



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

ECONOMICS LEGISLATION COMMITTEE

Consideration of Additional Estimates: Supplementary Hearings

THURSDAY, 6 MAY 1999

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SENATE
ECONOMICS LEGISLATION COMMITTEE

Thursday, 6 May 1999

Members: Senator Ferguson (*Chair*), Senator Murphy (*Deputy Chair*), Senators George Campbell, Chapman, Murray and Watson

Substitute members: Senator O’Chee for Senator Watson

Senators in attendance: Senators Conroy, Chapman, Eggleston, Ferguson and Murphy

Committee met at 8.48 a.m.

DEPARTMENT OF THE TREASURY

Consideration resumed from 5 May.

In Attendance

Senator Kemp, Assistant Treasurer

Department of the Treasury—

Australian Securities and Investments Commission

Mr Greg Tanzer, Regional Commissioner ACT

Mr Phil Khoury, Executive General Manager

Mr Shane Tregillis, Acting Commissioner

Department of Finance and Administration—

Mr Robert Twomey

CHAIR—I declare open this additional day for supplementary hearings of the Senate Economics Legislation Committee. In accordance with the order of the Senate of 6 May 1993, a number of senators have given notice of matters they wish to raise. There being no objection, I suggest we consider this matter in the portfolio of Treasury. I welcome the minister, the Hon. Senator Rod Kemp, and also Mr Tanzer from ASIC. Minister, do you wish to make a statement?

Senator Kemp—No, except to just re-emphasise that I understand we have two hours to run and the siren sounds at quarter to 11.

[8.50 a.m.]

Program 8—Business affairs

Subprogram 8.1—Australian Securities and Investments Commission

Senator CONROY—Mr Alan Cameron, the Chairman of ASIC, was quoted in the *Age* of Thursday, 11 March 1999, on page 3, as saying that ‘incompetence was not a crime’ when

queried about the action ASIC would take as a consequence of its post mortem of the near collapse of Burns Philp and Co. Is ASIC at all concerned at the kind of message we may be sending by allowing gross irresponsibility by letting directors of a company so easily off the hook?

Mr Tanzer—No. The direction that is being set there is consistent with directions in the rest of the criminal law, which suggest that really criminal action should be reserved for those matters where there is intention on the part of the defendant, or at least reckless indifference on the part of the defendant, to commit the crime.

The company law has for some years been a little different in that, under section 232 of the Corporations Law and previously section 229 of the Companies Code going back to time immemorial, gross negligence could be seen as a criminal offence. In fact, there was a provision in the law dealing with that.

There have been successive parliamentary committee reports, starting with a Senate Standing Committee on Legal and Constitutional Affairs report in about 1992 chaired by Senator Cooney, which recommended that that offence for negligence really should be taken out of the law because it was out of kilter with the rest of developments. I think really the chairman's statement on that occasion was just reflecting that reality.

Senator CONROY—So is section 232 still in the law at the moment?

Mr Tanzer—Yes, section 232 is there, but it deals with dishonestly failing to discharge duties, making improper use of position to gain a particular advantage for self and so on. But the provision that requires a director to exercise all due care and, on failure of that, it being a criminal offence, my recollection is that it is no longer there.

Senator CONROY—It was taken out when it was shifted?

Mr Tanzer—I think it is actually more in the last two or three years, but it was a flow through of that report of the Cooney committee.

Senator CONROY—So you would not consider at all that the circumstances involved here would be appropriate to apply a criminal sanction on negligence?

Mr Tanzer—The direction that is being taken is to institute a system whereby civil penalties may be imposed for gross negligence. For example, significant monetary fines and potentially banning orders can be made by a court, but it is in a civil proceeding now.

Senator CONROY—When you say 'civil penalties', who would they be against? Is it the directors, the company as an entity or the individual directors?

Mr Tanzer—The civil penalty can be made against the company, but a banning order of course would be directed to a director.

Senator CONROY—Have you considered any banning orders in relation to this case?

Mr Tanzer—In relation to this particular case?

Senator CONROY—Burns Philp.

Mr Tanzer—No, my understanding is that the decision of the commission was that the appropriate regulatory effect was to publish the report which exposed the nature of the conduct involved, rather than to take any further action. Some of these activities you will understand took place some years ago. Generally speaking, the courts have followed an approach that orders such as banning orders are primarily seen as being there for the protection of the public and the greater the length of time between—

Senator CONROY—So you are signalling then that you are going to leave Solomon alone? It has been a few years?

Mr Tanzer—In relation to the Burns Philp matter?

Senator CONROY—It was a few years ago and your general attitude seems to be, ‘Well, it was a few years ago’.

Mr Tanzer—No, I am not suggesting that at all.

Senator CONROY—I wrote down the words ‘some years’.

Senator Kemp—It would help if the officer was given a chance to answer the question and to answer it in his own terms, and if we avoid trying to put words into the officer’s mouth.

Senator CONROY—I am sorry; I wrote down the exact words.

CHAIR—I will take note of your intervention.

Mr Tanzer—The question, as I understood it, originally related to the Burns Philp report. The question that you are now raising relates to an ongoing investigation.

Senator CONROY—No, I am sorry. You had moved from Burns Philp. I had asked about any banning and then you moved into a more philosophical description of ASIC’s attitude.

Mr Tanzer—Yes.

Senator CONROY—Which suggested using the words ‘some years’. I am not putting words into Mr Tanzer’s mouth, Senator Kemp. I was just wondering where the application is and perhaps you might want to apply it to this.

Mr Tanzer—You are dealing with a completely different investigation in that case. You are dealing there with an investigation of a matter—

Senator CONROY—You only wrapped the Burns Philp one up a couple of months ago.

Mr Tanzer—That is right, and now you are speaking about a different investigation to the current investigation. We really cannot comment on it.

Senator CONROY—It is taking some years.

CHAIR—Senator Conroy, let him finish his answers.

Mr Tanzer—It has, but we are in the position that we are in a public forum and I do not think it is appropriate to comment on the nature of that investigation.

Senator CONROY—I am probably seeking your comment or view. I am just intrigued by this ‘some years’ concept. Without going into any specifics—and I have drawn an individual specific—I would probably be happier, or be making myself clearer, if you were to expound further your views on the informal time limit that you are ascribing to ‘some years’.

Mr Tanzer—I am not ascribing any particular time limit to ‘some years’. I was actually describing the approach of the courts to the application of banning orders and disqualification orders. Generally they are seen as appropriate orders for the protection of the public. Therefore, the length of time between the alleged conduct and the imposition of the penalties is a relevant consideration for the court to take into account.

ASIC’s general orientation towards the investigation of criminal or civil matters is to complete them as soon as they possibly can. As you know, the annual report publicises a self-imposed deadline or performance indicator. I should not use the term ‘deadline’, because it is not strictly that sort of thing where things are cut off if you go beyond it. The self-imposed

performance indicator is that we aim to complete 75 per cent of our investigations within 12 months. We have been achieving that.

There are cases where that is not possible; either the complaint of the activity arises some time after the event, but the activity itself is still seen as significant enough to warrant investigation, or, indeed, the investigation itself is so complex and detailed, and involves so many documents or parties, that it takes us beyond that time limit. Certainly, ASIC's general orientation—and it is well publicised—is that we aim to complete matters as soon as we possibly can.

Senator CONROY—Burns Philp is probably the best example of utter incompetence this country has seen in corporate management. You as a regulator cannot find the willingness to at least try for a ban on some of these incompetents who have cost their shareholders millions and millions of dollars. It is clear cut; your own report is clear cut. Your own chairman says 'incompetence is not a crime'. No, but it is at least worthy of a ban, Mr Tanzer. If you cannot find the willingness to ban gross incompetence, irrespective of the time frame, when would you consider using a ban? Why bother having the banning order if you could not get round to banning the single largest incompetent act?

Senator Kemp—Mr Chairman, I think this estimates is to ask questions of officers, not to give the chance for Senator Conroy to make a long statement. Senator Conroy obviously feels strongly about this issue and I think a lot of people feel strongly about it.

Senator CONROY—Why bother having a regulator?

Senator Kemp—We need Senator Conroy just to ask specific questions which the officer can answer. I think his comments should be framed in that light.

CHAIR—Senator Conroy, you are entitled to your views; it does not necessarily mean—

Senator CONROY—I have asked Mr Tanzer to comment.

CHAIR—I know, but the idea of estimates is not for you to make statements and then ask Mr Tanzer to comment. It is to ask questions of the officers. Mr Tanzer, you may or may not wish to comment on Senator Conroy's statement.

Mr Tanzer—All I would say about that is that you are entitled to your opinion of the Burns Philp matter.

Senator CONROY—I am entitled to ask you to justify it.

Mr Tanzer—Certainly.

CHAIR—Senator Conroy, you are not allowed to.

Mr Tanzer—My statement in response to that is that ASIC took the view, as is well publicised in the report—and it has been published and it is out for all to see—that the appropriate action in this case was to publish the report and give a dose of sunlight to the circumstances surrounding it.

You also asked a question about when ASIC generally bans people. I cannot find the figure here, but we have a consistent program of banning directors of companies if, for example, two or more companies have failed to pay 50 cents in the dollar. That is a consistent program that, over the years, has resulted in the banning of a number of directors. I do not have the figures so I will not speculate on the number, but it certainly runs to the hundreds over the years.

Senator CONROY—I believe that, if you looked at the circumstances of those cases, you would find that they are no less incompetent than the people you have not banned—like Burns Philp.

CHAIR—Order! Senator Conroy, the points that you are making are points that you may wish to raise in debate in the chamber, as to the adequacy of decisions that have been made by ASIC, but you cannot ask the officer to justify in estimates why a certain decision was made, because the decision was made by ASIC. You can debate it in the chamber; you cannot ask him to justify it.

Senator CONROY—I do not actually think you are making a ruling here. I think you are giving an opinion on what you think it is appropriate to ask ASIC.

CHAIR—No, I am ruling that you cannot ask for opinions.

Senator CONROY—It is going to be a long morning if, every time you do not like a question, you are going to try to rule it out.

CHAIR—I do not mind you asking questions at all, but when it is only your opinion, and you are making statements and asking the officer to agree with your opinion, I am saying that he is not here to agree or disagree with your opinions.

Senator CONROY—How can you justify not banning directors of Burns Philp?

Senator Kemp—I think the officer—

Senator CONROY—It is a question; it is not an opinion. I am asking a question.

CHAIR—All right, the minister is allowed to respond.

Senator Kemp—Senator, I am allowed to respond. You are entitled to ask a question and I am entitled to respond. I think the officer has dealt with this. He has gone through the history of this. If my memory is correct, he has explained the position that was taken. I do not think it helps the investigations of this committee if the same question is tirelessly repeated by the senator.

Senator CONROY—You have got nothing to add?

Mr Tanzer—I have nothing to add to the previous answer.

Senator CONROY—The minister is inviting you to take the 7.30 defence. I invite you to ignore him.

Mr Tanzer—I have got nothing to add to the previous answer.

CHAIR—Senator, you do not ask officers to ignore ministers at the table.

Senator CONROY—I did not know the minister gave a directive.

CHAIR—He said he had already answered the question.

Senator CONROY—You read Gerard Henderson's column this morning and you've got the irks.

Senator Kemp—Senator, I think it would be a great help if you would kindly ask your question and stop trying to have a political—

Senator CONROY—What have you done to upset Gerard Henderson?

Senator Kemp—If you want to have a political exchange—

CHAIR—Senator Conroy! If you want to continue, ask questions.

Senator Kemp—If you want to have a political exchange and a political debate, we will certainly have one. But in the meantime, why don't you confine yourself to the facts.

CHAIR—Order! Do you have any further questions, Senator Conroy?

Senator CONROY—Briefly, what do you consider are the key lessons from Burns Philp and Co.'s failure?

Mr Tanzer—I think the lessons that we were seeking to draw are set out in the report. My summary would be that there is a real need for directors of companies to be vigilant about ongoing operations; to be especially vigilant about the financial reporting of the impact of those operations; and to link to those two points, when we are talking about a listed company, keeping the market informed on an ongoing basis of significant developments affecting the company.

Senator CONROY—In your view, did a lack of corporate governance inside Burns Philp contribute to their problems?

Mr Tanzer—I would rather not go too much more into the detail of the Burns Philp matter, because while it is a report of the commission, and I am an officer of the commission, it was not a report that I published. I have certainly read it, but the sort of question that you are asking would be—

Senator CONROY—I am happy for you to take it on notice.

Mr Tanzer—better informed by—

Senator CONROY—I am happy for you to take it on notice and pass it on.

Mr Tanzer—Certainly.

Senator CONROY—ASIC is unfortunately getting a reputation in the press as being a soft touch. One example of this is ASIC's treatment of a takeover bid for Taipan Resources by Paulsens Gold Pty Ltd. The other is ASIC allowing Tower Life of New Zealand to change its offer terms midway through its bid for FAI Life. This, I understand, left shareholders uncertain as to the real price of the bid. Could you give us a brief explanation of ASIC's position in these two matters?

Mr Tanzer—I would rather not speak about those two particular matters—again, partly because I was not directly involved in those. What I can say is that ASIC finds itself in a fairly invidious position in just about any takeover matter. In a very few cases, takeovers are not contested and then it tends to be the case that ASIC's involvement does not become an issue. Although ASIC tends to be involved in just about every takeover that takes place, because of the nature of the law, there tends to be an application to ASIC to modify or vary the law in a particular respect to permit a takeover to proceed in a particular way, not because people are trying to get around the law, but because the law sets down a fairly prescriptive procedure. That frequently requires modification. In the larger number of cases, takeovers are hotly contested. The issues are primarily issues between the two parties involved. ASIC's stance is to apply the law so that shareholders are treated fairly and given adequate information on which to decide whether or not to accept the bid. Frequently, there are detailed technical discussions and technical disputes. Just as many financial commentators tend to say that ASIC has been too tough in a particular case as say that we have been too lenient.

It is not that we do not take notice of the sort of comment that is made. Indeed, ASIC recently ran two seminars in Sydney and Melbourne after the event to explain its views and stance on particular takeover matters once they were finished. We have the same problem as we do in relation to current investigations—it is very difficult to publicise a view in the context of an ongoing and acrimonious takeover dispute, because that would be seen as taking sides. There is no unwillingness on the part of ASIC to speak about particular takeovers, as we demonstrated in running those two seminars for practitioners and industry people.

In relation to your question, I am really not the best person to answer that. I apologise for that. There is no lack of willingness. If you are interested in discussing those matters in particular detail, I am happy to undertake that somebody can be here on the next occasion to talk in detail about that.

Senator CONROY—I appreciate that, but I am sure they are probably going to be here in a few weeks, anyway, so I can take it up with them directly. I am sure you understand that I am not reflecting the individual views of journalists. ASIC has enormous capacity to vary the law on these matters.

Mr Tanzer—Yes.

Senator CONROY—It is a discretion.

Mr Tanzer—In relation to takeover matters and in relation to fund raising matters.

Senator CONROY—Yes. The parliament has given it that capacity. What the parliament is seeking to try to do through this process is get some understanding of what drives a decision to create a precedent like the one that was created in this case, because it may not necessarily have been the intent of the parliament for the variations to take place in the way that they did. Your capacity to just vary the law willy-nilly is not quite the right way to describe it. I appreciate you saying that you ran a seminar. If you have not already completed your annual report, a brief summary in your annual report to the parliament may assist the Senate, certainly, and the parliament as a whole, to understand.

Hostile takeovers are a fact of life, as you have said, and the primary aim should be, as I think you described, making sure that shareholders—not the warring managements but the shareholders—get fairly treated and are provided with full information. That should always be the intent, which is why there is such concern about the Tower and FAI situation, because terms were varied in the middle. To use the football parlance, the goalposts moved in the middle of a match and the rules changed, and that creates lack of certainty. It certainly causes the parliament to be asking, ‘Well, what the hell happened?’

I do have a few other questions to do with Tower but perhaps I can take them up after I have seen your annual report and if Mr Longo is here next time—I know he always enjoys coming. But briefly on that as a whole: do you think that allowing Tower to alter that bid during the bid process sets a precedent for any other takeovers?

Mr Tanzer—Again, Senator, I would rather take that on notice. You made a comment that it is not right to use the word ‘willy-nilly’ about how these discretions are exercised. There are a couple of very important safeguards in place. The first thing is that ASIC has published its policies and has published statements on how it will exercise discretions in this area. We cannot hope to cover all of the possible circumstances in which those discretions would be exercised; that would be an impossible exercise. But to the extent possible we publish, for the certainty of the market, our policies on how the discretions will be exercised. Also, we publish pro forma relief applications, so that if a person needs a particular style of relief that fits into a clear set of guidelines that have been published they can apply for exactly that relief. It fits within the existing policy. ASIC gives quite a strong indication that that relief will be granted in the particular case, provided it meets that set of published guidelines.

ASIC is acutely aware of its responsibility, both to the parliament and to the marketplace and the investing community generally, to exercise those discretions responsibly to the extent possible. There is always room for debate in a particular case about where that has been so, and we do not shy away from that. I think the framework is quite robust. It is possible for

those discretions to be scrutinised, because the exercise of discretions is publicised in a particular case and the broad policy statements are also published and well known amongst the professional community that tends to involve itself in these areas, including the financial journalists that you speak about.

Senator CONROY—What leads to further concern, from what you have said, is this: the Australian corporate market is litigious. The takeover panel is one suggestion at the moment coming before the parliament about how to avoid the litigiousness of the corporate takeover world. If you were to knock back a company in a similar position to Tower Life—not an identical one but a reasonably similar one—you would end up in court defending your position, when they could point to this other example where you have allowed a change to be made and then quote their own where you had not, in reasonably similar circumstances. This is the sort of thing that can create mayhem in the market.

I am not saying that there is anything on the horizon right now but I am very conscious that, with ASIC having the power for the variations and not a strict parliamentary set of guidelines—not that judges have not taken their own interpretation over the years of what legislation means or is meant to mean—you are left in a position where you are defending your precedent, saying, ‘No, no, it doesn’t apply to others,’ whereas a court is going to say, ‘If you did this for them, why won’t you do it for these?’ The judgments that you have made are going to end up being questioned in courts and possibly overturned on similar circumstances.

I am particularly conscious of trying to avoid the situation that because of making groundbreaking decisions—and this was reasonably groundbreaking in terms of some of the more established procedures—you are going to be up for challenge. You would be aware of the debate among the columnists. Some do not believe you should vary anything: there is a set position and your job is not even to finetune. That is an active debate in some sections of the community, particularly among the financial media.

Mr Tanzer—We are acutely aware of the need to exercise those discretions responsibly and in a consistent way. One of the purposes for which those discretions exist is to enable the market to function more efficiently, rather than being hamstrung in a particular case by legislation that is framed for a general circumstance but does not quite fit the particular circumstance.

On the vast majority of occasions, when the commission exercises its discretions they are not challenged. That is not because they are not challengeable. There is provision for the decision of the commission to be appealed to the Administration Appeals Tribunal in the vast bulk of these matters. It tends to be the case that the commission does get taken to the AAT occasionally and it has to defend its decision there.

We do not have a 100 per cent success rate with the AAT, but we have quite a significant success rate. I would be happy to give you an indication of the sorts of matters that go there and how successful we are—I just do not have that to hand at the moment.

Senator CONROY—That is all right. What does ASIC consider will be the primary benefit of having enforceable undertakings as a new enforcement tool? In what circumstances would ASIC pursue an enforceable undertaking, as opposed to using the Corporations Law, to pursue through the courts someone suspected of breaking the law?

Mr Tanzer—The enforceable undertaking is a new power that has come to ASIC with the new functions that ASIC assumed on 1 July 1998, and it is a power that some other regulators have had. Notably, the Australian Competition and Consumer Commission has had it for some

time. We have published a practice note which goes into some detail about the circumstances in which we think enforceable undertakings are appropriate, so that is available.

To summarise, enforceable undertakings provide a much greater strength to the sorts of undertakings that parties would accept from each other in a civil proceeding. Because of this provision ASIC has the advantage now that, whether in the course of a civil proceeding or even before commencing a civil proceeding, it is possible to accept an enforceable undertaking so as to bind the other party to a particular course of action.

It is something that has been used in a number of cases. We used it in a particular case arising out of my office in an investment scheme matter on which I could go into some detail here, but it is the sort of thing that, in essence, provides strength and some stiffness to the sorts of undertakings that you otherwise might see offered as part of a settlement of a civil proceeding or in order to avert civil proceedings.

Senator CONROY—I am concerned that it may become a tool that you can use what I would describe as ‘inappropriately’—actually taking companies to court. I know the minister will start getting edgy in his seat in about five seconds, but Crown Casino is an example. It is dear to your heart at the moment.

Senator Kemp—Very predictable, I might say.

Senator CONROY—It is very dear to the minister’s heart. Did you get an invite to the wedding? As an example, ASIC claimed in a press release of 10 August 1998 that it had investigated the Crown Casino and found that it had breached the continuous disclosure provisions of the Corporations Law late in 1997. Why did ASIC not prosecute Crown for the breach of the Corporations Law?

Mr Tanzer—That particular breach was not a criminal issue, in ASIC’s judgment. The issue related to the disclosure of the trading position, the financial position, of Crown Casino during late 1997. The investigation found that, in our view, Crown Casino had breached listing rule 3.1, but there was no evidence of dishonesty—

Senator CONROY—You can’t have looked very hard if you couldn’t find dishonesty at Crown Casino.

CHAIR—Senator Conroy, let Mr Tanzer complete his answer before you jump in over the top of him speaking. Some simple courtesy, please.

Mr Tanzer—We did form the view that there were significant elements of Crown Casino’s internal operations that needed to be improved to ensure that those sorts of breaches did not occur again. For that reason, we sought and obtained an enforceable undertaking in the same way as we would have sought orders of this kind of nature as permanent injunctions, or injunctions in a civil proceeding.

The enforceable undertaking went to detailed issues going to the sorts of compliance systems that would be put in place in Crown to ensure that there was no recurrence. Essentially, that was a way of achieving the same sort of result that we would have been seeking to achieve by undertaking a civil proceeding. The result of that is that officers have undertaken a review of the enforceable undertaking and how it is being dealt with. I am informed that the officers believe there has been a substantial improvement in the systems in place.

Senator CONROY—Lloyd has been dumped; of course there has been a substantial improvement.

Senator Kemp—Senator, just stick to appropriate questions. Leave the commentary aside.

Senator CONROY—I appreciate your nervousness as always on Crown.

Senator Kemp—Senator, you are so predictable. Your obsession, I think, is more to the point.

CHAIR—The gallery is not here, Senator Conroy. No wonder the gallery is not here. Continue with your questions, please, and forget your asides.

Senator CONROY—It is just that the enforceable undertaking in this particular example seems to have arisen out of the fact that—and it is this perception that is the most danger to your organisation—if you throw enough money against you and put enough legal roadblocks in the way, you can make your back off. As long as you promise not to do it again, everything is fine.

There is no sanction on Crown for what they did. All you have got is a commitment that they will not do it again. They took you to court, and they were prepared to spend a couple of years defending themselves in court, if necessary. Notwithstanding that they paid your costs—that is right, isn't it: they paid your costs?

Mr Tanzer—I cannot remember the exact detail of the press release. My recollection is that that is so. I would not be counting on it.

Senator CONROY—They pay your costs and get away with saying, 'We won't do it again.' My concern and the perception of some people that I have talked to in the market is that, as long as you are prepared to talk tough back to ASIC, they will wimp out, give you a bit of a slap on the wrist, say, 'Don't do it again,' and you will say, 'Okay, I won't do it again.' That perception in the market is corrosive to your capacity to do your job.

Mr Tanzer—I hear what you say, Senator. In the position of being a regulator, you have to look at each case on its individual merits. I could just as easily quote to you—I am just looking briefly at the annual report—the 26 criminals who were gaoled last year by ASIC: Douglas Edward Reid, former Southern Cross Holdings Deputy Chairman, was found guilty of false accounting theft and sentenced to 10 years gaol with a non-parole period of eight years. That was a matter where Mr Reid was in fact charged within about three days of us being made aware of the particular offence.

Senator CONROY—It was a good case. It is just that he should be sharing a cell with Lloyd.

Mr Tanzer—There are numerous other—

Senator Kemp—Mr Chairman, these are serious topics. We have a major agency of government before the chair. I do not think it is an appropriate occasion for Senator Conroy to sling-off on political comments and attack particular individuals. I would ask you to ensure that Senator Conroy confines himself to questions which can be reasonably and appropriately handled by the officer at the table.

ACTING CHAIR (Senator Murphy)—Thank you, Minister. I am sure we will stick to the relevant questions.

Senator CONROY—Has ASIC or the ASC before them ever been forced into the courts to enforce one of the undertakings, an enforceable undertaking?

Mr Tanzer—No, I do not think so.

Senator CONROY—They have always been adhered to and, as you indicated, Crown were adhering and have lifted their game?

Mr Tanzer—My recollection is that we have not yet been forced to go to court to enforce an enforceable undertaking. That is part of the benefit that we were seeking to obtain by having the power there, because the fact that it can be enforced tends to assist with compliance with it. There have certainly been cases where undertakings or promises have been made in the course of court proceedings which, we believe, have not been kept. We have brought the odd contempt proceeding against people, but they are relatively rare.

Senator CONROY—The government are proposing some changes to potential liabilities of directors as part of a process at the moment. You would be aware that the government intends to change the description of fiduciary duty and remove the criminal penalty for breaches of duty of care and diligence?

Mr Tanzer—Yes, that is right.

Senator CONROY—I am just afraid that these proposed changes will not help ASIC in your duties. Do you have a view on that?

Mr Tanzer—It is really a question of government policy.

Senator CONROY—The combination of weaker rules for you to try and enforce and what could be, if people were being unkind, an overly forgiving attitude by ASIC could be viewed as a watchdog without teeth. I am sure you have been reading those comments in the newspapers, and I think Mr Westfield was the most unkind journalist that I have seen. I think I have been quite mild compared to Mr Westfield. He has obviously got his own barrows to push. Are you comfortable that you are a watchdog with teeth?

Mr Tanzer—I think the record proves that the watchdog has teeth.

Senator CONROY—You might want to take this one on notice. How does ASIC compare to other corporate watchdogs overseas in terms of size, funding and success rate with sanctions? On average, how much does it cost for ASIC to take an offender to court? I am happy for you to take that one on notice.

Senator Kemp—That is a pretty huge question, I would have to say.

Senator CONROY—As I said, they can take it on notice. I am not asking for an answer right now.

Senator Kemp—They can take it on notice, but I would not wish to raise the expectations that you will get a thesis on it. Obviously, ASIC will always take questions on notice seriously, but I think that is a pretty broad question.

Mr Tanzer—It is, Senator. We have on occasions looked to get quite hard information on the sorts of questions that you are asking.

Senator CONROY—Only if you have got it, please. I am not asking you to go and do something if you have not done it.

Mr Tanzer—It is difficult to get good hard benchmark figures. It is very difficult to get a figure like the last one that you asked for on the average cost of taking an offender to court because it varies so much depending on the nature of the matter. Even when we attempt to benchmark ourselves against overseas regulators and the types of legal systems that they deal with, the types of functions that they have quite often vary. Our closest parallel with a regulator in another jurisdiction is the Financial Services Authority in the UK. It has the advantage that it is in a similar legal system, but they are still a vastly different organisation from us and they are relatively new as well. They only came into being in the last couple of years.

There are actually very few regulators around the world that have this combination of being the companies' regulator—being in the position of registering companies, being responsible for administering laws with respect to corporate governance, insolvency, takeovers and fundraising—as well as the conduct of securities and futures markets. That is where some of the difficulties lie.

One thing I can say about that is that I am not aware of any other regulator that has imposed that sort of performance indicator that I mentioned there. I am not aware of any other law enforcement agency that imposes and publishes figures in that sort of way.

Senator CONROY—Give me anything you have got. As I said, I am not asking you to go off and start something new but just whatever is reasonably handy. Could you give me a run-down on ASIC's reasons for its impatience to act on the proposed changes to compulsory acquisitions? Do you intend to allocate further resources on this matter to the High Court? ASIC recently issued a note or whatever allowing some minority shareholders to be bought out and it was challenged in the court, and you lost.

Mr Tanzer—The law provides a mechanism whereby once a person has achieved a 90 per cent shareholding, there is a procedure whereby the person who then has a 90 per cent shareholding can what is euphemistically termed 'mop up' the other shareholders. They can buy out the other shareholders. There are fairly detailed provisions dealing with the circumstances in which that can be done. Again, there are discretions for ASIC.

Senator CONROY—You vary them fairly substantially, though? Someone suggested you pre-empted the legislation that is about to come before the parliament.

Mr Tanzer—I am happy to take that on notice, Senator, and give you more detail about the particular circumstances.

Senator CONROY—Are you intending to appeal that decision?

Mr Tanzer—My recollection is that it has been appealed.

Senator CONROY—How much has been spent pursuing this action at this stage? I am happy for you to take that on notice.

Mr Tanzer—I will have to take that on notice.

Senator CONROY—There has been a hive of takeover activity in recent years. Can you tell us how many takeover disputes ASIC has considered and referred to the Corporations and Securities Panel in the last year, if there are any?

Mr Tanzer—I do not have that handy.

Senator CONROY—Are you happy to take that on notice?

Mr Tanzer—Yes.

Senator CONROY—How many have reached the courts for mediation after that?

Mr Tanzer—In the last year?

Senator CONROY—Yes. Does the market consider the panel an appropriate or reasonable avenue to sort out takeover disputes, in your view, or has the market preferred to go to court?

Mr Tanzer—I guess that is part of the reason why the role of the panel is under active consideration by the parliament now. I think, historically, when the panel was first brought in, there was a genuine intention that it would be used as a way of short-circuiting takeover disputes.

The reason it was brought in originally was that the predecessor to the ASC, the NCSC, had the power to declare that the circumstances of a particular takeover were unacceptable, even though they did not breach the law. Because of a concern that the NCSC effectively had the power to act as prosecutor, judge and jury in those sorts of matters and there were no clear guidelines about exactly what was unacceptable—although they were developing over time—it was appropriate to remove that decision to an independent body.

The early history of the panel was not especially happy—not because of any fault of the panel. In a sense, it was not able to short-circuit those sorts of disputes; the panel itself tended to get tied up in litigation as well—around its procedure. There have been referrals to the panel; I cannot give you the detail of those now, but that is certainly the issue that is under active consideration. From ASIC's point of view, we generally do not enter into that sort of policy debate, although we can see advantages in a properly functioning panel to deal with those sorts of disputes.

Senator CONROY—On the issue of continuous disclosure of listed companies—and we have briefly chatted about one company's problems—Mr Cameron was quoted as saying that it is:

. . . a vital part of the credibility of the stock market. Investors need to be assured that listed companies have promptly and fully disclosed to the market all information which is material to the price at which they might be prepared to buy or sell securities.

Is ASIC concerned at all about the current standard of compliance for continuous disclosure?

Mr Tanzer—It is a matter that we actively monitor in conjunction with the ASX.

Senator CONROY—Breach of continuous disclosure is one of the most frequent reasons for referral to ASIC by the ASX—an average of about three a week. My concern is that, although the market is on a bit of an upward run at the moment, it may turn down and that is when the pressure goes on to cut the corners.

CHAIR—If this is a bit of an upward run, Senator Conroy, I would like to see a real run.

Senator CONROY—It has been going for a few years. I hope you are doing well on the market, Senator Ferguson?

CHAIR—I do not do well in the market, Senator Conroy. I do not invest.

Senator CONROY—I am just concerned that there are circumstances where regulation becomes a little more flexible. It works fine in an upward run, but becomes more of a concern and can lead to greater cutting of corners in a downturn. Would you be concerned in that set of circumstances? Not that I am, for a moment, suggesting the economy is going to turn the corner like that.

Mr Tanzer—I do not think the regulation has become more flexible.

Senator CONROY—I am referring to the proposed changes.

Mr Tanzer—The continuous disclosure obligation has long been a disclosure imposed on listed companies through the listing rules of the Australian Stock Exchange—listing rule 3.1. The Corporations Law was changed to enshrine that requirement in legislation some six years ago. I am sorry to add to that thought. In a sense that stiffened the obligation, although there was always a capacity for the listing rules to be enforced. The fact that it now appears in law as well as in the listing rules stiffens the obligation if anything. The ASX regularly queries companies in respect of their disclosure. We maintain a consistent watching brief in this area. As you say, we receive a number of referrals and conduct a number of inquiries into those

sorts of matters. I do not know that the regulation has become any less firm or any more flexible.

Senator CONROY—Does ASIC consider it to be good policy for companies to fully disclose through remuneration of directors and senior executives?

Mr Tanzer—We put out a press release last November, again accompanied by a practice note which set out our views—exactly to make that point really—that, as part of the obligation to disclose the true financial position of the company and to produce financial statements in a form that enabled shareholders and potential investors to make a reasonable assessment of the company in which they might invest, it was important that directors' and very senior executives' remuneration in all its forms was disclosed.

Senator CONROY—Do you agree with the criticism of that practice note issued on the operation of S300A that it is too ambiguous and allows for inconsistent and inadequate disclosure practices?

Mr Tanzer—The practice note procedure is quite long and detailed. For those who are interested in it, it normally is preceded by a draft practice note that is circulated to people for comment, so that when the final practice note does go out it has fairly worked out the bugs, if you like. We always take into account criticism of practice notes, and we regularly review policies and practice notes when it becomes necessary to do so.

Senator CONROY—Should this disclosure include the value of shares, share bonuses, share options and other non-cash based entitlements given to individuals?

Mr Tanzer—My recollection is that the press release dated 1 November referred to such issues. It states:

The elements of emoluments to be disclosed would normally include salary and fees, non-cash benefits, bonuses (possibly separate categories of bonus where the bonuses are paid on different performance criteria), profit share, superannuation contributions, other payments in connection with retirement from office, the value of shares issued, and the value of options granted.

Superannuation contributions, golden handshakes and other payments in connection with retirement from office should be included as remuneration.

Senator CONROY—What is the enforceability legally of a practice note? What is the legal standing of it?

Mr Tanzer—To give you a detailed technical answer to that I would have to go back to the practice note. My recollection of the basis of the practice note is that it rests on ASIC making clear its view of the obligation to fairly report the financial reporting obligations in Corporations Law. We issue a number of practice notes where we state what our view of the law is. To enforce that, if in a particular case it was considered warranted, we would have to test that opinion in court.

Senator CONROY—So it is not binding until you have had a win or a loss?

Mr Tanzer—That is my understanding of this particular case.

Senator CONROY—Are you aware of the Ernst and Young study of the top 100 companies which found deficient and inconsistent disclosure?

Mr Tanzer—I am not personally aware of that study.

Senator CONROY—It revealed fairly substantial non-compliance with the practice note—particularly in the share/share option issue. I appreciate that you cannot possibly cover every issue. I am sure somebody has had a chance to have a look at it. I am interested in ASIC's response to it. If you could take that on notice.

I will shift to the minister for a minute. Minister, do you support the disclosure of the sorts of things that we are talking about: share options, bonuses, golden handshakes?

Senator Kemp—I support government policy on these issues. There is no reason why I would not.

Senator CONROY—It is not actually a catch-22.

Senator Kemp—I know. You are so clever, Senator, but—

Senator CONROY—I was sure you would fall for it easily!

Senator Kemp—Let me make the government position clear on the laws which have been passed: I certainly and very strongly support them.

Senator CONROY—I appreciate that you were not handling this particular bill when it came through—the amendments to section 300A. Senator Ian Campbell was handling the bill. The question over remuneration disclosure was being actively discussed in the chamber and the government put to the Senate that ‘remuneration’ should be deleted and ‘emoluments’ substituted. I do not know if you have ever had to bother reading the *Hansard*—it is pretty ugly—but there was an active debate. ‘Remuneration’ was the original wording of the amendments, but ‘emoluments’ was suggested by the government as a more appropriate term, consistent with other corporate practice that covered everything. I am just interested in whether you think the sorts of things we are talking about—value of share, share bonuses and share options depending upon performance—would have been the intent of the government in the word ‘emoluments’.

Senator Kemp—As you know, this now comes under Mr Hockey’s area. If there is a specific question relating to that, I will seek advice from the minister. Do you want to put that one on notice, Senator?

Senator CONROY—Yes, if I could. I would—

CHAIR—I am not quite sure how it relates to additional supplementary estimates.

Senator CONROY—Senator Watson is not with us.

CHAIR—I know, but I am.

Senator CONROY—But not for much longer.

CHAIR—I am not that crook!

Senator CONROY—It is just that the government felt very strongly on this particular point in the chamber and they made the point that ‘emoluments’ was the appropriate word—that it was all encompassing—and it seems that a significant number of the top 100 companies are flouting the law in this particular area. Having spent some hours in the chamber discussing this at great length, as I am wont to do—

Senator Kemp—Yes, we have noticed that, Senator.

Senator CONROY—I am disappointed to find that companies are choosing to disguise, exclude and not meet their obligations and that, notwithstanding the claim that there are a few anomalies and misinterpretations, companies are fundamentally not complying with the requirements of the law. I am sure someone in ASIC is looking at this issue, but the government gave commitments at the time that emoluments covered all parts of remuneration and that ‘remuneration’ was too limited a word. I was just wondering if you could take on notice what the government was intending to do: whether to refer it to ASIC; whether ASIC has the power to chase it up.

The parliament was seeking to ensure disclosure and information for shareholders—they are the owners of these companies—and at the moment we have got a fairly blatant situation where many of the top companies in this country are deliberately withholding key information that shareholders need to base their judgments on on how to vote at general meetings.

Senator Kemp—Senator, you have made that assertion. I think the officer at the table has made a reply to you, and you have put a couple of questions on notice—

Senator CONROY—It is not a question of making an assertion.

Senator Kemp—and I will bring those to the attention of Mr Hockey and we will see whether we can get you a reply.

Senator CONROY—You would be aware that the government has referred those changes last year plus a range of other issues to the Joint Committee on Corporations and Securities. Is ASIC intending to put in a submission to that committee?

Mr Tanzer—I do not know the answer to that. As you know, we regularly appear before that committee, but I cannot answer that question directly.

Senator CONROY—I spoke to the Assistant Commissioner—it may have actually been at home; he was very accessible at that point—and he suggested that there was potential confusion which the note was hoping to clarify. He indicated that ASIC may be willing at that time. As I said, it was just a conversation and he has now moved on. I was just wanting to get a commitment that, if you believe that some of these areas are greyer than the legislation intended them to be, you would be putting a submission in on a couple of those points.

Mr Tanzer—Certainly, I am happy to take that back and ask the relevant people. As I say, there is no lack of willingness on ASIC's part to appear before the committee and to give—

Senator CONROY—I welcomed and commended the practice note. I thought it was appropriate, given the way that some companies—even at that stage—were trying to avoid their responsibilities under the new law. Unfortunately, despite the practice note, that has become almost an epidemic. Companies are just flouting the law on this issue. I am keen to get ASIC's contribution to that committee. I do not think it has held any hearings yet, but it is certainly open for submissions. Senator Chapman, who is with us, is the chair, so I know he would welcome a contribution.

Senator CHAPMAN—Indeed.

Senator Kemp—If companies are flouting the law, of course there are procedures to ensure that the law is put into effect. You made some general observations based on an article.

Senator CONROY—It is not an article; it is a study. It is an Ernst and Young—

Senator Kemp—But if there are specific cases where companies are flouting the law, the law will take its course, and ASIC has a very important role in that.

Senator CONROY—Minister, it is not an assertion, it is a study conducted by Ernst and Young, a reputable accounting firm that does support the GST—so you want to bear that in mind—

Senator Kemp—Most people do, tragically, except the federal Labor Party.

Senator CONROY—Most Australians do not.

Senator Kemp—Most people do support it.

Senator CONROY—Most people you mix with do, but then you probably mix with a lot of people who earn more than \$50,000, Minister.

Senator Kemp—We are on this side of the table and you are on that side of the table.

Senator CONROY—And you got 48 per cent of the vote, so I would not get too carried away.

Senator Kemp—The public voted on this. We are not getting carried away; we just happened to be voted back into government and you were voted into opposition, and tax reform was the major issue at the election.

I just want to make it clear to the committee that, where there are cases where companies flout the law, there are procedures to ensure that the law is enforced. We have before us ASIC, which plays a major role in that. Where there are specific cases, Senator, and if you have specific cases, you are quite entitled to bring them to the attention of ASIC if you feel that action has to be taken.

Senator CONROY—Although I am sure that ASIC is aware of the Ernst and Young study—and I appreciate that Mr Tanzer may not necessarily be—could you take on notice a question to give us an indication of what ASIC is doing in relation to the Ernst and Young study and what follow-up ASIC is pursuing on this? Notwithstanding that some companies have complained bitterly—and I know the reason that you are having to deal with the GST legislation is that Senator Campbell has been shafted because he allowed these amendments to go through, and he is not with us in this area anymore—

Senator Kemp—Cut the editorialising, Senator. I do not know whether you are running out of questions.

CHAIR—I am sorry, I am not concentrating, Minister. I should really be because he is having a bit of a free run. Senator Murphy and I were making some other observations.

Senator Kemp—Senator, we are very happy to sit here and answer specific questions. We have a distinguished officer from ASIC here to respond to those. If we can cut out the editorials and the political comments, we can probably further assist Senator Conroy better.

Senator CONROY—Mr Tanzer, are you in a position to comment on how Australia's accounting standards compare to accounting standards in the USA and the UK?

Mr Tanzer—It is a fairly general question.

Senator CONROY—Is that a bit broad?

Mr Tanzer—It is. Australia participates actively in international fora looking into international accounting standards. As part of that process, ASIC, for example, participates in a working party of the international organisation of securities commissions, which looks at international accounting standards and whether or not they are appropriate from IOSCO's point of view as an international organisation of securities commissions. So we are certainly broadly aware of the direction taken in the international accounting standard setting field. We have some knowledge of accounting standards as they apply in other jurisdictions. The process in Australia is that accounting standards are set by the Australian Accounting Standards Board, a procedure that is under active consideration by the parliament.

Senator CONROY—Do you think it would be prudent for Australian companies to adopt the accounting standards used in the world's biggest capital market, the USA?

Mr Tanzer—Some large Australian companies do adopt that practice. It is really not a question for me to offer an opinion on.

Senator CONROY—I wanted to congratulate ASIC on its recent alert to investors concerning potential fraudulent investment schemes around the place. I am referring

specifically to your recent April Fool's Day contribution. I understand that ASIC have done something similar to that before, though maybe not necessarily up on the Net. I hope that the educational message that you are trying to get out gets out. Have you any brief comments you would like to put on the public record to emphasise that?

Mr Tanzer—I can give you some details of that. We do regard the role of educating investors as very important, because a regulatory system has to rest on a culture of compliance rather than a culture of fear of retribitional penalty. We do believe that most people like to comply with the law once they know how to comply with the law. From the investors' point of view, it is very important that they take some fairly simple steps to protect themselves. The legislative framework provides some particular steps that they can take.

This particular campaign was a campaign whereby we set up a fake Internet site for a company that was allegedly selling millennium bug insurance. It was a glossy site. It had photos. It was projecting possible returns of up to 300 per cent, but guaranteeing returns of 30 per cent on your money over the first 15 months. It was said to be able to achieve those sorts of returns because it was selling this insurance to government agencies and to blue-chip companies to insure them against potential loss. It was said that those returns were available because there were very few other people in the field. The site also offered people the invitation to pledge sums of \$10,000 or \$50,000. It also had an indication on the site of higher sums of money but said that those subscription levels had been sold out. People were invited to pledge money. We had 230-odd people respond to that and offer to pledge money in addition to about another 1,000 people who sought more information about the scheme.

Senator CONROY—Did you say 1,000?

Mr Tanzer—A thousand people sought more information about the company and the scheme.

Senator Kemp—What was the total of pledges?

Mr Tanzer—About \$4 million.

Senator CONROY—I guess it just proves the old saying that there is a sucker born every minute.

Mr Tanzer—We were trying to get the message across to people—and in a very direct way. The advantage of this campaign over campaigns we have run in previous years which were based on newspaper advertisements was that we were able to communicate directly back to the people who had communicated with us.

There were some very simple things that people could do. They could have looked at the real ASIC web site and conducted a company search just to see whether the company existed, whether it was registered in Australia. They would have found out that it was not. They would have found out that there was no prospectus registered in Australia. From that, they would have been immediately put on notice that there may have been a difficulty with this. But really, the key messages that we were getting across are that there are simple, non-costly steps that people can take to protect themselves. In addition to that, people need to be very careful about the sorts of returns that are offered and, if you see a very large return being offered, it means that there are very high risks involved in the particular investment, assuming it is not a scam.

Senator CONROY—I can only commend you on your initiative and hope that at least 233 people have learned a very valuable lesson about giving away \$4 million. Moving on, there have been changes in the regulatory landscape—I expect that meant change to the structure

of ASIC as well. I know you have brought some people in. Has this meant any redundancies at all as part of your—

Mr Tanzer—I might just refer to some notes so I can give you the precise answer. We went through a restructuring and reduction in the number of staff in the previous two financial years, amounting to some 370-odd staff leaving over those two years. There have been only 45 redundancies so far this year. They largely relate to some restructuring in the Victorian regional office and within our information division but, in terms of the new functions, I think that has been a net addition of some 110 staff.

Senator CONROY—Is that process of change, amalgamation, and absorption complete? Have we seen the last of the—

Mr Tanzer—It is largely complete. We have had some lag times in recruiting people in key areas. Most of that recruitment is complete, but it is not yet complete.

Senator CONROY—I know Senator Kemp will share my concern in this next area. Specifically, has the restructuring—and I think you did indicate that it might have—affected operations of ASIC's information processing centre in Traralgon, Victoria? It is a very serious issue.

Mr Tanzer—I do not have the information on whether any of those redundancies were people within the IPC at Traralgon, but certainly 15 staff have left the information division over this current year.

Senator CONROY—Should the community of Traralgon be concerned about the consequential employment impact of the restructuring in this area? It is one of the highest areas of unemployment in Australia, which is one of the reasons I think that it was a good initiative for the centre to be set up there. Is there reason for community concern in Traralgon?

Mr Tanzer—It is a general question. It is a difficult question to answer.

Senator CONROY—Are you going to sack anybody down there, or are there any retrenchments proposed? Is that more specific?

Mr Tanzer—That is quite specific. The answer is no, at this stage.

Senator CONROY—‘At this stage’—is that today? How long does ‘this stage’ last? A week?

Mr Tanzer—As far as I am aware, there are no current plans for retrenchment or a voluntary redundancy program to be offered in any particular area of ASIC, including the information processing centre.

Senator CONROY—You might want to take that on notice in case they have not mentioned it to you yet. You might just want to confirm that on notice, because I know Senator Kemp would be particularly concerned, as a Victorian senator, if that were something that may be in the wind.

Senator Kemp—I am very glad to see you are taking an interest in jobs in Victoria.

Senator CONROY—Always.

Senator Kemp—I have been critical of Labor Victorian senators in the past on this issue, and I am glad to see your interest in it.

Senator CONROY—What is ASIC's view of the merger of the ASX and SFE?

Mr Tanzer—We are keeping an active eye on the merger. Our judgment, I guess, is that it is at a relatively early stage. We are having detailed discussions with both parties.

Essentially, the regulatory interest is that there will be a number of rule changes that need to be made. Potentially, there is the opportunity for the new merged entity to have to apply for approval as a stock exchange or approval as a futures exchange operator. We are actively involved in discussions, although the primary discussions are taking place between the two parties themselves.

Senator CONROY—I was thinking probably more in terms of concerns about the price of the SFE. I know that you have had to have, I think, three chats now with the ASX about their price.

Mr Tanzer—Yes.

Senator CONROY—I understand there are concerns about the price of the SFE at the moment.

Mr Tanzer—In any merger there are issues about devaluation of the respective entities.

Senator CONROY—You would want to be watching this lot fairly closely, given the recent history, wouldn't you?

Mr Tanzer—We watch all of these issues reasonably closely.

Senator Kemp—A very good answer.

Senator CONROY—Is the price discrepancy due to some anomaly in accounting reported by the SFE?

Mr Tanzer—I do not know that there is a price discrepancy with respect to the SFE at this stage. It is something I cannot comment on.

Senator CONROY—Are you at all concerned at the loss of competition as a consequence of the merger?

Mr Tanzer—ASIC's primary role in this area is to promote the efficient development of the securities and futures markets in Australia.

Senator CONROY—Monopolies are usually pretty efficient.

Mr Tanzer—Equally, there are concerns about monopolies and the extent to which they can extract monopoly rents out of a circumstance. The other thing that needs to be taken into account in this sort of business is that it is increasingly becoming a global business. I cannot speak for the ASX and SFE themselves, although I know that they, like us, tend to benchmark themselves against their overseas competitors.

One of the potential benefits of this sort of merger is to create an entity within Australia that has a better capacity to compete. I am not really in a position to offer a firm view on whether that is overall a good thing or a bad thing. That is something that the Australian Competition and Consumer Commission would be assessing.

Senator CONROY—Do you know if they were appropriately consulted on this?

Mr Tanzer—I think it is a matter for—

Senator CONROY—I will be pursuing them when they are here; I was just wondering if they had indicated to you that they had been kept in the loop.

Mr Tanzer—My understanding is that we have provided some comments to them in relation to this.

Senator CONROY—What do you expect would be the impact on prices for information of services from a combined exchange?

Mr Tanzer—There is an active debate about the price of information provided by exchanges, about whether it is a public or proprietary good.

Senator CONROY—That war has been lost, hasn't it?

Mr Tanzer—It is one of these debates that resurface from time to time.

Senator CONROY—I am sure you will be pleased to know that it is going to resurface again soon.

Mr Tanzer—It is hard to speculate on what might be the impact of that, once a merger went down the track. At the moment, the SFE conducts a derivatives and futures exchange. The ASX conducts a securities market with an options market and so on. There are some synergies there. There are some synergies between the markets, and there are some separations between the markets. It is something that needs to be worked through. I am sure it is actively exciting the minds of the people at the two organisations.

Senator CONROY—Since the ASX listing, has ASIC looked at prices on information for company share prices indices? I understand there have been some fairly dramatic increases in prices in this area. Is this something you think you should be looking into?

Mr Tanzer—I do not quite understand the question. Is it about the price of information used to set the index itself?

Senator CONROY—There has been an argument about what is in the index.

Mr Tanzer—If it is an issue of what company share prices form the index, that is primarily a matter for the ASX. It is primarily an internal matter for the ASX, although, as a regulator in the field, we maintain an interest in it. Our primary interest is because the index is critical to index trading, index tracking funds and so on.

The performance of the index is a very useful benchmark for fund managers and investors because they can benchmark their funds' performance against the performance of the share price index. We are very interested in ensuring that the index, the capacity for index tracking and the capacity for the index to be used as a benchmark are maintained.

Senator CONROY—You assigned \$7 million over three years in the 1998 budget to administer the Managed Investments Act.

Mr Tanzer—That is right.

Senator CONROY—Do you think that amount was sufficient? I understand that there is still a fair degree of bedding problems going on and that there has been resistance to change in some sections.

Mr Tanzer—We are working through that at the moment. You are quite right that the amount was about \$7 million over three years. We are going through the process of spending that. That is one of the areas where we have not spent quite as much this financial year as we originally projected to because of lags in recruitment. In terms of the workload, we are seeing a significant increase in workload around this time of year.

We commissioned some market research a little earlier in the year to help us project the peak of workload both in licence applications and scheme registrations. We were projecting a significant increase through April, May and June and then tapering away. Our experience in April suggests that the peak will be a little bit later than that for a number of reasons, which I can go through, if you would like.

Essentially, we expect that the peak will be a little more smoothed out; it will probably run into July and August. As a result of that, most of our internal training activities for that

particular unit have ceased because we geared them up to deal with this. We are making some other internal rearrangements so that they can focus their attention on dealing with that mandatory workload. At the moment, with fingers crossed, we expect that the resources that we have on hand will be able to handle that efficiently.

Senator CONROY—Have there been any problems in administering the MIA, particularly in the area of tax relief and stamp duty relief for changing to a single responsible entity?

Mr Tanzer—The issue that had been raised by industry was that some trustees and managers were concerned about the possible impact of capital gains tax and stamp duty on the transfer to a single responsible entity, from an ownership structure based on a trustee and manager to a single responsible entity. That problem, as I understand, has now been addressed if not in all jurisdictions then in nearly all jurisdictions. Legislation is, I believe, on the way in the other jurisdictions.

Senator CONROY—Senator Kemp, you announced something recently on the managed investments and stamp duty capital gains?

Senator Kemp—I will have to check my records.

Senator CONROY—Has ASIC provided any relief to managed investment schemes concerning the capital adequacy requirements of the Managed Investments Act? What are some examples of the relief, if you have?

Mr Tanzer—We have had a number of applications for relief. In preparing for this, I was reading one of our regular briefings on the work that is flowing through the unit; one of the issues that is mentioned there is relief applications relating to the net tangible asset requirement, so the answer is yes. I do not have details of the numbers and so on.

Senator CONROY—I was wondering if you could take on notice how many times you have provided that and roughly what the areas are. This next one is probably easier for you to take on notice. What considerations would ASIC take into account in providing such relief? So, just an explanation of what the issues were and why you went down that path.

Mr Tanzer—Certainly.

Senator CONROY—Would you care to comment on an article in the *Financial Review* of 16 April 1999 in which the outgoing chief of Merrill Lynch Australia, Mr Greg Bundy, criticised the practice of Australian stockbrokers taking up shares at the expense of their clients? It is an issue that I have raised previously with Mr Longo—I am not sure if you were there at the time. Mr Bundy had some fairly sharp words for the way corporate conduct worked in this area before he left. Do you have any comments?

Mr Tanzer—From the regulators' perspective, there are some conflicting arguments. It is incontrovertible that ASIC takes a strong stand against insider trading. There are a number of prosecutions before the courts now and there are a number of other investigations into that area. If this activity of which you are speaking is effectively a method by which brokers were engaging in insider trading, that would obviously be a matter of concern and a matter that we have actively taken an interest in in the past.

I guess the contra argument to that is that, provided the broker is buying at the price that everyone else is buying at in the particular issue, it may well give the market and investor some comfort that people who are involved in the issue are prepared to back it by taking up shares themselves. But it is a little difficult to generalise.

Senator CONROY—This is a widespread practice though, here in Australia, isn't it?

Mr Tanzer—I do not know the answer to that, Senator.

Senator CONROY—There are some very famous examples in Victoria—and you are probably going to need to move your chair because Senator Kemp is going to get more agitated in a second. The capacity of the Premier of Victoria and his wife to just phone up a mate and say, ‘Look, we would like to get in on this subscription’—

CHAIR—Senator Conroy, you are making a statement. The officer said he could not answer your question.

Senator Kemp—I think it is always best, Senator Conroy, if you can resist your natural temptation to attack your political opponents and just confine yourself to questions which are before the chair. Mr Chairman, Senator Conroy asked me a question about stamp duty and the Managed Investments Act. We are working with state and territory governments and industry to resolve the state and territory stamp duty issues. My understanding is that—and I will check whether there is any further information—a number of them are now proceeding with legislation directed at moving concerns about state and territory stamp duty.

The announcement I think Senator Conroy may have been referring to was an announcement we made—I think early in March—concerning the relief from capital gains taxes, as well as a number of other adverse tax consequences about transferring to the new regulatory regime for the Managed Investments Act. That announcement was particularly welcomed by the industry. But the stamp duty issue was one which we are trying to resolve but just have not got around to yet.

Senator CONROY—You only got around to it after they beat you up at that conference.

Senator Kemp—Who was this?

Senator CONROY—The IFSA conference.

Senator Kemp—They praised us lavishly.

CHAIR—Senator Conroy, let’s not have a debate.

Senator CONROY—They beat you up so badly—

CHAIR—Senator Conroy, could you return to questioning please.

Senator Kemp—Senator Conroy has got a very vivid imagination.

Senator CONROY—It was a page 2 article in the *Financial Review*, actually. I do not think it was my imagination. Returning to the issue—

CHAIR—Returning to additional estimates, is that it?

Senator CONROY—Returning to the issue of additional estimates, as I was saying: how does the practice here differ from the SSE regulations in the USA, where I believe a stockbroker is not permitted to hold shares in a new float?

Mr Tanzer—I do not know the answer to that. I would have to get you some information.

Senator CONROY—Take that on notice.

CHAIR—Could I intervene. While there are lots of questions being taken on notice, the purpose of additional estimates is so that officers can be queried in relation to questions that were placed on notice at the estimates hearing. If we are going to have this run of continually taking further questions on notice, then it is never ending.

Senator CONROY—I think the chair is being a little unfair in that part of the arrangements for today were to ensure that some officers who may be able to assist in areas not directly in Mr Tanzer’s expertise went home.

CHAIR—I understand that, but I am just wary—

Senator CONROY—I am doing my best to be as cooperative as I can—

Senator Kemp—That would be a first.

CHAIR—I am just wary of the practice of taking too many questions on notice.

Senator CONROY—Senator Kemp, are you editorialising from your—

Senator Kemp—I am, actually. I plead guilty to editorialising.

CHAIR—Do you have any further questions, Senator Conroy?

Senator CONROY—Does ASIC believe senior staff and dealers in Australian stockbroking firms should get priority access to new listings?

CHAIR—That is asking for an opinion. You cannot ask Mr Tanzer—

Senator CONROY—I am asking what their view is.

CHAIR—No, you did not. But if you are asking them for their views it is still asking for an opinion.

Senator CONROY—I am not sure what they are doing here then, if you are not meant to ask them what their positions on issues of public debate are.

CHAIR—If you read standing orders, they are not allowed to offer opinions on things. You can ask them about activities or question other things, but not opinions.

Senator CONROY—So they do not have opinions on activities? They do not have a view on the activities that take place in the market? I thought that was actually their job. I thought that was why we gave them money.

CHAIR—They are not allowed to be questioned on their opinion—whether they have a discretionary opinion or not.

Senator Kemp—Senator Conroy, I get the distinct feeling your questions are tapering off actually.

Senator CONROY—I am almost finished.

Senator Kemp—Maybe if we could get the last couple of questions out, then we can all go home.

Senator CONROY—We have 20 minutes and I am almost finished. I thought I was keeping well within the spirit of the agreement.

Senator Kemp—I think it is clear that you have almost finished. I thought you had finished 20 minutes ago.

Senator CONROY—No, I still have a couple of pages. The less talking that the chair and the minister do the quicker we will finish.

CHAIR—You have not had very many interruptions from the chair, and there could have been a lot more.

Senator CONROY—Has ASIC followed up the disappointing response by licensed security dealers, advisers and insurance brokers to ASIC's Y2K compliance survey?

Mr Tanzer—Yes. We have written to the people to whom you refer. The original survey was a voluntary survey seeking information about the level of preparedness and the level of activity amongst securities industry licensees for the year 2000. We got a relatively disappointing response to that. Now we have taken the action of writing individually to them and asking for specific information and we are getting a much better response to that.

Senator CONROY—Will you be pursuing that?

Mr Tanzer—Yes. It is part of an exercise. The Council of Financial Regulators published a report in, I think, December last year which went to the level of preparedness within banks, insurance companies and the banking and financial system generally for the year 2000. The second stage of that was to produce a report on the level of preparedness in other parts of the industry. The chairman of the commission has been very active in promoting year 2000 awareness. He often speaks in speeches of having made an agreement with the heads of other regulatory agencies around the world.

Senator CONROY—I was going to ask you: how are we going with helping some of our neighbours?

Mr Tanzer—It is a very important issue around the world. Our own preparedness is also something that is actively on the commission's agenda at every meeting. We are currently in the process of working through our final testing procedures now, but we expect most of that to be complete by June.

Senator CONROY—This is my final area of questions. We will all be happy about that, particularly the minister.

Senator Kemp—Yes, I think I can speak for everybody. All of us would be happy, even Senator Murphy.

Senator CONROY—Could you give me a brief explanation of the debacle involving the trading of shares in Onetel? How did such a situation arise?

Mr Tanzer—I do not think I can actually go into a lot of detail about that, because I think it is a matter on the public record that we are looking into that matter.

Senator CONROY—I have a press release here calling for arbitration.

Mr Tanzer—Yes.

Senator CONROY—To ASIC's knowledge, has there been a breach of the regulation?

Mr Tanzer—I do not have a sufficiently detailed knowledge of that particular matter.

Senator CONROY—It might be easier for me to put these on notice, to save you jotting them down.

Mr Tanzer—Yes. We have issued a media release but it is probably because of the nature of the matter and there are some ongoing inquiries there, as I understand it. It is probably not something where we would be going beyond the terms of the press release.

Senator CONROY—I will put it on notice. I am just intrigued by the view in the press release that:

ASIC and ASX are in agreement that the participating organisations and investors should agree to cancel all trades.

Why would an investor that has made a killing on this be willing to arbitrate just because you guys have decided that they should? I presume you have no force of law that can make them come to the table for arbitration?

Mr Tanzer—My recollection of this particular part of the matter was that there was effectively a mistake made by some people in the broking community, who believed that there had been revaluation. This is a fairly sketchy understanding so I probably do not want to go too far. But the reason why we were publishing a statement of that nature—again from memory—is that it was really quite an extraordinary set of circumstances where a fairly significant mistake had been made in the minds of some brokers, who began trading on a

mistaken belief that something had significantly happened at the market price. It was not. It was something that was programmed to happen, as I recall. So it was not a question of someone having access to information that they should not have had. It was just a pure mistake. That is my recollection. So it is a fairly extraordinary set of circumstances.

Senator CONROY—Who are the principal shareholders in Onetel?

Mr Tanzer—I do not know the answer to that.

Senator CONROY—Does anyone know?

CHAIR—Never heard of them, Senator Conroy.

Senator CONROY—No media magnates involved?

CHAIR—Did you have some, Senator Conroy?

Senator CONROY—I have no shares in anything, you will be happy to know.

CHAIR—Fairly obvious, Senator Conroy.

Senator CONROY—Mere backbenchers and shadow ministers can rarely afford to dabble in the market.

Senator Kemp—But you did run a major superannuation fund for a while.

Senator CONROY—I would love to be able to claim that I ran a large superannuation fund. I was but a functionary, Minister.

Senator Kemp—I thought that was the case. Oh dear! I have been sadly misinformed.

Senator CONROY—You have. It is not unusual for that to be case.

CHAIR—Order! I think that we are perhaps getting outside of the—

Senator CONROY—I have actually completed my questions. I happen to be putting these last couple on notice. Thank you, Mr Tanzer.

CHAIR—Thank you, Senator Conroy, and that concludes the supplementary estimates hearings for Department of the Treasury.

Committee adjourned at 10.26 a.m.