutions that have not been revised to plain English, modern English or anything else. I am concerned that they, in fact, may not properly deal with this area in the very way that we have been discussing it in terms of principles. Secondly, following from that, if you put in such an exemption you may require the law to then stipulate the circumstances under which the exemption would not apply—for instance, if the company's constitution said that it did not have to be disclosed or it did not have to be transparent and those sorts of things. I just wonder if that is not too big a gate for most of our top 100.

Prof. Baxt—I do not think we are suggesting that the constitutions of the companies would override the law. If the law said that you had to disclose and the constitution said you did not then clearly the law would override the constitution. I think we are talking about the way in which the constitution provides for these things to be dealt with through the processes within a company in terms of these things being disclosed et cetera. Providing that those processes are within the spirit, if you like, of the legislation, then ASIC would be able to issue a class order or whatever they do to deal with it. That would be the way to deal with it. I do not think we are trying, by sleight of hand—and it would be quite inappropriate for the institute—to suggest that, 'We're going to provide some of our companies with a wonderful out here, which is not available to anyone else.'

CHAIR—Are there any further questions?

Senator CONROY—I have questions, but Professor Baxt and Ms Upton have to go.

CHAIR—If you need to get away, now is probably as good a time as any.

Prof. Baxt—We apologise, but we do have to go.

CHAIR—Thank you very much indeed.

Senator CONROY—We understand what it is like getting a plane in and out of Canberra. It is all right. Could I get the CPAA or the ICCA to expand on a statement in their submission. I think it may be similar to some of the points Professor Baxt raised. I refer to the statement:

We believe that bonuses and other benefits to directors (and senior management), including performance hurdles for payment and severance arrangements, should be subject to disclosure (beyond that required by—

the Corporations Act—

and Accounting Standard AASB 1017 'Related Party Disclosures') to include the likely cost of the time the transactions are incurred [approved] with at least annual updates of the likely eventual cost and approved by shareholders.

Are you getting at the contingent liability if there is a termination payment issue, which has had an airing in the last few weeks as part of the discussion, or is that slightly separate? Regardless, I am interested in your views on the contingent liability issue as well.

Mr Neild—Yes, we intended to pick up the extent of the contingent liability that would be involved, so that the shareholders know what the likely benefit is.

Senator CONROY—Do you think that is not required at the moment? I think you, Mr Rofe, may have talked about that. I am interested in the argument that at the moment it should be recorded—these termination payments, in particular—because it is a contingent liability. What is your view as experts? Should it be recorded at the moment, or is it just a grey area that has never been recorded and should be from now on?

Mr Dixon—I think we are asking for greater transparency. As I said before, if we had greater transparency we would hope that shareholders would then be able to make decisions in terms of supporting or not supporting the remuneration packages being paid to the executives in their firms. You would note that, under AASB 1017, there is a constraint in relation to the number of disclosures. I think it only relates to the top five that fall into the bracket of people who influence the strategic direction of the company. We support disclosure that gives the shareholders a full view as to what is being paid and what the contingencies are—in other words, so that shareholders are in a position to assess the likelihood of a certain level of payment.

Senator CONROY—I appreciate that and I appreciate your supporting that disclosure now. But I am not quite sure if you said whether you believed it was required to be recorded as a contingent liability now. Is it there or do we need to change the accounting standard?

Mr Dixon—The definition of a contingent liability to the entity is that, provided that it meets the requirement of being material, it would require disclosure. I would have to go back and check, but that is my initial reaction.

Senator CONROY—So, in the case of Mr Gilbertson or Mr Batchelor—we have lost Professor Baxt, so we cannot get his clinical or legal opinion, but this is how it seems to me—‘material’ would include things that would potentially cost the company \$10 million or, in Mr Smedley’s case, \$20 million plus an \$800,000 pension for life.

Mr Dixon—When accountants talk about ‘material’, they mean material in relation to an accepted base. So an accepted base in relation to—I will use the old terminology—the profit and loss statement, which is now called the statement of financial performance, would be in relation to the profit of that company. So you might question whether even that amount in relation to the BHP Billiton situation would be material.

Senator CONROY—Is material, in your mind, one per cent the company’s profitability or is it two per cent? I am just trying to get a sense of—

Mr Dixon—The rule of thumb that accountants have long used is that if it is less than five per cent of an acceptable base, it is not material. If it is more than 10 per cent, it is definitely material and if it is between five and 10 per cent, you toss a coin—so, you exercise your judgment.

Senator CONROY—I love the science of accounting sometimes!

Mr Rofe—We are, in fact, writing to companies this year to suggest to them that these—what are in our mind—contingent liabilities should be disclosed under ordinary accounting principles. This has nothing to do with whether it is the top five executives or anything like that.

Senator CONROY—You are trying to flush them all out?

Mr Rofe—That is right. If there is a potential liability to pay \$20 million to Paul Batchelor, we should have been told about it at the time that contract was entered into, not the year after it is paid out.

Mr Dixon—I should also have pointed out that under section 1017 of the Corporations Act 2001, when it talks about disclosures in relation to directors, the materiality concept really does not apply in the context. Under section 1017, one dollar is reportable.

Mr Rofe—We certainly think that it is reportable.

Senator CONROY—I want to come back to this issue of ‘unreasonable’. If you are still there Mr Dwyer, please feel free to jump in—if you want—on some of these issues. Out of sight sometimes means out of mind, unfortunately, in parliament.

Mr Dwyer—Thank you, I am still here.

Senator CONROY—With respect to this question of ‘unreasonable’. Mr Dwyer, I note, in particular, that your submission states:

... the practicalities of investigation and legal assistance in pursuing these claims will remain of concern, given the extensive litigation that will be required to recover these payments.

I am wondering whether you believe that the definition at the moment is too broad or vague and whether, as Professor Baxt indicated, a good lawyer would be able to drive the proverbial truck through it and whether or not the legislation needs to have a bit more definition to get to what it is intending to do. Mr Dwyer, you might like to start the discussion on this issue and then the accounting bodies might want to join us.

Mr Dwyer—The practicalities are often not affected by the wording of the law. In effect, obviously, the courts will determine the message of this law. We think it is clear enough that it is there to pursue unreasonable director-related transactions. What the court will eventually determine is unreasonable, we are not able to determine at this stage but clearly, as Professor Baxt stated, there will be a significant amount of funded opponents to any actions that are brought by liquidators to try to recover these payments. The point we made in our submission is—particularly in unfunded liquidations, where there are no assets to assist the liquidator and where a liquidator may need to seek litigation funding or, indeed, indemnities from creditors—that is the hole we see in terms of having adequate resources for liquidators to pursue them. It is not necessarily the wording of the law. We think that we are far better to get something into the law to trip the next payment, albeit we cannot make it retrospective, to at least start the ball rolling in terms of having legislation to target any future payments that are unreasonable or, indeed, are related party transactions.

We normally seek the assistance that we need as liquidators from ASIC. ASIC has traditionally been underfunded to pursue these requests for assistance from liquidators, particularly in relation to what we might call small or medium sized companies where perhaps ASIC’s profile does not benefit from being involved in those investigations. And that is where we as liquidators need assistance—in some of the smaller to medium sized companies, not where the majority of the shareholders are coming from but where indeed creditors and potentially employees are the ones who will be detrimentally affected.

Senator CONROY—Thanks, Mr Dwyer. Mr Dixon or Mr Neild, is the definition of ‘unreasonable’ too vague? Do you think we need to tighten it up?

Mr Dixon—I can see where, under section 588FDA, the attempt has been made to define it, but I still believe that a person like Professor Baxt would have a field day in court. That is

why I was suggesting before that these situations really do have to—in the first instance, I would hope—be argued out by independent directors, perhaps on a remuneration panel, who would work out what they thought was reasonable in the circumstances, because there are just so many factors that you have to take into account to attract the right person and given that we are, particularly with our publicly listed companies, now working in the world market and not just the Australian market. We are bidding now around the world for people to run our companies. So it is a very difficult context in which to argue what is reasonable and unreasonable. We are getting to the situation, for example, where CEOs here are paid less than some of their employees because their employees are working in the United States market.

Senator CONROY—But that happens now with employees working here in Australia. The CEO is not necessarily the highest paid individual in many institutions.

Senator MURRAY—Scientists might get more.

Mr Dixon—That is right.

Senator CONROY—One of the anomalies of the disclosure laws about the highest paid five individuals is that—and it has caused a few chuckles—five-year employees are paid more than the CEO, and that is revealed in the annual report.

Mr Dixon—The classic illustration is the banks.

Senator CONROY—Mr Cuffe was paid more than Mr Smedley perhaps.

Mr Dixon—Exactly. Many of the FX dealers, because they are earning on commission and working not only in the Australian market but also in others, particularly the US market, are earning more than the CEOs here. Trying to get to what is a reasonable amount, I think, is a very difficult concept. As I said, I think there is a change in culture. We are more and more aware of what we think people should be paid. I appreciate the efforts—and perhaps these are our best efforts as a community—to put it into words. At least if they are in there it is a starting point. But I do not think we should then have expectations that we would necessarily be able to pursue it all the way successfully in all cases through the courts.

CHAIR—It seems to me there is almost a circularity in the definition. Basically, the definition says that an unreasonable payment is a payment that a reasonable person, having regard to certain defined circumstances, would not have agreed to. The definition seems to me to take you virtually nowhere.

Senator CONROY—Well argued, Senator Brandis!

Ms Burrow—We agree that it is far too vague, but at the same time I would argue that there is no problem about establishing an appropriate community standard. The substance of the bill relates to directors, although we agree it should extend its application to senior executives. Directors have extraordinary responsibilities under the law, and yet all too often we do not see a great deal of evidence that they take those responsibilities seriously. The two issues we put up are greater specificity with regard to performance, which is reported through benchmarks to shareholders, and a prima facie presumption of reasonableness.

If we are talking about directors' fees with a \$100,000 remuneration base, 40 per cent of that at \$40,000 ought to be seen to be, prima facie, unreasonable. If we are going to set community standards, governments have to be brave enough to put something on the table. You would not deny the professor and his legal colleagues the right to actually argue against the prima facie case, but at least it is there for the arguing. You cannot simply put a word up. I am interested in the notion of 'extortionate'. I am not sure it should replace it, but it might be something you would add to it. You have got to bite the bullet. The community is not going to

thank you for wimping out on this one as we have wimped out on auditing standards and the like. We have to set decent community standards, and shareholders and customers alike would appreciate that. We are appalled at the evidence that is now rolling in and, all of the excuses aside, inaction is just not going to wash from here on in. It does not matter whether you can fix the past—although we would like to—but let us, for goodness sake, establish decent standards for the future.

CHAIR—It is not beyond the courts to decide what is reasonable; in fact, every day of the week courts decide what is reasonable. When deciding what is a reasonable price for a good or a service, they look at the market. If I, for example, engage a plumber and I forget to get a quote so that his contract of service with me is silent on price and there is a dispute as to how much he charged me, the law would say, ‘It would be an implied term that the price would be a reasonable price,’ and that would be determined by the cost of plumbing services for that particular task in that given market. So it is not that you cannot define a reasonable price, if you have sufficient market evidence to determine it. But the payments that are at issue here seem to be so specific that one doubts whether there could be a market against which the reasonableness of the payment could ever be tested.

Ms Burrow—But there is a market. In fact, in terms of directors’ fees, we have picked the upper end of the market, I would say. There are a lot of Australian working people who would love a remuneration package of \$100,000 for a few days work a month. We are not saying that you should make it impossible to look at unreasonableness under that figure. But certainly at a figure like that, where you have got the chairman and senior directors, particularly company related directors—not independent directors—picking up that sort of money, the community think it is unreasonable.

CHAIR—But you have got to be a bit more scientific than what the pit of your stomach tells you sounds like too much money.

Ms Burrow—As opposed to what—what you think is too little?

Senator CONROY—Whatever the market can bear.

Mr Dixon—To give one example, and in this case it is a personal illustration, I happen to be the Director of XBRL Australia Ltd. I get no remuneration for that, because I am doing that as a delegated responsibility as Director of Accounting and Audit for CPA Australia. When CPA Australia applied for professional indemnity insurance for my role, the quote was \$80,000. So, if you are looking at the cost for directors, if I was going to be charged \$80,000—and putting this now in a more commercial environment—I would be wanting to get a lot more than that. If you are talking about a \$100,000 limit, that is only giving me a margin after PI insurance of \$20,000 for all the effort I am putting in.

Ms Burrow—But remember: we are not saying it is a cap; we are saying it is a minimum standard which would establish a prima facie case. I accept your circumstances, because I am in the same boat. None of the boards I actually end up on pay these massive fees, I have to say—not that I would accept it anyway in that context.

Senator MURRAY—You might be tempted, though?

Ms Burrow—I also find it a bit hard to get insurance that indemnifies me against all sorts of things. Nevertheless, there have to be community standards. That is our point. We do not want to argue about figures. We want to argue about the fact that you have to have specific issues—that is, performance benchmarks; that would be a big test—and, whether you let the courts decide it or whether you decide it through law, there will be a prima facie set of standards. They are already out there in the community’s mind. They are saying that, in this

case and as they see it, it is outrageous that directors can earn not much less than \$100,000 for a few days work a month, compared with the working week and the amount of effort that people put in. We can have all sorts of arguments about that, but somewhere or other you have to establish—and courts will decide—whether it is market related or the sorts of community standards that we suggest. Companies now decide. As you said, some of the boards that we are on appropriately pay nothing and others pay massive fees, and you can argue whether that is appropriate. But you can make the argument.

Mr Dixon—Another indication of the pressures that are out there is that one of Australia's largest legal firms informed me last week that, whereas they used to have pages—that was the word they used—of potential directors who, if someone came to them, could make recommendations, they now have a very short list that does not even go down part of a page, because people are not coming forward.

Senator CONROY—Dick Warburton is always available to be on more boards, as is Mr Greiner. You just have to ring them up.

Ms Burrow—And most of the boards do not have women on them, unfortunately. We might be better off if they did.

CHAIR—Our discussion is wandering a bit. Senator Conroy, why don't you bring it back?

Senator CONROY—I go back to the very point you raised on this issue of what is reasonable, how a court tests it and how it would apply in this instance. A court may look around and see the following list: Chris Cuffe, \$33 million from Colonial; Steve Jones, an estimated \$30 million from Suncorp Metway; Brian Gilbertson, an estimated \$24 million to \$34 million from BHP; Smedley, \$20 million; Anderson, \$19 million; Trumble, \$13 million; Prescott, \$11 million; Park, \$10 million; Fletcher, \$8 million; Higgins, \$6.7 million from Lend Lease; Keith Lambert, \$4.4 million from Southcorp for a couple of weeks; Tom Fraser, \$4.7 million from AMP's UK arm; Stan Wallis, who has now given it back, \$1.6 million; and, of course, Paul Bachelor is still to come. My concern is that, if we do not take the Ms Burrow approach and try and set some sort of indication of what we think is reasonable through this legislation, this is the market. A judge may look at something in the future and go, '\$10 million? That is ballpark looking at this list. That is absolute ballpark.' The concern is that, if we do not take a stand and send a message, as I think Senator Watson says, we will get left with judges being caught in the difficult position of saying, 'This seems to be about the norm in these sorts of companies, so it is reasonable.'

CHAIR—But the counterargument is that Ms Burrow's community standard, in practical effect, translates into parliament deciding what the ceiling on remuneration is, which means making a judgment about the economic worth of unknown, unspecified individuals in unforeseen circumstances. That is the difficulty with that approach.

Senator CONROY—But the self-regulation approach has led to this. This is a small number of the ones we really know about. There are quite a few more. Mr Rofe has probably dealt with hundreds more examples than I have just quoted.

Ms Burrow—We are talking about company directors and CEOs who are part of underperforming companies or companies that collapse and deny workers their entitlements, creditors their payments et cetera. We are talking about irresponsibility. We are not talking about rewards. There ought to be a much more reasonable approach to rewards for performance too. Nevertheless, we are not talking about that. We are talking about companies and those people responsible for those companies who have not only let the community down but, in large part, have been responsible for questionable if not fraudulent practices.

Have you thought about community anger? This is where I get a little passionate about this. We talk about economic profitability, the equities market and all the rest, but 87 per cent of all the jobs created since 1996 have paid \$26,000 or less, and 47 per cent of them have paid \$16,000 or less. Company directors can earn \$40,000, \$60,000, \$80,000 or \$100,000, and the same in bonuses, when, at the point the companies collapse, the workers on those low incomes are denied their entitlements. And you wonder why people are angry?

You have to understand there is massive anger out there. We are not talking about theory and having years to debate standards and all the rest of it. Frankly, we rely on professionals like accountants to get their act together. They are not in the pay, and they should not be in the pay, of companies. They should be part of the community. We rely on lawyers not to just find a way out of technical difficulties for these companies that have either collapsed and denied entitlements to workers or have underperformed and taken away shareholder value for our superannuants, whose money increasingly props up some of this performance. We have a right to be angry. The community is angry. They want community standards and, surely, if our parliamentarians—the law-makers in our country—cannot accept their responsibility to set standards of unreasonableness *prima facie* then, with due respect, why do we elect you?

Senator MURRAY—Regarding the point about the definition of unreasonable, sometimes in parliament and legislation we will not try and define a word completely but we will indicate in what circumstances it applies. You outlined some circumstances in which the parliament could perhaps say that unreasonable applies. Unreasonable would be where a company has lost significant value—where major losses have occurred. Your litany of sins could form the floor of an unreasonable reward and, I assume, talking to my friend up there in the ether, would also assist the insolvency profession.

CHAIR—Let us bring the Treasury officials into the discussion now.

Senator CONROY—Would you like to respond to the issue of unreasonable, which you have heard us discussing? Is it defined enough, or are you not in a position to go any further because it is a government policy decision rather than a Treasury decision? Would you like to respond to some of the debate that has gone on?

Senator WATSON—In the process, in relation to unreasonableness, could you also talk about when the obligation is incurred or when the transaction was entered into, because that is subject to some debate as well.

Mr Rawstron—Basically, the bill reflects government policy. In terms of what the definition of unreasonable is, whether a particular transaction is unreasonable largely relies on what the courts decide in that particular circumstance.

CHAIR—But, if that is the way it works, then the courts will say that reasonable is a market related concept. They will do that. That is the way they always answer these questions. That really outsources the problems to the courts. As Senator Murray has suggested, there could be circumstances of defeasance or triggering mechanisms to presume unreasonableness if defined events occur, but we do not see that legislative device being had regard to.

Mr Rogers—The bill tries to pick up an existing definition that is already in the law—in the same part that this amendment is going into—to reduce the kind of uncertainty that you are talking about. Rather than introduce a new definition, it tries to pick up an existing one that is used for uncommercial transactions, which presumably already has a body of case law and common use by insolvency practitioners behind it, and apply that to directors' bonuses. Unfortunately, the AICD is not here. They suggested using the extortionate test, which suggests to me a higher benchmark. That has another problem, in the sense that it is currently

applied to percentage rates to loans, so it is not something that is translatable to dollar amounts, whereas the current uncommercial transaction is.

CHAIR—Please remind me: which provisions are the uncommercial transaction provisions? Are they in the Corporations Act?

Mr Rogers—They are in the same voidable transaction part that the bill is going into, so we are trying to use the same definitions that are already present in that part of the act.

Senator MURRAY—But, if a company goes into liquidation, has major losses or sees a major reduction in its capitalisation, would that be regarded as an unreasonable circumstance for the purposes of this provision?

Mr Rogers—Not directly, but they are all things that a reasonable person would consider when considering the benefits and detriments of those payments.

CHAIR—What about Senator Watson's point about post-agreement circumstances and having regard to them?

Mr Rogers—That is a slightly different issue. That is trying to catch the situation where an agreement is entered into earlier on and then the payment, the actual transaction, is made later on. The bill has a four-year net period where it can catch transactions. What that provision does in relation to obligations is to say, 'You don't look at the time the obligation was entered into.' For example, people have been talking about reference to remuneration by market capitalisation. On the face of it, it may be an entirely reasonable and appropriate measure to use for executive remuneration. But, down the track when the transaction is made—the case of One.Tel is a prime example, I guess—it has gone bust and the payment of X million dollars is not reasonable where it has gone bust, even though the obligation was framed in a reasonable way.

CHAIR—But then there is Senator Conroy's point. He read out that list of packages and payments. If this were to be tested by a court in a particular case then the party seeking to support the payment would call a headhunter or someone like that, and the headhunter would say, 'Packages of this amount are as common as day.' If that were the evidence—

Mr Rogers—The evidence would have to take into account—

CHAIR—then it would be very difficult to say that that is unreasonable.

Mr Rogers—I would say that the evidence would have to take into account the performance of those companies at the time, because this only applies to companies that are liquidated.

Senator CONROY—Can I clarify that point. Colonial just had a \$400 million write-off by CBA for their Colonial investment. With AMP, I do not think I need to say anything more than their initials. Southcorp is a dog at the moment; Brambles, another dog at the moment. All of these companies, bar BHP—you could actually have a different argument about BHP—have actually had incredibly bad performance.

Ms Burrow—But good directors' fees.

Senator CONROY—Great directors' fees, great packages and shocking performance. I know Mr Rofe has been straining at the bit to jump in a couple of times, so I might let him, rather than me, respond on this question.

Mr Rofe—I think the relationship between pay and performance is a key issue. I agree with about 90 per cent of what Sharan had to say, except for three things: capping, some of

sort of dollar figure in the legislation to cover when these things apply, and interfering with tax deductibility, which just imposes another cost on the shareholders.

Senator CONROY—You do not think that would give a greater incentive for shareholders to take a much more active role? I know you encourage them to—

Mr Rofe—No, this is corporations legislation not tax legislation. That is a completely different issue. They tried cutting out tax deductibility over a certain level in the US and it did not work.

Ms Burrow—If you are talking about share options which have been estimated to be worth \$1 billion, or \$10.5 million for each CEO, just because you put them in the account section named ‘Expenses’—that is, you declare them as expenses—why should taxpayers fork out for the sorts of bonuses that, frankly, we as ordinary people cannot even imagine—

Mr Rofe—Wait on. We are talking about a different issue here. I think the Treasurer flagged this possibility.

Ms Burrow—He did.

Mr Rofe—If you caused something to be put through the profit and loss account, you should get a tax deduction for it. That is a separate argument. I think your argument was saying that remuneration over a certain level should not be allowable as a tax deduction. I think they are two separate issues, really.

Ms Burrow—I was not clear. Ours is actually about putting stock options in the expenses or profit and losses.

Mr Rofe—I think that is a separate tax issue rather than what we are focusing on here. Going back, I think Senator Brandis referred to reasonableness as a market related quality. What is so wrong about that? Are we now going to impose a cap on what football stars, opera singers or people like that can get paid?

Ms Burrow—We do! We have a salary cap on footballers.

Senator CONROY—Great argument!

Mr Rofe—Should we say there is one cap for league and one cap for union, or something like that?

Ms Burrow—Let us be serious about this. There is a salary cap on footballers. Their institutions, their clubs, have been through the courts several—

Mr Rofe—That is not imposed by parliament, though, is it?

Ms Burrow—No.

Mr Rofe—I do not think it is the role of the parliament—

CHAIR—To use Mr Rofe’s other example, I do not think there is a salary cap on opera singers.

Ms Burrow—No.

Senator WEBBER—Inasmuch as government funding allows.

Mr Rofe—I would like to go back for a moment to the insolvency aspects of this bill. We have been talking about the remuneration side of things. My understanding is that ASIC has already commenced civil proceedings against the people at One.Tel. I understand the liquidator has either commenced or is considering proceedings to recover these bonuses. I go back to Bob Baxt’s point: is there really a serious gap in the legislation which needs to be

filled? I am not convinced that is the case. Further to what he said, I think insolvency is the one area of the law which has not yet been subject to the CLERP processes or their predecessor: Michael Lavarch's corporate law simplification program. For a number of years we have been going through the corporations legislation one bit at a time. We have had various bills and CLERP documents. Insolvency is the one area which has not been covered.

CHAIR—You may be aware that the Joint Committee on Corporations and Financial Services is about to embark on a major review of insolvency.

Mr Rofe—I go back to Bob's point: I think this needs to be gone into thoroughly and, perhaps, made the subject of a CLERP discussion paper eventually. At that time, we could look at these things. Is there a gap here to do with the bonus payments to Jodee Rich and Brad Keeling?

CHAIR—Mr Dwyer, do you want to come in on that?

Mr Dwyer—Yes, thank you. I think this legislation will assist. I reiterate that the discussion going on here today clearly is a lot broader than what this bill, the **Error! No document variable supplied.**, is looking to address. Whilst I hear Mr Rofe's concerns that this will not strengthen the existing provisions, we as liquidators think it will. We have been dealing with the Corporations Law in relation to voidable transactions, uncommercial transactions, for a long time. We find those provisions acceptable. We get very good support from the courts in interpreting those provisions, with reasonable evidence before them, despite what Professor Baxt says. We get, I think, great support from ASIC to the extent that they have the funding. I think the main issue for us as liquidators is to have sufficient resources to support us where there are no assets to support that litigation. With respect to Mr Rofe's suggestion that the law reform has been outstanding in relation to insolvency for some time, we agree, but the CASAC-CAMAC report is littered with agreed legislation amendment requirements. It has been a period of four to five years with some pushing from the profession and, indeed, ASIC that those amendments have not been brought before the parliament. The new inquiry into insolvency is only going to retrace old ground. It is already all there before the parliament in the submissions that have been made, and we would encourage your committee to push forward with the amendments that are already on the table.

Senator CONROY—A number of the submissions have criticised the four-year clawback period. I wonder if people want to expand on that or if Treasury are in a position to comment on that. Your answer is probably that it was a government decision and you have just written that.

Mr Rogers—It is basically fitting into the existing regime. A range of periods for clawback are allowed under part 5.7B of the Corporations Act, ranging from six months for any payment while the company is insolvent up to, I think, an unlimited period for certain payments done with a high degree of culpability. This fits somewhere in between. It is most like the existing related party clawback allowance, which is also four years. That is pretty much why the four years has been picked. I guess the main difference is that this also applies to payments made while the company is still solvent. Only a limited amount of 5.7B currently does that.

Senator WATSON—If I recall—and I may be incorrect and, if so, I stand corrected—Professor Baxt indicated earlier that he thought there may be gaps in this legislation in that arrangements associated with associate companies would not get caught, and he thought that was a loophole. What is your view?

Mr Dixon—That was one of the things that we brought up in our submission.

Mr Rogers—I guess it was not something I entirely understood at the time he made that comment. The bill is directed at payments made to directors or to their close associates or on behalf of those directors. If a payment is made to a related party by a company that becomes liquidated on behalf of the director, this bill is going to catch that. If it is made to any other related party or any other creditor or any other person other than a director, or connected with them, to the extent that it is caught by the existing law, it will be caught on a wind-up then.

Senator WATSON—What if it is made by a solvent company to a director of an insolvent company associated with that company in some way? Would that get picked up?

Mr Rogers—If the solvent company does not go liquidated then this bill will cover it. This bill is only concerned with recovering money to companies that become wound up. If a company is solvent and it makes any amount of payment, this bill is not going to affect that.

Senator WATSON—Even though these people get their payment not from the insolvent company but by an associate solvent company? That is what worries me.

Mr Rogers—Then there is no detriment by that payment to the insolvent company. There is no loss to the creditors or to anyone else associated with the insolvent company.

Senator WATSON—Can we have a view from the insolvency practitioner?

Mr Dwyer—I think this relates to insolvent transactions and that it is a clawback to an insolvent company. If the company is solvent I do not see that it necessarily applies. If the payment is to a director of an insolvent company then this does not apply and, if the insolvent company is in liquidation, the liquidator would be happy to get the payment.

CHAIR—On the basis that it is an uncommercial transaction, in effect.

Mr Dwyer—Yes.

Ms Burrow—What if the company was a subsidiary company and the directors are the one and the same, with a few different faces?

Mr Dwyer—I think the law adequately provides liquidators with provisions to claw that back under the related sections under 588, which relate to uncommercial transactions. This legislation supplements that and provides the ability to claw back directors' bonuses from directors and related parties to directors, which has not been there for liquidators previously. So it is supplementing the existing law.

Senator CONROY—On the advice I am given I think that there are some holes in the unreasonable director related transaction issue. How are family members captured? If money is paid to the wife of the executive—

Mr Rogers—That will be captured by the bill.

Senator CONROY—You are absolutely confident?

Mr Rogers—A new provision, 588FDA(1)(b) provides that payments covered will be to a director of a company, a close associate of the director of a company or, indeed, to any person on behalf of either a director or a close associate. A close associate is defined as a relative or de facto—

Senator CONROY—Let us just say that it is granted to them rather than paid to them? This is a critical issue in terms of whether it is received by or paid to. 'Received by' can actually encompass more things than are currently defined by 'paid to'.

Mr Rogers—As I have perhaps touched on before, the issue that we are concerned with is the outflow of value from the company. It is payments made, transfers or conveyances of property away from the company.

Senator CONROY—The legislation talks about payments.

Mr Rogers—And transfers of property, conveyances of property, the issue of securities and the disposition of any property of the company are all covered.

Senator CONROY—In your view, all outflows are covered?

Mr Rogers—All outflows of value from the company are covered.

Senator CONROY—Let us say you get vested with an option that is \$1. This legislation would capture the dollar vesting value to get it back. By the time it is chased down—because obviously it can be four years previously—the options you have been vested have been on-sold. You have sold them. The value of them was \$10. You are not capturing back the \$9 difference.

Mr Rogers—Not on the face of the bill, but what the bill does is plug into the existing regime. The existing regime provides that there is a range of probably 10 or 15 orders that a court can make, one of which is that, in relation to property that is recovered, the court can capture not only the property but also the benefit that accrued to the person as a result of the transfer.

Senator CONROY—Are you saying that is within the bill?

Mr Rogers—No, that is already in 5.7B of the law.

Senator CONROY—On the issue of outflows to subsidiaries you indicated that you did not quite understand what Professor Baxt was saying.

Mr Rogers—If it is an outflow to a director or any of those people that I have previously mentioned it will be captured.

Senator CONROY—But let us say you are employed as a company. Take Mr Hosking, for instance, who is head of Axiss—he has just resigned. He is not employed as an employee, he is employed as a company.

Mr Rogers—If he is acting as a director then he will be a director for the purposes of the law in court. If he is acting as an employee, no, we will not be capturing it. We do not capture payments to employees. The capture is of payments to directors. The Corporations Act already provides for a wider definition of director.

Senator CONROY—So you are saying it does not apply to CEOs, non-executive directors and directors. I am just trying to make sure I have got in my head that that is the target. But a CEO can be a director.

Mr Rogers—Yes, and they would be caught.

Senator CONROY—Even if, for instance, a CEO is not on the board?

Mr Rogers—The definition of director is perhaps a bit broader than what people think it is.

Senator CONROY—That is what I am trying to get from you. What is your definition?

Mr Rogers—The current definition under the Corporations Act, which is not in front of me unfortunately, is wider than sitting on the board. There is a set of criteria that will provide under the Corporations Act that you are a director in fact even if you are not one in title.

CHAIR—A deemed director?

Mr Rogers—Yes.

Senator CONROY—He is not here with us, unfortunately, so I may be completely misrepresenting him, but Professor Baxt seemed to feel that if an outflow was to a subsidiary company then that would not be captured. Let us just say that company was purely set up for the purposes of remunerating the CEO in a different way. The money goes to this company, so it is not paid to the director, but the director is the sole beneficiary of the company through whatever complex transactions—and there are lots of very clever ones.

Mr Rogers—The bill does directly provide for that. It is payment to anyone on behalf of a director—

Senator CONROY—That is ‘anyone’. A company is not an ‘anyone’.

Mr Rogers—With respect, I think it is.

Senator CONROY—It is an entity.

Mr Rogers—It is anyone. ‘Any person’ is the term used by the bill and a person incorporates that.

Senator WEBBER—But entities are different.

Mr Rogers—‘Person’ includes a corporation.

Senator CONROY—I am just trying to get to the nub of what Professor Baxt was meaning. Maybe we can get him to put in a supplementary submission.

Mr Rogers—Sure. I would be happy to respond to that.

Senator CONROY—Maybe he can explain a bit more what he meant.

CHAIR—I can assure you, Senator Conroy, that what Mr Rogers says is right.

Senator CONROY—I am not doubting it. I am just saying Professor Baxt’s is certainly a greater legal mind than mine.

Mr Rogers—Yes, it would have been good to explore it further.

Senator CONROY—So if we could perhaps seek some further explanation from Professor Baxt.

Senator WATSON—I feel that I would like the words ‘in accordance with Australian best practice’ in the bill. I think that would tend to focus the mind a bit.

Mr Rogers—In terms of the reasonableness of a payment?

Senator WATSON—Yes.

Mr Rogers—I could not really comment on that.

Senator WATSON—Would that give us any greater strength or give any strength to the courts in interpreting this?

Ms Burrow—It is certainly worth exploring somewhere or other as to whether or not you define it by context so it gives an indication to the courts for consideration. What worries me is still the acceptance, it seems in the main, that the market is reasonable. Frankly, if you do not temper—

Senator WATSON—But they should get away from it and point to best practice, because best practice is taking into account the circumstances under review.

Ms Burrow—I do not have an argument against that. I still think you need to go further and find a way to at least indicate tempering the market, because, frankly, the corporate club sets the market—

Senator WATSON—That is what I am trying to do.

Ms Burrow—and that is not going to be a community standard that we are interested in establishing, which, by the way, is not about capping, Ted—and I am sorry if I have given that view although, as I said flippantly, it is a great idea. It is really about saying that there ought to be community standards around reasonableness. I accept that parliamentarians might be wary of setting a figure, although it would be interesting. But however you do it, you have got to give the courts every view that in these cases of non-performing companies or indeed insolvent companies tempering the market is absolutely what reasonableness is about.

CHAIR—Are there any more questions?

Senator WATSON—Are you going to explore that Australian best practice concept?

CHAIR—You have asked your question and you have received your answer. Do you want to take it any further?

Senator JACINTA COLLINS—I would like to take that question a bit further and I will see if anyone else here is interested in reflecting on that further to Ms Burrow's comments. It appears to me that Ms Burrow is saying back to Senator Watson that best practice on its own, without some mechanism to assess, develop or enhance it, is meaningless. So unless you have something behind the rhetoric of best practice it is not really going to make any difference.

CHAIR—There is a legal issue too, I think. I am sorry to keep raising these legal issues, but I think there is an inconsistency between reasonableness and best practice because, again, courts are going to make these decisions and courts say what is reasonable is what is sufficient or competent or what is a standard within the broad range of acceptability rather than what is best practice.

Ms Burrow—We are actually talking about circumstances where company performance does not go anywhere near best practice—that would be my concern.

CHAIR—But that is a different question.

Ms Burrow—But it raises a benchmark that at least in this case—although I appreciate what Senator Watson is trying to do—actually suggests that in some way or other best practice should be used to assess reasonableness in the context of absolutely irresponsible practice, and we still do not get to the point of asking what a reasonable community standard is and how you temper the market given these directors. And we would hope you would extend it to senior executives. They are responsible for the joint; they actually have legal responsibilities to run solvent and performing companies.

CHAIR—Yes. Is there anything further?

Mr Dixon—Perhaps all important contracts at all levels could have negative elements. In other words, there is the positive in terms of linking it to a certain performance but in fact where there is failure there are also penalties.

Ms Burrow—Sanctions are a good idea. I think Professor Baxt actually talked about that. The whole sanctions regime is something we have not discussed but I think that is a very good point.

CHAIR—I suppose that raises the question of the extent to which parliament wants to get into writing the detail of executives' contracts, too. As there are no other issues, I thank Ms

Burrow, Mr Rofe, the officers from Treasury, the representative of CPA Australia, Mr Dwyer—I thank you for patience—and also, in their absence, the Institute of Company Directors. I thank the secretariat, the Hansard staff and the parliamentary sound and vision staff.

Committee adjourned at 6.39 p.m.