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JOINT COMMITTEE ON CORPORATIONS AND SECURITIES

Thursday, 4 June 1998

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

Senators and members in attendance: Senators Chapman, Conroy, Cooney, Gibson and Murray, and Mrs De-Anne Kelly and Mr Kelvin Thomson

Terms of reference for the inquiry:

Australian Securities Commission Annual Report 1996-97

WITNESSES

JOINT COMMITTEE ON CORPORATIONS AND SECURITIES

Australian Securities Commission Annual Report 1996-97

CANBERRA

Committee met at 4.44 p.m.

CHAIR—I declare open this public hearing of the Joint Parliamentary Committee on Statutory Corporations and Securities. This is a public hearing in relation to the annual report of the Australian Securities Commission. I welcome members of the committee and welcome Mr Alan Cameron and Ms Jillian Segal of the ASC. We hope some more representatives of the committee will be here shortly when the division is finished.

CAMERON, Mr Alan John, Chairman, Australian Securities Commission, GPO Box 4866, Sydney, New South Wales 2001

LONGO, Mr Joseph Paul, National Director, Enforcement, Australian Securities Commission, GPO Box 4866, Sydney, New South Wales 2001

SEGAL, Ms Jillian Shirley, Statutory Member, Australian Securities Commission, GPO Box 4866, Sydney, New South Wales 2001

TANZER, Mr Gregory Mark, Regional Commissioner (ACT), Australian Securities Commission, GPO Box 9826, Canberra, Australian Capital Territory 2601

CHAIR—There are a number of areas we would like to explore with you. The first issue—if I could open the batting, as it were—is that I had a letter from Mr Bradley several days ago claiming that the budget allocation to the ASC was going to be insufficient for your expanded responsibilities under the Managed Investments Bill. I wonder whether you would like to respond to his claims.

Mr Cameron—What the budget has done is to allocate additional funding for the first two years for the transition to the new regime. The assumption underlying that is that the funds that we expend at the moment in this area on activities such as surveillance of trustees, unit trusts and managers will continue to be available and they will be topped up by the additional money that the government has allocated to us for the next two years.

In the third year there is a small allocation, I think $250,000 from memory, and that is expressed as being to enable the parliament to conduct a review of the legislation to see whether it is working effectively and so on. I must say, if we had a preference, it is that the extra allocation or some part of it might be needed to continue even while that review is being conducted. But there is plenty of time to deal with that with the government if that emerges as a concern.

Basically it involves about 20 or 21 extra staff—I think about 40 presently work in that area. On our present estimates that will be enough to enable us to carry out our responsibilities. If it is not enough, we are certainly quite happy to talk further to the government about receiving additional money through the estimates process or through the next budget. As I understand it, the government is prepared—I think Senator Campbell may have said something to this effect in the Senate the other day—to look at the resourcing question if it becomes an issue.

In anticipation of the legislation and in anticipation of the budget we have already committed a significant amount of existing resource to preparing for this legislation, in effect by diverting it from other activities on an interim basis. So we will ensure that the area is appropriately resourced. If there is not enough money in the commission as a whole to do it, we will seek further money.

CHAIR—At this stage you are confident that the resources are adequate?

Mr Cameron—As far as we can estimate. As you know, Senator, we will have a quite different role under this legislation to the role we have been used to performing. Exactly what will be involved, the complexity of the compliance plans that will be lodged with us for approval, the number of fund managers who will seek licensing and the number of funds that will seek to be registered are all a little unpredictable.

If the parliament does pass the legislation in the next few weeks and it starts on 1 July, the transitional arrangements will be complex and the commission may have to be facilitative to ensure that the funds are there so that we can get under way very quickly in July. New funds will be needed to start under the new law in that event. We may need to use our exempting and modifying powers to ensure that commercial transactions are not impeded by the comparatively short period between the passing of the law and its coming into effect, but I think we can do that.

CHAIR—While we are talking about the Managed Investments Bill, I understand that you have promulgated draft proposals for managers of funds and so on. Do I recall correctly that the trustees have made comment on that publicly?

Mr Cameron—Yes, in fact a whole group of people have made comments.

CHAIR—As I recall, IFSA was saying they thought that some areas of the bill were too stringent and would perhaps hinder smaller funds from effectively operating. Perhaps you could outline the proposals and how you see them working and respond to some of those criticisms.

Ms Segal—We have, as mentioned, put out the seven policy proposal papers. I think there were about 56 detailed submissions. We have had a team of people analyse them and the commission has participated in receiving feedback. As a result of that I think we are intending to modify some of the policy proposals that are in the papers to take into account the concerns of industry, particularly those at the small end of the market, that perhaps some of the proposals in there would make it difficult for them to remain in business, whilst at the same time seeking to preserve the philosophy that underlies these policy proposals, namely that there be financial requirements and very focused compliance plans.

So the underlying principles will remain the same but the proposals will be adapted in a flexible way so that there are the same requirements in philosophy but different in impact at the big end of the market and at the small end of the market.

Mr Cameron—I think the only gloss I would add to that is that we have to bear in mind that this is the risk end of the market compared to superannuation. Some of the interesting comments we have received have been about the relationship between the requirements we were suggesting in the policy proposals and those that apply in the superannuation arena at the moment. That is an issue that we are also looking at. We do not want to create such strong protective devices that it makes the superannuation arena look like the risk end of the market.

I would emphasise that and also the fact, of course, that Australia, unlike the other major jurisdictions like the United Kingdom and the United States, uses these devices at the bottom

end of the market for small scale films, agricultural schemes and so on. We cannot make it impossible; we have to ensure the appropriate balance between facilitating the ability to issue these kinds of investments and providing appropriate investor protection.

Ms Segal—Just to give you an example, our original proposal was that the licence application and scheme registration should all happen together. The feedback from the market seems to be that it is going to be very difficult and it would be much easier and more flexible if we could separate them. So there is an opportunity where we can say, fine, we will readjust our thinking and separate it to accommodate the concerns of industry and at the same time still manage to have an opportunity to very carefully review compliance plans and so on.

Senator GIBSON—A couple of small firms have approached me about the SIS legislation—having to have the $5 million capital requirement when making up the deficiency between net assets and the $5 million by bank guarantee, making it hard to manage funds. Of course, there is the argument that if you have $1 billion in funds management, what is $5 million anyway; the emphasis is on non-breach.

Mr Cameron—We have received a lot of submissions along those lines and we are seeking to ensure that the fund managers themselves have appropriate resources not only to provide some sort of hurt money or whatever but also to ensure that they have got enough money to administer the scheme, in the sense that these schemes bring in investors' money but the investors' money is supposed to be allocated to the investment; and what the manager needs is the resources to operate the register and ensure that appropriate accounting records are kept and so on.

We are clarifying and expanding the present explanations as to just what these financial resources are needed for and the difference between the resources that are needed for the custodian, the person who is going to look after and hold the assets, as opposed to the fund manager. In the case of the very small schemes, we do not see a great need for the manager to have that great an asset base, other than to ensure that they can manage their assets.

Ms Segal—Another point worth making is that not only have we received these submissions but we have promptly gone out and had further consultations and focus group meetings with various participants in the industry so that we are not just relying on their written submissions but on having discussions with them; sometimes more comes out of that, more useful feedback. Given the relatively short time frame there has been, we have sought to encourage that sort of feedback.

CHAIR—In your new expanded role of the Australian Securities and Investment Commission you will have what I suppose you would call two defined areas of responsibility, market integrity and consumer protection. How do you define those as separate operations or separate areas, as it were? What defines market integrity and what defines consumer protection?

Mr Cameron—Perhaps I should interpolate that the third area, general registration of companies, will continue. I should note also that if the legislation is finally passed in the Senate, this will be the last meeting of the Australian Securities Commission with its

parliamentary committee because we have a new name, presumably from 1 July or soon after.

I think the distinctions between market integrity and consumer protection are not easy to draw. Of course, in some jurisdictions, notably the United Kingdom, they are no longer having to draw that distinction because they have put them together into the same regulator, the new Financial Services Authority. In Australia the market integrity function is that which we perform overtly with respect to the Stock Exchange, the futures exchange, the licensing of stockbrokers and futures brokers—the people who deal on those markets. That is clearly market integrity. Dealing with issues like insider trading, market manipulation and so on, that is all market integrity.

Where the grey area arises—and it is a grey area that does not cause any difficulty administratively—is how you characterise how we deal with investment advisers because investment advisers are in the financial markets but they are providing advice to consumers—called investors in that case. With our new role, of course, there is a pure consumer protection role with respect to those products that we do not otherwise have a role in, such as insurance, superannuation and banking products. They are prudentially regulated by others but we will have the consumer protection role.

We will have to have a close and effective working relationship with the new prudential regulation authority to deal with those overlaps at that end of the market. But consumer protection is basically the role of looking after all of the people who individually invest in superannuation, insurance, banks and so on; on the way in they are our problem. When the money is in there, the health of the institution is APRA's problem. Of course, I will be the ASIC representative on the board of APRA and the Governor of the Reserve Bank will be sitting on the board of APRA, as well as the Council of Financial Regulators, so I hope we will have APRA locked in as the linking force to ensure that the whole system works.

I visited London briefly on the way back from the IOSCO meeting last week. The Financial Services Authority in the United Kingdom, which is in effect putting APRA and ASIC together, started operation on the first of this month, at the beginning of this week. I know they are having some quite interesting issues about what they are doing internally in distinguishing between market integrity and consumer protection and what sort of visit you get from which part of the FSA.

That is the same sort of issue we will have here, but a little more externally, as to when a market participant might hear from APRA or ASIC or might see us jointly. We are talking to the chief executive of APRA and we are trying to coordinate our visits with market participants so that the new scheme operates effectively and seamlessly.

CHAIR—Do you have any plans on how you will promote consumer protection in the field?

Mr Cameron—It is fair to say we probably do not yet. We have been a bit reluctant to anticipate the passing of the legislation in this respect. Apart from anything else, we saw the detail of it only very recently. In fact, Jill and I have come this afternoon from a meeting

with the commissioners of the ACCC to start thinking about the coordination that will be needed between us.

We know that the ACCC issues a lot of material that promotes consumer protection. We are talking to them about, among other things, how their material will relate to us and deal with our role. That is something that our staff will be turning their minds to now that it seems—subject to only what we loosely call the Patrick amendments being dealt with by the Senate—that the scheme should start on 1 July or soon thereafter and it will be appropriate to be changing the way in which this area is sold. But of course it is only being changed in an interim way; there is a further step somewhere down the track when the state fair trading offices also are coordinated with ASIC. That is not happening on 1 July, so we will not be spending a lot of effort on promotion until the rough edges of coordination are sorted out with all of the existing fair trading offices.

Ms Segal—I think it is fair to add that we have given thought to—almost independently of this, but it fits in very neatly—the need for consumer education and the nature of the risk to consumers and investors in the financial sector gradually changing with the electronification, the e-commerce side. We are focused on that and have been giving some thought to how we look at consumer protection in the electronic era and how we educate consumers in relation to that.

Consumers might be quite leery of people making unsolicited phone calls or putting out information in the media, newspapers or whatever, but over the Internet they might be less suspicious or less aware of the risks. So those are things that we certainly have on our agenda and we will be taking forward in conjunction with the ACCC and APRA to start thinking about those issues.

CHAIR—You would envisage a close working relationship with the ACCC then?

Mr Cameron—I think it is inevitable and highly desirable that we should do that. They have a lot of experience in this area and we want to tap into that. But there will also be what you might loosely call mixed products that do not fall neatly into either jurisdiction. We want to make sure that the public are not disadvantaged by any such issue between the legal regimes. It is not just the regulator, it is the legal regimes that are an issue, too. We are working on ensuring that those regimes will be effective.

CHAIR—Have you got transitional arrangements in place in terms of the responsibilities that are moving from the ACCC to you?

Mr Cameron—I think it is fair to say that we do not have at the moment because neither of us was familiar with the legislation—it was only introduced in the last week or so. Today was the second meeting between our offices; there was a meeting last week. Today we have agreed on setting up arrangements to get this in place pretty quickly. It is not as though at the ACCC level they have a large existing workload of current matters that have to be sent across to us, we have clarified that already, it is just a question of how we in fact handle those matters that are out there. I do not want to go into detail but they have told us that one of those matters is one that we referred to them and they will now be sending it back.

CHAIR—Will you be developing similar transitional arrangements for the Insurance and Superannuation Commission?

Mr Cameron—Yes, but that is a bit more advanced because we have known a bit more of the detail of that because there are staff moving as well. There is no staff moving from the ACCC. We will have a fair deal of time I think to sort out the arrangements with APRA and ASIC. The ACCC one is a bit more one-off.

Senator GIBSON—Do you expect to get any people from the ISC?

Mr Cameron—In terms of actual numbers I am not sure at this stage. There are discussions going on. We pick up an entire group of people called the superannuation complaints tribunal who work in Melbourne who are transferred administratively to our responsibilities. Other individuals are not coming in large numbers because most of them that we are interested in are in Canberra and unless they wish to move to either Melbourne or Sydney, they are not likely to wish to join us, so we are realistic about that. We will have to use secondments or temporary placements to ensure that we have the expertise. But we have several senior people from the ISC already working in our office.

CHAIR—You are reported as saying that IOSCO's proposals for new listing standards could be included in the CLERP reforms for fundraising, although I understand there are quite significant differences between the two. I wonder how you would see them as being coordinated and integrated into the CLERP legislation.

Mr Cameron—The interesting issue is that the ASC was very keen to get the IOSCO paper published so we asked for it to be published last week so that it would fit into the CLERP timetable. It looks superficially rather different from the traditional Corporations Law model that has been in operation since 1991, which does not give any sort of check list as to what ought to be in there.

On the other hand, what is in the CLERP proposals is closer to where the IOSCO guidelines are heading because CLERP is talking about guidelines for profile prospectuses and so on and that is not unlike the sort of things that the IOSCO proposals contain. I do not for a moment suggest that it is going to be easy but I think once the IOSCO papers were published last week, it is possible for the Treasury and the commission to look at how we can coordinate these things. It is not only us, at the moment I think it is probably the Stock Exchange, because the IOSCO principles were about cross-border offerings and cross-border listings are run largely at the moment by the stock exchange, not by the law.

What we were really looking to do was to get them published, talk to the Stock Exchange, talk to the CLERP proponents within Treasury and see what we could do to harmonise all these things. The interesting thing is that public attention for several years now has been on international accounting standards and their relevance to harmonising for the purpose of cross-border issuing. This was a reminder that there has been in the background this other exercise on non-financial disclosure and the non-financial one might even come through ahead of the accounting standards.

Perhaps I should put it this way: there is nothing in the IOSCO proposals that we will have any real difficulty with. There is nothing that is conceptually difficult. We do not happen to do it that way at the moment but with a bit of effort I think we can find a way of harmonising them.

CHAIR—How widely do you think the IOSCO proposals will be adopted by other countries?

Mr Cameron—The really good news is that their adoption was strongly supported by the SEC. That is the magic factor that, as we all know, is highly relevant to the potential success of the accounting issue. In this case it looks like that will not be a problem. Perhaps I should introduce Mr Tanzer, the ACT regional commissioner. His late arrival, of course, is due to his presence before another committee. He is warmed up.

I think I have answered your question, but it is really highly likely at the Nairobi meeting in September that they will be adopted, I think that is much more likely than not.

Senator CONROY—I have questions on different matters.

Senator COONEY—I have different matters, too.

Senator CONROY—I want to start off with a report which Mr Tanzer will be familiar with; he is in it. I want to refer to the report on 16 May. It was announced that Justice Callinan was investigated by the ASC in relation to his directorship of Giant Resources which collapsed in 1990 with losses of up to $300 million.

Before I begin, I want to put on the record both the right of the community to know that justice has been done and also the right of Justice Callinan to clear his name. As Mr Temby said in relation to the prosecution of the late Justice Murphy:

> In such a case it may be a justified course to prosecute, even if the evidence is not sufficiently strong to make a conviction more likely than not and the case would not have proceeded against an ordinary citizen. . . .First, if a decision is made not to prosecute, some people will think there has been a 'cover-up'. . . . Second, it is important that the public have confidence in the courts and public officials generally. . . . Allegations which might diminish this confidence should not be allowed to fester but should be exposed to the light of day. There is a lot to be said for prosecution in such circumstances, even if it results in an acquittal. That will serve to clear the air. . . . The best course may be to institute a prosecution if there is a prima facie case, even if a conviction is reckoned to be unlikely. . . .
>
> In matters of public controversy the balancing process which must be undertaken to determine where the public interest lies can be a delicate one. A broad view must be taken. So far as allegations against persons holding high public office are concerned, it will sometimes be necessary to decide whether. . . prosecution will on the one hand 'clear the air' or on the other hand simply 'muddy the waters'.

When were these allegations raised by the liquidator of Giant Resources with the ASC?

Mr Tanzer—The liquidator's report was received by the ASC on 9 November 1995. That is the liquidator's report under section 418 of the Companies Code. We are referring here to a company that was put into liquidation before the commencement of the Corporations Law and that is why the report is made under the Companies Code.

Senator CONROY—Can a copy of that report be provided to the committee?

Mr Tanzer—The normal procedure is that we treat those reports as confidential. That is the normal process for the commission but I would be happy to see whether or not we could provide it on a confidential basis.

Senator CONROY—Were these allegations raised with the ASC via the liquidator's report or did they come in a different form?

Mr Tanzer—The liquidator's report did not raise any—I am not sure what allegations you are particularly referring to. Can I make one point about your initial statement that the ASC had investigated the matter. In fact the quote that is attributed to me there is that we conducted no such investigation. But perhaps if you particularise the allegations, I can tell you whether they were raised in the report.

Senator CONROY—That is going to make things a bit tricky.

Mr Tanzer—I am not trying to be difficult. If I could say in general terms: the report of the liquidator, without attempting to traverse areas that were confidential, reported on the deficiency, reported on who the major creditors are and included an opinion of the liquidator as to the cause of those losses. Normally a liquidator's report of this nature will also state the liquidator's view on whether particular offences have or have not occurred or may have occurred or whatever. My understanding of this liquidator's report is that the reason for the deficiency is said to be losses incurred on investments in associated companies or loans to associated companies and there are no specific allegations of contraventions by particular persons in the liquidator's report.

Senator CONROY—Could I use the word 'examined' rather than investigated as a way of describing what happened; would you be more comfortable with that?

Mr Tanzer—We use the term investigation not as a term of art but as a term that means a particular thing, which is when we formally commence an investigation under section 13 of the ASC Law because an officer of the commission has a reasonable suspicion of a contravention of the Corporations Law. But leading up to making that assessment, yes, we examine or inquire or whatever.

Senator CONROY—What were the offences that were alleged to have been committed by the directors of Giant Resources, including Justice Callinan, that were examined by the ASC?

Mr Tanzer—As I say, the liquidator's report did not, from my memory of it, disclose particular offences. What it raised were that the losses occurred, that these are the creditors, a number of other pieces of information; it did not disclose particular offences; it did not state particular offences.

Mr Cameron—As I understand it, the examinations, to use your word, were conducted by the liquidator, not by the commission. The liquidator reported, having completed the

liquidation, in the course of which the liquidator conducted examinations of various people, including former directors.

Ms Segal—Section 541 examinations.

Mr Cameron—Yes, those were the examinations. What was also going on very publicly was litigation against the directors on the basis of an allegation that they had breached their fiduciary and statutory duties as directors. That litigation, of course, was settled in due course. That enabled the liquidation to be completed and the liquidator then reported. That puts it in context, I think. Examinations also refer to a situation where certain people—-

Senator CONROY—Oh, to be a lawyer! Anyone not a lawyer stand up. All the lawyers leave; the rest of us will stay.

Mr Cameron—People can be brought in before the liquidator and examined on oath and that is what occurred in this case. As part of the liquidation the liquidator conducted the examinations of a number of people.

Senator CONROY—I might come back to that first point in a minute. I would like to seek leave of the committee to incorporate in *Hansard* a copy of the statement of claim filed in the Supreme Court of New South Wales in relation to this matter. It sets out a range of allegations that were made against the directors of Giant Resources, including Justice Callinan, by the liquidators of that company.

CHAIR—I'd like to examine it.

Senator CONROY—Have a flick through; it's just a court document.

Mr Tanzer, you were quoted in the *Sydney Morning Herald* article as saying that the liquidator's report had not been fully investigated because:

We did not think it was an appropriate use of resources for the ASC to act on the liquidator's report because there had been significant civil litigation and the lapse of time made it difficult to go back to witnesses.

Why should the mere fact that significant civil litigation had occurred deter the ASC from fully investigating allegations of serious criminal conduct?

Mr Tanzer—I guess the answer to that, Senator, is you are making an assumption that allegations of serious criminal conduct were made in the liquidator's report, so we are probably traversing into—

Senator CONROY—I did not quite say that. I would probably disagree that I quite said that. I accept the point you have made that the report cleared everybody or did not argue that. But, as Mr Cameron has said, you were aware that there was significant civil action going on.

Mr Tanzer—That is quite right. Your question was why should the existence of significant civil action deter the ASC from investigating allegations of serious criminal

conduct. What I am saying is that in this case that question involves an assumption that allegations of serious criminal conduct had been made. You referred to a statement of claim in a civil matter. The making of allegations in a statement of claim which in a proceeding of that nature does not necessarily amount to allegations of serious criminal conduct, depending on the nature of those allegations.

Senator CONROY—Have you previously seen that statement of claim?

Mr Tanzer—I cannot say that I have read that statement of claim in the last couple of months.

Senator CONROY—Had you read it at the time that you made the decision?

Mr Tanzer—I was not the ACT regional commissioner at the time the decision was made.

Senator CONROY—Do you think that the then regional commissioner would have examined a document like that?

Mr Tanzer—You are asking me the question. I do not know.

Senator CONROY—Do you think he should have?

Mr Tanzer—I know that the circumstances of the civil litigation were known to the people making the assessment at the time of the liquidator's report.

Mr Cameron—If I can interrupt Mr Tanzer to say Mr Longo has joined us. He has some knowledge of this. He has also just escaped from the estimates committee.

Senator CONROY—Because Mr Tanzer was quoted, I thought he was the appropriate person to ask about Giant.

Mr Tanzer—It is the case that you are asking about the circumstances or the reasons for the decision made by the ASC at the time. As I understand it, the reasons for not proceeding with an investigation basically fell into five categories. The first was that civil action had been taken by the major parties and—

Mr KELVIN THOMSON—Why does it make a difference that there is civil litigation? Whether or not there is civil litigation, if there is some criminal activity alleged or suggested or whatever, is that not a matter of no consequence? The issue before you is whether there is anything of a criminal nature.

Mr Tanzer—Perhaps if I read through the five reasons, you will see how it all adds up. It is a fair question, Mr Thomson. The first point was that the issues had been the subject of civil litigation and the issues had been tested as part of that, and well tested. The applicants in the civil litigation: it was not a question of the applicants not being able to conduct the civil litigation to full effect. The applicants were well resourced and, to use common parlance, well able to look after themselves and their own interests.

The third factor was the age of any possible breaches involved here. We are talking about conduct that is alleged to have occurred in 1988 and 1989 and the issues fell for determination by the commission in 1996. So immediately there is an issue of the statute of limitations but that brings up the question about witnesses' recollections and the like.

Senator CONROY—Can I ask as a non-lawyer on that point, do you have provision to go to the Attorney-General to ask him to waive that under the act?

Mr Tanzer—Under the present law there is provision to seek a waiver from the Attorney-General for charges to be laid outside that time.

Senator CONROY—Given that I think you said this was under an earlier law, does that same waiver apply?

Mr Tanzer—Yes, the same provision arises. Although, given that the time limitation would probably be five years rather than six—I think it is five years under the cooperative scheme.

The last two categories were that it could not be demonstrated on the evidence available to the ASC that the decision made by the directors at the particular time were contrary to the interests of Giant; and the final category was that the liquidator himself thought that no further action, or he had expressed an opinion that no further action, was appropriate by the ASC.

To answer your question, Mr Thomson, a little more directly, the information before us did not disclose evidence of what you might call serious criminal activity, such as would justify an investigation of the matter, particularly after that length of time. There are cases where the ASC has undertaken criminal action in relation to significant insolvencies after the liquidation or during the liquidation of those companies but this was not one of those because of the nature of the allegations essentially.

Mr KELVIN THOMSON—I am not entirely satisfied on the point about the civil litigation covering the matter. You said that the applicants were well able to look after their own interests. I am sure that is right but I would also say that their interests and the public's interests may well be entirely different. So your obligation is to make sure that the public interest is being looked after, not whether the applicants are effectively looking after their own.

Mr Tanzer—Certainly.

Mr Longo—Before coming back to fundamental principles, just to clarify some facts, there were two or three major civil suits that arose out of the collapse of Giant. It is true that one of them involved Mr Callinan as a defendant but, as I think has been made clear publicly, those proceedings against him were in fact discontinued and he made no contribution at all to any settlement.

Senator CONROY—They settled the case against Richard Pratt on a civil basis as well; that does not mean he is not guilty of corrupt criminal behaviour.

Mr Longo—Perhaps if I could continue. The first thing to bear in mind is allegations were made against Mr Callinan and other directors in those proceedings; those proceedings were discontinued against him; and there was a settlement to which he did not contribute. So that is relevant to any assessment that we might make later.

Second, the other major proceedings were brought by the banks against the directors and he was not a party to those proceedings at all. Those proceedings went all the way. Mr Antico and others had judgment entered against them. He was not a party to those proceedings.

If we can just go back to fundamental principles for a moment, the ASC gets section 533 reports. That is what the section number is now—under the Companies Code it was section 415 or 418, if my memory serves me. These reports are assessed and the liquidator is in a very good position to be helpful because he or she has looked at all the books and records and he or she is an important part of the regulatory framework.

The activities of the liquidator are supervised by the court and the liquidator is duty bound under the Companies Code, as is relevant here—and now the Corporations Law—to file reports with the ASC. He is duty bound to tell us if there is any evidence of misconduct. So liquidators are an important source of information to the ASC and its enforcement activities.

The liquidator on this occasion was very active. As we have noted, a lot of civil litigation arose out of the liquidation. There was the fullest investigation and ventilation of the facts arising out of the collapse of this company. I note, for example, that Mr Callinan was not a director for some five or six months before the company went into liquidation.

By the time the matter came to us we had a lot of information upon which to make an assessment and, as Mr Tanzer has noted, the liquidator himself was not pressing us to investigate any person, not just Mr Callinan. I stress, we are focused on Mr Callinan but there were many directors of Giant at the time and the commission made an assessment about the position of all the directors, not just Mr Callinan, and took a position to the effect that Mr Tanzer has described.

I should also add that the liquidators are usually pretty robust about telling us when they think we should be prosecuting people and usually they complain when we do not. On this occasion, far from pressing us to commence a formal criminal investigation, the opposite was true and the age of the matter and related circumstances had to be weighed up. So for those good reasons, we think, in this matter a decision was made, in fact a couple of years ago I think we got the report—was it 1995?

Mr Cameron—It was 4 April 1996.

Mr Longo—Not to take the matter any further. This company went into liquidation on 26 April 1990, some eight years ago. So for those broad reasons no criminal investigation was launched against any director of Giant Resources, not just Mr Callinan.

Mr KELVIN THOMSON—Can I take up one point about his resignation as a director five or six months before the liquidation and insolvency. You would have had a lot more experience with these things than I do but the experience I have had with companies going under, frequently the directors whose conduct most requires looking at are precisely those who have managed to bail out at a time which is convenient, before the ship goes down. Is that your experience too, and, if so, why would you regard that as a factor?

Mr Longo—I would not call it a factor so much as a fact. It is important to appreciate what happened; that he ceased to be a director in December 1989 and the company went into liquidation in April 1990. There was then extensive complex civil litigation where the facts surrounding the collapse of the company were extensively explored. The liquidator gave us a report, a very comprehensive report, which I think included a photocopy of the statement of claim, if my memory serves me. All that information was assessed by officers of the commission some two years ago and a judgment was made that there was insufficient material upon which to justify the commencement of a criminal investigation against any director.

Senator CONROY—Can I just follow up on a couple of points you made.

Mr Longo—I really want to stress and it is very important to appreciate that when the issue was put before the officers of the commission who had the responsibility for making this decision, they were looking at all of the directors, not just Mr Callinan, and having regard to all the facts and circumstances, including the judgments made by Hodgson in the New South Wales Supreme Court and the liquidator's views as well. It is important to have that context, in my view, in understanding how we came to that decision.

Senator CONROY—One point that seemed to hang a little bit of weight on your argument is that the banks only proceeded against three directors. Can I be a cynic and say that is because they were the only three that were still being underwritten and there was no point in chasing the people who were never going to be able to pay a substantive amount. FAI walked away from the indemnity on the others, so all you were ever going to get was maybe the house and a bit of property, whereas Pioneer continued to bankroll the other three. I just find it amazing that you would use a test that says, 'Oh, well, they did not chase those ones,' when clearly, cynically, they went after the ones where the real money was.

Mr Longo—I could not speculate on why they sued some and not others. I certainly would not see it as a test of any process of reasoning that the commission might go through in deciding whether or not to take on a matter. I do note that the directors that were sued were also directors of Pioneer and Mr Callinan at no time was a director of Pioneer. Pioneer was found later to have been a de facto director of Giant.

One can speculate as to why things happened or did not happen. From the commission's point of view its duty was to assess the liquidator's report, to assess the position of all the directors, not just Mr Callinan, and make a judgment about whether a criminal investigation was warranted. On the facts and circumstances before us one was not warranted.

Senator CONROY—I appreciate that you have got far more experience in this than I and you say that a liquidator comes to you and says, 'Don't prosecute, it's all fine.' I am just a little concerned that one of the most senior regulatory authorities in this area takes so much weight of that.

Currently we have a situation that the NCA have been investigating to do with a number of transactions that happened back in the mid-1980s, the notorious VicInvest case that you may or may not be familiar with, where Mr Pratt entered into an agreement with Elders and money was transferred through a company called VicInvest. VicInvest subsequently collapsed, just vanished, and there was something like a $52 million outstanding loan.

There was civil action and, after some toing-and-froing, Mr Pratt got the cheque book out and a $25 million amount has suddenly appeared in the Elders balance sheet, with their directors refusing to disclose to their own shareholders what it was for. Clearly that matter was settled. I understand it also involved the cardboard box contract which for a company like Elders/Fosters is something of some substance, given that they wrap their cans in cardboard. I would be very concerned if the NCA suddenly turn around and said, 'Well, there has been a commercial settlement, no-one is calling on us to prosecute.'

Mr Longo—Senator, I am not in a position to comment on VicInvest but in principle I really would like to stress that the commission's officers made their own independent judgment about whether there ought to be any criminal investigation of any director of Giant. It is proper and appropriate for us to place weight and give due consideration to the liquidator's views, for the reasons I have given, namely that the liquidator is an officer of the court; it is part of his statutory duty to be on the lookout for breaches of the Corporations Law and to bring them to our attention. Parliament actually intends for us to place weight on the liquidator's view. But I stress we always form our own view at the end of the day as to whether an investigation is actually commenced or not. As I mentioned earlier, we are usually criticised for not commencing enough of them rather than for actually accepting a liquidator's view that one should not be commenced.

But I would not want you to think that simply because a civil action has been launched that we do not take criminal action. In fact, there are many examples in other corporate law contexts where the commission might take quick civil action to freeze assets or to try to preserve a situation on behalf of creditors and then to bring criminal action. In fact, that is quite common. So I would not want the committee to think that, simply because civil action has been taken, the ASC would rule out criminal action.

Senator CONROY—I am just looking at the five reasons Mr Tanzer advanced. He has got civil action, which you seem to be agreeing is not a real reason not to proceed with criminal; the applicants were well resourced—

Mr Longo—Would you repeat that?

Senator CONROY—Civil action had been followed through.

Mr Longo—It was a factor taken into account.

Senator CONROY—From our perspective, you are saying it was not the sole reason, but we are arguing that we are not sure that it should carry as much weight as perhaps it seems to have.

Mr Longo—Perhaps I can give you an example of why it must take some weight. On the facts of this particular matter the creditors who were harmed, if you like, by the collapse were not, if I can put it this way, mums and dads, they were banks. They were able to pursue their interests. They were able to pursue those interests in a way that got to the facts of the matter, perhaps in a way where there are a whole range of investors or creditors who do not have those resources to run the action. In those circumstances there may very well be a public interest in the ASC assuming the mantle.

But in the circumstances of this case, as it happened, the commission had the benefit of the fullest consideration of the facts and circumstances arising out of the collapse because it had been hotly litigated before a Supreme Court judge and we also had the benefit of the views of the liquidator. It is very important that we do look at each matter on its merits. On the particular facts of this matter we had the benefit of that earlier litigation and the liquidator's considered views.

Senator CONROY—Can I take you through some of the allegations?

Mr KELVIN THOMSON—Before you do that there is one matter I want to be reassured on, based on the discussion we have just had, and that is the reference you made to the fact that Justice Callinan had resigned as a director five or six months before the liquidation and the suggestion that this might have been a reason for not pursuing it. You do not need me to tell you that if you are a director at the time a company goes down there are risks for you and prospective penalties so there are plenty of incentives for directors to leave the ship before it goes down. I think I would like to hear that this is in fact not a basis for not investigating a matter involving a particular director, that they have ceased at that sort of time interval before liquidation.

Mr Tanzer—I will let Mr Longo answer for himself because he knows more about it. But the way I understood Mr Longo's statement was that he was stating the fact that Mr Callinan had resigned a couple of months previously; at no time certainly have I advanced that as a reason, nor is it advanced as a reason, for not proceeding against any particular person. The reasons for not proceeding were as I set out before.

Senator CONROY—I want to come to some of those allegations that you say are not in the liquidator's report but arise in the statement of claim and perhaps other places and I was wondering if you could respond. I might run through them all. It is quite a lengthy list—I apologise—as to why Callinan should not be prosecuted for the following offences and breaches of his director's duties.

The reasons stated are that he: allowed Giant Resources to trade whilst insolvent; breached his duty to act in good faith in the best interests of the company as a whole; breached his duty having regard to the financial position of the company to have regard to the interests of the creditors of Giant Resources; breached his duty in the circumstances by not taking any action that would prevent prejudice to the position of existing creditors of the

company; breached his duty to avoid placing himself in a position where his duty as a director conflicted with the duty he owed as a director of another company or other companies; breached his duty to act with reasonable care, skill and diligence in the exercise of his powers and duties as a director of Giant Resources; breached the statutory duty placed upon him by section 229(1) of the Companies (Queensland) Code to act honestly in the exercise of his powers and discharge of his duties as a director of Giant Resources; breached the statutory duty imposed upon him by section 229(2) of the Companies (Queensland) Code to act with reasonable care and diligence to act with reasonable care and diligence in the exercise of his powers and the discharge of his duties; breached the statutory duty imposed upon him by section 229(4) of the Companies (Queensland) Code not to use his position to gain advantage for any other person; in causing Giant Resources and others to grant various securities acted in breach of the relevant duties I have referred to above; caused and permitted Giant Resources to carry on business in breach of the relevant duties as I have described above; caused Giant Resources to continue to carry on business at the insistence of and with the assistance of Pioneer International Finance Limited and Pioneer International Limited for the purpose or partly for the purpose of preferring and/or protecting the interests of Pioneer International Finance Limited and Pioneer International Limited; breached his fiduciary obligations to Giant Resources by causing or procuring Giant Resources and others to grant various securities.

That is a fairly impressive list of allegations. You are saying that the liquidator said they are a bit old and the liquidator said 'Don't do anything.'

Mr Longo—Senator, with the greatest of respect, those allegations—

Senator CONROY—They deserve investigation.

Mr Longo—The allegations were made against all the directors and in the case of Mr Callinan were subsequently withdrawn. Those very matters were presumably taken into account when the liquidator filed his report with the ASC.

Senator CONROY—That is a civil matter. That does not take away from the civil action.

Mr Longo—Perhaps I am not making myself clear. They are allegations in a pleading, they are not evidence of anything, they are merely allegations. I suppose what I am trying to explain is that those allegations were subsequently withdrawn. They were discontinued against a lot of the directors, including Mr Callinan.

Senator CONROY—So was the case against Pratt.

Mr Longo—So they do not constitute evidence of anything, they are merely allegations.

Senator CONROY—You are supposed to investigate allegations.

Mr Longo—Our job is to commence investigations where there is some evidence of a contravention which would warrant the exercise of our compulsory power.

Senator CONROY—Did you conduct any interviews?

Mr Longo—We had the benefit of a very lengthy liquidator's report, we had the benefit of lengthy previous litigation and an assessment was made, as we do routinely of reports of this kind, that there was insufficient evidence to warrant the commencement of an investigation. I really cannot take it any further now—perhaps Greg can—but I have reviewed this file because there seemed to be some indication in the press that there might be an interest in the matter.

Senator MURRAY—To put it in common parlance, you are describing in legal terms an ambit claim.

Mr Longo—I think that is a fair way of putting it. The pleadings are merely allegations. Very serious things are put in pleadings from time to time and they get a lot of press but the duty of the commission is to look at the evidence, look at the documents and to put due weight on the report of the liquidator who has done the work, who has reviewed the documents, who is under a statutory duty to do those things and to bring to our attention offences.

Parliament expects us to discharge our duty with those liquidator's duties in mind. So I do not think I can usefully take it any further now but I am quite happy to be of any further assistance.

Senator CONROY—Unfortunately I have still got some questions. I am interested in your comments on the view expressed by Chief Justice David Hodgson of the New South Wales Supreme Court Equity Division who said in May 1995 that Giant Resources was at least near insolvency at the relevant time. In light of the comments made by Chief Justice Hodgson, I would also be interested in the ASC's view of the statement made by Justice Callinan in the liquidator's hearing that:

The view I had [at the end of June 1989] was that Giant's financial position was satisfactory having regard to the value of [the assets]. . . and I was heartened by the fact that Standard Chartered Bank was prepared to continue or to renew its $30 million facility.

I note, in fairness to Justice Callinan, that the civil action did not proceed against him, but that judgment was entered against the three common directors of Giant Resources and the Pioneer companies, Sir Tristan Antico, Mr Desmond Quirk and Mr Gregory Gardiner.

If I can go back to Chief Justice Hodgson's comment, you do not need to be a lawyer to draw an implication from the fact that there seems to be something wrong. Just because the liquidator says, 'Look, let's leave it alone, it doesn't really matter,' you have got a Chief Justice pointing to what to me, as a non-lawyer, seems to be a fairly serious breach.

Mr Longo—Senator, I have tried to answer your question in the fullest way I can. I do not think I can usefully take it any further without speculating upon the merits of a very complex case which was very carefully considered by the case officers from two years ago, based on a very lengthy liquidator's report. A wide range of considerations were taken into account and the commission decided to take no action against any director of Giant, not just

Mr Callinan. That is a judgment that was made then and, as I say, I have had some opportunity to review what occurred then for the purpose of this hearing. I do not think I can take it any further.

Mr Cameron—I would like to add one thing, Senator, and that is to comment on the fact that it was a civil claim. The significance of that is that those making that claim presumably had some reason to believe they might have been able to establish it civilly; in fact they never did, they withdrew it. That is quite different from being able to—

Senator CONROY—They reached a settlement. Who paid costs? That is like saying Pratt is innocent because he reached a settlement.

Mr Cameron—I cannot comment on anybody else, I am merely commenting on this case. As I understand what Mr Longo has told us, this claim was withdrawn against Mr Callinan.

Senator CONROY—It was a settlement.

Mr Cameron—My point is not about that anyway. My point is that those who propounded the case did not necessarily believe themselves that there was evidence of a criminal offence. It is quite a different thing to make this claim.

Senator CONROY—I note that the action heard by Chief Justice Hodgson was brought separately from the action to which the statement of claim I have referred to applies, although it does relate to the same course of events.

Mr Cameron—Certainly. But I do not think anybody in the room, except perhaps you, knows enough about the actual detail of the matter to comment on the remarks of Chief Justice Hodgson.

I was going to make the point, just for the sake of the record, of course, that in 1989 and at the time of the litigation and at the time of the commission's decision Mr Callinan, as he then was, was an ordinary citizen. He was not treated any differently by the commission, he was not a public figure. We had no idea he would become a prominent public figure and he was dealt with absolutely ordinarily. I think for the sake of the record that really ought to be noted. There is no suggestion that he was dealt with in any way differently to any of the other directors, all of whom also were private individuals.

Mr KELVIN THOMSON—In terms of his own position and legal background, some of the things that have been indicated, which perhaps you would be aware of if you have reviewed the case, it is suggested that in November 1988 he had a conversation with a fellow director of the company who indicated to him that Pioneer might cease its support for Giant Resources. Given that the support seems to have been critical to whatever remaining solvency Giant Resources still had, would you not have expected someone of his background to have been making immediate inquiries into that matter?

Mr Cameron—I think in fact, if I heard your dates correctly, very shortly after that he ceased to be a director. Did you say 1988?

Mr KELVIN THOMSON—Yes.

Mr Cameron—No, he had only just been appointed at that point.

Mr KELVIN THOMSON—Sure, but if you give him a piece of information, would it not seem appropriate to be making inquiries into the matter? We understand that he suggested that legal advice should be obtained and acted upon by his fellow directors. Does the ASC think that is sufficient or would the duty of due diligence of a director require him to seek to ensure that the matter is investigated and that he is informed of the outcome?

Mr Cameron—I think all we can do is carry out our statutory function of deciding whether there is a matter to be investigated.

Senator CONROY—Did you interview anyone other than read the liquidator's report?

Mr Cameron—No, we did not. We have never said that we did. That was my comment about the examination. The examinations were those of the liquidator.

Senator CONROY—Examinations were in the liquidator's report.

Mr Tanzer—The examinations were conducted by the liquidator.

Ms Segal—The liquidator did examine the directors.

Mr Cameron—Using the powers of the liquidator.

Senator CONROY—Have you examined anybody or done anything other than read the liquidator's report?

Mr Cameron—No, we did not, but we never said that we did. We saw no reason to do so on the basis of the liquidator's report.

Mr KELVIN THOMSON—Let's talk about the duty of due diligence of a director. If you are told as a director that Pioneer might cease its support of Giant Resources and that that is absolutely critical to whether or not this company is going to be solvent, what sort of responsibility do you have? Should you not be making sure that is investigated and that you are informed of the results of that investigation?

Mr Cameron—You might as a matter of due prudence make some further inquiries. I do not know if he did and I do not know, if he did, what the result of them was. Bearing in mind what the commission had to do in 1996, we carried out our role. I do not think, on the basis of hypothetical facts, that we should really comment any further.

Mr KELVIN THOMSON—If you are unable to tell us whether or not these facts are accurate, it does not leave us feeling very comfortable that the thing has been investigated properly.

Senator CONROY—In a general situation, if a suggestion is put to a director like that of any company that the main body propping it up was thinking about pulling the pin, what would you do? What would you expect any director to do?

Mr Cameron—Clearly you would expect a director to make inquiries and to act in accordance with the ordinary standard of care that is imposed by the law. There is no suggestion that, taking everything into account, the allegations that arise out of that were the subject of the civil litigation and they were then—

Senator CONROY—I am making a general statement and asking what you would expect a director to do.

Mr Cameron—I am sorry, I am speaking for the officers of the commission. But if you are asking these highly hypothetical questions, clearly as a prudent director, confronted with the information that the person who was propping up the company—I think you put it—was likely to withdraw that support, I would behave appropriately.

Mr KELVIN THOMSON—It concerns me that you appear not to be able to tell us either whether he did take those actions or whether he received that advice. We believe that he received the advice but he failed to take the action. But the point is that we are not in a position to know this without having the benefit of the ASC investigation. If that is the case, it is hard to be satisfied that this has been treated as it ought to have been.

Mr Longo—On that line of reasoning, we would have to investigate formally and comprehensively every allegation that was made to us. Can I just say, we are never going to do that. We place a lot of weight on the advice and inquiries that the liquidator makes. Liquidators are themselves regulated, they are officers of the court and they have important statutory functions. Parliament expects us to take all that into account when we assess what the liquidator has uncovered and on this occasion that occurred.

Can I say, with the greatest of respect, it is not very easy to simply say that on these facts that would warrant a criminal investigation. That involves a whole range of judgments and considerations that the ASC is under a duty to think through before making a decision to investigate. On this occasion that judgment was made and it was made properly. I really do not think I can take it any further.

Senator CONROY—I will still put a number of propositions to you; you may choose to have no comment. Whilst I note that Justice Callinan has claimed that he had no involvement in the negotiation of the security arrangements with the Pioneer company, would not his duty as a director require him to keep himself reasonably informed of those negotiations and the effect they might have on the other creditors of the company and the company itself, particularly given the parlous financial state Giant Resources was in?

Mr Longo—Senator, the content and extent of the director's duty in the particular facts and circumstances you have posed is not one that I can properly assist the committee with right now. It all depends on a whole range of considerations; there is no simple answer to that question.

Senator CONROY—I probably agree. I probably hoped you might have found some of the answers perhaps. I also note that in the Sydney Morning Herald article Justice Callinan has said through his lawyer that because this matter was settled in the commercial courts, with the damages action dropped against him, that it should be the end of the matter. Would you not agree that the mere fact that a commercial decision was made not to proceed against Justice Callinan would not of itself clear him or any other person of that matter if some form of criminal conduct had been engaged in? That is a very important point.

Mr Longo—I have stressed before that in principle the commission always makes a final judgment about whether a criminal investigation is warranted. The fact that civil action has been taken, one way or the other, is not conclusive of whether criminal action is taken. It is all a question of weighing up the likelihood of obtaining the evidence in a way which would warrant the commencement of an investigation.

There are many instances where the commission has assisted or brought its own civil action and followed it up with criminal action. I really do think that is something that is very clear and it must be right because there is no way the commission in the public interest would not take criminal action because of civil action, in principle. But that is not what we are saying here.

Senator CONROY—You will probably need to take this next part on notice. Could you please, if you are able to take it on notice, note in relation to the list of allegations made against Justice Callinan which I listed earlier, the relevant provisions of the Companies (Queensland) Code or other enactments that are alleged to have been broken? Can you also provide in relation to each alleged offence the penalties set out in the relevant statute for the commission of that offence? Is it possible to get that sort of information?

Mr Longo—Senator, the commission is always concerned to be very cooperative with this committee. Those allegations were made by the liquidator—the very same liquidator who told us that there was nothing against any of the directors from the criminal point of view. I am just wondering how helpful it would be for us to speculate upon which sections of the Corporations Law or the Companies Code the liquidator had in mind when making those allegations in a statement of claim for filing in a civil court. I suppose we can ask the liquidator and he might tell you, but I do not know whether the chairman has a different view.

Mr Cameron—Sometimes it might be obvious and sometimes it may not be a criminal offence that is alleged.

Mr Longo—I suppose we could have a go at it but I am just not sure what use it would be.

Senator CONROY—If you could provide it to the committee.

Mr Longo—I have some reservations about it because it is very speculative.

Senator CONROY—If we could have an indication.

Mr Tanzer—I think it needs to be emphasised, lest there be any implication, by listing particular sections and particular penalties, the penalty may have applied to the particular conduct that was alleged. Because, as you have pointed out and Mr Longo has pointed out, there is no penalty in relation to the conduct that was alleged in that particular proceeding because it was a civil proceeding.

Senator CONROY—Can I understand the point you are making? I think if you are able to put a piece of paper together for us, I think you should stress those points at the top in bold. I have one last question. Did the ASC seek any external advice in relation to these matters?

Mr Longo—Senator, I still have a reservation on providing that to you. I would like to think about it, if that is all right. I would like to take that under notice and think about what sort of help we can provide the committee and the form of the help. I am not saying we will not do it. No doubt we will be guided by the commissioner.

Mr Cameron—I understand your hesitation that the allegation is not even an offence.

Mr Longo—That is right.

Mr Cameron—It is all very well to say that it looks like an offence but the person who makes the allegation is not alleging an offence. That is the point I was trying to make earlier when I said these were allegations in a civil suit. I would be concerned that, while I know you seek the document for the best reasons, it is capable of being misconstrued.

Senator CONROY—That is why I suggested you might want to put the points in big bold type at the top, so that it could not be misconstrued in that way.

Mr Cameron—We will do what we can.

Senator CONROY—I have every confidence in Mr Longo.

Mr Longo—It will be a challenge for us.

Senator CONROY—Did the ASC seek any external advice in relation to these matters from counsel or the state or Commonwealth DPP or any other law enforcement agency or was it purely in-house?

Mr Tanzer—Purely in-house.

Senator MURRAY—Mr Cameron, KPMG undertook a study in February this year on the costs of regulating responsibilities for the managed investment function. You will recall this was submitted to the parliamentary Joint Committee on Statutory Corporations and Securities in March at a special hearing. The report estimated that the new ASIC would require over $20 million for the first two years of the new arrangements and $4 million to $5 million each subsequent year, which would suggest from their point of view additional ASIC requirements over the first four years of up to $30 million. Of course, you might not agree with the KPMG study and I understand that.

You said on 27 October to this committee that the ASIC would need no more than 50 people. I understand that is a generalised figure for the managed investments function after the start-up hump, which would suggest that after the first two years the ASIC would require up to $3 million to $4 million a year. The total the government has provided is much smaller, $7.1 million additional funding over four years, including no funding at all in 2000-2001.

My question really is for you to reflect and react to the KPMG figures and for you to reflect and react to your original assumptions and to tell us what has changed, whereby you think the government's $7.1 million may be sufficient for your new tasks.

Mr Cameron—I did cover some of this territory before you arrived, Senator.

Senator MURRAY—My apologies.

Mr Cameron—I am happy to see if I can recapitulate, and I hope I get it right in the same form the second time around. The $7.1 million is extra money that the government is providing in particular for the transition and that will provide 20 to 21 extra staff in each of the next two financial years. In the third financial year, however, the government figuring allows only for $250,000 which is for your parliamentary review of how the legislation is working.

I said earlier that I thought it was possible that we would have to ask the government through the additional estimates process or the next budget or the one after that—there is plenty of time to do it—to continue the extra funding or some part of it into the third year pending the parliamentary review.

I do need to emphasise that in any event it was extra funding on top of the resources the commission already had for its traditional role of registering and licensing the fund managers, trustees and the surveillance activities and so on, so that while regulators would always be happy to have some extra money, I do not think the commission can say that it is satisfied at the moment that it does not have sufficient resources to put in to manage the transition and get the new regime, assuming parliament legislates it, up and running. I do not think I have personally ever seen the KPMG report to which you referred.

Senator MURRAY—I think it was tabled.

Mr Cameron—I know it was tabled but I do not have a copy of it. It was produced at a time when the parliament was getting conflicting material in different directions. As I understand it, it was not produced in any way in consultation with the commission. It represents an outside firm's estimate of how they thought we would deal with the legislation. I think it may have assumed that compliance plans would be more detailed than we think they should be.

The sort of compliance plan we wish to receive and register will not be a detailed line-by-line, blow-by-blow description of the compliance procedures intended to be adopted by the fund manager; it will be an overview of how they intend to ensure that the law is complied with and investors are protected. Perhaps that is part of the explanation for them

having taken perhaps a more—I cannot think of the right word to use—extravagant view of just how much it would cost for the commission's regulatory role to be performed.

I do not know whether Mr Tanzer, who has been involved in this to some extent, is more familiar with that document, or Ms Segal. But for my part I was never persuaded by what I heard about that report to lead me to think we should revisit it. We had a good look at what we were expecting to do and what we needed to do it; we have spoken to the government about it, the Department of Finance as well as Treasury. I am sure—and Senator Campbell said this in the Senate the other day—that if it does not turn out to be enough because we get far more applications, far more schemes to be registered or far more detailed compliance plans than we were expecting, we will certainly say so. Ms Segal is quoted as saying that we will not be backwards in coming forward and that position remains the same.

Senator MURRAY—I think, as an aside, if KPMG has been somewhat extravagant in their views as to costs, it should make us all a bit careful when they produce other reports on other things.

There is another element of funding; because your role is really changing fundamentally with the Wallis package as well as the MIB package—you can correct me if I am wrong—you are receiving extra funding in the order of $19 million for the Wallis functions?

Mr Cameron—Yes, that mixes several things as well. I will make sure I get this right. I think the budget in this current year is expected to increase by about $16 million and some of that is a one-off component to help with the FSI recommendations, the implementations of the Financial Systems Inquiry. Some $5.4 million of it is for the new basis upon which we are funded for information technology. That is quite irrelevant to the FSI context, it is part of the government's moving away from the acquisition council method of funding our normal information technology, so it has produced a quirky increase beyond what it would otherwise have been. I need to emphasise that. The rest of it is a mixture of managed investment funding and FSI funding on an ongoing basis.

Senator MURRAY—That was really my next question. I would assume there are parts of those two sums of money, the $7.1 million and the $16-odd million, which are discrete, but there must be some commonality. Some staff, for instance, would be capable of doing or would do both roles or functions in a regulatory sense; or am I wrong? Is this like separate divisions? How does it work?

Mr Cameron—You are probably right that the staff will end up being more merged. But conceptually, from the point of view of obtaining funding from the government, they have been treated as additional person hours or person years or whatever. In fact we are intending to bring together within the commission both the managed investments role and the new FSI role and to integrate them as far as possible with the ongoing activities of the commission. We do not want to have a Wallis branch of the commission or a managed investments branch of the commission forever, so they will be mixed with the other activities of the commission in due course. Staff may well be crossing those boundaries but conceptually our funding is on the basis of the overall additional work that needs to be done.

Senator MURRAY—Is that $16 million a year?

Mr Cameron—I am just checking these numbers. The current information technology funding is $5.4 million, the financial systems inquiry money in this current year is $10 million, which is a mixture of the one-off money and the recurrent money. We are having some funds transferred from the ISC and the ACCC totalling just under $4 million and the managed investments funding is almost $4 million in the current year.

Senator MURRAY—Would it be better from the committee's point of view if we were to regard all those funds—although you have broken them out—as being in fact lumped together, probably with the exception of the IT stuff?

Mr Cameron—With the exception of the IT.

Senator MURRAY—And to say to ourselves, that is the total amount of money which is available to you to do your increased regulatory role in those two areas. Because if we took that approach then a shortfall in one area may be compensated by that. Are you with me? People are arguing you are under-resourced in one area. I have not heard anyone say you are under-resourced in the Wallis area but I have heard it said on the other side.

Mr Cameron—Once the allocation occurs the commission's money is all in a large pool. That is why I said earlier, for example, that we have funded the preparation of the managed investments out of the existing funding and we will probably internally make adjustments once the additional funding comes through to pick that up. We have transferred existing people and existing money to enable this preparation to occur.

Senator MURRAY—I am sure it is in the papers and I should have checked before I came, but what will be your total increase in staff as a result of this?

Mr Cameron—Let me see if I can recall the details off the top of my head. The people coming across with the FSI are something around 80 to 85 in total, including the 25 from the superannuation complaints tribunal. There is a total of 60 for managed investments. Is that right?

Ms Segal—It is just over 100.

Senator MURRAY—So where are we with that answer?

Mr Cameron—I have been given a piece of paper that reminds me of the details. We are expecting 21 new staff in managed investments and an additional 60 in the financial systems inquiry area. That does not include the 25 for the superannuation complaints tribunal, so it is the 85 plus the 21.

Senator MURRAY—You are quite right, Mr Cameron: I heard the parliamentary secretary say that if you are not resourced well, the government will make sure that you are properly resourced. However, the parliamentary secretary is a junior minister and I doubt if he can bind cabinet. So I make the request to you on behalf the committee, if I may, that you should alert this committee as well as the government if you feel you are short resourced in that area.

CHAIR—I am sure he was speaking with the full authority of the Treasurer.

Senator MURRAY—I hope so. But I make that as a serious request because it is part of our statutory responsibility to ensure that you are capable of doing the job you are given by the legislation to do.

Ms Segal—Could I just add, Senator Murray, your point earlier was a very valid one, that we will be operating as an organisation in a functional way obviously with functional responsibilities and there will be some people who will be dealing with compliance in managed investments as well as compliance in other areas. As Mr Cameron said earlier, it is very much a matter of putting these things in place, getting through the transition; once the legislation gets passed, going through the initial phase of managed investments and seeing how it goes.

It is a very valid point to say that if it is not adequate, it is certainly a matter to come back on. But the most appropriate thing to do is to see how it is going and where we are and where we end up in a year, because it is only then that we see how many managed investments lodge compliance plans, et cetera, and how many people are actually needed.

I am confirming your offer and indeed confirming what you said earlier, that it is a matter of assessing as we go. The estimates have been done on the basis that those are the funds that we think are required but it is very much a matter now of seeing if that is the case.

Senator MURRAY—Thank you, that is all I have, Mr Chairman.

Senator COONEY—If I can ask about the report. The commission has its regulatory function about which you have been tested just now and it also has a facilitating function, to make sure that the corporate world runs well and produces goods and services for us all, which I hope are not taxed as such in the coming months.

CHAIR—They are already taxed, Senator Cooney.

Senator COONEY—Does the commission give thought in that context to helping build up a culture not of compliance but an ethical culture; a culture where people do not do things so much because the law requires them to but because that is the sort of thing we want done? Do you ever look along those lines at all? There is a report that the legal and constitutional committee brought down a few years back on the duties of directors, which went into this ethical thing, a very definitive report.

Mr Cameron—We are at the moment involved in some consideration of just what our role in that area should be. You could take a narrow view that we are a law enforcement agency and the law sets down minimum standards and it is our role to ensure compliance with those standards but you could also take a more expansive role and say that good corporate governance involves going beyond the strict requirements of the law. We do from time to time discuss the extent to which the commission should do that.

The reason why we are wary about doing that is that it can rather blunt the image of the law maker if it expresses opinions about matters that are not within the law and it gets rebuffed too often because it weakens its image as a regulator and as a law enforcer. Notwithstanding that risk, the commission decided some time ago that it was prepared to take the risk of selectively and at senior level expressing opinions on matters as to what is appropriate and what is not appropriate for good corporate governance.

I am not sure whether you are fully aware of this, Senator, but this now matches the preference of the government, in the sense that through the context of the APEC finance ministers Australia is taking a particular interest in corporate governance in this region. The Treasurer has committed the government, and I am almost tempted to say the commission, to taking a higher profile in terms of encouraging good standards of corporate governance, not only within Australia but in the region, helping the region to improve corporate governance.

I think there is not much doubt in the minds of most observers that one of the factors in the Asian financial crisis has been a failure to some extent of corporate governance in some of the institutions, some of the larger enterprises of—I hope you will not press me for examples, even of countries.

Senator COONEY—I cannot even think what country that could be.

Mr Cameron—I struggle immediately to name them. It is really because there is a sensitivity about the issue, even domestically, that we are cautious in doing so normally. But we have decided that we should have some consultations with industry and we are doing so within the next few weeks, to expand our horizons to some extent in this corporate governance arena and to be prepared to chance our arm a bit in terms of encouraging better practices, even when they go beyond the strict requirements of the law.

Senator COONEY—If you are giving a talk at a dinner, people pay a lot of money to come and hear you, Mr Cameron.

Mr Cameron—You can summon me to come here and talk to you for nothing. I do not know why you would pay good money for it.

Senator COONEY—We see you at your greatest. Is that the sort of thing you do talk about and encourage?

Mr Cameron—I can suggest an example. You could imagine hypothetically an instance where a company had the candidates for election to its board listed in a particular order that produced a result where the shareholders perhaps would not get a reasonable opportunity to vote and express their wishes on who they wanted on the board because all the places could be filled up before they had voted on some of the candidates.

The commission takes the view now that if that were to happen we would be prepared to express an opinion, certainly initially privately and if necessary publicly, that it would be a good idea for the company to organise its affairs so that shareholders thought they had a genuine opportunity to vote on who they wanted on the board. It is possible to structure the voting mechanism so that it can occur and we would be encouraging companies to be

responsive to their shareholders. That is not within our legislative remit but it is an example of where we would be prepared to say something.

Senator COONEY—I think in the new legislation coming through there are provisions to say that the ASC might be able to do good things—this is not how the section reads but it is the thrust of it—to benefit shareholders. We had a very good session in the estimates committee about workers and things like that, which were very lucidly explained to me. Would you chance your arm, once that legislation was in, to talk about the obligation of companies to be good social citizens as well or would you feel that is going a bit beyond your brief?

Mr Cameron—It is an interesting challenge that you pose for me, Senator. As you know, it is a matter of great legal controversy, the extent to which the obligations of a company go beyond the initial narrow class of stakeholders—the expression stakeholders itself might be controversial—or the wider group of employees and the community generally, for example, with respect to environmental issues—one of Ms Segal's particular interests. That is a matter of corporate responsibility of a more modern kind which is not yet clearly understood in the law and it may well be something the commission should look at in the future.

Senator COONEY—The demons of the 19th century are still with us.

Mr Cameron—I am not sure if it is you who keeps quoting Foss v. Harbottle in the Senate. Some of the demons are being removed.

Senator COONEY—You have got some very good people on board.

Ms Segal—I certainly think that the environment and occupational health and safety areas, which used to be considered matters that were not legislated for, are now clearly legislated for and are part of the legislative responsibility of the corporation.

Senator COONEY—Things are obviously moving. It would be good to see the commission keep its function in the forefront of corporate life, if I can use that expression.

Ms Segal—Internationally, in terms of whether it is accounting standards or whatever, you see corporations having to comply with various filings in the United States to do with environmental exposure in a way that is moving internationally. No doubt that will be taken into account as those things are looked at.

CHAIR—Can I ask a question in relation to the Geneva finance case, where I understand you used the services of Mr Peter Quigley free of charge. The report in that case cautioned against that practice of using experts when there might be a financial conflict of interest.

Mr Cameron—As I think you know from your briefing notes, that was a case that the commission won at first instance and then won an appeal and you are quoting from the appeal. I am advised that the unsuccessful appellants in that matter are now seeking special

leave to appeal to the High Court so perhaps it is not awfully appropriate for me to say very much about it.

In another context Mr Longo was reminding us all earlier that receivers, liquidators and so on perform a very important regulatory role and in a sense the way in which we relate to them and the way in which we ensure that there is not a wastage brought about by duplicating investigative activities, is a very important part of our judgment. That particular case involves judgments made by the commission some years ago. Having regard to the comments that have been made, we would certainly be very careful about taking advantage of such free services in the future.

There are other contexts in the public arena recently where it has become quite obvious that there can be concerns about that. There were no such concerns in this case in our view but we will now I think be more wary than we might have been as a result of that experience.

CHAIR—Do you have any consultants currently engaged in investigations?

Mr Cameron—Insolvency practitioners?

CHAIR—Consultants.

Mr Longo—There might be one or two. We often retain experts to assist. Specialist accountants and barristers assist us with our investigations from time to time, so we use consultants in that sense. If you are talking about consultants in the technical ASC Law sense, I do not think there would be many of those at all, maybe one or two.

CHAIR—Any providing free services?

Mr Cameron—No, absolutely not. We could use some.

CHAIR—In your report you indicated there was room for improvement with regard to the timeliness of investigations. I think in 1996-97 you completed 48 per cent of market investigations within nine months and you aimed for 85 per cent of major corporate investigations to be completed within 12 months but succeeded in completing only 67 per cent in that time frame. I am wondering what steps might have been taken by the ASC to achieve your targets, particularly the nine months time frame.

Mr Longo—We would not want to anticipate the thunder of our next annual report, Senator, by letting you know what wonderful results we have been achieving. But I can say that the timeliness of our investigations, with one or two very public exceptions where concerns have been expressed, I think has improved. We are obviously looking at this now, with annual report time coming upon us again. I think the current statistics for the KPI—

Mr Cameron—That is the key performance indicator.

Mr Longo—We are trying to complete 85 per cent of our investigations in less than 12 months. I think we are very close to achieving that probably for the first time and that is

very gratifying. In the market area as well I think you will see some improvements. That is a pretty rough way of looking at it.

There are a number of other steps the commission has been taking in the last 12 months which are beginning to be felt, with greater use of project management methodology, a greater use of IT and our training initiatives are beginning to pay off. All of those sorts of issues contribute to more timely investigations. In broad terms, I think you will find in the next annual report those figures should have improved. Rather than promise you they are going to improve, let us just wait and see. I think you will find they have improved from last year.

There is still a long way to go. One of the big issues facing regulators and law enforcement agencies all around the world is the capacity to be able to respond promptly and effectively to misconduct and it is something we are working on all the time.

Senator MURRAY—Are there any court systems, other than the six court systems we have, which tend to hold you up more than others as a result of being clogged or underresourced or underfunded?

Mr Longo—Generally speaking we operate in the civil courts for our civil work and generally the Federal Court. So far as the criminal work is concerned, that is done by the state criminal courts; the Federal Court does not have any criminal jurisdiction. It is very hard to generalise about that because there are so many reasons for delays.

Some things are in our control in terms of the time it takes to do an investigation but a lot of things are not in our control. Things are even less in our control once the matter leaves us and becomes the subject of charges. There are so many reasons for delays: the court lists vary from state to state and the approach of defendants varies from matter to matter. There is a wide variety of reasons for why there might be a delay. I do not think I could say that a particular court is not performing as well as another particular court, I would not put it that way at all. It is a rather complex subject really.

Senator COONEY—The Commonwealth has a criminal jurisdiction but it does not have any criminal courts. Is that the position?

Mr Cameron—Yes.

Mrs DE-ANNE KELLY—Under the corporate economic law reform program insurance agents are presently under the Insurance (Agents and Brokers) Act. As I understand it, a company can no longer be licensed; the licence has to be held by an individual. Does that mean in effect that those companies will have to be sold to an individual, which is going to attract considerable capital gains tax? Is that not going to create difficulties for insurance agents?

Mr Cameron—We are just caucusing to make sure we have the same understanding of the position. I think I am right in saying, subject to correction by my colleagues, that the change will not take place as part of the 1 July mooted change to ASIC and APRA. Secondly, if I understand its proposed nature correctly, all of the people presently licensed

by the ISC will come under our jurisdiction. When that happens our regime does not preclude the company being the licensee but it requires the individual deemed to be appointed as a representative of the licensee, if you like. I cannot see why it would prevent those companies being able to be licensed.

Mr Tanzer—I think the issue relates to the corporate law economic reform program proposals for streamlining licensing. There are proposals for how the licensing of agents may be done in the future. I think the basic answer is that it is a proposal, as I understand it at this stage. Probably the question is better directed to the minister or to the department and Treasury, which is responsible for developing the policy. As Mr Cameron says, under our legislation, to be a securities industry licensee the person can be either a corporation or an individual.

There is definitely a policy objective in our legislation that we should not have lots and lots of individual licensees; that there should be a licensee, who can be an individual or a corporation, who basically takes responsibility for a number of representatives because they have more direct control of the activities of those representatives. There is a difference between that and the approach which has been taken with the insurance agents and brokers legislation since 1984. I think that is what is intended to be streamlined as part of these proposals.

Mrs DE-ANNE KELLY—So is that going to force the company shares to be sold to the individual and attract capital gains tax, bearing in mind it may be a $1 company? It is going to happen?

Mr Tanzer—I do not know. As I understand it, that is a proposal in the corporate law economic reform program and it is really a question that is better directed to the department or the minister.

CHAIR—It has not been translated into legislation yet?

Mr Tanzer—No. If it is part of the corporate law economic reform program, that is correct, it has not been.

Mr Cameron—It would be part of the CLERP 6, so called, and CLERP 6, as far as I am aware, is not yet available, even in draft form.

Mr Tanzer—It has not been produced yet.

Mr Cameron—I think the point you are making should be brought to the attention of the government, if I might say so, or brought to the attention of Treasury as part of the consultation process on CLERP 6.

Senator MURRAY—CLERP and CLRB sound like trolls, don't they?

Mr Tanzer—Before we finish, I want to make a request to the committee. Not long before this hearing the committee secretary sent to Mr Cameron a letter relating to two

matters. These are matters about which the committee had received correspondence and we have been asked to provide a response, which we will do in due course.

One of those matters referred to allegations made by a person of misconduct by ASC officers and that matter will be pursued. We have a published policy within the commission of pursuing complaints of that nature which involves an internal investigation and in due course a report and so on.

The reason for raising it here is that the committee secretary's letter referred to your having received two signed affidavits from people relating to this misconduct. For the purposes of our investigation it would be very useful if we had access to those affidavits because obviously that would provide part of the information that our investigating officer would want to have a look at. I appreciate that it is a matter entirely for the committee whether or not you wish to give us that but I make the request that you might make that available to us.

Senator COONEY—I think if allegations are made against people, they are entitled to know what those allegations are, particularly if they are in affidavit form. My own instincts would be, if I just got a letter, I would not disturb my commission on just say so; if there is some further evidence, I would. That is just my own personal feeling: I think it is a bit unfair to have people investigated on the basis of allegations that are not made clear to them.

CHAIR—We are happy to provide it. Any other views on providing a copy of the affidavit?

Mr KELVIN THOMSON—No problem.

Senator MURRAY—No problem.

Mr Cameron—It is interesting that the word affidavit is used because that certainly creates for us the impression of a sworn document in court proceedings but I am not aware that there are any court proceedings. I expect what they are is declarations of some sort but if they are sworn documents, presumably those who swore them expected that they might be made available to those investigating the complaint.

Senator COONEY—Have you been watching *Our Mutual Friend* by Dickens on Channel 2? Remember he was calling the affidavit the 'Alfred David'?

Mr Cameron—No, I missed that.

CHAIR—Mr Cameron, I thank you and your colleagues for the time you have given us this afternoon and the way in which you have answered questions. We will look forward to continuing this in relation to our hearings on the CLERP bills.

Committee adjourned at 6.31 p.m.