COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT COMMITTEE on CORPORATIONS AND SECURITIES

Reference: Company Law Review Bill 1997

TUESDAY, 24 MARCH 1998

CANBERRA

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CANBERRA 1997

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SENATE

Tuesday, 24 March 1998

JOINT COMMITTEE ON CORPORATIONS AND SECURITIES

Members: Senator Chapman *(Chair)*, Mr Anthony, Mrs Johnston, Mrs De-Anne Kelly, Mr Leo McLeay and Mr Kelvin Thomson and Senators Conroy, Cooney, Gibson and Murray

Senators and members attending the hearing: Senators Chapman, Conroy and Murray and Mrs Johnston

Matter referred by the parliament for inquiry into and report on:

Company Law Review Bill 1997

WITNESSES

Committee met at 11.57 p.m.

Senator Ian Campbell, Parliamentary Secretary to the Treasurer

MURPHY, Mr James, First Assistant Secretary, Business Law Division, Treasury, Parkes Place, Parkes, Australian Capital Territory

PATCH, Mr Robert Gordon, Senior Adviser, Business Law Division, Treasury, Parkes Place, Parkes, Australian Capital Territory

CHAIR—Welcome, once again. Do you wish to make a statement on the Company Law Review Bill, Mr Murphy?

Mr Murphy—There has not been much time spent on this but, as you would be aware, this bill's predecessor was the second simplification bill which was prepared for the previous government. It was addressed by this committee last year and there was a report. The government tabled its response to those recommendations in the parliament and now we have the bill before us again. It has been through the House of Representatives and now it is back with the committee.

CHAIR—Do you wish to make any specific comments on the proposals that were particularly raised by Mr Matheson in the hearing last week with regard to corporate governance issues?

Mr Murphy—Mr Matheson's views were that the bill reflected a minimalist approach by Treasury to corporate governance issues. This government has taken the view that there should not be a prescriptive approach to corporate governance and that enhancements or improvements in corporate governance performance by Australian companies should be market driven. It feels that there should be basic principles involved in the legislation which ensure a minimum standard of corporate governance and that improvements in corporate governance would come through the market seeking better reports from companies, the market using its leverage to get better corporate governance performance. That would come through investments in shares or movements of funds in and out of companies.

One of the better disciplines on corporate governance has been what has happened in the past in relation to Coles Myer when they had particular problems. Major institutions reduced their investment in Coles Myer. We see now that some of BHP's corporate governance practices are being questioned. It is arguable that the market is the discipline that should bring about more corporate governance practices. I do not think it is a minimalist approach. I just think it is government's policy at the moment that there should be less prescription.

Senator CONROY—The market did not pick Yannon. The whistle got blown from inside.

Mr Murphy—It is the market that questions. The market brings about corporate governance practices when you have a Yannon type scenario, which we found out much later

after the event. It is the major institutions that then react. They withdraw their investments or alternatively seek to get changes on the board.

Senator CONROY—So you do not think there is any role for the government to say, 'We think that Yannon was not the right thing to do?' Do we just wait until it gets discovered and let the markets deal with the share price by withdrawing their investments?

Mr Murphy—I think you will have to elaborate on that question.

Senator CONROY—I am just trying to understand the philosophy you are putting to the committee where you are saying that in the end the market will punish all corporate governance by the institution withdrawing its money.

Mr Murphy—No. The law sets down particular requirements. If the ASC is investigating Yannon, and there is a breach of the law related to party transactions or there is fraud, that is the sanction. If there is any disquiet or, if you want to put it in one way, a smell about a company, the reaction will be that the major institutional investors will seek to get changes in the board of that company.

Senator CONROY—The problem with Coles is that most of the major institutional investors thought there already was a smell. It is well-known that they were all light in Coles shares and that is why they were able to exert so little influence. So the market was not able to deal with that because the major investors, which you are giving a great deal of influence to, in terms of enforcing corporate governance, were already light in Coles shares because they were unhappy with the fact that there was a long history of related party transactions, some that were obviously perfectly legal, some which perhaps—without wanting to prejudice any ongoing association—are subject to question.

Mr Murphy—If there are breaches of the law in Yannon, that is a corporate governance issue. There are provisions which could be called corporate governance throughout the company law or the corporations law which apply to companies. As well as that, there is best practice, which certain companies aspire to. I am saying that the law should set out certain requirements, which it does, and then the market will itself seek out better disclosure, better corporate governance. The only argument is about how much should be put into the law and be prescriptive.

Senator Ian Campbell—I wonder what element of the CLRB that is before the committee, or what proposal of the committee's report on the then called second simplification bill, would relate in any way to the circumstances at Coles Myer and particularly Yannon.

Senator CONROY—I am responding to Mr Murphy's philosophical position that he is putting to the committee. I did not raise the question of the market helping to determine corporate governance, and we will come to some of the points in terms of what is and is not in the bill and those sorts of things. That philosophy is important to your government so Mr Murphy is articulating and I am responding with a particular example that that is probably not the whole direction we should go. Mr Murphy was explaining further before you interrupted.

Senator Ian Campbell—In terms of specifics, the government would always be interested to hear suggestions of how extra prescription in the law might avoid related party transactions. Certainly in the discussions that related to the company law economic reform program we looked at directors' duties and corporate governance issues. One of the decisions the government came to was to put into the hands of shareholders the right to take action on behalf of the company against directors where the company fails to. That is the sort of thing that puts more power through the law into shareholders' hands. I do not personally see that saying that we do not want a black letter law, tick box approach to corporate governance would avoid the potential for the sort of problems we have seen under investigations.

Senator CONROY—I was not suggesting it could be the sole answer. I was concerned that perhaps Mr Murphy was suggesting it was a substantial answer. But I would probably agree with you that I do not think it is the whole answer. I suggest we move on if you want to keep going with your general comments before we descend into a full-scale debate about corporate regulation.

CHAIR—Mr Murphy, have you got any further comments?

Mr Murphy—No.

CHAIR—Are there any further questions?

Senator MURRAY—Parliamentary Secretary, we have a submission from a Mr Shann Turnbull and one of the things he says is that, in a number of other jurisdictions worldwide, company law comes down to many fewer pages than we are going to end up even with this review process. He says the Canadian act is about 90 pages and somewhere else it is very small.

The other thing which exercises anyone's mind in this area is that the world is a fast moving place and things are changing. Do you envisage a further major reform period within a certain five- to 10-year span having got this under your belt? Do you see this as part of an ongoing process or do you see this as holding the line for a couple of decades?

Senator Ian Campbell—I do not have a crystal ball that is that accurate, Senator Murray. You saw a release by the Treasurer last week. The company law economic reform program policy document outlines six major areas of reform that the government will be seeking to legislate, the first four pieces of law prior to July this year covering fundraising, takeovers, directors' duties and corporate governance—that we just discussed—and accounting standards reform. Those pieces of legislation we envisage will actually be available for public exposure within the next seven days. I will make sure that members of this committee get copies the minute they are publicly released. Later in the year we will be seeking to implement the reform of chapters 7 and 8 of the law which regulates the securities and futures markets. I think that exercise will result in a lot fewer pages in the law. That process, which is called corporate law economic reform, some people say is the biggest reform program since 1990, even though this was not the reason for doing it. It is probably the most substantial policy reform since the 1960s or the 1950s because in 1990 the only substantial policy change was the introduction of, as I understand it, the disclosure regime. Mr Murphy can probably be more accurate there.

It is a substantial reform agenda. It will make the law easier to understand not only by continuing the plain English rewrite which the simplification task force created. It probably will make it less hefty in terms of the pure weight of paper. However, from my experience both on the joint committee in the early 1990s—and I see Mr Nugent is still with the committee—and in the portfolio in the past year or so, I am not totally convinced that, by making the law shorter in terms of the number of lines or words in it, you necessarily make it less onerous on the business community. Sometimes making things more clear by expanding on what the law provides can actually make it more simple for the business community. Section 10.22, which underpins the prospectus provisions, is an example of that, where the provision itself is quite short. It says that you have got to put everything in a prospectus that a reasonable investor would like to know. The lawyers have interpreted that very broadly and ended up with massive prospectuses that no sound, sensible person would ever read and therefore investors probably miss out on information because they are overloaded with it. I still have a very open mind on how big the law should be. I am sure it should be smaller than it is now. Our reforms that you will see shortly will make it smaller.

In terms of ongoing reform, it would be this government's view that, wherever there is a need to make the company law facilitative of economic activity and encouraging investment, building enterprises, capital formation and, very importantly, underpinning the protections for investors, then we will continue to do that. I would expect that post the CLERP, which is the acronym for corporate law economic reform program, we would be looking forward to further reforms if Australian people, in their wisdom, were to re-elect us at the next election.

Senator CONROY—How onerous is requiring a fax number? I will take answers from anyone.

Mr Patch—Could you restate the question, please, and explain the context?

Senator CONROY—How onerous is requiring corporations to put a fax number on so that that can be used for electronic voting, et cetera?

Senator MURRAY—It is in the submission from the corporate governance people.

Senator Ian Campbell—Sandy Easterbrook.

Senator MURRAY—Sandy Easterbrook, yes.

Senator Ian Campbell—The federal government, in its electronic commerce paper, which is paper No. 5 under the CLERP proposals and which I commend to the committee, puts in place the government's considered view on facilitating the use of electronic means of transmission. The underpinning philosophy is that we will ensure that the Corporations Law is rewritten to ensure that all documents that are required to be lodged with the ASC or that are used in communications for companies' transactions or other parts of their operations, are made—to use a new cliche for the 1990s—technologically neutral. That is a new one. So wherever you are required—

Senator CONROY—Your commitment is that you would be mandating the sending of notices of meetings to electronic addresses and receiving proxy documents. It will be

mandated that companies are required. It will not be optional for the company. That is what is in your reply.

Mr Patch—Senator, the position in the review bill as it currently stands is that a shareholder or a member of the company will be able to fax their proxy form to the registered office of the company.

Senator CONROY—That is not the question.

Mr Patch—That is facilitating the use of fax machines.

Senator CONROY—No, that is not what I am asking. I accept that if a company chooses to put an electronic fax number onto here—fax this back to us—they then can fax it in and it is acceptable.

Mr Patch—The bill goes a step further than that.

Senator CONROY—That is what I am seeking.

Mr Patch—The bill does go a step further than that and says that you will always be able to send a proxy form to the registered office of the company, irrespective of whether the company has said, 'This is our fax number.' If a shareholder can identify that number—probably a relatively straightforward process—then proxy forms can be lodged at the registered office by fax.

Senator CONROY—This is more to Senator Campbell than yourself, although you may have been party to preparing the government's response to the committee's report where this issue is addressed. I just want to make sure I clearly understand, because it will come down to Senator Campbell as to whether an amendment gets moved now or later. I am quite genuinely trying to seek this information. In your response you talked about the bill facilitating the use of technology without requiring a specific provision in the constitution. I took that, and the rest of the response, to mean that if a company wants to use that technology, it will be facilitated to use it.

Mr Patch—Which paragraph are you reading from, Senator?

Senator CONROY—I was just reading paragraph 18. According to it, under the current law companies can only use technologies for their meetings if it is permitted by their constitution. But from the way I read the government response, it is the company's choice. It is the company's choice whether or not they will accept and/or advertise an electronic fax address.

Mr Patch—That is under the current law. The current law is that proxies can be lodged physically at the company's registered office, but the constitution would have to say, 'may use a facsimile'. The bill will say—

Senator CONROY—Which bill are you referring to?

Mr Patch—The capital review bill.

CHAIR—The bill that we are hearing.

Mr Murphy—I think if you read on it is there, isn't it, Senator?

Senator CONROY—I and quite a number of other people have not read it the way you are, which is why I am trying to clarify your position. The way it looks to me, and to some other people who have an interest in this, is that companies will not be required to provide a fax number that they can accept proxies on. What you are saying is possibly in another bit of legislation that is coming. Maybe we can clarify that. Maybe I and a number of other people have misread it.

Mr Murphy—You are saying that, where we have said the draft bill considered would allow companies to send names, it is not prescribed.

Senator CONROY—That is the key difference I am trying to get to.

Mr Patch—I do not think we can require companies to receive by fax, because it would effectively mandate a company to have fax machines in registered offices. It might not want to do that. What the law will say, once this bill comes into force, is that—

Senator Ian Campbell—Regardless of the constitution—

Mr Patch—regardless of the constitution you will have a right, under the Corporations Law, to fax a proxy to the registered office.

Senator CONROY—Are you saying then that any shareholder will be able to fax in, irrespective, and it must be accepted? Is that the intent where this legislation is going?

Senator Ian Campbell—Quite right. But I think the problem that Robert Patch has alluded to is a classic example of the problem with prescription. If you said that companies, if they are provided with a fax number, must fax out notices or must receive proxies by fax, you could find Steve Conroy Pty Ltd—

Senator CONROY—Does not have a fax.

Senator Ian Campbell—Has a 1982 fax that receives paper like my old home fax did at a very slow rate and you might find that it was actually a problem. That is a classic example.

Senator CONROY—I accept the spirit in which you have given the answer. On recommendation 2, I am interested in the view that the right of a director to call a meeting unilaterally would therefore only be relevant in practice where a director is unable to obtain this level of support for a resolution. In terms of the dynamics of how that plays out, there is always a minority of independent directors, from my experience. I could be wrong and there could be some boards of corporations running around the country where there is a majority of independent directors.

Mr Patch—I think the position is that, under the bill, the replacement rules will provide that a director may call a meeting. But that will not be a mandatory rule; it will not apply for all companies. Companies will be able to opt out of that. I think that recognises that directors should work collegiately as a group and to manage the company. If a director disagrees on a significant issue, it is a bit like collective responsibility in cabinet. If they disagree on a issue, what they should do is perhaps resign and call public attention to that issue, rather than call a meeting.

Senator CONROY—I guess that is one perspective. I am interested that that is a perspective that you are coming from. I am interested that a lot of boards will be glad to know that the view from the government is that they should operate as a collegiate. I have a greater understanding of where you are at. I do not necessarily agree. I have a greater understanding of where you are coming from. Thank you for that.

An argument that has been around for a while is about days—28 days, 21 days, 14 days. On balance, you opt for 21. Why not opt for 28 days? I am just looking at the reference to the fact that the facilitation of communications technology proposed by the bill, particularly in relation to electronic service of notices, means that proxy documents will greatly reduce the real time required to send notices. It is much harder particularly for overseas investors.

Mr Patch—The Corporations Law currently has 14 days for ordinary resolutions and 21 for special resolutions, so the thrust of the bill is to take it to a common 21-day standard. In the course of developing the bill, representations were put to the committee that institutional investors require 28. Views were also put to us in the course of developing the bill that 28 days would have the practical effect of denying the members of some companies the opportunity to consider resolutions.

The argument—I think it is mentioned in the ASX's submission to the committee—is that, by and large, the resolutions that are required to be voted on are required by the ASX's listing rules and that the ASX would come under pressure to waive the requirement for a meeting. The net result of extending that to 28 days may be that there would be fewer shareholder resolutions because of the ASX waiving the need to have the meeting or the resolution in the first place.

The other answer to the question alludes back to the corporate governance issue earlier on that it is always open to companies to give 28 days notice at present, and 21 days is a practical minimum period. I would also point to the fact that enhanced communications technology will allow these sorts of documents, notices of meetings and proxy forms to be circulated far more rapidly than they have been in the past. With the development of the Internet, documents can come around the world very quickly.

Senator CONROY—I am sure you are not intending this, but it just seems almost contradictory: on the one hand you are saying that we do not want to mandate a fax because there could always be companies without faxes and then there is your defence for saying why you do not want 28 days because the criticism is whatever. They are almost contradictory positions. You have got people that do not have a fax that cannot be assisted by the 14 to 21—

Mr Patch—The people who are saying that they would like the 28 days are all institutional investors—large institutional investors, foreign investors—with millions of dollars. I think they are the sort of people who do have access to this sort of technology and for whom the Internet is something that they would use.

Senator CONROY—They may perhaps be taking a broader public interest position than just satisfying their own institutional paid clients. Perhaps they are thinking of the small investor, like Steve Conroy, who does not have a fax at home and would not be able to fax in and who might need 28 days.

Mr Patch—I have never heard them argue the case on the part of the small investor.

Senator CONROY—I am not here arguing their case necessarily. I am here perhaps in the broader public interest.

Senator Ian Campbell—The idea of trying to have a similar notice period as much as possible throughout the law is a good one, because people have a figure in their minds. It is probably a bit like in political parties, Senator Conroy, where you know what the notice provisions are for various meetings and so forth. There is no doubt that some of the big international organisations, such as Calpers, the Californian pension funds, and a couple of other international people who are interested in corporate governance and make a great contribution to the debate, say that this is desirable as far as big international funds are concerned.

The argument against it is that if you want to try and take advantage of market opportunities and you need to get a provision put through a general meeting, you obviously might prefer to act a bit more quickly. So you have to find a balance between a whole month or three weeks, or two weeks as it is now, and the government thought that 21 days is only a minimum. If companies want to accommodate the strong wishes of big investors such as the Californian pension funds and other big funds—

Senator CONROY—They, tragically, only just got a last-minute fax in—and this had been kicking around for two months.

Senator Ian Campbell—They put their views. I have a regular correspondence, if not dialogue, with those people and they do make a genuinely good contribution. This is how Calpers works; they say, 'If you want us on your share register, you have to listen to us.' We think that is a good demonstration of how corporate governance should be and can be improved in Australia, with much better communications between shareholders and the managers of the corporation. That is what we seek to encourage.

People who want to listen to Calpers and other big international funds from all parts of the world, if not to big fund managers in Australia, can indeed say, 'We think it is a good idea to have 28 days notice.' We are not stopping them from doing that, but we think there are lots of other companies for which 28 days would just see the clock ticking, would be a waste of time and would not help corporate governance or good corporate management. You really have the best of both worlds: you can get your 28 days if the company thinks it is in the best interests of the shareholders and the company—and the shareholders are the

company—but 21 days notice has a range of other merits. It is not a massive philosophical argument.

Senator CONROY—I can appreciate that.

Senator Ian Campbell—It is a relatively long period when you think that we are in the era of electronic commerce, faxes and relatively reliable mail systems. We are going from 14 days to 21 days, and the post even across the Pacific to our cousins in America is probably far more reliable than that. I am sure that, if we posted a letter in Canberra today, it would probably turn up in Los Angeles in two to three days, so 21 days is still a relatively significant period of time. I know they have to get these notices, make decisions, talk to their investors and so forth, but I think we have it right, on balance.

Senator CONROY—Probably one of the more contentious of the issues is the question of corporate remuneration. We have had some discussions about that, but I am just interested in trying to facilitate the speedy passage of this bill and something you could perhaps say on the record might help that.

Senator Ian Campbell—The government's position was that this committee had the so-called second simplification bill, as it was labelled at that time, referred to it very early on in the government's time, before I became responsible in this area. I received the report of the committee and, as the chairman would know because I think he was chairman at the time, it was a bill of the previous government. As I read the submissions to the committee and the deliberations of the committee, it was based fairly strongly on the submissions of AIMA, as I recall—I am happy to be corrected if that is wrong—and probably CGI.

Senator CONROY—Mr Easterbrook.

Senator Ian Campbell—Mr Easterbrook is a strong supporter of that. It was not in the committee's terms of reference—not that that stops the committee; they can say whatever they want and the government will listen because this committee has already developed a reputation in the area—but we thought that, in the terms of the committee's report, the bill should not be amended in that form. Again, it fell outside the government's considered philosophy on prescription. We do not believe that requiring that sort of disclosure is going to necessarily enhance corporate governance. It is pretty easy, through the disclosure regime already in Australia, to work out who is being paid what in a lot of corporations, but it does not actually add a lot in terms of disclosure.

We reconsidered the matter when we looked at directors' duties and corporate governance in CLERP, and we again rejected the concept because, quite honestly, we did not think that it really added anything to the shareholders' sum total of knowledge about how the corporation was going to run and operate.

Senator CONROY—They might disagree.

Senator Ian Campbell—Some shareholders would and others would not, and there are mixed views on each side. From a personal perspective, I would certainly like to see a more

vigorous debate about that particular issue. It arouses great passions, just like politicians' pay. It is a very similar issue.

Senator CONROY—Absolutely.

Senator Ian Campbell—Whenever the pay of politicians is raised—or even that of public servants, I might say, Mr Murphy—

Senator CONROY—You know how much the electors love to know about us, so imagine shareholders and their directors.

Senator Ian Campbell—That is right. Giving an increase in pay to politicians is not particularly popular, and when people see higher remuneration reported for company directors they also think of fat cats, pinstripes, Rolls Royces and that the directors are all getting overpaid. As you would know, the reality is that salaries and remuneration for corporate managers is very much an internationally competitive field now, and if you do not pay the right amount you lose Australia's best managers to overseas.

Senator CONROY—It is mandatory in a number of countries—the US being the obvious one.

Senator Ian Campbell—Yes, it is. There are different forms of it. I would like to see a more structured debate about what would be best for Australia if indeed more prescription in that area is required. I am very dubious that it will add to corporate governance in Australia. I think things such as the shareholder's derivative right of action will be a better tool in the hands of shareholders than prescribing remuneration. There would need to be a debate where all of the players put their views and talk about all the different forms of things that should be disclosed in terms of remuneration. I mean, should it be the salary package or should it be any other perks?

Jim Murphy can correct me if I am wrong, but I think there is some prescription required in relation to share options and those sorts of matters which are far more relevant these days because they make up a lot more of the package, and shareholders have a relevant interest there.

Senator CONROY—If you are going to champion and say, 'Here is this part of the package,' why not do the whole package? That would end the argument and perhaps facilitate getting the bill through parliament a bit quicker than it might otherwise. But that is for you to consider. I would not have thought it was that controversial.

Senator Ian Campbell—I do not know that the committee in its initial recommendation put a form for an amendment about how and what should be remunerated and by whom.

Mr Patch—There will always be an issue here about what the legislation will be like. If it were possible for someone to come up with a particular form and say, 'This is what we want,' we would then have a big debate over whether that particular provision was the appropriate one or whether we should have a provision at all.

Senator CONROY—Just to enlighten Senator Campbell, the recommendation—I am just reading again from your report, which refers to the recommendations—talks about the policy of the board for determining the remuneration, including incentives of the board, senior executives, and the relationship of these policies to the performance of the company/group, and, secondly, the quantum and components of the remuneration of each director of the company, and each of its five highest paid executives, including the existence and length of any service contract for the CEO. That was the sort of thing that was being debated.

Senator Ian Campbell—Did it talk about which company should do it? Should it be all companies or should it be all listed companies?

Senator CONROY—Listed companies to disclose. It went on to talk about some other things but I am just highlighting those two.

Senator Ian Campbell—I have certainly received a lot of mail on that. But you would need to look—I have done this, which is why I formed the view that I did in relation to directors' duties and corporate governance in the CLERP paper No. 3.—at whether by requiring all listed companies you end up requiring that sort of disclosure by people in relatively small enterprises. There are 1,200 companies listed on the Australian Stock Exchange, and some of them have very small capitalisations. You start to wonder what benefit that has to the shareholders of that corporation. The thing is that at the top end of the scale you get quite a lot of disclosure in these things anyway. I am very dubious about it but I genuinely would like to see a better informed debate. It seems on the surface to disclose remuneration and tell people that what directors get paid is good—I mean, motherhood is good. The law requires a lot of disclosures about a lot of things but I think we need an informed debate about what companies should disclose. I do not think asking 1,200 companies to make those sorts of disclosures helps those companies or those shareholders one iota and nor does it help Australia to grow better companies. They are the sorts of issues that I think an informed debate could uncover.

Senator CONROY—Unfortunately, we may have—

Senator Ian Campbell—And you do have the government's package on directors' duties and corporate governance as another piece of legislation which is in this area and that will be before the parliament in this calendar year. So, if this does generate an informed debate out of tonight's hearings or through the newspapers, then I will closely monitor it. I suspect I watch corporate governance practices almost as much as Sandy Easterbrook, because it is my job.

CHAIR—Are there any further questions?

Senator CONROY—There is the argument about disclosure of material supplied to overseas regulators and their requirements, as opposed to Australian regulators—it has probably been sparked by some company called Crown that seems to have a problem with disclosure—and a lack of confidence that all relevant information does always get disclosed. Can you comment on that?

Mr Patch—I can respond to that. This bill was intended to address core company law issues, things like meetings, forming companies and financial reporting to members. We are really getting into a market issue now.

Senator CONROY—Some of us think these should be called corporate issues.

Mr Patch—Those sorts of issues are being addressed under the corporate law economic reform program, in the financial markets and investment component of CLERP.

Senator CONROY—We are probably not as lucky as you in seeing the detail of what is in those proposals.

Senator Ian Campbell—Could I just put this in context. One of the reasons the corporate law economic reform program was brought up in March last year was because of the simplification program initiated by Michael Lavarch when he was Attorney-General. I have not got to the bottom of this but I suspect it actually came out of some work done by this committee when Senator Michael Beahan was chairman. This committee went around Australia—I was the deputy chairman of the committee—and a lot of people said, 'This law is too hard to read. You have to be a Rhodes scholar to understand it. It is too difficult and it should be written in plain English.'

It became a bit of a personal hobbyhorse of the then chairman of this committee that we should, particularly after meeting with the plain English expert who has since joined the simplification task force, Robert Eagleson. The then government—and I suspect it was based on Michael Beahan's urging—created a thing called the simplification task force, which the coalition in opposition supported very strongly.

The main idea of it was to simplify and to rewrite in plain English the provisions of the law. However, when you started doing that you started coming across policy things that were to be picked up. But it was not ever designed—and this is no criticism of the former government—to be a major policy rewrite. That is why we set up the CLERP program, because as the Business Law Division people were going through that they picked up a number of areas that needed reform. The business community and many other people said, 'Look, we need some major policy reforms.'

Therefore, this bill, the second instalment on the Lavarch simplification program, did not seek to go into major policy overwrite.

Senator CONROY—We would be just concerned that these sorts of issues could fall between two CLERPs. As I am indicating, it may assist the facilitation of this particular bill if you are able to come back during the parliamentary debate—you will probably not get a chance to come before the committee again—and give some indication of a willingness to address these issues down the track. It may facilitate the passing of this bill.

Senator Ian Campbell—My understanding, from the political point of view, is that there were a number of policy issues that came to the surface under the second simplification and that all of them have been addressed in the CLERP.

Senator CONROY—I will indicate why the committee members are concerned. It is your flat rejections of these points in your response that causes the concern. For instance, on this issue there is this statement:

. . . a general requirement for the routine lodgment with the ASX of all documents lodged overseas by Australian listed companies runs the risk of imposing an unnecessary paperwork burden and, therefore, increased transaction costs of these companies.

That will be true today, and that will be true in three months time.

Senator Ian Campbell—Correct.

Senator CONROY—Therefore, you can have the debate now or you can have the debate in three months time. We are saying let us have the debate now. If the attitude of the government is that this is set in concrete—that it is your response, so we have got to presume it is—then you will have the debate now.

Senator MURPHY—I think you have got to look at the purpose of that.

CHAIR—I recall the ASC responded on this last week—

Senator MURPHY—Yes.

CHAIR—And they made the point that a lot of the requirements overseas were not for material information, like in the US. It was information that really was not material—

Senator CONROY—I remember what they said. I just have some trouble over the suggestion that they have got to prepare all these documents and then hand them to one regulator. It is one post pack to the ASX of the same documents. What is the increased transaction cost—a stamp? They have already prepared the documents for the other regulator overseas.

Senator Ian Campbell—But they have been prepared based on the requirements of that law, which I know very well for Canada, the US—depending on which state you are in the US—or the European Union or Great Britain, who have just announced a company law review—

Senator CONROY—Very significant, I agree.

Senator Ian Campbell—It is very nice to see the Blair government going down the tracks—

Senator CONROY—Following in the footsteps of the Labor government.

Senator Ian Campbell—What you are really advocating by doing that, even though again it looks good on the surface, is that if a company might be listed on the stock exchange, for example, of Mauritania, in east Africa—and I know that there are some Australian companies that probably will be listed there when they get a stock exchange, if

they have not got one already—they may have a whole range of requirements which would be very relevant to Mauritania and their laws but which might well be entirely irrelevant to the ASX listing rules or the Australian company rules.

Senator CONROY—But why don't you let the market decide whether it is relevant or irrelevant?

Senator Ian Campbell—I think the reality is that the market—

Senator CONROY—Having to try to find that Mauritanian stock exchange might be increasing transactions costs, whereas the simple thing may be a postage stamp to the ASX. So it is already sitting there and if anyone wants to go and look they can go and look, rather than chasing Mauritania. That is my simple suggestion.

Senator Ian Campbell—I think the reality is that on stock exchange databases—the SEC, for example, in the United States, with the EDG—any person who is investing in a company that is listed on both exchanges could find that information with the flick of a switch on the Internet.

Senator CONROY—I am more worried about the investor trying to find the information. The investor is not likely to be listed on both.

Senator Ian Campbell—But what the investor would need to do was not only to see what information—

Senator CONROY—Fax Mauritania. Maybe they do not have a fax.

Senator Ian Campbell—What they would have to do—and please correct me if I am wrong, Mr Patch or Mr Murphy—is not only find what the disclosures were but find under what regime, what were the requirements and what regulations, and also, I suspect, what were the financial reporting standards.

Senator CONROY—But surely the market investor will judge whether it is relevant. He may go, 'I do not care about what they have put in Mauritania.' You are giving them the option to have a look at it by requiring them to give it to the ASX. Again I repeat, on the attitude that it runs the risk of imposing an unnecessary paperwork burden, they have already created the paperwork to do the listing over there. It is a file.

Mr Murphy—But the information that they are providing to the overseas country may be of little use in—

Senator CONROY—But the investor can judge that for themselves if they want to look through it.

Senator Ian Campbell—But why would you have the regulator in Mauritania telling Australian companies what they should disclose? We are in control of our own destiny here. We set the laws in this parliament in terms of companies; ASX set the listing rules. If we do not like what we are—

Senator CONROY—This is not a question of sovereignty. If this company wants to go over to Mauritania and apply to be listed, and it has to supply all this information, then it is its own choice. All I am arguing or discussing is whether or not one postage stamp would then supply the exact same information—all it is is a photocopy—to the ASX here and then the investor could choose. There is no extra paperwork. It is a photocopy and a stamp, albeit it possibly a big stamp.

Mr Murphy—I think there are already rules. What are we looking at? We are looking at an Australian company which is operating in the US. So any significant disclosures that are made in the US market would have to be disclosed in Australia—

Senator CONROY—Unless your name is Crown Casino, and then it is optional.

Mr Murphy—I can only state what the law is. Administration practice is another issue. That is the issue of the ASC. We can talk about that, if you like. But I think you have to look at it that the instance, I suppose, that you would be concerned about would be if there were Australian investors investing in a company which is operating offshore completely. I suppose what you are concerned about is that Australian investors may not be getting the information they should because the company is operating offshore and it has nothing to do with the ASX. That may be a gap. What I would say to you there is that, if the company is operating in any legitimate jurisdiction, if there are problems or whatever—

Senator CONROY—I would have thought in that circumstance we would catch it with this because, if it is not listed on the Australian Stock Exchange, you could not make it supply information.

Mr Murphy- No, that is what I am saying.

Senator CONROY—I am not sure you catch it. I am probably talking about the ones that are listed on both.

Mr Murphy—If you have an Australian company which is operating in Australia—say, BHP—and operating in the US market, under the ASX listing rules any significant disclosure that it makes to the US market it would have to make to the Australian market.

Senator CONROY—I live in Melbourne and I do not have as much confidence as you do in the application of the law.

Mr Murphy—That is right, but that can be the law. The law can only require these things. If, from the other point of view, any significant information is disclosed to a US regulator, there are memorandums of understanding between the regulators on cross-fertilisation of information, cross-exchanges of information. Any significant disclosure that occurred in the US market which was pertinent would be given to the ASC, or, if the ASC was ticked off and was suspicious, it could request that information from the US. There is a problem where you have companies operating in jurisdictions which do not have sophisticated regulatory regimes. That is an issue.

Senator CONROY—We will probably have to agree to disagree in terms of the application of the disclosure requirements at the moment and whether we feel that they are being followed through sufficiently. There is a very prominent example I have mentioned a number of times where there is debate and they have taken the ASC to court. They are questioning the whole structure of continuous disclosure of the market and what it means.

Mr Murphy—And one hopes that the courts stand behind the regulator because—

Senator CONROY—I am a friend of the NCA and I have lost faith in the courts.

CHAIR—That has nothing to do with the offshore.

Senator CONROY—That is Mr Murphy's example, not mine. The only other question I have is the argument about general management discussion in terms of whether that should be mandated or provided. I am interested in it just very briefly.

Mr Murphy—It is a matter of policy.

Senator CONROY—It is a policy question.

Senator Ian Campbell—Again, this is an area where it comes down to whether you prescribe it and who you prescribe it for. A number of Australian companies do management discussion analysis in their annual report. For many companies it is good corporate practice and assists corporate governance and shareholders. Good companies who want to improve their shareholder value will very naturally pick up that sort of good corporate governance practice. For many companies it will add to costs and their red tape burden and not assist shareholders. The government has decided that it is opposed to mandating that every company create this new requirement in an annual report to write what is effectively a subject of assessment of the company's future prospects and management.

Under the CLERP program, it is fair to say that we have picked up the principle to an extent by saying that we want to make it easier for companies, particularly in prospectuses, to make forecasts. At the moment you have a reverse onus of proof which discourages people from making forecasts. We think that by clarifying the liability and bringing the onus of proof back in line with mainstream law that would encourage people in prospectuses to make forecasts based on reasonable expectations.

That sort of approach, making it easier for people to make those statements without fearing law suits coming down on them within a few weeks of making those announcements, is a more appropriate way to go rather than saying, 'Thou shalt write a little essay about what you think the company is going to do and put it in every single annual report.' Put simply that is why we said that MD&As are good for some companies. Good companies who think that is in the interest of their shareholders will do it.

I know it is very much a market driven thing. For example, the G100, the group of 100, who are big supporters of MD&A have already set out—and I do not want to get the terminology here incorrect—a guideline, I think, for their members on how to prepare an MD&A and the benefits of an MD&A. They have seen that the government does not want to

prescribe it. I do not think they are particularly happy that we have not prescribed it, but they have said, 'We will now encourage our members in the G100, Australia's top 100 companies, to do MD&As.' A range of other organisations such as IFSA and others will promote that and the government will monitor that over the next couple of years, and I think that is the way to do it. Rather than the government saying, 'Thou shalt do that and cover these six items in your essay on what is going to happen in the company,' let us let the market promote what we regard as good corporate governance.

Senator CONROY—Do you think there is a difference in compliance costs if it is a G100 suggestion and they decide, 'We'd better do it,' or if the government says, 'You've got to do it'?

Senator Ian Campbell—Probably not so much for the G100, because the G100 all have head offices in every state, big legal departments and financial controllers who are all members of the G100 and come along to lunches and listen to me give speeches about corporate governance. For them, it would not be much.

Senator CONROY—Lucky them.

Senator Ian Campbell—But there are lots of other companies who would find the requirement an added burden with more red tape, and it would not add to the benefit of their shareholders in terms of how their companies are governed. I would be surprised if most G100 companies do not start putting out annual reports with MD&As with them over the next few years. We will be monitoring closely. The only people who will monitor it more closely than me are probably Sandy Easterbrook and Ian Matheson, but I am sure we will do it together. It will also be monitored by BLD and the ASC.

Senator CONROY—You can add my name to the list.

Senator Ian Campbell—And, most importantly, institutional shareholders.

CHAIR—There being no further questions, I declare the hearing closed. Thank you, Mr Murphy, Mr Patch and the parliamentary secretary for attending.

Committee adjourned at 12.52 a.m.