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JOINT COMMITTEE ON CORPORATIONS AND SECURITIES

Reference: Company Law Review Act 1998

TUESDAY, 17 AUGUST 1999

SYDNEY

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JOINT COMMITTEE ON CORPORATIONS AND SECURITIES

Tuesday, 17 August 1999

Members: Senator Chapman *(Chair)*, Mr Cameron, Mr Rudd, Mr Sercombe and Dr Southcott

Senators and members in attendance: Ms Bishop, Mr Cameron, Senator Chapman, Senator Conroy, Mr Rudd and Mr Sercombe

Terms of reference for the inquiry:

To examine whether:

directors of a listed company should be elected by a proportional voting system;
companies should be required by the Corporations Law to report on compliance with environmental regulation;
listed companies should disclose information, which is disclosed to, or required by, foreign exchanges;
companies should be obliged to report any proceedings instituted against the company for any material breach by the company of the Corporations Law, or trade practices law, and, if so, a summary of the alleged breach and the company's positions in relation to it;
an application to register a proprietary company should include a copy of its constitution;*
listed companies must give at least 28 days notice of a general meeting;
listed companies should be required to disclose more information relating to proxy votes;
whether listed companies should be required by law to establish a corporate governance board and an audit committee;
whether the directors and executive officers of a company should be obliged to report to the auditor any suspicion they might have about any fraud or improper conduct involving the company;
whether a director of a listed company should have the power to call a meeting of members;
whether listed companies must specify a place, fax number and electronic address for the purpose of receiving proxy appointments;
whether listed companies' annual reports should include:
(a)discussion of broad policy for determining the nature and amount of emoluments of board members and senior executives of the company; discussion of the relationship between such policy and the company's performance; and
(b)details of the nature and amount of each of the emolument of each director and each of the five named officers of the company receiving the highest emolument.

**This includes consideration of the proposed amendment to Part 2A.2, Section 117 (2)(k) of the*

Law "Applying for registration" namely, that:
(ka)for a company limited by shares or an unlimited company, a statement that the written agreement referred to in subparagraph (k)(i)

i. includes a summary of the rights and conditions attaching to the shares agreed to be taken up;
ii. sets out the total number of persons who have consented to be members and the information referred to in subparagraphs (k)(i) and (k)(ii);
iii. contains a statement that, if a constitution has not been adopted, the Replaceable Rules will apply and that they create a contract between the members the terms of which may alter if the Replaceable Rules change after the company is registered.

WITNESSES

Committee met at 9.44 a.m.

ACTING CHAIR (Mr Sercombe)—I declare open this public hearing of the Joint Parliamentary Committee on Corporations and Securities and welcome all the witnesses who will be appearing before the committee today. The purpose of this hearing is to take evidence on certain matters arising from the Company Law Review Act 1998. This is the fourth public hearing on this inquiry and the committee expects to conduct a further hearing tomorrow in Sydney. The committee has received 89 written submissions which it will consider, along with the evidence it receives during its public hearings in preparing its report.

The committee prefers to conduct its hearing in public; however, if there are any matters that a witness wishes to discuss with the committee in camera, we will consider any such request. I would also like to remind witnesses that the giving of false of misleading evidence may constitute a contempt of the parliament.

[9.47 a.m.]

FALCONER, Mr Ian Leslie, Company Secretary, Rio Tinto Ltd

ACTING CHAIR—Welcome, Mr Falconer. The committee has before it your written submission. Are there any corrections or alterations you wish to make to that submission?

Mr Falconer—No, Chairman.

ACTING CHAIR—I invite you to make an opening presentation to committee if you wish, or you may speak to your written submission.

Mr Falconer—Firstly, thank you for the opportunity to make this oral presentation. We feel it is important for companies to have an input into this process, as well as our advisers and lawyers and so on. Rio Tinto is delighted to see that the terms of reference of the inquiry have now been expanded to examine the operation of section 249D about the 100 shareholders requisitioning general meetings, and that was one of the points in our submission.

The other two matters that we wanted to bring forward today were the need for environmental reporting under the Corporations Law, and the new section on the disclosure of proxy voting statistics as far as proxy voting intentions are concerned and the actual proxy voting, or the results of proxy voting.

Firstly, just briefly on environmental reporting, I should say at the outset, as we said in the submission, that Rio Tinto is a strong supporter of voluntary reporting on environmental matters. We believe reporting our performance on environmental issues to be just as important as reporting the commercial, financial and technical aspects of the business. We see that social environmental reporting assists in achieving the corporate goals because it helps us to get cooperation from our host communities in the areas where we operate, and it also assists the other stakeholders in our operations.

But we do feel that the inclusion of the reporting requirement in the Corporations Law is unusual because it adds a certain amount of confusion to the reporting requirements and voluntary disclosures that we have under the various pollution control acts and also, importantly, the new national pollutant inventory where companies are required to report on environmental issues. There are other groups, such as the Mining and the Minerals Council, that produce an environmental code of work, and others looking at environmental regulation.

So the new section 299(1)(f), the requirement to report in directors' reports, does give a certain amount of duplication to reporting, and particularly in groups of companies such as Rio Tinto. The law as it stands requires all of the subsidiary companies in our group that are affected by environmental regulation to report in their directors' report, as you know. In our case there are probably 20 companies that are preparing their statutory accounts in February and having to report and are not able to refer to the group annual report which would come out in about March or April.

We have this problem of sweeping up the smaller subsidiaries and them having to report in the directors' report on compliance with environmental regulations, yet them not being able to refer to that because the class order 98/2395 requires information which is excluded from directors' reports to be made available at the same time as the directors' report of the company, and for the directors' report of the subsidiary company not to be made available without attaching the excluded information. We find that impossible in the way that we work.

Those subsidiary statutory accounts receive no public exposure. They are not regarded by the groups of companies as an important communications tool. We simply file them with ASIC and there is no comment in the media from them. Certain interest groups may delve into the ASIC database if they wish to, but that would not be a very effective use of their time, because there is a much better report prepared on a group basis. We did quote examples in our submission of a subsidiary of the Rio Tinto group—Comalco. It produced an environmental report in its own annual report. In the directors' report, it was able to refer to the environmental section of the so-called glossy annual report. Other companies, such as Rio Tinto, are unable to do that.

In summary of environmental reporting, we are strong supporters of the need for it, but we feel that having it in the Corps Law is duplication and that there are unintended consequences for subsidiary companies in the preparation of their statutory accounts. It is not seen by them as a communications tool.

The second issue we would like to mention is the disclosure of proxy statistics. Rio Tinto is one of the few companies that votes on all items by poll, and we have done that for the last two years. This is mainly because of our unusual dual listed company structure with Rio Tinto PLC in the UK, where we combine the votes of the UK electorate with the votes of the Australian electorate and then make a joint decision on the combined vote. The mechanics of that require us to have a poll on most items, but last year and the year before we decided it was probably simpler to have a poll on the so-called separate decision items, which are those that are decided by the Australian shareholders only. So we have been routinely going to a poll and announcing the results of the poll after the votes have been combined. A media release would announce the results, and that is quite straightforward.

Now the new section 251AA has added some confusion: there is a requirement to report the statistics of what I would call proxy voting intentions and, on top of that, a requirement to report the votes actually cast in a poll. So we have two sets of numbers. We find that a little misleading and, I must say, our announcement of those figures was an unusual nine-page document.

The third issue is the treatment of abstentions in the Corporations Law. The way that is set out in the section is contrary to the common law approach to an abstention, in which we feel an abstention is not a vote, whereas the Corporations Law talks in terms of an abstention being a vote and having to report the number of abstentions. Our submission quoted what we feel is the leading authority on this—*Horsley's Law and Procedure of Meetings*. Clearly, their view and the common law approach is that the abstention is not a vote.

Another practical aspect of the abstention, or the so-called abstain box on the voting forms, is that institutions use that abstain box, we believe, as a sort of balancing item. They may have received instructions to vote 'for and against' for a certain number of shares. Some of them say, 'We haven't got instructions for the rest, but we'll abstain just to balance up our total holding with the total number of shares that we are voting for.'

Another issue here, on proxy voting intentions, is that most companies do not go to a poll, and a vote is taken on a show of hands. That would mean that the proxy intentions are not relevant in the decision, because those intentions are not actually transferred into votes. Of course, if we have the situation where the show of hands goes one way and the proxy intentions go another, it does cast some doubt on the vote that has been taken on a show of hands. In summary, we do not see any problem in reporting actual votes cast to the media and, if necessary, to incorporate them in the minutes, but we do not see the need to report these proxy voting intentions.

The other issue, of course, is the treatment of the abstentions. We do not feel that they should be reported on in any way in that they are not a vote. The last item we want to enlarge upon this morning is the question of section 249D: 100 shareholders to convene an EGM. I must say it is very timely to see that now under examination, given the experiences of Wesfarmers and North. You may have seen a documentary on SBS a couple of weeks ago which gave us some background to that.

Rio Tinto recognises that provisions should be made in the Corporations Law to protect the rights of all shareholders, small and large, but we do need to see that there are adequate safeguards against abuse of those rights. One example of that is the old share splitting tactics that we have seen in Wesfarmers, North and, indeed, Rio Tinto. I have quoted in a letter to Minister Hockey an example of that. Six days before the Rio Tinto annual meeting last year, I received 50 off-market transfer forms for one share each and for those 50 shares to be taken from a shareholding of a high-profile union official. Some of those new shareholders with one share attended the meeting; some could not attend and appointed two proxies to attend on their behalf. So we feel that is an unusual way to go.

The 100-member threshold, which now has no monetary minimum value, does seem to Rio Tinto to be inadequate, given the changes in technology—how easy it is now to garner 100 shareholders by clicking a button on the mouse to go through to the Internet and have your name recorded—and the explosion of share registers through successful privatisations. For example, Telstra has 1.4 million shareholders and the AMP has 1.18 million shareholders. These are huge registers, mega registers, compared with Rio Tinto's 40,000 in Australia and 100,000 in the UK. We are a small player in that field. In looking at the cost of mailing information for an extraordinary general meeting called by shareholders, I suppose you would be looking at $1 million or $2 million all up for mailing and printing of materials, venue hire, security—all that sort of thing—for companies with such large registers.

In the case of Rio Tinto, we have a dual listed arrangement with Rio Tinto PLC. If we had received a request for a meeting from 100 shareholders, we may well be required to convene a meeting of Rio Tinto PLC in London if it is regarded as a joint decision—that is, something that both electorates need to vote on. That would be a pretty large expense to do

that, given all the logistics required. With those problems, we see that there is an opportunity already for shareholders to put items on the AGM agenda. So do we really need to make it so easy for 100 shareholders, perhaps with one share, to convene a meeting of their own when there is already the ability to have items put on the regular AGM agenda to be discussed by all shareholders, rather than the few that have the single interest that is going up to an extraordinary general meeting?

We would have seen in the cases of North and particularly Wesfarmers that the matters to be discussed at the EGM were not really permitted to be discussed at the AGM at law. The QC said that these were matters that should be in the realm of directors and management and not matters to be decided by shareholders. Even with that advice, Wesfarmers has felt it is best to go ahead and hold the general meeting.

Finally, we would suggest that it may be a good protection and a good safeguard that the number of shareholders be related to a percentage of the number of shareholders rather than 100 and that a requisition and the holding of a meeting should be subject to the prior approval of ASIC as a condition precedent to the holding of that meeting to ensure that it is taken for a proper purpose. Chairman, that ends the matters I wanted to enlarge upon this morning.

ACTING CHAIR—Thanks very much. Do you have a view on the percentage of shareholders that would be appropriate in this sort of scenario you are suggesting? Would that vary depending upon the scale of the company?

Mr Falconer—No. We have often thought of what that should be. We have got five per cent in the law, as you know, for the number of votes. Maybe that is an appropriate number—five per cent of shareholders.

Ms JULIE BISHOP—That would be a lot for Telstra.

Mr Falconer—It would be a lot for Telstra.

ACTING CHAIR—Thank you. Any further questions?

Ms JULIE BISHOP—On the environmental issue, a company like Rio Tinto obviously has international operations as well. The compliance is required with the Australian regulation. Should the disclosures be limited to complying with the Australian regime?

Mr Falconer—I suppose it is the Australian Corporations Law. Rio Tinto reports internationally. I think other companies may find it difficult to report adequately under the law on their international operations. But I really cannot give you much of a view on that. I do not know.

Ms JULIE BISHOP—Secondly, there is the requirement that there be disclosure of particular and significant matters. Does the terminology ‘particular and significant’ give you any concern in terms of the company’s operations?

Mr Falconer—No, it does not give us any concerns in that we have very good systems in place for looking and monitoring environmental performance. We have got assistance from people like the Minerals Council. The company has no problem in determining what is particular and significant.

Ms JULIE BISHOP—Your point, as I understand it, is that this is not the appropriate place for environmental reporting.

Mr Falconer—Correct. It is not appropriate there. It sweeps up too much in the small subsidiary companies that just simply lodge accounts with ASIC.

Ms JULIE BISHOP—So it would not be sufficiently valuable in that. It could be more valuable if reported elsewhere?

Mr Falconer—Definitely, yes.

Senator CONROY—You seem to have a horror of this vote splitting thing. I did not actually follow what the problem was.

Mr Falconer—The problem is that we see that as an abuse of that power in the Corporations Law to split votes to less than a marketable parcel—such as to one share—and then have a shareholders' meeting overrun by people with a single interest. This precludes the opportunity for, as the law talks about, shareholders as a whole to have an ongoing discussion at the annual meeting because there are so many people there with one share and perhaps having appointed two proxies. They really take up a lot of the time of the meeting on one issue. It is probably better for shareholders as a whole to cover the whole range of the company's performance.

Senator CONROY—Would you have the same problem of 50 shares being split if 50 individual shareholders purchased like that? Would you have the same problem? What I am trying to get to is that, if you were able to introduce something that stopped this, would it actually stop your problem?

Mr Falconer—No. It is pleasing to see that the Australian Stock Exchange's new listing rules, which come in on 1 September, do provide the right for a company to refuse to register an off-market transfer which is less than a marketable parcel. A marketable parcel is a $500 parcel of shares. Companies used to have the right to refuse to register transfer prior to the introduction of CHESS. With electronic trading, it was impossible for the company to intervene when it all happened automatically. But under the CHESS regime the CHESS participants are forbidden from processing a transfer which would result in the creation of less than a marketable parcel, so the electronic side is under control. Now, under the new listing rules, off-market transfers will be able to be restricted.

Senator CONROY—Democracy is often described as the worst possible system except any other you would like to suggest.

Mr Falconer—Which system, sorry?

Senator CONROY—Democracy.

Ms JULIE BISHOP—It is a novel concept.

Senator CONROY—What is an acceptable market bundle?

Mr Falconer—An investment of $500 is what has been decreed by the Australian Stock Exchange. It used to be based on the number of shares, depending on the range of the share price, but it has now been simplified.

Senator CONROY—And the Stock Exchange's profits are determined by how many people list on there?

Mr Falconer—How many people and, I guess, what value adding services they can provide to their customers. As you know, they are embarking upon new projects to improve returns to their owners.

Senator CONROY—It must be difficult for them to regulate the larger companies that are listed on them when they are the determinant source of their profit.

Mr Falconer—I could not comment on that.

Senator CONROY—As I said, I understand the problem that your company as well other companies would face and it would not necessarily just be around environmental issues. It could involve industrial relations or a range of other issues. I am just perplexed by the thought that, simply by taking the step that the ASX apparently are now listing, you actually solve your problem. Anyone who is going to this extent to, some may say, disrupt your meetings—others may say have genuine shareholder participation—must be organised. To me it seems short-sighted in the fact that it will not stop the problem if these people are well organised. They are clearly well organised, so it is as if you are introducing a rule you know is really not going to work.

Mr Falconer—I agree, and it is up to the company to improve its communications with those so-called single interest groups. It is through things like this environment report and our ongoing relationships on the employee relations side. But I think this business about marketable parcels is really to do with the convening of meetings, putting the company and the other shareholders to the expense of having an extraordinary general meeting on a single issue, convened by 100 people with one share or, in the future, 100 people with a marketable parcel.

Senator CONROY—Is the problem you are identifying the calling of a meeting or the actual conduct of a meeting?

Mr Falconer—I am in this presentation referring to the calling of a meeting, the section 249D issue. The conduct of the meeting, as you say, will be a problem that will continue on and I think that is, again, down to the companies and the chairman, in particular, to provide the right atmosphere for discussion at annual meetings. But this particular issue is the ability

to call a meeting and, as I say, putting the company and the other shareholders to the expense and everything else that goes with an AGM.

Mr RUDD—Just returning briefly to the question of the requirement to report on compliance with environmental regulatory regimes, if I read the logic of your submission, I think the simple and unstated proposition is that you are simply concerned about the financial cost of what you perceive to be this excessive compliance requirement, both through the group on the one hand, and through the subsidiary structure on the other.

Mr Falconer—It is not so much financial. It is management time, confusion and uncertainty at the time of preparing the statutory accounts for the subsidiaries of just how is this report being developed. Of course, they have to say the same things and the reporting in the subsidiary statutory accounts is not seen by the stakeholders. If the stakeholders see this, very few of them would go into ASIC's database and extract the accounts of the subsidiaries. So this report enables a fuller discussion, a graphical presentation and a much more user-friendly sort of presentation than you would traditionally have in a directors' report, which is of a subsidiary company, but it is a black and white thing that probably just details a whole lot of figures. Indeed, the figures and the financial position set out, although it is correct for the legal entity, does not purport to give the results of a particular business unit or a segment of a large group of companies.

Mr RUDD—So financial costs arise in terms of the allocation of management time to that task?

Mr Falconer—I think so, yes—the time, uncertainty and the unnecessary part of it in that people do not look at the statutory accounts.

Mr RUDD—Finally—pardon my ignorance on this question, but I am backtracking partly to a question originally asked by Julie Bishop; it concerns where you have a genuine trans-national corporation such as yours operating in multiple regulatory environments—not having read that document there, how does your group manage the reporting of compliance with the multiple and, presumably at times, conflictual environmental regulatory regimes, not to mention the fact that within Australia you have conflictual regimes as well? That, in part, dovetailed with the question of drilling down to which entity operating in which business environment and, therefore, which regulatory environment should provide the most copious and full accounting that is compliant with the environmental regulations which pertain specifically to its operational environment.

Mr Falconer—Yes, it is a difficult one. The company does have the same environmental standards and code of practice for its operations globally. That has been set out as a very definite way we work. In fact, we have a booklet called 'The way we work', which sets out a lot of these underlying philosophies. So we do adopt the same set of standards and would report the same way for an operation in Indonesia as we would for an operation in the US or in Australia. The Minerals Council's code would also have the same basis for its preparation. Our group has a major environmental staffing that uses the same systems and procedures for the reporting of significant environmental issues across the world. We are monitored in that by many of the stakeholders internationally who read our report. Our report is audited

independently by an independent expert in this area. I think we are in our fourth year of reporting now. It keeps improving as time goes by.

Ms JULIE BISHOP—You have indicated that Rio Tinto has very specific procedures for reporting. In fact, you have a booklet telling you how to do so. If, under this requirement there were another standard procedure for oil companies to report in a particular fashion, would that also cause some confusion or unnecessary duplication?

Mr Falconer—Yes, it would. I feel that the experts in our group would know what is significant and particular and would be in a much better position to say to senior management that these are the issues that need to be reported on, rather than, if you like, black-letter law about 'these are the numbers of exceedences of omissions and so on which might be in the law'. Our view is that we should leave it to the companies which are the experts in this field to report as they see appropriate. If the stakeholders do not feel that that is adequate they will soon let the companies know. That certainly happens with our group. There are ongoing discussions with the environmental groups.

Ms JULIE BISHOP—Disclosure is somewhat subjective, isn't it, in terms of determining what is significant, what is particular, what is material and what is not?

Mr Falconer—Yes, it is. It is up to the view of those people, as are many things subjective. For example, the rate of depreciation on assets and the way of calculating that is under debate within the accounting profession—ways I do not understand.

ACTING CHAIR—You were saying earlier, though, that in the case of Rio Tinto there was no difficulty in your capacity to make judgments about what was significant in terms of the reporting. Could you elaborate a bit on how you make that determination?

Mr Falconer—We have four categories of incidents. It is not my particular field, but I hope I can find it here in this report. The most serious is a critical incident. That will be defined somewhere. And then there are lower level incidents. There are four categories. Category 1 is 'procedural non compliance with no environmental impact'. An example that we give there is the late submission of a report on environmental matters. For reference, this is page 20 of this annual report. Category 2 is 'incidents with low potential for impact on the environment'. An example given there is a contained spill. Category 3 is 'incidents of non compliance with the potential for moderate environmental impact'. An example given there is restricted contamination of ground water. The most serious is category 4: 'incidents which have a high environmental impact'. An example given there would be the breach of a tailings dam. Environmental managements across the group look at incidents across that reporting category.

ACTING CHAIR—How were those particular categories developed within the group, by what processes?

Mr Falconer—I am not sure. It would have been done by our environmental people within the office area rather than the people in the field, in that these people have knowledge of environmental issues and the need for reporting and directors' obligations and liabilities. But I do not know particularly how they would have been developed.

Ms JULIE BISHOP—In relation to that process, would incidences that would have a significant or not significant financial impact come under the listing requirements?

Mr Falconer—The listing rules?

Ms JULIE BISHOP—You are talking about the environmental impact, but some of them might have a greater financial impact on the company than others and might not correlate to one to four. Your No. 1, because of the penalty or because of the civil action or the like, could have a material financial impact.

Mr Falconer—The financial side of it would be picked up through other reporting requirements. If there were a tailings dam problem, that would cost some millions and there would be a requirement under listing rules—3.1, continuous disclosure—and just general good relations and communications with the stakeholders and investors, to let them know. In our case, that would be the subject of a media release and probably with some early indication of what the cost might be.

The reporting on environmental issues is not financially driven, although it goes on here to talk about the financial provisions to meet future environmental and social obligations. In particular in the mining industry is site rehabilitation after a mine has been fully mined out. The group makes provisions to rehabilitate that area and those provisions are shown routinely in the accounts.

On our reporting on those four categories of incidents, we have a table which is a sort of high level consolidated summary again showing the total of incidents that we have had, those which are unresolved from the previous year and those which were resolved in the current year. So we have had these, we have attended to them and resolved them. We have got the others carrying forward to next year and those incidents are explained, described.

Mr RUDD—Again, largely for my own information, I have just looked at section 299(1)(f), which goes to the specific requirement on environmental reporting and which reads:

The Directors' Report for a financial year must:

(f) if the entity's operations are subject to any particular and significant environmental regulation under a law of the Commonwealth or of a State or Territory—details of the entity's performance in relation to environmental regulation.'

I would make two comments about that and seek your response, just at a level of interpretation and not wishing to comment on the previous attitude of the government or this committee in relation to the term 'significant'. 'Significant' is like beauty in the eyes of the beholder, so I presume that creates an interesting challenge in how you choose to interpret your obligations under that provision. Secondly, I go back again to my question of operating under multiple regulatory environments if you are producing a consolidated group report. How many countries do you operate in at the moment?

Mr Falconer—Eight or 10.

Mr RUDD—Without having reviewed the document to which you are referring there, you have eight to 10 separate appendices which cover your compliance in relation to particular and significant environmental regulations. Obviously the same pertains to Australian law. I am trying to get a sense of how you actually render that.

Mr Falconer—How do we decide whether things are 'particular' or 'significant'?

Mr RUDD—Given the fact that you have multiple regulatory environments that you operate in, does, for example, your group report simply render this as it pertains under Australian law or are there other jurisdictions which make similar imposts on you in their Corporations Law equivalent regimes?

Mr Falconer—As far as I am aware, there are no laws about what is particular and significant in other countries. There is not in Australia; it is just those words, 'particular' and 'significant'. It is really up to the environmental scientists and environmental management to determine what is 'particular' and 'significant' to the company. We do get help from organisations like the Minerals Council. The Australian Industry Group, whom I think you are speaking with later, have put out some guidelines to assist in the reporting of 'particular' and 'significant'. My belief is that we should leave this to the experts within the company—the people on the ground who know what is particular and significant, the people operating in the remote areas. We would use the same standards in one country as we would use in another country. I do not believe there is a set of rules in the US, or the UK or Indonesia. There may be emission controls and pollution acts and so on. We would certainly comply with that and report back to those government agencies.

Senator CONROY—You would never have an Ok Tedi type of problem?

Mr Falconer—I do not believe so. I think at Bougainville Copper we were a little bit ahead in that we had built a pipeline to take the tailings down to the coast. This was a large issue in that we were polluting the river and the pipeline was built to take it away. A lot of people would say that we did not do enough, but we were doing things, and this was 12 or 13 years ago.

Mr RUDD—I suppose it is an issue of public policy. My own view would be that this is an enormously discretionary provision. Again, without having been privy to the previous deliberations of this committee or, for that matter, of the government, I presume these amendments were incorporated in the act last year. It seems from the tenor of your response that Rio Tinto's interpretation of compliance is, 'Well, let's look at what our peak body, for example, lays down as industry best practice in terms of reporting under this provision and we will run with that.'

Mr Falconer—No, I think we would feel that we go a bit beyond what is in the peak body in that this is the Minerals Council of Australia and Rio Tinto operates globally. We would pick the best of our own work in this area and our own efforts. A typical example of this would be where it is working the other way, that is, the reporting of all reserves and resources under something called the JORC code—the Joint Ore Reserves Committee code. That is the way you calculate all reserves. It is an Australian group that has put this together. This code has been embodied into the listing rules and now all companies are to report under

JORC. That now is the global leading code on the reporting of resources and reserves and has been used internationally. The Rio Tinto group obviously adopts that across all of the global operations. There is something similar in environmental reporting but it is internally generated with an eye to what people are talking about regarding best practice guidelines.

ACTING CHAIR—Do you have a view, Mr Falconer, on how Rio Tinto's performance in relation to environmental reporting compares with other entities in the industry—not necessarily companies on your scale? Obviously the law needs to take account—if one were to accept your submission that Rio Tinto goes to considerable lengths to comply with environmental reporting standards—of the whole industry. Do you have a view about where you sit in relation to practice generally?

Mr Falconer—We would be amongst the leaders. The other major companies are WMC, North, BHP. Obviously it is the bigger companies that are leading it because they have the resources to do that, and maybe different strategies. So I would only go as far as to say that we were amongst the leaders.

Ms JULIE BISHOP—On section 249, your recommendation is that prior approval for a meeting should be given by ASIC, so it would be up to ASIC to determine proper purpose. Perhaps you could expand a little on that. There are a number of reasons why a meeting should not be held. It could be sufficiently close to an AGM; it could be of enormous cost to the company and the like, but that still would not make it an improper purpose. What is it that you would actually be asking ASIC to do?

Mr Falconer—I think it would be like in the case of Wesfarmers, where they had the QC's opinion. These matters are matters that should not be decided by shareholders, but the company decided to have the meeting anyway, to have that dialogue.

Ms JULIE BISHOP—For its public relations purposes or whatever.

Mr Falconer—Yes. Whereas if we had ASIC there, ASIC could say that this is not a proper purpose and the company is not bound to hold an extraordinary general meeting, even though it has had a request from five per cent of its shareholders, for example.

Ms JULIE BISHOP—And under that scenario, the company could still proceed for its own purposes if it wished to.

Mr Falconer—You could certainly have a shareholder information meeting, but not a meeting where people are voting on various resolutions that have been put up.

Ms JULIE BISHOP—Would that give rise, I almost ask rhetorically, to court intervention then as ASIC's ruling would be challenged?

Mr Falconer—It possibly could, yes.

Ms JULIE BISHOP—I am wondering whether that is where it ought to lie in the first place—that if a company believes it is for an improper purpose, the company could always

seek to injunct the sending of notices or something, as opposed to getting ASIC involved. I am just trying to explore that.

Mr Falconer—Yes, I guess it could go down that route and be very costly for both sides. In the North case, the company ended up paying legal fees for both sides voluntarily, I suppose. But that would not be a good outcome, would it—going to court to talk about ASIC's decision? But we just thought it would be good to have a sort of umpire, if you like, that said, 'Because of these things, maybe you have six months before your next meeting; therefore, you cannot put something on the AGM notice paper. It is an important issue; it runs to matters that shareholders should discuss and should have opinions and votes on'- that sort of a view, rather than at the moment, there being really no umpire on proper purpose.

Ms JULIE BISHOP—And ASIC could get its own independent advice?

Mr Falconer—Presumably.

Ms JULIE BISHOP—Retain its own QCs to give the advice.

Mr Falconer—Maybe it is something ASIC would not want to take on.

Ms JULIE BISHOP—On the contrary.

ACTING CHAIR—Thank you very much, Mr Falconer, for your time.

Mr Falconer—Thank you, Chairman, and thank you for the opportunity.

[10.47 a.m.]

NIVEN, Mr Douglas David, Deputy Chief Accountant, Australian Securities and Investments Commission

SEGAL, Ms Jillian Shirley, Commissioner, Australian Securities and Investments Commission

ACTING CHAIR—Welcome. The committee prefers to conduct its hearings in public. However, if there is any matter that you wish to discuss with the committee in camera we will consider any such request. I would also like to remind witnesses that the giving of false or misleading evidence may constitute a contempt of the parliament. I now invite you to make your presentation.

Ms Segal—Thank you. I thought it would be helpful if we came before you this morning and, in light of ASIC's experience to date, expressed some views about a couple of matters before you. I refer in particular to the environmental disclosure requirements that are in the legislation. I would also be happy to comment on directors emoluments, to give you the benefit of what has been our exposure to the issue and where we have come to, and then I would be happy to discuss the matter further with you. I have Mr Niven with me. He is our deputy chief accountant and I am sure he can explain the ins and outs in greater detail than I as to where we have come to on the emoluments issue.

I would like to start with the environmental reporting and just walk through a little bit of history which you are probably all familiar with, but I thought it would be as well to rehearse where we have got to in terms of where the regulator is at. When the provision—section 299(1)—was inserted in the law, we were contacted by a large number of representatives of organisations who were concerned with the provision and how it would be interpreted and who felt that its drafting was perhaps not as clear as it might have been.

As part of our practice note 68, which I will talk about when I talk about directors emoluments, we put out some guidance that we thought was appropriate at the time. I am not sure if members of the committee have seen that, but I will refer to it. We basically said that we understood that section 299(1)(f) had been referred to this committee in its previous reference, before the last election, and therefore the matter was before the committee, but that we were conscious that industry needed some guidance because they were having to report for a period that would start perhaps before the committee's considerations were out. As it turned out, that was very prescient of us, because there was an election, and it has only come again before the committee now.

So we put out some guidance, but the note made reference to the fact that it was before the committee and therefore, (a), it was not final and, (b), it was not very detailed. It was in the nature of some general guidance. We basically stated some pretty obvious—but, nevertheless, industry found them helpful—suggestions as to what the provision meant. That is that, where an entity was licensed or otherwise subject to conditions of a specific licence for environmental regulation, the requirements would probably cut in, but that, given where they were actually located in the directors' report to shareholders, we did not see them as

specifically limited to financial disclosures. It did not say that they were limited to financial disclosures, which one might have thought would refer to contingent liabilities or capital commitments, but they related to performance generally in relation to environmental matters, so narrow or specific accounting concepts of materiality did not necessarily apply. That was one of the questions we kept being asked—the accounting concept: if it is over 10 per cent is that where it cuts in? We said we did not think it was quite as specific as that.

On the other hand, it was general information, it was information to shareholders in the directors' report, so it would be much more general and less technical than information which they would normally provide, say, to the environmental regulator when companies make detailed disclosures on compliance and when specific figures as to monitoring data et cetera would be put out. That is not what it is about. It is information to shareholders to talk in general about the performance of the company in relation to significant environmental matters. And merely because you have reported to the environmental regulator does not mean that therefore this is not something that would be included here. Those were the matters that we put out in a press statement and as part of the practice note or guidance note.

We continued to receive significant contact from industry. I and our chief accountant, Jan McCahey, met with a range of bodies—Group of 100, the Environmental Managers Association, the Australian Industry Group, who I note will be speaking to you later today—and it is fair to say that much concern was expressed to us as to what this meant. We felt constrained in what we could say and did not wish to go much beyond what that guidance note said because it really was still a matter before this committee. But we did say a number of other things. We said we thought it was, as our guidance note said, directed to shareholders and therefore what needed to be put out was something that would be meaningful to shareholders. We heard reports of some companies that were going to drown shareholders in technical data as a way perhaps of not revealing what they should. We said it is a general communication to shareholders and it would not be something that would be so bulky it would be out of context in the annual report, if you could see a shareholder reading a couple of pages about environmental disclosures so it was something meaningful.

We said ASIC would take what we called a rather light-handed approach to the matter to begin with. We thought it was important that people complied with the spirit of the provision and made a serious attempt to disclose something meaningful, but we would monitor what was disclosed in this next year and, after a year, would have a better view as to what sort of level of compliance we were talking about and what difficulties were encountered. Then, if the committee thought it appropriate—and this is where I would be happy to discuss it—in the light of experience and the way in which was complied with, we would put out a more detailed guidance note.

We did, as I mentioned, speak to the Australian Industry Group. I do not know if you have seen the particular publication that they put out—I would be happy to leave it with you. Whilst we were not in a position to endorse it, we did discuss it in detail with them. I would like to suggest to you that it provides some quite useful guidance as to what companies should do and how the matter is really something that is general and does fit in with a disclosure regime. You can have detailed voluntary disclosures in the form of environmental reports that you might have seen a number of companies put out to shareholders, but this mandatory environmental reporting is much more limited and is very general.

Their publication does deal with some of the issues which were raised with us. I would like to draw the committee's attention to them because, if you were minded to in any way expand or amend the provision, they would be matters you might want to comment on. If you were not minded to change it for the moment, and to wait and see what a year's worth of experience does, and we were in a position then to put out a policy proposal in conjunction with industry and discuss it, these would be the matters that we would also deal with. For example, it talks about the reference to Australian states and territories but notes that you often have companies that have overseas ventures, whose performance is of relevance to shareholders.

I might say it is our view that, if there are matters of significant investments or joint ventures or overseas enterprises with serious environmental implications, that should also be disclosed. If you are a shareholder you are still interested in the overseas operations of the company. Joint ventures are similar. That has become a question of scale of investment. There are these issues that are not caught up in the provision because of the difficulty of drafting a provision to try and make it fit all circumstances. That is why the outcome of a policy proposal for comment, and then a policy of ASIC's in due course, might be the way to deal with some of the uncertainties. I leave these with you.

I note that a number of people have commented that the section itself should be redrafted and that there is uncertainty. I am not advocating it one way or the other as far as the committee is concerned. I am just saying that we could deal with the uncertainty in the form of a policy because it is very hard to make a provision that is going to deal with all the uncertainty that will exist, whatever the drafting. There are provisions in the actual section that are unclear because the greatest difficulty has been in relation to what performance means and details of the entity's performance.

On the other hand, when it is being discussed, the disclosure should refer to compliance. Other people have commented to us that it is not strictly a compliance provision but a disclosure provision. If a company wanted to tell their shareholders what they were doing with not just technical compliance with a legal provision, the wording is probably appropriate. I am not putting a particular proposal to the committee for redrafting it, but merely a way forward, if it suited the committee in dealing with the uncertainty and the response of industry.

As a positive, a number of companies have since commented to me that, whilst it took up some considerable time of the board in this first reporting round, that was quite an interesting experience to have the board focus in on environmental issues. Our feeling is that there has been some quite interesting compliance. We look forward to doing our surveillance on the reports, but we do not intend to take any enforcement action against companies in relation to this in the first year, unless there is obvious and intentional non-compliance altogether. If they have made a reasonable attempt, we will just collate the information and then make a judgment. We would like to put out some guidance at the end.

ACTING CHAIR—Thank you very much. Do you wish to go on to director emoluments at this stage?

Ms Segal—Would you like me to do that?

ACTING CHAIR—It might be more convenient to deal with them seriatim.

Mr RUDD—On this broad matter, and just for clarification for myself, what status do your practice notes have? Do they have the same status as regulations?

Ms Segal—No, they do not. They just provide guidance.

Mr RUDD—In terms of non-compliance with these new relevant provisions of the act, in any subsequent action before any relevant court would a reasonable court look to your practice notes as forming the best guidance in terms of whether companies had fulfilled their duties before God and man?

Ms Segal—I think it is fair to say that a court would look at our practice notes. It is also fair to say that where our thinking is to some extent, and where it might go if we were to put out a practice note, would definitely be further than the provisions of the section. I think that a court would construe it back to the words of the section. In particular, I refer to the fact that it says 'significant environmental regulation under laws of the Commonwealth, state or territory'. If we were arguing about a multinational corporation not revealing its major environmental issues in PNG, or wherever was relevant, I do not think a court would be likely to say that our practice note, which would say that if you have a major overseas investment you should also detail it, would stand up because the provision is quite specific.

That is the difficulty of very specific provisions. Unless there is a specific add-on for it to be amended by some other mechanism, or by the regulator, it does not capture some of the key issues. I think it is fair to say that we have a number of major corporations here in Australia. Some of their environmental issues that their shareholders are interested in relate to investments overseas, particularly in the mining industry. I am not sure it quite captures that, but I would have thought, spirit-wise in terms of disclosure to shareholders, that is possibly where the thinking was. I am really surmising. It is in your heads more than our heads.

Mr RUDD—No, it is an important issue. We have been discussing it this morning already. What strikes me as a newcomer to this committee, without any criticism of matters historical, is simply the ambiguity of the NF provision which is subject to anything particular and significant—with 'significant' being a highly conjectural term itself. I think what you are saying to me is that, short of further amendment to the act, the real vehicle for providing clarification to corporate Australia is through your practice notes and that would form the basis of subsequent legal interpretation.

Looking at your existing practice note 68 paragraph 74, which I think you referred to in its substantial elements before, you say that the information provided in a directors' report cannot be reduced or eliminated because information has been provided to a regulatory authority for the purposes of any environmental legislation. I think you are seeking to say there that your interpretation of the requirement is that, whatever the totality of the compliance statement to the relevant Commonwealth or state environmental regulatory authorities might be for that company's operation within that legal jurisdiction, that has to be reflected in its equal totality in the directors' report. Is that what that means or have I misread it?

Ms Segal—No, I do not think it says that. I apologise if it is not as clear as it should be. People did say to us, 'We disclose already in another forum to environmental regulators; isn't that sufficient? It is information that is out there.' We were trying to say, 'Merely because you disclose elsewhere, and perhaps are required under the terms of what might be your environmental licence to disclose, it does not relieve you from this obligation.' I think the nature of the disclosure here is a different form of disclosure, in most cases, to what they would disclose. That is what we have tried to say in some of our public comments and meetings with environmental groups. It is directed to shareholders. A disclosure to an environmental regulator is directed to that regulator to check compliance.

Mr RUDD—It is a different audience.

Ms Segal—It is a different audience that is very specific as in, for example, 'Here is the requirement for pH levels at the end of pipe.' It is our view that a shareholder is not going to necessarily, in general, be well informed by that sort of disclosure. They want to know the much more general environmental performance of the company and compliance with significant requirements or non-compliance. It is more interesting.

Ms JULIE BISHOP—Unless the failure to retain that pH level is something that gives rise to a consequence.

Ms Segal—Absolutely.

Ms JULIE BISHOP—It might well be a science act.

Ms Segal—Absolutely, if it is a significant, particular breach, saying, 'Well, all our factories are required to comply with stringent requirements, and if we breach that we will be liable to significant fines.' But I think what you really want to achieve is some disclosure that is relevant to that company, rather than some sort of pro forma that might be put there.

Ms JULIE BISHOP—Have you finished yet?

Mr RUDD—I am happy to rock on, but we can play tag football, if you like.

Ms JULIE BISHOP—I was just going to follow that up. In terms of the level of inquiry you have had, I take it that there is quite a level of confusion about this section and what people's obligations are and what companies' obligations are under it.

Ms Segal—If I could just say that I am not sure that there is confusion. It is not quite as bad as that. I think there is concern.

Ms JULIE BISHOP—But is the concern relating to any specific aspect of it? For example, is it relating to the term that Mr Rudd has already raised—'particular and significant'? Is it that? Or is it the requirement that the entity's performance in relation to environmental regulation be documented? And is there a standard format by which companies are meant to report, or are they very much left up to their own devices in penning a performance report?

Ms Segal—Under this provision?

Ms JULIE BISHOP—Yes.

Ms Segal—I think that the uncertainty probably is across-the-board in the drafting of the provision. I think it is not a very clearly drafted provision. It has got that dash in it and details of the performance that does not necessarily follow.

Ms JULIE BISHOP—It was an afterthought.

Ms Segal—Put a lawyer's hat on, or a draftsperson's hat on. I am not sure that it is actually terribly clear drafting. But, that being said—and, of course, companies have had the benefit of very detailed advice, and the lawyers have pointed out all the possible inconsistencies—when I sat down with the Environmental Managers Association, I think it is fair to say that they have all got a pretty good idea of what it is getting at and what they are going to do at the end of the day.

Ms JULIE BISHOP—Are they concerned by matters such as the Trade Practices Act and omissions? Are they concerned that what they do might well be deemed to be misleading? If we are getting something that is a little more folksy in terms of reporting to shareholders rather than something that is far more technical that would go to the regulators, where do they draw the line in terms of, 'Well, if we omit that, it could be misleading'?

Ms Segal—I think some have raised that. The more general concerns have been about international companies. I think that the globalism that is reaching into the business community is such that they have been very worried about what to disclose about overseas investments.

Ms JULIE BISHOP—They do not have to disclose anything here.

Ms Segal—No, I think that is right. They do not, but they are worried about the fact that they think they should be because, if it is a meaningful disclosure and it is a significant investment with an environmental impact, they are worried why it is out of the net. And, similarly, there are a few companies which are listed overseas, and if they make disclosures here they of course have to make similar disclosures overseas, and then they are worried about their liability overseas.

They are worried about joint ventures because so much of the mining industry is done through joint ventures, and they might have a minority interest in a technical sense in a joint venture, but be an operator. Is it picked up? So a lot of the concern has been about how the provision actually applies to what is a complex industry as well as, I suppose, just the fact that it is not clear. To the best of my knowledge, I have seen analyses in presentations of what 'particular' and 'significant' mean, et cetera.

Ms JULIE BISHOP—It is not actually defined, is it?

Ms Segal—It is not actually defined and people would prefer if it was defined. But I think that they recognise that the minute you define it and you say, 'It is 10 per cent,' that

somebody who has a nine per cent impact will not disclose, and that is perhaps why it is more difficult to define it. That is why I think that there is a suggestion from our part almost to wait and see what the compliance is like, what it produces. That is not to say that if you wanted to clarify some of the drafting that that would be a bad thing, but I actually think performance will not be too bad in terms of disclosure.

Ms JULIE BISHOP—It might be that we do not need to be more prescriptive. You can hardly accuse this of being prescriptive.

Ms Segal—I think that is right. The drafting could definitely be improved, but I would not necessarily advocate that it should be more prescriptive in terms of drawing very tight boundaries if the intent is to have some effective disclosure to shareholders about environmental matters.

Mr RUDD—I have two sets of comments: one which follows on more or less directly from that and one slightly broader. The first, I suppose, goes to this question of policy scope and that of the provision of the act as it stands. On the one hand I am encouraged by your earlier comment that this has led to some focusing of attention in the boardrooms across Australia on what exactly are our environmental regulatory requirements and how should these be reported. I understand also, however, that it is not as if directors would not be aware of those matters at present because they are required to be appropriately briefed in terms of what those regs are. But the audience to which they are directing their compliance is essentially an internal bureaucratic audience within the various states, territories and the Commonwealth of Australia and not to the public, to the shareholders.

That to me sounds good at one level. Militating against that you have got the issues, I think, which Julie Bishop was just touching on, which are compliance burden questions and global market international competitiveness of firms and the overall regulatory burden on directors at present. So that is a militating factor.

In trying to wrap those two sets of conflicting concerns together, is a way through, though, something along these lines: (a) if annual reports were to state explicitly what the environmental regulatory requirements are under which this company operates in its jurisdictional environments, the Commonwealth and each of the states; (b) gives a summary statement—and the devil lies in the detail of that—of compliance which could be relatively brief and to the point; but (c) then does engage in, shall we say, copious cross-referencing to compliance reports which have already been submitted to the various levels of government and various departments within those levels of government so that shareholders, if they are keen and concerned, can then do their own digging, having been given the tools through which to dig, so that you do not have this unnecessary bulking up of reports which others have spoken to us about this morning as well. That is one set of comments. I will get your comment on that and then I will touch on one other issue.

Ms Segal—As I read the section, just dealing with the first point of what might be disclosure of the regulations that they are subject to, I do not read 299(1) as requiring a separate compilation of all the regulations that a particular corporation might be subject to. It requires some details of the performance so that they might say, ‘All our requirements, all our compliance is satisfactory except in the following ways. The most significant is the

following.' But it does not technically require a very detailed compilation of environmental regulations.

Mr RUDD—Wouldn't shareholders want to know that, particularly if there are fine regimes attached to non-compliance?

Ms Segal—I think you might be coming into a burden question because there are so many environmental provisions that a corporation might be subject to. Where on the basis of legal advice would they ever draw the line? They would say, 'We might have environmental licences for water discharge, and then there is ozone, and then there is car emissions, and then there is this and that.' The minute you have a specific requirement for that sort of disclosure, corporations on the basis of legal advice will have the most enormous list. I would have thought that would be somewhat burdensome for them and not terribly informative to shareholders. Maybe you need to have a significant line drawn somewhere because there is a raft of environmental legislation.

Mr RUDD—Is there a significant hinge in your interpretation through a proposed practice note on the level of dollar fine, because you are going to have to have some arbitrating principle?

Ms Segal—The way the provisions are drafted in many states, any breach of the environmental laws can result in a significant fine. You can breach a licence requirement in a big way or a little way, and the harm sometimes determines the fine. That is why that sort of prescriptive thing might be difficult. If you then have your summary of performance, that might be what they are going to be doing in the end anyway. Regarding cross-referencing, where they put out a large voluntary disclosure—a document which details environmental performance—as many companies are now doing, they will already do cross-referencing because it has been raised, and we have said that we think it is an excellent idea. Cross-referencing to disclosures to other regulators may be more problematic because not all of that information—

Mr RUDD—Is in the public domain.

Ms Segal—is in the public domain or, if it is, it is not so accessible and it is quite technical—I am not sure that it would be terribly informative. There is a balance between getting some meaningful information to shareholders, not having an enormous burden on the corporations, and also not encouraging unnecessary litigation. If you start putting some of those very detailed disclosures to environmental regulators at the forefront, you might be encouraging a focus on them that is not necessarily a good idea.

Mr RUDD—I have a very final point, which you might be able to dispense with very quickly and which has been touched on already. It is this question of international reporting of a company's international operations. I was talking before about policy scope and this goes to jurisdictional scope. When the act says that we are looking at an entity's operations, which are subject to any particular and significant environmental regulations under a law—excuse my ignorance on this question—are there Commonwealth, state or territory environmental laws and/or regulations which would require an Australian corporate entity to report on their activities beyond Australia? I do not know the answer to that.

Ms Segal—Again, I would not profess to be an expert on details of the various environmental laws and regulations. It is fair to say that, where there might be reporting obligations that require the company to report about some environmental incident or whatever it is that would have a significant impact on the corporation, that would pick up overseas matters. That is because, if there is a significant fine or a loss of reputation overseas, it would have an impact back here. But when it is described as breaching an Australian law or regulation, it does not pick up overseas jurisdictions. That is why the wording here specifically does not pick it up. If it were re-worded or if a policy were to say, 'What you are really interested in is the impact on the corporation, on shareholders and on its value,' then it would be picked up.

Mr RUDD—That is an interesting point. It runs somewhat counter to the earlier logic about the domestic focus, which is more general reporting as opposed to specific financial implications to the company.

Mr ROSS CAMERON—Where does the Australian Industry Group get the idea that—

Ms Segal—It is not our practice; it is definitely theirs.

Mr ROSS CAMERON—Right. Perhaps it is unfair to direct this to you, but they provide a fairly specific threshold here for those who fall within the net of compliance—being assets of over $5 million gross revenue, of over $10 million or having more than 50 employees. Is that somewhere in the act for a private company?

Mr Niven—What they are actually referring to is that, within the Corporations Law and the financial reporting requirements, there are separate requirements for proprietary companies which only kick in under section 45A of the Corporations Law, when two of those three criteria which they have mentioned are actually met. Public companies are always required to comply with the financial reporting requirements of law, but proprietary companies are required to comply only where those particular criteria are met. There are a couple of other variations such as a shareholder request for the information or an ASIC request for financial reports. So I think that is what they are referring to there.

Mr ROSS CAMERON—Picking up what Mr Rudd and Julie were saying, it seems to me that we are imposing another layer of reporting requirements; we are imposing another increment of Australian managers spending time jumping through bureaucratic hurdles, instead of trying to build productive enterprises. Every time you get to this threshold of 50 employees for a private company or $10 million in turnover, you wind up having to create this internal bureaucracy to sit around agonising over what a provision like this means. Once you work it out, you actually have to go ahead and do it and get your advice from a QC and ask, 'Why do you have to list everything? "Significant" means that you don't have to list everything, but what is significant? What is our potential exposure if we don't list enough, and then perhaps we have an unanticipated liability?'

My instinctive response to it is that this is just another classic example of governments feeling like they can solve all of the world's problems by writing another piece of legislation. I am particularly concerned about the impact. It is all right for Rio Tinto to add

another bureaucrat to their X number of already existing bureaucrats, but for the smaller guys—

Ms JULIE BISHOP—Rio Tinto disagree.

Mr ROSS CAMERON—who are desperately trying to cross that threshold, every additional increment is an additional disincentive.

Ms Segal—We are talking about disclosure here. The kick-in point of when a private company falls over that line is really not a matter for this provision because it applies most generally across the law. Other provisions have decided where the line is drawn in terms of financial disclosure. I do not particularly think that that is the issue because the Corporations Law has decided that when you are a private company that is large—namely, when you cross two of these tests—you have to have certain financial disclosures.

As to the question of whether this additional provision provides additional disclosure, it is fair to say that good corporate boards—whether you are large or small—will be considering environmental issues because they are significant. The environment laws have been written to provide such significant penalties—potentially, $1 million fines or gaol for directors—as to focus their attention. If you were to say that this provision was not to be there but there should be appropriate disclosure of significant risks and opportunities for the company, you would imagine that, where there were significant environmental concerns, they would also be disclosed.

Ms JULIE BISHOP—There is already that obligation.

Ms Segal—Exactly. That is what I am saying.

Mr ROSS CAMERON—If it is already there, what are we adding by adding another layer of compliance? It is not as though we are adding another fresh area of environmental conscience. All we are saying is, 'What is your level of compliance with all your existing obligations?'

Ms Segal—That question of how you get that compliance is more in your bailiwick than in ours. Given this provision, from what we have seen in our surveillance of reports—certainly in terms of what people have said they have done, of which we are yet to see more detail—there is now much more disclosure on environmental matters. That is because there is that provision. Whether it is worth it in terms of what it costs companies to provide that extra disclosure, I really am not in a position to guess.

ACTING CHAIR—In the short time we have left with you, could we move on to the second issue you wish to address.

Ms Segal—Directors' emoluments. Again, I will refer to our practice note, which you would have seen, and give you the benefit of our surveillance to date in terms of compliance and the issues that have been raised with us.

We put out a press release relating to our surveillance on reports with balance dates from 1 July to 31 December last year, to look at in particular director and officer emoluments—this provision having been inserted—and a few other issues which I am happy to talk about. It is fair to say that we found compliance very good. There had been very good compliance with the provisions, with a number of exceptions which I will deal with, mostly concerning options and valuation of options. But in terms of the disclosure of director emoluments—and Mr Niven can correct me if he wants to qualify that—there had been effective compliance. That is not to say that companies do not have issues with identifying officers who are not directors, but they had actually gone forward and done it and there had been good compliance.

The exception was with the valuation of options, where they had not included the valuation of options in disclosure of emoluments. People have said to us that the reason why they have not done that was that valuing options was too hard, too difficult, and that if they are not in the money then what value do they have?

Our response to that has been that they clearly have value. People would not be seeking them if they did not have value. If they are in the money, we think it is quite clear that that value can be disclosed. If they are not in the money we have said that no-one is going to be jumping on them saying, 'You have to value it in a different way.' But, however you come to a value, you ought to disclose. You can disclose how you came to a value.

Some sort of disclosure is important, and there are various ways of making that disclosure. You can imagine a scenario. They could be out of the money but if there was a certain increase in the share price they would suddenly come in the money and then they would be worth X. There are various ways in which disclosure can be effective, to just tell shareholders what that might be worth. That is all we are suggesting that people do, not prescribing a certain way of valuing them but saying that they are valuable, people are seeking them, and therefore there should be some disclosure about them.

Otherwise, disclosure has been quite effective. It is fair to say that there is some debate out there. More concern has been raised with us about emoluments and disclosure of emoluments for executives than for directors. Without expressing too finite a view on it, at ASIC we think that, if you were concerned about the provision, the real focus must be on disclosure of director emoluments. There is debate on the executive emoluments. It is something that is disclosed overseas. That might have been something that influenced the parliament and the committee to think that it was important.

On the other hand, boards overseas tend to have more executives on them than our structure here. There is an argument that they do not have quite the same conflict position as directors in terms of directors setting their own remuneration. Directors set their own remuneration. That is where there is possibly room for further discussion. I do not think that we, from where we sit, would object to some movement there if that was what you thought was appropriate. But, on the other hand, there is compliance with the provision, largely, as it is.

Obviously, we think that the important thing is that the different provisions that exist at the moment with the accounting standard and the law and the uncertainty which we tried to

clarify in our practice note need to be worked through. We understand that the AASB is working on bringing the accounting standard into line with the law. That will be a good thing, that there is no inconsistency.

Senator CONROY—I know there was some debate about what the five covered, and your note clarified that. I am not sure if all members of the committee were actually on the committee or involved even in parliament at that stage. I was just wondering whether you could outline some of the concerns that were raised at the time and where you broke it down. I note you have made the comment about executives and directors, so I was just wondering whether you could set the parameters.

Mr Niven—If I understand your question correctly, it was not the broad range of inconsistencies and problems with the wording of the section but specifically the question of whether there should be an overlap between the directors and the five named officers. We came to the conclusion that it was best to disclose both the remuneration of each of the directors plus the additional five executive officers who were not directors.

The reason why we came to that conclusion was really tying into the overall intent of the section. In preparing practice note 68 we went back to try and understand what we thought was the intent of the section. We were actually looking at the section and seeing that it was trying to draw a line between the broad policy for remuneration and linking it to performance. We felt that the section really was trying to get at officers who were not directors. In narrowing it down you could just end up with a group of directors, including officers, and no additional persons. So we really just tried to step back from the section and look at what was actually meaningful disclosure. It seemed better to go for more disclosure rather than narrow it down and eliminate some individuals.

Ms Segal—Where we have heard concerns expressed from various boards of directors is where it comes to remuneration or emoluments of the executives as opposed to the directors, as I mentioned. In some cases they think they have got internal management difficulties and privacy issues. We understand those. I am not in any way discounting them, and that is why I thought that, from the perspective of where we sit, the disclosure by directors is the key. There is a difficulty, philosophically, about the disclosure for executives. But, on the other hand, there has been compliance.

Ms JULIE BISHOP—Let me take the example of junior explorers in WA. You can get some companies with four or five directors. If you are starting to look at the executives, you are really getting down the list to some people whose salaries ought to be of absolutely no interest to shareholders at all. The disclosure would outweigh any benefit if it relates to somebody who is earning under $50,000 or something like that—or under $100,000 or whatever. Isn't there some sort of threshold that ought to be considered? If you are talking about small, listed companies, you are getting down into areas that could quite properly be left for shareholders at a general meeting.

Ms Segal—I will just make one comment and then ask Doug. I suppose it depends on what the philosophical underpinnings are for the disclosure. If it is to disclose what are high amounts of money that are being paid to senior executives, that would lead one to say, 'There should be some cut off.'

Using salary as an indicator of control, determining who are the people running the business and effectively in control of the business—and it is a shorthand way of getting there—then it does not matter what the amount is if they are the five people in addition to the directors who are running the business. That should be known. If the view is taken that their salary should be known to the shareholders then the disclosure is appropriate. It comes out of the United States and the United Kingdom where the United States certainly had very large salaries that were being paid to these people. They were seen as being in control—de facto directors.

Ms JULIE BISHOP—Has disclosure done anything to lessen those salaries?

Ms Segal—I am far from being an expert in proffering an opinion there but, from what I read in the newspapers, I would not have thought so.

Ms JULIE BISHOP—Apocryphally speaking, you would think it has gone the other way.

Ms Segal—But I do not know whether that was the intent. I do not know whether the intent was to lower remuneration or really just—

Senator CONROY—There was no suggestion that people were trying to stop executive increases. There was no suggestion in any of the debate that took place in the parliament that that was the intent.

Ms Segal—I think it came from thinking that people with high salaries effectively had positions of power and influence in a corporation. Therefore, in the United States philosophy of it, they had de facto power. Therefore, it was thought that disclosure was necessary. That was where it came from, the United States. I am not saying that that was exactly the translation here, but that was the thinking.

Ms JULIE BISHOP—My concern is that every company is different and we cannot translate the US experience entirely to the Australian experience. Within Australia there are vastly different ranges of companies and corporate structures and the like. Because we were in Western Australia yesterday I am thinking of a number of the submissions that were put forward to us by people who are on junior explorer boards in WA saying that they have not got five people to get down to, let alone having to disclose them.

Senator CONROY—In this case he ended up with the secretary. The receptionist was one of five.

Ms Segal—Yes.

Ms JULIE BISHOP—On the basis of privacy and confidentiality that is a ludicrous requirement.

Mr Niven—In our practice note we have tried to address that. One of the other points that we have dealt with, apart from the overlap between the five officers and the directors, was to say that while the section does actually only refer to officers—which could include

the secretary-receptionist—other parts of the section do refer to senior executives. We felt that what the section was trying to look at was those executives who are actually involved in the management of the corporation. In the practice note we suggested that in fact it is not appropriate to disclose remuneration of someone like a receptionist-secretary. **Ms Segal**—That is not to say that, if the committee was minded to put some guidance in there, we would be unhappy. Can I just mention one other thing? I noticed that the committee has before it a number of other issues which I do not wish to comment on, but one of them relates to election of directors and voting by shareholders, et cetera. I am not sure if the committee is aware of the fact that CASAC is preparing a discussion paper on shareholder participation and director elections. I understand that they are aware of the committee's call for submissions and your deadline of 27 August or whatever it is, and they will be making every effort to get you their paper. It will just be a discussion paper, but they have been looking at ways of electing directors, at shareholder democracy issues and so on.

Senator CONROY—You seem generally pleased about the level of disclosure. I am surprised at that given the level of lack of disclosure on options. Ernst and Young did a survey recently which highlighted extensive non-disclosure in this area. I am just surprised that you seem to have taken the view that—

Ms Segal—The options is the one part that has not been well disclosed. We agree with that. Apart from the value of the options, they have disclosed remuneration.

Senator CONROY—I am just trying to get my mind around you saying, 'Here is an executive that has disclosed this part but not this part, but we are happy.'

Ms Segal—Did I say we were happy? No. But I just thought that it was worth saying that, apart from the option issue which we are certainly focusing on, encouraging people to improve—

Senator CONROY—My accounting training finished in first year university, which was a long time ago, but I have struggled to understand this argument that it is hard to value, or, more importantly, that the intent of the legislation did not cover options. I am staggered that any accountant at all could possibly have defined it that way. I am just wondering, if you saw this grey area, why they think they have been able to not include options. 'Emoluments', we were assured in parliament by the parliamentary secretary in the debate—which, if you have got nothing to do at night, I recommend to help your sleep—was the word he recommended on the basis that it would cover everything. I am just surprised to find that some accountants have been willing to say share options are not part of everything.

Mr Niven—Our interpretation certainly has been that 'emoluments' does include options. We cannot see anything in the definition that would enable you to exclude a particular element of the emoluments. Some of the arguments that have been put forward by some accountants are along the lines that, if you do have an option that is out of the money at the time of issue, they would argue it has no value. In our media releases we have not accepted that because we believe that, if they had no value, people would not be seeking those options. From our point of view, we believe that there is a value in this.

Senator CONROY—Because the balance sheet disclosure in effect dilutes other shareholders' value. How can anyone seriously argue that there is no cost to business? It is a ludicrous proposition which I am just surprised that any accountant of any stature has been prepared to argue in a public sense.

Ms Segal—Yes.

ACTING CHAIR—As there is another pressing matter, I thank you for your presentation.

Senator CONROY—You indicated that you would not—and this would be an unfair word—'prosecute' or chase hard in the first year. I am presuming that non-compliance in this area in the second year would be looked on in a different way.

Ms Segal—I think that is right. Our approach is very much—as with other areas, too; this is by no means singled out—to see what particular performances are like by undertaking surveillance, to then go quite public on those results with an educative program, and then to say to people 'We will be monitoring it; if you do not comply further, we will be seeking stronger action.' So we will certainly be doing that, as we have on other matters. With the campaign you will have seen at the moment on 235, directors' disclosure, we have found that they have not been disclosing interests. We have gone very public as to the problem. We have written to those specific directors in great detail saying, 'Oversight? Were you away? Whatever it was, the fact is you have to comply,' and we will be conducting further surveillance and taking much more severe action.

Senator CONROY—So if I was to be in a debate in parliament in the next couple of weeks on any of these issues, I could stand up confidently and say, 'ASIC will be enforcing that option as a part of emoluments in the next reporting period'?

Ms Segal—Yes, after the results of the next reporting period. So that is probably the following—

Senator CONROY—Accepting that the—

Ms JULIE BISHOP—You are asking the questions first and shooting later. It is supposed to be the other way around.

Senator CONROY—No, I am accepting that in these 12 months—although I do not accept it is a legitimate argument, but there has been an argument, and you can be prepared to be flexible about it—you are going to be pursuing the issue.

Ms Segal—Just to come back to options, I think it presents difficulties for the regulator because, in the case of options that are out of the money, whilst I think they have value and you think they have value—and I think they do have value—the question is that there is no definitive way of prescribing how they should be valued. I do not think the Accounting Standards Board or us—

Senator CONROY—I accept there is a legitimate debate about the valuation method.

Ms Segal—It becomes a hard thing to prosecute, though. I think there are other ways of trying to educate the community and get through to the Accounting Standards Board or others to find ways of providing guidance. It is not a straightforward thing to say we are going to prosecute if, indeed, there is no agreed way in which to value them. It may be that the work should be referred to the Accounting Standards Board to provide guidance.

Senator CONROY—My understanding is that they are actually looking at that right now.

Ms Segal—So, when they come out with an accounting standard, then we are absolutely determined to enforce accounting standards. But where there is uncertainty I do not think—

Senator CONROY—I am just concerned that you are not absolutely to enforce parliamentary law.

Ms Segal—More so. I know this is another debate, but parliamentary provisions at times—and accounting standards are the perfect example—need amplification in order to make them applicable to different aspects of business. I think the role of the regulator is to push that process along where we see the gaps and deal with a surveillance and educative process, because in many cases I do not believe that directors are always aware of the issues. It is important that they become aware of the issues. At times it is dealt with elsewhere in the corporation.

Senator CONROY—Can I refine my question then just slightly? And nods, unfortunately, do not get recorded in *Hansard*. So I can stand up in parliament and say that, once there is an agreed method of valuation of the options, notwithstanding there has not been as much compliance as we would have hoped in the first 12 months, in the second 12 months, once that agreed valuation method is there, you will be enforcing the disclosure of options?

Ms Segal—Yes.

ACTING CHAIR—Thank you very much.

[11.46 a.m.]

FALCONER, Mr Ian Leslie, Chairman, Legislation Review Committee, Chartered Institute of Company Secretaries in Australia

GLASGOW, Duncan William Scott, General Counsel and Company Secretary, Intech Asset Consulting Pty Ltd, Chartered Institute of Company Secretaries in Australia

RENNIE, Mr John Campbell, Chair, Public Company Secretaries Discussion Group, Chartered Institute of Company Secretaries in Australia

ROBINSON, Mr David, Corporate and Legal Issues Committee Member, Chartered Institute of Company Secretaries in Australia

ACTING CHAIR—Welcome back, Mr Falconer. You are wearing your hat as Chairman of the Legislation Review Committee, I understand?

Mr Falconer—That is correct, Chairman.

ACTING CHAIR—I also welcome Mr Rennie, Mr Glasgow and Mr Robinson.

Mr Falconer—I point out that David Robinson is Executive Legal Counsel of the AMP.

ACTING CHAIR—Thank you very much. If there are any matters that you wish to discuss in camera we will consider such a request. I remind witnesses that the giving of false or misleading evidence may constitute contempt of parliament. Thank you for your submission. Are there any changes or matters of amplification you wish to make to the submission?

Mr Falconer—Thank you for the opportunity for the institute to have some time with you to enlarge upon our submissions. We have made three submissions covering all of the areas that are under review today and indeed the area that became under review as announced yesterday, which the institute is very pleased to have seen.

The areas that we would like to cover are, firstly, the role of the company secretary and the removal of that position in the Corporations Law; then we would like to cover the section 249D question about the 100 shareholders convening an EGM. We would also like to say a few words about the disclosure of the proxy voting intention statistics in the new requirement of the law and finish up with the 28 days notice issue. I will not be doing all of the speaking because we have other experts here. I will ask Duncan Glasgow to talk firstly about the role of the company secretary.

Mr Glasgow—Mr Chairman and members, we would like to put forward five reasons why the position of company secretary should be retained in the Corporations Law. I will go through them fairly quickly. The company secretary, whilst not the sole proponent of corporate governance, is responsible for making directors aware of their obligations and part of corporate governance is compliance. It is the job of a properly qualified company

secretary to perform that. Take it away and there is a question mark over whether the company will necessarily be able to comply with all of the form filling in and so forth that it is required to do.

The company secretary has the unique position between the board and management and this can bridge that separation and assist with the better management of the company. That has developed over a period of time from where the company secretary had really no involvement to the point now where the company secretary has a significant involvement.

But more importantly, when you look at what is happening out there in the community, 70 per cent of all employees are employed by small business. Small businesses are predominantly proprietary limited companies and they need people in them that have got some expertise, experience and the right qualifications to be able to bring to those companies some of the community concerns and the general compliance obligations that are necessary for running those small companies.

One point that should be made is that ASIC's database is very much dependent upon documentation that is filed. If it is not filed properly, then that database loses its integrity and you cannot rely on it any more, which would be a significant problem. A company secretary's principal obligation is, in fact, to provide that information which ensures the database. If you go on then, you have got small proprietary companies, large proprietary companies and some foreign controlled corporations. Those employ significant numbers of people, have significant turnover and, in fact, should have a company secretary.

Finally, we made a submission on 24 February this year and put a proposal to the committee. Principally, the background of the proposal is that, within the Corporations Law, there are a number of obligations that are of a compliance nature. It was suggested that these were the responsibility of both the directors and the company secretary. It was proposed that these be grouped together in one place in the Corporations Law to make it abundantly obvious that those are the obligations, that directors are responsible for compliance with those issues and that the directors then have an opportunity to appoint a company secretary and delegate that responsibility to the company secretary. That delegation would provide a complete defence to a non-compliance by the directors. That is all I wanted to say on that issue.

ACTING CHAIR—Thank you.

Mr Falconer—The next matter we would like to discuss, Chairman, is the issue of the 100 shareholders having the ability to convene an EGM under section 249D. John Rennie will say a few words on that subject.

Mr Rennie—I should disclose that I am also company secretary of Pacific Dunlop Ltd and on behalf of the institute and its members in Melbourne, which encompass all the major companies in Melbourne, we do welcome the broadening of this inquiry which was publicised yesterday to encompass these two sections, which we believe are critical to the due administration of the Corporations Law.

One section which is not mentioned in the advertisement but which we think is most relevant is 249P. Section 249P is the one that allows shareholders to put items on the notice of meeting. We argue and submit that that is a clean and efficient way of disposing of matters at an annual general meeting. As we have said in our submission, while there are some additional costs, and it may have a mailing factor, there is no need to convene a special meeting and it does allow minority shareholders to have their say in front of all other shareholders. Both BHP and Amcor have had such resolutions. I have copies of them here if the committee wishes to see them.

On the other hand, section 249D(1)(b) appears to have no regard for either the nature of business which may or may not be appropriate for consideration at a shareholders' meeting, even though it meets the proper purpose test under section 249Q, or the timing of the meeting and the rights of the shareholding body as a whole, particularly having regard to the costs of convening a special meeting. In the 1980s, I think you would be aware, the 100 shareholders may have been regarded as acceptable, particularly to smaller listed companies. But today, we are dealing with mega-registers. Telstra already has over one million shareholders, as does the AMP, and I saw in the paper today that the number of people who have applied to become new shareholders of Telstra or to reserve a prospectus is also over a million. So the test we are looking at now is 100 out of two million. This is because of the success of those two privatisation programs. I think the two best examples are Telstra and the Commonwealth Bank.

The issue that we are concerned about is that, if the 100 shareholder limit is allowed to prevail, you could have a group of 100 Telstra shareholders asking for a meeting under section 249D. That meeting would have to be held unless there was a court order to the contrary, and that is by no means certain. There are two recent examples—North Ltd and Wesfarmers Ltd. We would be happy to go into those with the committee. North Ltd reached a compromise with their shareholding body, and that special shareholders meeting is going to be held immediately before the AGM so that there will only be one mailing cost. Wesfarmers, however, are having a special meeting.

An identical position would arise if the same body of shareholders decided to wait until two months after the annual meeting. They would then say that the next annual meeting is 10 months away and it should be held immediately. We would estimate that, in a company the size of Telstra, the cost of holding that meeting would be between $1 million and $2 million. As a follow-on to that, two months later a separate group of 100 Telstra shareholders could ask for a meeting which would involve the cost of another $1 million.

Our suggested solution to that would be, firstly, that the threshold of 100 shareholders in section 249D(1)(b) be increased to the same level as is already required as a percentage of issued capital under part A, and that is five per cent. While five per cent of shareholders in a large company may appear substantial, you have got to remember that there would be 95 per cent of shareholders who still would not participate in that request. In the case of Telstra today, that would be over one million shareholders who would not be consulted as to whether that meeting should be held.

Secondly, we still believe that any request to hold a special meeting separately from the annual meeting should be subject to the prior approval of the ASIC. We say ASIC because

we believe ASIC is best placed to do a value analysis on the entirety of the proposal and to determine whether the issue is one of such importance that it justifies the cost of holding a special meeting. That would be our submission on those two sections.

ACTING CHAIR—Have you discussed that matter with ASIC?

Mr Rennie—We have not, no. We were intending to raise this item today, but we only became aware yesterday that it was now part of the formal terms of inquiry of this committee.

ACTING CHAIR—So you have not even had an informal response from ASIC?

Mr Rennie—We have not even mooted it with them, no.

ACTING CHAIR—I am sorry to have interrupted your presentation.

Mr Rennie—That was it, thank you.

Mr Falconer—It is over to me again to talk about proxy voting intentions. The institute certainly feels that the requirements of section 251AA are confusing and not relevant to the decisions made at shareholder meetings. Indeed, the reporting requirements of this new section are felt to totally mislead the markets and those who read the reports.

The treatment of abstentions, as required under the Corporations Law, we feel is contrary to the common law approach. The leading authority on the law and procedure of meetings indicates that an abstention is not a vote; it is to refrain from voting. It is not a vote, therefore why does the Corporations Law require a reporting of the number of abstentions in the same way as the number of indications to vote for or against? It is the institute's belief that a number of major funds managers and nominee companies use the so-called abstain box as a balancing item to weigh up the number of voting intentions that they are putting on their proxy form with the total shareholding of that institution. So it is in many ways used as a balancing item.

The reporting of proxy voting intentions, when those proxy intentions are not turned into votes because of voting on a show of hands, we feel may lead to people questioning the validity of a vote on a show of hands where that result may be contrary to the total of the proxy voting intentions. So it seems strange to have to report those intentions when they do not take any part in the decision making. It is the institute's view, in discussions with its members, that the new requirement has not led to any increased lodgment of proxies over the very short period we have had to comply with this—that is probably one AGM season. We have not seen any greater number of proxies or greater number of voting intentions by the institutions.

The institute believes that there is no problem in reporting the results when votes are taken on a poll. That is a proper way of informing the market. But then to have to report a second set of figures, being the proxy voting intentions, will just add to confusion in the marketplace, particularly as those intentions will be changed in the case of corporate representatives who may have lodged a proxy and then actually arrived at the meeting,

withdrawn the proxy voting intention and voted. So there would be a bit of confusion and misleading.

In summary, the institute feels that there are two problems with this new section: the need to report on proxy voting intentions, and the treatment of the abstention as a vote when in fact it is not a vote. Chairman, you have heard most of that before from me.

ACTING CHAIR—Yes, I had a sense of deja vu.

Mr Falconer—I would now like to hand back to John Rennie to talk about the question of 28 days notice.

Mr Rennie—This one I can be very brief on. We have discussed this in detail with our members. Of all the recent changes to the Corporations Law, this could be described as the least appropriate. At one stroke it has negatived the efforts which both the regulators, particularly the Australian Stock Exchange, and the corporate sector have been making in trying to expedite the release and discussion of information by shareholders in the market. We have discussed this at length and we are not aware of any substantial case ever being advanced to justify an extension of the mailing timetable, nor does there appear to be any evidence to suggest that it has had a positive impact on shareholder relations.

Ian mentioned that the Melbourne companies have not noticed any discernible increase in the lodgment of proxies. What we have noticed is a substantial and growing use of the lodgment of proxies by facsimile. We would see this as a very positive initiative which has been introduced into the Corporations Law, but one which at the same time really calls into question why you need an extra seven or 14 days time to consider a voting form when now you can return it by facsimile.

We would strongly urge the committee to reinstate the original 21-day time period, but we would suggest that this apply to both ordinary and special resolutions. At least then all matters would be treated equally. If a problem did exist, it was always one which was within the control of the major shareholders themselves and/or their nominees or advisers. The onus should be imposed on those parties to improve their internal communications and not to allow them to take the easy way out by having an extra week's delay in what was already a prolonged process. In other words, we do not accept that the institutions could not manage under the previous system if they had the proper controls in place. They are helped, as we say, by the advance of facsimile proxies, which will be growing. We think this is against the whole philosophy of the market in delaying information rather than trying to bring it forward. That is the submission which we have set out in our written comments to the committee.

ACTING CHAIR—Thank you very much, gentlemen. Are there any questions?

Senator CONROY—Before I come to a couple of the points you have made, in your general submission you state that the nature of the amendments made to the Company Law Review Bill and the manner in which they were made was a considerable disappointment to the institute and its members. In case anyone is interested, I moved those amendments. So I would put back to you that I am fairly disappointed at the tenor of your submission.

Mr Rennie—Were those amendments ever subjected to public comment?

Senator CONROY—I was about to draw to your attention that in 1996 this committee unanimously supported those, following a lengthy set of public hearings, much like these ones, so anybody who chose to bother to read the 1996 committee's report would have found a unanimous support for the 28 days, as an example, and for a number of these other amendments. The final legislation was then released in 1998. Funnily enough, another set of hearings was held publicly where these issues were aired and debated at some length. It would be fair to say that the committee split on party lines at that point in terms of support, with the government members rejecting the amendments that they had previously supported. That was three months before the bill was actually debated.

Those amendments were clearly flagged in that report in March 1998 and were subsequently tabled in parliament and available to anybody who wanted to look at them. Not agreeing with them is not the same as no consultation. I believe you have probably been misled because, as some of the other submissions make the point, the government have attempted to suggest that there were these last minute amendments that no-one had ever heard of. This is absolutely not the case.

ACTING CHAIR—Could I suggest that the time is used most effectively if we do not have a debate at this stage—there are other forums for that—but rather put questions, no matter how pointed they may be, to the witnesses.

Senator CONROY—The final point that I was going to make was that, if you actually examine the evidence that was given over the course of the three years, there has been a significant case made about 28 days by some significant contributors to the committee: IFSA, its predecessor bodies and a number of other organisations have supported a range of the changes. On the 28 days—you make the point, and I wrote the words down, 'No case was made'—can I refer you back to the evidence of the 1996 inquiry, the 1998 inquiry and this one in which there is evidence from significant individuals supporting the 28 days.

Mr Rennie—Can I make one comment that, if I am wrong—and I would obviously go on record that I am wrong if that is the case—that does not prevent, I would submit, this committee revisiting those subjects. For the reasons we have given, we believe that they run counter to the advancement of information. We would hope that, notwithstanding the background that has been referred to, the committee is willing to review that decision and try to allow the 21-day rule to be reimposed in the circumstances we have mentioned.

ACTING CHAIR—We certainly have your submission, and the committee is meeting for precisely the purpose of reviewing the provisions.

Senator CONROY—We had a hearing in Perth yesterday where a number of good points were made in terms of that. Notwithstanding the fact that it says 28 days, due to a range of other requirements it could be as much as six to eight weeks. This is a problem in terms of the volatility of the market and the currency of information being given to shareholders for their consideration. We had a discussion on how the seven days, going from 28 days down to 21 days, would perhaps make a difference of only seven weeks to six weeks or perhaps, in a worst-case scenario, eight weeks to seven weeks, and then there is the

issue of the currency of the information. I was wondering if you would give us a view on that issue of—even though 21 days does not sound like many—21 days sometimes becoming seven weeks and 28 days sometimes becoming eight weeks. The question I asked yesterday, which I now put to you, is: do you have a view on how seven or eight weeks in terms of currency of information actually works in practice in the market?

Mr Falconer—There is the requirement, as you know, to prepare annual accounts and have them available to shareholders 21 days before the annual meeting, and we now have the issue of the 28 days. Certainly, it is something companies think about in the currency of the reports. The Stock Exchange has moved to change a few areas like this in the listing rules on 1 September so that the companies have more flexibility in giving a date of currency of the information in the annual report. In terms of my own company, it is a major issue in the length because my company reports at the December year end, accounts are at the end of March, and the AGM is at the end of May. There is a two-month period when you are at risk, if you like.

Senator CONROY—Sure.

Mr Falconer—I do not know whether you find the same issue, John.

Mr Rennie—Yes, that is fine.

Ms JULIE BISHOP—Just moving on from that, could I ask those who are company secretaries or directors of companies that have overseas shareholders, whatever percentage it is of your register, is there an issue of which you have become aware of overseas shareholders being given sufficient time? I do not have the problem of being a member of the former committee, so I come to this with a totally open mind. In terms of the 28 days, it seems to me it is reversing the trend that technology and the greater efficiencies in companies would be seeking to achieve. You are trying to shorten time, generally, rather than extend it.

Mr Rennie—Could I speak for Pacific Dunlop and then David can perhaps speak for AMP. Of our overseas shareholdings, over 90 per cent are held through the Australian nominee system and the majority of other shareholders are in New Zealand. If there is a delay factor it is between their nominee and dissemination of that information to the underlying shareholder in our case.

Ms JULIE BISHOP—And the difference between 21 and 28 days?

Mr Rennie—We would hope that, with the advancement of technology, things like the notice of meeting will be available on email if someone wants them, certainly facsimile. That should not be an issue.

Mr Robinson—I do not have the figures on the international shareholders but by far the majority of our shareholders, over a million of them, are retail shareholders. They will be predominantly based in Australia and New Zealand. And for the same reasons that John mentioned, we would be in support of the technology moving ahead and having the 21 days rather than the 28 days.

Ms JULIE BISHOP—Is it essentially a question of the information available to shareholders becoming increasingly stale because of the time period?

Mr Rennie—The effect is that the annual meeting is postponed by a week. In other words, the mailing date is the same. It is the gap between when the annual report is mailed with the notice of meeting and the meeting. As Ian pointed out, the accounts need only 21 days, the notice of meeting needs 28 days, and the discussion of that material at the annual meeting. They still have the information in their hands but it is getting staler for discussion purposes.

ACTING CHAIR—Any further questions on the 28 days matter?

Senator CONROY—I had a question in relation to the disclosure of the proxy voting. I can understand the concern of a chair revealing prior to a vote and thereby discouraging genuine participation. People would say, 'I am not even going to bother to vote any more because there is no point.' Does your concern go to that aspect or the non-disclosure? In other words, if it was revealed after a vote how the proxies had voted, would you still oppose that, or is it putting off the genuine participation beforehand?

Mr Falconer—There are two issues. Putting the proxy voting intentions to the meeting beforehand we feel is not the right thing to do at an annual meeting. You are virtually saying to those that turn up, 'Look, you need not have bothered coming.' That is a replaceable rule under the law that most companies probably will not take up.

The institute's main concern is in the disclosure of those proxy voting intentions when indeed they were not put into votes. We see it as meaningless. When a vote is taken on a show of hands, what is to be gained in a governance or any other perspective about disclosing, 'By the way, we have 500 million intentions to vote here but we have not used them because we have gone on a show of hands'?

Mr Rennie—Generally speaking, those shareholders who are in the meeting room have not put in a proxy, so their votes are not counted in any statement of intentions. Our experience—and David might be able to comment on this—is that a number of larger institutional holders send a representative to the meeting. Those votes are not in the proxy voting intention either. Therefore, anyone who is in the meeting forum will not be reflected and the figures that are in fact published may be misleading.

Senator CONROY—Can I just clarify that point you made. You are saying that an institution may send an individual as a representative. Will they have given away their proxy anyway, will they still hold their proxy, or can both happen?

Mr Glasgow—Both can happen.

Mr Rennie—Normally they would not put in a proxy. They would send a representative who, if there was a vote at the meeting, would attach the form of appointment to the voting form, but may not have disclosed his identity before the meeting, and certainly may not have identified how many shares he represents before the meeting.

Senator CONROY—Let's assume that I have a share in—

Mr Rennie—A classic case is AMP.

Senator CONROY—Let's assume I have a share in AMP. I do not, but let's just assume I do.

ACTING CHAIR—You bought GIO, did you?

Senator CONROY—I really hope not! Let's assume I have one share, I turn up, and I cast my vote. However, I might like to know how my super fund voted because I might want to go to my super fund and say, 'Why did you vote against me at this particular meeting on this particular resolution?'. How would I find that out, other than go in and ask them? They may say, 'We just gave our proxy to the chair. We have no idea what really happened. We just said to do whatever you want.' In terms of disclosure and governance, it may be that there is something served by me knowing that my super fund actually voted against me. I may then seek redress with my super fund to say, 'Why?'. It may be just a form thing that they sent off, you know, and they do not really care.

Mr Falconer—The proxy voting intentions do not show by shareholder. It would just be a grand total. Also, your super fund, if it were not the AMP, may have its holding held in a company like Westpac Nominees. You are not really going to know, unless you go to your fund and ask, 'Please tell me.' You could direct your fund—

Senator CONROY—My bit

Mr Falconer—to vote your bit a certain way. That would be the way that it would go.

Senator CONROY—Is that an argument for greater transparency and greater disclosure then, in terms of listing?

Mr Glasgow—I would not have thought so. In the super fund arena, and it may just have been an example you have picked, the interesting thing is that you do not as a member of a super fund own an interest in a particular share, you own an interest in the super fund but not in particular shares. Therefore, with your request or direction to that super fund, they do not have to take any notice of it at all.

Senator CONROY—I accept that they do not have to take any notice of me whatsoever in that sense.

Mr Glasgow—I do not think seeking greater transparency is going to achieve anything there because you do not have any right to direct that super fund how they are going to vote.

Mr Falconer—Maybe you would have to go through the trustees.

Senator CONROY—That is the next step. They have elections too. It may be that I am very unhappy with the voting pattern of the trustees of my super fund.

Mr Glasgow—At which point you then withdraw your funds.

Mr Falconer—I still do not think you would know, because it is one vote out of Westpac Nominees or ANZ Nominees, unless you are with BT where it would be Pendal. But you still do not know what that vote is from those institutions. You only know a total. You could say generally the institutions voted this way.

Senator CONROY—In America it is compulsory for funds that are registered to cast a vote.

Mr Rennie—That is the point that Ian made, and that is why the abstain box is so dangerous. We have been advised that some funds tick the abstain box for any shares for which they do not have instructions. It appears that they are voting their entire holding whereas if you went underneath the abstain box you would find they may not have received instructions for all those shares.

For example, if they had 20 million shares and were instructed to vote eight million for the motion and four million against, and no instructions on the other eight million, they would tick the abstain box for the other eight million to give the impression that they were voting all their shareholding. That is one of the dangers of the abstain box, that it is not actually a vote.

Senator CONROY—I accept there could be confusion. Again, I would probably make the point that perhaps this is an argument for greater transparency and disclosure in terms of clarifying those sorts of problems.

Mr Glasgow—What we are trying to say to you is that it is not an issue for the company, it is an issue for the super fund. The company cannot find out. You can get a situation where Westpac Nominees is registered as the holder of 20 million shares. As a company you have no idea what super funds it is representing. It could be Connelly Temple. It could be SMF. It could be all sorts of other super funds, you have no idea. Then it can change because you change trustees.

Ms JULIE BISHOP—You are at the wrong end. If you want that level of disclosure—

Mr Glasgow—Go to the other end.

Senator CONROY—I have purely given you a personalised example. As I said, there have been submissions supporting this proposal, particularly from IFSA, which is a very major organisation, as well as other smaller associations. Do you have any idea what is in their mind when they support this? I think they are appearing over the next few days, so I will be able to ask them specifically. I am just wondering if you would like to rebut them in advance, given that these have been public debates, because in their submissions to us they continue to be supporting the disclosure of the proxies.

Mr Falconer—I think we have said it all in our submissions and here today. I say again that these are not actually votes unless they are used at a poll. We are talking about votes. They are not votes. What we are saying then is, 'We want transparency about how people

might have voted had they been given the opportunity.' As Duncan says, it is really not the companies, it is the institutions who are investing that maybe need more accountability to their members.

Senator CONROY—We will hopefully be getting some more evidence to support one of the points you made, that it has not led to an increase in the amount of proxy voting at this stage, in that first 12 months. Do you think just one round, when the changes were made very late, is a fair time to make a judgment? Perhaps there is an argument that this is a measure designed to increase the total amount of proxy votes over a period and there is a question as to whether or not 12 months is a long enough period to judge, when, as you pointed out, it came in very late, and it was relatively unknown, if you believe the government. Maybe enough institutions had not been prodded to take note of it, and maybe over two to three years the 30 per cent will grow to 50 per cent as a consequence of the measure.

Mr Falconer—I agree there is a growing trend of lodging proxies, but I would not see that this legislation will assist it. I do agree with you that one year is probably too short a time frame. I do not think this legislation will assist. It is really the move in other circles, that shareholders—like your example in your super fund—want to make sure that the votes are there if they can be used if we do go to a poll. I think that is a general trend, as my colleagues would agree?

Mr Glasgow—Yes.

Mr Falconer—So we will see more lodgments and more proxy voting intentions over time.

Senator CONROY—I guess you would be disappointed, then, to know that the lodgment via fax and email was so vigorously opposed by so many organisations in these last couple of years and that even the government originally did not want to support, given that you have said it is a good thing—

Mr Rennie—It has worked, there is no question of that.

Mr Falconer—It was just problems of authenticating—that was the only issue.

Senator CONROY—Sure, I accept that.

Mr Falconer—We company secretaries are pleased to accept things in that format.

ACTING CHAIR—As there any no further questions, thank you very much for your presentation.

Mr Falconer—Thank you, Chairman and members.

Proceedings suspended from 12.23 p.m. to 1.36 p.m.

[1.36 p.m.]

EASTERBROOK, Mr Alexander Arthur Douglas, Director/Principal, Corporate Governance International Pty Ltd (ISS Australia)

ACTING CHAIR—Welcome. Can you tell us something about your organisation?

Mr Easterbrook—Corporate Governance International Pty Ltd are probably best known for the proxy advisory service that we provide to major institutional investors in Australia, covering the top 100 listed companies. We report on them from a governance perspective and we use the ISS Australia name for that activity. ISS happens to have the same initials as another large proxy advisory house in the United States called Institutional Shareholder Services. We have a cooperative arrangement with them. The two organisations are quite independent, but we exchange research and information.

ACTING CHAIR—Mr Easterbrook, the committee prefers to conduct its hearing in public. However, if there are any matters that you wish to discuss in camera, we will consider such a request. I would like to remind you that the giving of false or misleading evidence may constitute a contempt of the parliament. The committee has before it your written submission. Are there any corrections or alterations you wish to make to that submission?

Mr Easterbrook—No, Mr Chairman. I believe the comments that we made in that submission are as valid now as when we put them in last August. I will be expanding on one or two things that have happened since then in this presentation.

ACTING CHAIR—Thank you. I invite you to make that presentation.

Mr Easterbrook—I have done a little slide show for the committee because there is quite a lot to cover. I think that is probably the most efficient way to do it.

ACTING CHAIR—We do have 45 minutes.

Mr Easterbrook—I understand that, but I would like to leave a bit of time at the end for questions.

Slides were then shown—

Mr Easterbrook—By way of introduction, the coalition government referred a number of issues to the PJC in July 1998, which is why we are all here. Basically, two types of things that were referred: insertions into the Corporations Law made by the CLRA 98 and a collection of other matters not in the Corporations Law which the committee was also asked to consider. We are concerned only with these six governance reforms plus one additional governance reform that is not in the Corporations Law. We will come back to those later.

I thought I would start off with trying to just draw a picture for the committee of what has happened since July 1998 on the international governance scene. Amongst other things, we have contacts with a large number of people in the governance industry internationally.

We are well in touch with what is going on. I suspect the committee has heard about the OECD global governance principles which were adopted by the OECD ministers earlier this year. There have been a number of initiatives by the World Bank on the governance scene.

The international corporate governance network had its annual meeting about a month ago and adopted a working kit on the global governance principles. I am going to table that kit. I have not got time to refer to it in detail, but I would encourage the committee to have a look at this working kit. There is quite a useful little summary of it. That is the first exhibit, which is a note that we sent out to subscribers in July. It says:

At their 1999 AGM on July 9, 1999, the ICGN membership, now representing some US$6 trillion in institutional investor capital,—

That is just a mind-boggling amount of money that the members represent—

unanimously adopted a practical ten point 'Working Kit' in response to the OECD Global Governance Principles.

In essence, the purpose of that was to put some teeth into those principles from the institutional investors' viewpoint.

The introductory statement in the working kit said, amongst other things—and I think this is an important issue for the committee to bear in mind—that the governance scene is now maturing out of being missionary into being quite commercial. It affirmed:

[A]long with traditional financial criteria, the governance profile of a corporation is now an essential factor that investors take into consideration when deciding how to allocate their investment capital. The Principles highlight elements that ICGN investing members already take into account when making asset allocation and investment decisions.

In other words, how the governance structure of the company operates is something that is taken into account in the decision on how much money or whether you invest in the company. It is not just a do-good thing, it is commercial matters. Looking at it from a point of view of the Australian market, the idea of the Australian government should surely be to try and make the Australian companies as attractive as possible to all investors, including major institutional investors from overseas. Their money helps to keep the price of shares up.

I will not go through everything in the UK but a great deal has been going on. I will be coming back to this recent speech by the UK Secretary of State. It is only 10 pages but I would strongly recommend that the committee look at that. It shows exactly where the UK is on some of these important issues of institutional investor voting and remuneration, which is one of the most contentious issues in Australia. Senator Conroy, you would be perhaps amazed with the very practical approach that the Secretary of State is taking there. He is saying, 'We pay football stars mega-dollar salaries. Why shouldn't we do the same for directors? they are doing an equally important job.'

A great deal has gone on in the international scene. By way of contrast, Australia has basically been standing still. Very little has happened in the last 12 months. This committee is even, when we get down to the nuts and bolts, contemplating a repeal of some of these reforms that were introduced last year. Getting back to that bit that I read out from the

ICGN working kit, if you are going to go backwards, what sort of message about the Australian market does that promote to the rest of the investing world?

I would like also to correct a bit on record on the reference. The reasons given by the parliamentary secretary to the Treasurer in his media release on 15 July 1998 were that these changes that were put in by the Senate to the Corporations Law were imposed on the business and investor community without consultation. The government believes that what Australian companies ought to be doing is striving to achieve world best practice, not following prescriptive check lists imposed by the government. I am sure Senator Campbell would not have written that himself because he would know the situation as well everybody else, but those are the facts.

These seven governance reforms I want to talk about have been supported by the institutional and the individual investor constituency since 1996. We have Mr Rofe here, from the Australian Shareholders Association, representing individual investors. I am sure he will tell you exactly the same. We have the submissions from AIMA going back to 1996 and we have Catherine Maxwell from IFSA, which is the successor to AIMA. I am sure she will also confirm that.

This same committee in November 1996 recommended in favour of nearly all of these reforms. They were incorporated in the second simplification bill under the Labor government. They were removed from the successor to the second simplification bill that came under the coalition government Company Law Review Bill in October or November 1997. So that is what happened. If there had not been consultation, I do not know what had happened there.

On the other point about not imposing restrictions that was referred to by the parliamentary secretary to the Treasurer, in fact the practice has been to try to get voluntary cooperation—and I have given you just three examples there on remuneration disclosure, 28 days notice and proxy voting results disclosure. Those have been in the corporate governance guide issued by the Australian Investment Managers' Association first in 1995 and then in 1997 and I believe there is a new version—the third edition—about to come out.

Those have been in there. The bottom line is that it has not been observed and if you want three examples again of that—and I am actually giving you some evidence. I gather from talking to some people who have been at hearings before the committee that a lot of statements have been made to you but no-one has actually, as I understand it, produced anything that is really solid evidence against this. This is evidence.

On remuneration disclosure, which is section 300A of the Corporations Law, I am going to table, so that everybody can look at it, section 1431, and I suspect that the Senate opposition who put these amendments into the Corporations Law last year were not aware of 1431, because what 1431 said was that the remuneration disclosure did not have to be complied with—this is cutting through the way it is expressed—by companies who balanced prior to 2 July 1999.

So what happened? In fact, of these top 100 companies that we reviewed, and we looked at this particular issue, about 70 of the top 100 balanced at 30 June—it is the most common

balance date for the major Australian listed companies—and only five out of 70 actually gave you that disclosure voluntarily. Now of course all companies provide it because they have to, but that is an example of why you need the disclosure, so it should be retained.

On proxy voting disclosure which is section 251AA of the Corporations Law, about 50 per cent of the top 100 companies voluntarily disclosed that prior to the law coming in. Section 251AA came in straight away. The remuneration disclosure was the only one which had delayed operation, just by virtue of section 1431. About 50 per cent of them disclosed the proxy voting results and we will come back to proxy voting later on.

Some of the most interesting did not disclose it although they were asked to do so and BHP is a very good example. Very interesting because it actually owns 17 per cent of itself under the Beswick holding which is now actually being removed. It is being done away with. When one looked at the voting last year by BHP, which was the first time it had to be disclosed, effectively that 17 per cent called the shots. That made the decision as to what would happen. That should also be retained.

There is one reform which I mentioned which was removed from the Company Law Review Act which was MD&A or Management Discussion and Analysis, which is a narrative contents to go in the annual report which basically tells you, particularly if you are not very financially literate, what the most important things are to know about the company, looking at it in its most simplistic terms. The deal was that that would be taken out of the Company Law Review Act, and I believe Senator Conroy will be familiar with that, on the basis that the ASX would cover it by a listing rule. While we are talking about listing rules, all these provisions in Corporations Law could have been covered by listing rules, but the bottom line was the exchange had not done so. You can contrast that with the approach of the exchange, for example, in London, where it is dealt with under the listing rules. But the bottom line is that the exchange opposed these reforms so one had to find another way to get them into the law and to get them complied with.

Where are we now? We are over a year after that deal and there is still no listing rule from the ASX. I suspect that if nothing is done, then nothing with ever materialise on it, although I believe the top 100 company representatives giving evidence to the committee are in support of that.

Again, the proof it—only a very few of the top 100 companies that we have reported on have included voluntarily an MD&A—management discussion and analysis—in their annual reports. I have brought you the Lend Lease Annual Report from last year which has a 13-page MD&A right up front. Again, I would commend that to you. It is very interesting reading and it gives you a very good picture of the company.

I am also tabling a very recent report, which is exhibit 6, that we did on another company. The is the only thing I would ask confidentiality for because we have only just issued this to our clients.

ACTING CHAIR—You would need to go into camera to be assured of confidentiality.

Mr Easterbrook—Let me just say, I will leave it to your good offices to save the time.

ACTING CHAIR—This is a public hearing.

Mr Easterbrook—Let me just read a bit out of this. This is a report which we issued last week on 10 August. We said:

The company's approach to corporate governance is generally good.

This is a company which has had a good record on governance but in issues that we suggest to our subscribers that they raise with the company, the two points here are:

Greatly expanded financial disclosure following a particular acquisition is a governance priority. That acquisition reinforces the need for the company to introduce a formal management discussion and analysis to the US reporting standard section in the annual report to provide a shareholder-friendly tool with which to monitor the all-important performance of management.

They have made a major acquisition. The question is: how well will it perform? This is a company which has had stunning results for its shareholders. It has made a major acquisition. The question is: is it going to earn as much on its new acquisition as it has made for its shareholders up until now?

Later on, in the body of the report, we said:

Shareholders should look to the chairman for greatly expanded disclosure following this particular acquisition. In particular, ISS would repeat a call it made last year in relation to this company. That call was the adoption by the company of a formal management discussion and analysis to US reporting standards.

So this is the second year running that we have said this company ought to do this. It would be interesting to see whether it does because it has not yet issued its annual report. But we are saying this should be a requirement. Because the ASX has not done anything, the committee should recommend that it should go into the Corporations Law.

The governance reforms that the investor sector requested, which I have got here, exhibit 7, was originally prepared in April 1998 for IFSA as a proposed new part 46 in the Corporations Law. The idea was to get something that was easily found all in one spot—a repository of governance reforms sought by investors—so you could find it. You would not have to go hunting all the way through the Corporations Law. It was given by IFSA in an even-handed way to the government representative, the parliamentary secretary to the Treasurer and to the Senate opposition. Basically, as I understand it, IFSA said, 'We don't care who puts this in; we just want it in. We would like both parties to support it.'

What happened was that this schedule, which is only four pages long, was given to the Treasury officials. They decided that the proper thing to do was redistribute all these seven provisions elsewhere in different sections of the Corporations Law. Again, I am tabling details of the different sections. Reverting to section 300A, it got stuck in part 2M of the Corporations Law, which was caught by section 1431. Part 2M did not become operative until 2 July. That is why the remuneration disclosure has only come in for half this year, in effect—less than half the company so far.

There were two unintended consequences of that redistribution, and I have already referred to section 1431. If the Senate opposition had known that the remuneration disclosure would not bite most of the companies reporting, which are the 30 June companies in 1998, I imagine they would not have agreed to that. Even more importantly, there was an error in the transposition. This is particularly important in relation to section 300A, and this is where part of the problem occurred. Where it talks about what the investors wanted in the Corporations Law on the remuneration disclosure, it should have said:

The director's report for a financial year must also include

(a) discussion of board policy . . .

That got translated, in section 300A, into 'broad policy'. I do not know whether it was a typo or that someone did not understand it properly, but part of the reason for it is that no-one understands what on earth 'broad policy' is. It is supposed to read: what is the board policy of the company on remuneration? That is a major reason why there has been all this confusion.

There is another subsidiary aspect of that. When this four-page schedule was drafted, they deliberately used the generic word 'remuneration'. They did not want to use a defined term in the Corporations Law because they wanted to use something that everybody knows—I think everybody knows basically what remuneration is—but Treasury, in their wisdom, changed that to the word 'emolument', which is a defined term in the Corporations Law. That, again, leads to one of the main arguments: what on earth does that mean? Using this technical defined term means it does not hang together properly. If the committee recommends anything, it ought to recommend that it, at least, go back to where it was supposed to be, and then people might have a better chance of understanding what it is all about.

Looking at the individual reforms, we have fax facilities for proxies in item 4. I am not going to spend any time on that. Last time, the committee may remember, the ASX actually argued against this, saying, 'This is a terrible imposition on companies. It is going to be terribly expensive for them.' Hopefully, it is no longer an issue. I table a letter from one of the top companies, David Jones, which says, 'Having the fax facility has simplified the procedure considerably'—'bloody good idea' in layman's terms. Here is a top 100 company actually saying they agree with it.

On page 12 of our submission we gave you a very powerful example of the benefit to investors of a fax facility. One company happened to be holding their meeting two days after Easter. Under the old regime, you had to get your proxy in to level 36 in a CBD building in Melbourne. Realistically, there was no way you could get there over Easter, and the only way you could get your proxy in was to lodge it about seven days early—almost 33 per cent of the notice period of the 21 days.

I have only put item four in here to counter the exchange's extraordinary argument that this was going to be a terrible imposition and cost on the companies. What is happening now is that most listed companies are increasingly outsourcing the maintenance of their share registry. That includes the processing of proxy votes. If you now look at the fax number that has to be given under 250BA by most of the top 100 companies, you will find that it is not

the company's fax number, it is the professional share registry's fax number. The company does not even have to have its own separate number, it is the professional share registry's number. There are only about three or four of them left. They do it for a large number of the companies. Hopefully, it is really a non-issue.

Concerning the right of a single director to convene a general meeting, I do not know whether this one was put into the Corporations Law by the Senate last year, I believe it was already in. Again, I do not want to waste much time on this, but an individual director of a public company can convene a shareholders' meeting if he thinks the board is misbehaving itself. That is basically the intention of it.

It is a very powerful tool indeed where you have independent directors in the minority. If they are in the minority then they cannot actually implement a board decision, or else the majority can implement a board decision irrespective of the concerns of the independent directors. It is actually a very useful threat to make sure that the rest of the board actually listens to them.

In reality, it is never going to be used. We are not aware of any use of this section to date in the top 100 companies. It is there as a mechanism to make sure that the director has a bit of muscle to get his views heard in the board. Is there any evidence of abuse of this section by a minority of directors? I know that there have been some submissions saying, 'It is terrible. There are going to be meetings called left, right and centre by madcap directors.' Show me the evidence. I cannot see any.

The next matter concerns Australian listed companies providing Australian shareholders with disclosure provided to US shareholders, which is section 323DA. Obviously, if you are an Australian shareholder you would like to be given the more extensive disclosure that the American regime insists the American shareholders in your company get. It seems a fairly obvious point. There were complaints about that from the exchange and from a number of companies. My question is: where is the evidence that it has been a major problem or cost? Realistically, all they will do is fire off either a fax copy or an email copy of what they are releasing on the US exchanges. It is no extra real cost or work. We made some comments on that in schedule 4 of our August submission, which I recommend you again revisit.

I believe the 28 days issue is one of the more contentious matters. Therefore, what I have tried to do is put the logic down as simply as I can. The clients of major investment managers, and I might add the Australian authorities, want institutional investors to play the governance role in listed companies. It is important that shareholders do that because otherwise there is no-one there to discipline management and make sure management is working for the shareholders and not for themselves.

A good example of the authorities wanting this is the Australian Securities and Investment Commission's policy statement 128, 'Collective action by institutional investors.' If the committee reads that it will see that the ASIC says, 'Yes, institutional investors ought to do this, it is part of their job'. I ask you: what is the point in holding shareholder meetings and asking shareholders to vote if the institutions, who are about 60 per cent of the available capital of Australian listed companies, in other words, on average they own 60 per

cent of the company, do not have enough time to do the job? What is the point? You might as well not have the meeting.

In fact, later on when we come to look at some of the statistics on voting, that is part of the problem. There is probably still not enough time, given all the mechanics you have to go through, for things to get done properly. That is why the institutions need extra time. Because in many cases the shares are actually held by custodians, it takes a while for the information to percolate through on what they are being asked to make a decision on.

They are expected to reach a well considered decision. Again, in the UK Secretary of State's speech he refers to the need for institutions to make a well considered vote. They have not just got to vote, they have got to make a well considered vote, they have got to make a logical, correct vote in the interests of the people they represent. They may need to get some external advice from time to time and they might even want to consult with some of their fellow institutional investors. They then have to make up their mind and tell their custodian how to vote. That takes a bit of time.

The trouble is that there is a elongated process here. In due course, electronics might help that, but at the moment it does not. You are going to have to change the law to enable electronic voting. They are looking at that in the UK. That is something that this committee should also take on board. Again, I would encourage you to look at what the Secretary of State says that the UK government is doing in this area. But the point is it just takes a long time.

We gave a very powerful example in our August submission of the benefit to all investors of an extra seven days. It is on page 9 of that submission. In essence, what happened was that a company proposed a way out share option scheme for its directors, executive and non-executive. Two of our clients rang us up and said, 'This is outrageous. It does not bear any resemblance to guidelines. Would you do us a report on it?' We did. To cut a long story short, the company had breached the Corporations Law on what they were doing and so we got the ASIC involved. The ASIC leant on the company and the matter was fixed up. They withdrew that proposal on the basis that they would subsequently put forward a more acceptable proposal.

I should also say that the institutions talk to a number of other institutional shareholders in the company. One of the reasons why the company withdrew those proposals was that when they added the numbers up they found they were not going to get a 75 per cent majority for what the board was proposing because too many shareholders were saying, 'No, this is not on.'

For that sort of governance activity to go on, you do need a bit of time. All we are talking about here is an extra seven days. In most cases you have a special resolution to be voted on by shareholders. Companies have to give 21 days notice anyway, so we are only talking about an extra seven days. I gather that there have been complaints made to this committee about this 28 days. I ask: where is the evidence of a major problem of cost or lost opportunity to Australian listed companies? Ask for concrete evidence of something.

There may be very occasionally a situation where a decision has to be made more quickly. It is possible in that situation for the company to get a dispensation on it from ASIC. But I suspect in most cases they are unlikely to get it because what it will probably mean is they have been rather dilatory in getting on with the job.

To get back to this point here—and we have Ian Falconer from Rio Tinto here—Ian tells me that I am wrong there, that six weeks ought to be eight weeks. Rio Tinto, which is one of the largest multinationals with huge international businesses, manages to give its shareholder eight weeks notice. If Rio Tinto can give eight weeks notice, what reason possibly can there be that Australian companies, if they get their butts off the ground and get themselves organised, cannot surely give 28 days notice, which is four weeks? Again, as I have said, have a look at what we have said in our submission.

Coming back to the beginning, there is no point in asking shareholders to approve things, to make decisions, if they cannot do it properly. You are either going to do the job properly and have a procedure which deals with the current logistical problems that exist at the moment or you may as well say, 'Don't have the meeting. Just give them a part on the board,' because it is a complete waste of effort all round. As I say, technology might in the future enable that period to be cut down, but at the moment it cannot do it and you will need to change the law to do it. So you have to deal with facts as they are now. The solution at the moment is to leave the 28-day notice alone.

Disclosure of proxy voting results is a very important issue. First of all, it is supported by both ends of the public shareholder constituency by institutions and small shareholders. They both say, 'We want this information. We want to see who is voting.' It is not just a matter of asking the directors to disclose this key information; it is actually as much to check that the institutions are doing their job. They are supposed to be voting on important issues. The question is: are they? I do not have time to go into why institutions have to vote by proxy. You are just going to have to take it from me and look at our previous submissions. The reality is that the only way most institutions can vote in any sort of organised and economical way is by proxy. So you have 60 per cent of companies owned by institutions all voting by proxy.

I would encourage the committee to have a look at our report or at least the executive summary at the front of it, which is only about three pages. What that report shows—and we were able to do this report because of this section 251AA—is that we actually got the information. Previously, we could get only about 50 per cent of the information. Only 50 per cent of the companies disclosed it voluntarily. We were able to look at the 70, 30 June 1998 balance day companies and see what the levels of proxy voting were in those companies. The average voting level in widely held top 100 companies was 32 per cent compared with 45 per cent to 50 per cent in the UK. The UK Secretary of State is saying, 'This has got to go up.' It has to. The report, which has been done by a committee of inquiry, came out in July in the UK saying that it has to go to 60 per cent. If it does not go to 60 per cent, the government is going to have to do something about it. If you contrast the UK figure with the Australian figure, it is just mind-boggling.

Again, this issue of control is extremely important. If you only have 30-odd per cent voting in a widely held top 100 company, what does that say for the power of a 10 per cent

shareholder? He is a third of the people that bother to vote and it gives him a huge power quite disproportionate to what you might expect his power to be.

Traditionally—in my previous existence, I was a partner in a major law firm—one is used to looking at control meaning 51 per cent plus but, if you have only 30 per cent voting, someone with 16 per cent can in fact get resolutions through. He controls it. It is a very important issue which I think the committee needs to give some thought to. That is why it is very important that this figure gets up to somewhere around here because, when the voting is as low as that, it gives power to people with vested interests. Major shareholders do not always have exactly the same interests as the public shareholders in the company.

This disclosure under section 251AA is essential to getting this level up. You need transparency on this issue so that people can complain about it. One question that I have for the institutional sector, which actually happens to be my client sector, is: 'What are you doing about it?' In the UK, the equivalent of IFSA commissioned a committee of inquiry to look at this. It has just reported and I have referred the committee to that report.

Now we get on to remuneration disclosure, which is probably the most contentious and therefore it is the one that I want to end up with and spend a bit of time on. There is a lot of misunderstanding about the logic of this. It is not about seeing how much Mr Eck got paid last year or how much Mr Prescott got when he left BHP, it is actually about the institutional shareholders who are supposed to be professional investment managers doing their job properly by monitoring management and boards, and making sure they are working for the shareholders.

If someone is going to work for you, surely one of the first things you want to know is what it is going to cost you. If you hire someone to paint your house, you do not tell him to send you a bill, you work out what the cost is. So it is very important that the professional managers do their job of seeing whether the remuneration is appropriate. We went to some trouble in the August 1998 submission to explain the logic of the disclosure. I would refer the committee to that. In particular, there are two essential prongs of that disclosure. This is coming back to this wretched board policy again, which is one of the problems with what is in section 300A. You want to know what the board's policy is on the remuneration of the top representatives of shareholders—the directors and top management. What is their policy on that? Why do you want to know that? So you can actually test, if you are a professional investment manager, whether you agree that that policy aligns the agents' interests with the owners' interests. Are the agents, who are the board and management, working hard for the shareholders or are they working in their own interests?

The second prong is that you need the disclosure of the individual remuneration break-up so you can actually test whether what happens in practice is consistent with the policy. You need both. You need both the policy and you need the actual practice so you can look at it and see whether you are in agreement with it or whether you want to talk to the company and say, 'Look, I do not think your policy is as good as this company's policy, which actually also happens to be performing a bit better than you are.'

The problem to date—and this is an issue which has not been addressed, for example, in the ASIC policy statement that came out after section 300A came in—is that they do not

address this issue of policy properly. I think this is an issue that the committee really ought to home in on. We need to get this better disclosed and explained.

I have not brought you any examples from the companies we have looked at since this came into operation, because frankly so many of them will be saying, 'The disclosed policy is not much help.' You really do not know; it is far too general. It probably goes back to the problem of whether it is broad policy, as opposed to the board's policy.

Then, again, the listing rules require shareholder approval of equity issues to executive and non-executive directors, unless they are pro rata—in other words, unless it is part of an issue for everybody. If the directors are getting special equity issue, then the listing rules say that the shareholders have got to approve it by special resolution—a 75 per cent majority.

So it is a very, very common agenda item in the top 100 companies. In fact, I have not gone back and looked at the figures of the companies we covered last year, but I would say that there would be a resolution for something of this nature in about 60 to 65 per cent of the companies. It is very common. Why is it very common? Because it is now increasingly becoming an equity incentive element as part of top management's remuneration. He gets a package, and part of that package is an equity incentive, either in the form of options or shares, or it might be a combination.

When you are asked to approve this equity incentive element, how can you, if you are a professional investment manager, actually decide whether to approve that bit of it if you do not know where the rest of it is? Is the equity incentive 50 per cent of the value, 20 per cent of the value or what? What is the rest of the package? You need to know what the rest of the package is, and the companies traditionally have not disclosed that voluntarily.

In fact, one of our complaints is that, although they now have to put in the section 300A disclosure, which is last year's package, when they are coming up to this year and asking for approval for something that is nine months after the year end date of the previous year, they will update that information if there is any material change, because sometimes there are material changes. So, in fact, I would argue that you need to beef up 300A by saying, 'If you are going to be seeking shareholder approval of equity incentives for the top management, you must update the disclosure that you have made as at the end of the last financial year,' so you then have the picture of how it fits in with the whole package, and you can make a considered decision.

Finally, if you compare the US and the UK positions with the Australian position, there is an SEC disclosure requirement very similar to 300A. It has been there for yonks. It is just the name of the game; it happens. In the UK, it is exactly the same, except it is in the listing rules under the combined code. Again, if we could get the exchange to do this, we would have no complaints, but the problem is that they will not, so you have got to put it in the Corporations Law. But it is required in the UK. In fact, they require a lot more in the UK than we require here. You have to have a report from the remuneration committee. If I can put a feather in Ian Falconer's cap, if you go and look at the Rio Tinto annual report for last year and look at what you can get, I presume on the web site, there is always an extremely good remuneration committee report in there which is very enlightening.

I keep coming back to the speech of the UK Secretary of State, which is 10 pages long and written in words of one syllable. Please read it; it is very readable. Whoever wrote it, did a very good job. It shows that the UK has really gone way beyond what the PJC is looking at as to whether to wind this back. They are looking at—not whether to disclose these issues or not—how to procure more effective disclosure and accountability. That is basically all I want to say on that, and I am happy to take any questions.

ACTING CHAIR—Thank you, Mr Easterbrook. You have been very comprehensive and consumed our time, but if committee members have a particularly pressing question, I will invite it. Otherwise, thank you very much for a most comprehensive submission.

Senator CONROY—I do have a couple of questions. They relate to some of the evidence that has been given to the committee and I would like to seek Mr Easterbrook's responses to them just for edification. I will run through them quickly. On the disclosure to US shareholders, it has been argued that the information that is supplied is in a different form; the financial information is at different dates. Therefore, it is very confusing, and that is an argument against that issue.

There has been extensive debate about the 28 days—it is too long, volatile markets, information is not able to be supplied and that it is stale—with a suggestion that it go back to 21. There is potentially a way through that now that we have acceptance of the electronic lodgment of proxies, perhaps by email, though I am not sure if email is included yet. But we do not quite need the 28 days—21 may be acceptable now.

There has been criticism of the structure of investments—that they are just custodians. It was said that the actual delay is needed because they have got to pass it back through a chain of command and that the problem is actually on the investor side, rather than on your side. There was discussion as to whether or not the disclosure of proxies should take place before or after the vote, the argument being that the disclosure of proxies beforehand discourages participation and people do not bother to come. If the chairman turns up and says, 'I've got 60 per cent of the proxies already,' people are discouraged from participating and perhaps even from voting. Could I very quickly get a response to some of those issues as they have come up during the course of the hearing so far.

Mr Easterbrook—Dealing with the US disclosure, if there is likely to be confusion, then the company should clarify it. You do find that some of the good companies will in fact include a reconciliation for the different types of disclosure. I do not see that as a problem. If some shareholders are getting better disclosure, then the Australian shareholders should get the same.

Coming back to the 28 days, it is possible to lodge a proxy by fax. I have not as yet come across any top 100 company which allows voting electronically by proxy. So the bottom line on that is that it is not there yet. And, as I said, I believe there will need to be some change to the law for that. Whoever's fault it is, the point is that you do have this elongated process at the moment. You have to deal with that.

What is so significant about seven days to the corporates? Again, I would say: have they given you any really powerful evidence of the extra seven days being a real problem? If you

have, I would like to have a look at it. If you have not, I think we have given you perfectly good evidence of the fact that seven days is needed, partially because of the imperfect logistical system at the moment, which will get fixed up but has not yet been fixed. What was the other issue, Senator Conroy?

Senator CONROY—Discourage participation if proxies are revealed before.

Mr Easterbrook—Section 251AA, which is the proxy voting disclosure, actually requires it afterwards. In fact, what it says is that when the company files with the exchange the notice of the resolution being passed, it has to provide that information. That was done deliberately to remove the issue that you are dealing with, so that the little shareholders were not swamped at the beginning of the meeting and depressed by that. Again, I come back to the fact that even the ASA, who represent the little shareholders, are quite firm in saying, 'We want this disclosure subsequent to the meeting.' I think one of the reasons they want the disclosure is because they want to get on the back of the institutions in saying, 'You have got to improve your voting.'

Senator CONROY—People have said—and maybe I have been confused and misunderstood this—that they thought of it as a replaceable rule. That is not your understanding?

Mr Easterbrook—Which one?

Senator CONROY—251AA.

Mr Easterbrook—I do not think so.

Mr ROSS CAMERON—On the question of remuneration, or emoluments, as I believe the act provides for, it is a very personal thing in the sense that if I walked up to someone I had met recently at a dinner party and said, 'Ross Cameron. How do you do. Can you just give me a precise breakdown of your remuneration, including the relationship between equity and non-equity interests' most people would be offended by that. Your argument is that once you get into a publicly listed company you sacrifice some of your rights to privacy. There is obviously a good argument for that. If your objective as an organisation is to maximise the prospects for return to investors, don't you run the risk, if you are going to start making people declare what aftershave they wear, down to the last dollar and cent, that good corporate leaders will simply say, 'I'm not going into a public listed company'?

Mr Easterbrook—If you look at the size of the packages at the top, I do not think that is a serious concern.

Ms JULIE BISHOP—But aren't we looking at corporations across the board? As I have said to previous witnesses, I come from Western Australia, there are a number of junior explorers in Western Australia, they are crying out for good corporate leadership in a number of instances, and when you take the directors and then the executives after that, you are virtually down to the tea lady in some instances, even if they have some sort of executive role—it might be of secretary-receptionist or whatever. Shouldn't there be a threshold, or shouldn't there be some other prescription?

Mr Easterbrook—The purpose of disclosure is not only are people being paid too much, but are they in fact being paid too little? There is one particular company—it is actually a pair of companies—where the most senior executive in this company is getting paid about $50,000 a year, which, on any sort of comparison, is far too low. The question is: are you getting the right calibre of person in there?

Mr ROSS CAMERON—If you want to just concentrate on the top 100, for example, if we are in a contest for corporate leadership with major companies from around the world, it seems to me we want to have the capacity to attract the best. If we are looking for somebody to run BHP or Rio Tinto, you want to be able to get the best person in the world for that job. Don't you run the risk that you will have a deflationary impact on executive remuneration and that you rub up against this Australian instinct which says that no individual should be able to earn that much, even though when Prescott resigns the value of the shares go up by $1½ billion?

Mr Easterbrook—Paul Anderson, when he came from the States, would have been very familiar with this regime because this applies in the States. As I have said before, it is an SEC requirement. You are speculating. Unless you have some evidence of what you are saying, I do not think it should carry any weight. I have tried to explain the logic of it. I agree that the price of being at the top of public companies is more public exposure. That is just the name of the game, and I do not think you will ever be short of talent coming into companies for that reason. There is no evidence of it that I have seen.

Mr RUDD—I have a few additional comments in relation to 300A, in particular section (1) subsection (c), and building on comments just made by Mr Cameron. If a company is a public company, there is something here which goes back to pretty definitional questions about what should be publicly disclosed; it goes to the very basic question: what have people got to hide here? It should be in the public domain, in my view. Secondly, in terms of the question of the international talent pool and trying to attract top-level executives to corporate Australia—whatever the merits or demerits of that argument may be internally—if I read your presentation correctly, we are in fact looking at more onerous disclosure regimes already in the US and either currently or prospectively in the UK. Is that right?

Mr Easterbrook—Currently.

Mr RUDD—Therefore, I would think that argument that we will frighten them away because we are causing this country to catch up on that score would not seem to hold much logic or weight.

A final point is that we have had discussions this morning and a presentation from ASIC in relation to the operational application of subsection (c) and the definition of emoluments and how options are treated within that. I seem to recall part of your presentation being that shareholders have a legitimate right to know the relative weighting of the individual constituent elements of a person's package, shall we say. What I cannot understand, as a lay person reading subsection (c), is how they can legitimately escape from providing clear, precise amounts and definition under that subsection. To me it reads perfectly clearly.

Mr Easterbrook—I think the problem has come about by use of this word 'emolument'. I did refer to that in my presentation, saying that originally, as drafted, the generic word 'remuneration' was used. Emolument has got a technical meaning under the Corporations Law which does not fit terribly neatly in here. I understand that there have been other submissions saying that remuneration is dealt with in a very higgledy-piggledy way all over the place, including in accounting standards et cetera, and it really ought to be cleaned up. I would agree it ought be cleaned up, but not at the expense of omitting this. This was intended to very simply—it is only about eight lines—say what the disclosure should be without going into a huge amount of detail. All I can say is that, from our experience of monitoring the top 100 companies, there is not a great deal of a problem with the specifics, which is under (c). The problem, as I have indicated before, is understanding what the policy is. And you need to look at both.

Ms JULIE BISHOP—What was your evidence to support the notion that the institutional investors could not cope within the 21-day regime?

Mr Easterbrook—If you look at the voting that I had on the board, in the UK it is 45 to 50 per cent and in Australia, in the widely held companies, it is about 32 per cent. That would seem to indicate either that the institutions are not voting, which is a possibility for some of them, or that, in some cases, the mechanism has not had long enough to operate.

Ms JULIE BISHOP—But you do not know which of those alternatives it is?

Mr Easterbrook—We do not know which of those alternatives it is. Unfortunately, the chain of command in this is elongated and clumsy, but that is just the name of the game at the moment. Until that is sorted out and shortened, it is going to take time. At least with the 28 days, the institutions really cannot complain that they have not got long enough. Whereas with the 21 days, they previously complained that they did not have long enough. They themselves asked for 28 days. They now have 28 days, so they ought to get on and vote.

Ms JULIE BISHOP—If there is no change in that pattern, we will know that it was not the time requirement.

Mr Easterbrook—That then is another issue which the committee should look at.

ACTING CHAIR—Thank you very much, Mr Easterbrook.

[2.36 p.m.]

GANKE, Mr Boris, Chairman, Australian Listed Companies Association Inc.

HETHERTON, Mr Peter, Committee Member, Australian Listed Companies Association Inc.

ACTING CHAIR—I welcome you to today's hearing. The committee prefers to conduct its hearing in public. However, if there is any matter that you wish to discuss in camera, we will consider such a request. I would also like to remind you that the giving of false or misleading evidence may constitute a contempt of the parliament. The committee has a written submission. Are there any corrections or alterations you wish to make to that submission?

Mr Ganke—We do not need anything in camera. We have discovered a couple of very minor typographical errors in our submission: in paragraph 10, it should be 'who would pay the costs' instead of 'pays the costs', and a plural is required on 'emolument' in the sentence on page 4, 'emoluments of directors and senior executives'. Otherwise, we adopt what we submitted last time.

ACTING CHAIR—Thank you for those corrections. I invite you to make a presentation to the committee.

Mr Ganke—Our presentation will be rather different from the ones that I heard this morning and from the previous one. Most of the references have been to the 200 leading companies. The Australian Listed Companies Association looks at what I will call 'the other end' of the spectrum—I do not want to call it 'the bottom end' as that can be misinterpreted. There are slightly over 1,400 listed companies today of which, would you believe, about 500 or 600 are capitalised at less than $20 million, about 200 or 300 have a share price of under 50c and about 200 have a share price of under 20c. The junior explorers that Ms Bishop mentioned are mainly in Western Australia, but there are a few in Victoria and Queensland. There are small industrial companies and small investment companies. They all perform a very useful function, but they cannot run in the same way as the top 100 or 200 leading companies.

It is nice to hear that one of the largest companies in the world, Rio Tinto, can get its very complicated annual report out six to eight weeks prior to its AGM. Most of the smaller companies that have around three directors, perhaps executive directors, and a couple of staff members, are running around in circles to meet the ever increasing number of ASIC and ASX regulations. These regulations change fairly regularly—almost every six months. So our attitude is rather different. I have prepared additional submissions. I have six copies, if I may submit them.

ACTING CHAIR—Thank you.

Mr Ganke—While they deal with some of the points that are specifically mentioned in the terms of reference for this committee, they also bring in quite a few other items. In my discussion with the secretary of the committee, I was told that we could make these

submissions more broad ranging than just the few terms we have been discussing in the various sections. Would you like me to hand those to you?

ACTING CHAIR—Yes, thank you.

Mr Ganke—They are somewhat voluminous, but do not get frightened; I shall not read them all. I will give you the six copies to distribute. We would like to see slightly less regulation and more time for the productive capacity of the companies, be they large or small. The one thing that we seem to forget is that, while Australia is a very large continent—and a lovely country—we are a very small player on the world scene. For instance, the total value of those 1,400 companies listed in Australia is about $600 billion. That is equal to about three US companies. In fact, it is possibly equal to about two or three of the recent Internet companies; it is just about that level.

While it is nice to lead, I think we should consider whether we are taking ourselves too seriously and whether we should not perhaps follow but follow within reason. What is appropriate for the US economy and US shares, which are mostly in the $50 to $100 range or even higher, is not appropriate in Australia where, as I have said, the average share price is probably 50c and there are probably only a dozen companies, such as Rio Tinto and BHP, whose shares are over $10 on the Australian Stock Exchange.

I do not want to read the first page of that additional submission because it speaks for itself. The parts that I think might interest the committee, based on the things I heard this morning and in the last address, concern the questions about directors' emoluments, the notice given for annual meetings and a few other points which are specifically in the terms of reference. We have commented on those. I can go over these in any particular order. We have no problem with the proxies being sent and accepted by fax, but we are concerned that email is not signed. It can be sent by any 12 year-old that can use a computer—somebody tells them to send it and they do so just for the fun of it—or by anybody else trying to cause some trouble.

The preference of the smaller companies and the junior explorers would be to have 21 days. I would not agree that most companies have special resolutions. A small number of companies have special resolutions, and if they do then they give 21 days notice. Previously it was 14 days. I think I would be a voice in the wilderness if I were to suggest that we go back to the 14 days, which worked for the last 20 years or so. Twenty-one days should be sufficient. It is more the small shareholder or some shareholder in the country who may be arguing that he needs more time. But institutions should be on the ball. Once they receive notice of a meeting, if they cannot get a proxy or whatever within 21 days then they either do not want to do it or they do not deserve any better treatment.

The reading of the proxy statements is an interesting one. I have attended annual meetings for the last 35 years or so. It was common for a chairman to advise the meeting that he had, say, 15 million proxies voting for a motion when there were 20 million shares on issue. The comment then amongst shareholders was, 'What is the point of discussing something? It is already a foregone conclusion. They have 15 million votes. Why should I even ask a question?' There is nothing new in that. We have heard today that 60 per cent of votes are held by institutions, but in small companies that does not apply.

Certainly, a large percentage of shareholders are proprietary companies. They do not have to give a proxy. Mostly they appoint a representative who comes to the meeting and you do not know which way he will vote. So if I am the chairman of a company that has, say, 20 million shares on issue, I will say, 'We have two million shares voting for and 100,000 voting against.' But, on the floor in the meeting there can be another 10 million shares that will vote either for or against, depending on which way they want.

Therefore, it can be misleading and confusing to the shareholders if a chairman announces those figures because we do not know how the representatives of these private companies, or the institutions, will vote. Those representatives do not have to disclose their votes until there is a poll on a show of hands. You do not know. Most of those companies have a small number of shareholders present. There is nothing wrong with announcing it, but it is meaningless.

Perhaps a chairman, if he really wants to inform and enlighten the meeting, should say, 'These are the proxies we have received and some propose to vote for and some propose to vote against. But the result, if something goes to a poll, may be totally different because I can see 50 people sitting here in the hall and we do not know which way they will vote. We know that some of the larger shareholders have appointed representatives but we have not got their proxies, so we do not know which way they will vote.' That might be one way of saying it, but what does it achieve? It is just a warning to shareholders that the numbers that he reads out might, on the actual vote if something goes to a poll, be totally different.

If I can go to the matter of the election of directors, we have made a point before and I would like to repeat it again. Firstly, it is not clear what proportionate representation means. Secondly, the association and everybody else that I have talked to is against it on the basis that this is not politics, there is money at stake here. The people who have 35 per cent of the company, if they want to vote for one particular director or vote some particular director off, should be able to do so. That is better than a system where some other group that might have only three per cent or five per cent finishes up with the same number because they have proportionate voting, whichever way it should work. I do not think that is a very practical one.

We have no problem with the environmental regulations. Again, if we look at the junior explorers either out in the west or anywhere here, the best that we can do—and I am a director of a couple of those—is to say that, to the best of our knowledge and belief, we have complied, we have not had any complaints and nobody is suing us, so we assume that we have not done anything wrong. What else can one do? If we want to actually explore or start mining, we have to do the environmental impact study before we can get our mining licence and so on. Again, if we do have a licence from whichever government it is—Western Australia, Queensland, New South Wales—then presumably we have complied with the environmental impact requirements.

We expressed some fairly strong views about companies having to report any proceedings. They generally already do, and if they are likely to be substantial, because of possible liability, we would say sure. But surely you would not telegraph your—shall we say—counter punches if someone is suing you. There could be one of those ambit claims or whatever, and you would say that your defence will be this, that and the other, which is what

the amendment seems to talk about, and you actually indicate what your defence will be. What happens to legal privilege and what happens to the practicality of the situation if you disclose to your opposition what your defence will be? That is the way we read it, so we do not think that is practical and appropriate at all.

I think I mentioned the 28 days and proxy. On corporate governance and audit committees, we talk about it all the time. I would say that, yes, probably the top 200 companies should have those committees in place. What about the other 600 or 700 I am talking about, which is probably half the companies on the Stock Exchange, that have a board of three or four people? Just have a look. You will find that the majority of those companies have a board of three or four people, of which generally three are executive and, maybe, if they are lucky, one is a non-executive chairman. And it is difficult today to get a non-executive chairman into one of those junior companies—industrial or mining—because of the extra disclosures and because they are in the public eye. I have met many leading business people here who will say, 'Not for me, thank you very much.' That is the situation. Sure, it may not apply if somebody gets invited to the board of BHP or Rio Tinto, but we are talking about the other 500 or 600 companies.

You have a problem; I am not disregarding that. You are trying to pass a law which will apply to all companies, but in fact the majority of those companies for which you are passing a law do not qualify for it. We do not have an audit committee, we do not have a corporate governance committee because we are the committee—we are three directors in one company and we are four directors in the other. That is the committee.

The other thing is that corporate governance is a little like integrity or honesty, et cetera. Can you legislate for integrity? I do not think so. Either people are honest or they are not honest. There are many statements that have been made today about corporate governance which are what I would call nice-sounding motherhood statements, because that is the obligation. Hopefully, the directors already behave that way anyhow. So, whether or not they state that that is the way they behave, does not matter. Again, it is not a question of whether there should be an obligation to make a statement of what your corporate governance is, but that to actually have a corporate governance board will not apply to about half of the listed companies.

We are strongly against one director of a listed company having the power to call a meeting. I heard the previous speaker say that, in yesterday's paper, there was mention of one minority director in a very large organisation with about two million members—the NRMA. If he decides to call a meeting—and in fact, I think they are calling a meeting; they are trying to have a meeting at the same time as the AGM, and the dissidents are trying to have it at a different time—do you know what the cost of that meeting will be? Hundreds of thousands of dollars—probably $2 million, as somebody mentioned. Even in the smaller companies it would be a lot of money. We had a company with 15,000 shareholders, and our cost was, say, $30,000—$2 per shareholder—to send out the notice. That is a lot of money for a small company. We would rather drill a hole for that amount of money.

I think that if that one director is also a shareholder and cannot get himself at least another five per cent or so of shareholder support, then he should not have the right to call a meeting. It could almost be used as extortion because somebody could say, 'I will call a

meeting and it will cost the company $1 million,' and to avoid that he would get a golden handshake and retire. It is dangerous.

Whilst on the question of calling meetings and whether it should be five per cent, you will find this submission of ours quite radical. Not so many years ago—and I have been living with the companies acts of 1936 and 1960 and the others—we had a minimum of 10 per cent. I would recommend we go back to that. There have been quite a few meetings held on the request of five per cent but they have led nowhere because somebody has said, 'There are another 95 per cent out there.' Some of them might vote with the five per cent but overall, if you cannot get 10 per cent, and preferably 20 per cent, you should not have the right to call a meeting. It costs hundreds of thousands of dollars in the large companies, and in the smaller companies obviously much less. But they have much less money. For them, $50,000 is the same as $5 million for Rio Tinto.

That is a step in the wrong direction. I have heard it said that it has not happened and it may not happen. I can see it happening. I can see it happening very soon in one particular company, and it will happen again. How will it be dealt with? Well, the shareholders pay for it. A suggestion was made this morning that maybe they should pay for it. Maybe if they had to pay for that meeting then they would not do it because it would cost $1 million. But if it can be abolished, this would be our very strong recommendation.

I do not have to use my full 45 minutes because our written submission has been made. I do not have to read the first page, or the second page. We have stated that our association was formed largely as a result of a sort of pogrom—being Russian, I understand the word 'pogrom'—against the small listed companies that occurred from the early 1990s and until the mid-1990s. The devil's number, 666 companies, were de-listed. Four hundred were de-listed simply because they were small, and the others because they were maybe a bit mixed up.

We looked at that and said, 'While there is life there is hope. People have invested money in those companies.' You may have bought 10,000 shares at 10 cents and in some cases those shares have gone up to over $1, $2, $5, or whatever. In the Poseidon boom days they went to $200-odd. But if the company is de-listed, that is it, it is finished. All the advertising by the stock exchange and all the PR was that you always had liquidity with shares. In fact, when it was compared to investing in real estate they said, 'You can always sell shares.' But when a company is de-listed, you cannot.

We looked at that. One of the companies that I am chairman of, Chapmans, was involved in a court case against the Stock Exchange. Effectively we won, although on a technical basis we did not. We are recommending strongly that the ADJR, the Administrative Decisions (Judicial Review) Act, be amended, or whatever other act has to be amended, to include the ASX listing rules so that they are part of the enactment.

One of the decisions of the court and the Court of Appeal was that it is not an act or an enactment, yet the listing rules are part of the Corporations Law, and our Stock Exchange is the most important financial institution in the country. If one officer—and this happened in this case, and we know it happened in other cases—decided a company was too small and should not be listed, there should be a review. There is no review. There is an appeal to the

committee of the Stock Exchange, and the committee then rubber stamps the decision. So that does not work too well.

I have made some points about insider trading. That is a subject that is currently in the news. I do not know whether the committee is prepared to even look at that but, again, I would say that Australia is trying to lead the way. No other country has that sort of legislation about an actual outsider becoming an insider. I give the example where, during the Poseidon boom, people used to fly over areas of Western Australia and look at who was mining, look at what colour the gas was or what colour the flaring was and decide whether there was oil, gas or nothing. On that basis, what were they supposed to do? Were they supposed to advise the Stock Exchange and say, 'By the way, I just flew over this, and I think that such and such a company has an oil strike'? Would the Stock Exchange or anybody listen to them? No, they would not. You have to look at that aspect of it.

As an association we are—and I am—strongly in favour of the strictest of punishments if directors and oil company officers use insider knowledge; that is, either that there is going to be a takeover or that they have an extremely large profit or something. They should be punished severely. Somebody wrote in the paper yesterday that someone saw Mr Anderson from BHP run over by a bus. Is he an insider or is he an outsider if the rest of the market does not know? What will it do the share price of BHP? We have a problem with that definition. Australia is leading the way, but I would not say that it is necessarily the most practical way to lead.

We have a few other points. One important one is on annual financial statements. If we want to lead again, why doesn't somebody suggest that we issue only consolidated accounts rather than parent company accounts? We have accounting standards in Australia—and, again, some other countries might have them, but not the United States and the UK, I think—that require the parent company's accounts. It is a relic of the past. Most companies today operate with dozens or even hundreds of subsidiaries. It is the consolidated accounts that everybody looks at, not the parent company. That could be eliminated, and I believe that is the international accounting standard. We have here a standard which our accountants do not want to follow.

There are other small things. The directors are to notify the exchange of a change of shareholding—which is probably all right, although, since they are doing it 14 days later, it is not quite clear what that achieves. The next section says to send a copy of the notice to each director within seven days. If I have notified the company that I have bought some shares and I have notified the exchange, I presume my core directors would either read the papers or know about it. I am given 14 days to do it. The company then has to send out the notice within seven days. The actual notification to the exchange and lodging it with the company should be sufficient. They can table it at the next board meeting.

I repeat the calling of a general meeting at point 8 in the appendix to the letter. I did that so that you could read the letter and appendix separately. I really think we could go back to 10 per cent. I have heard the comment made that today you could have 100 shareholders owning one share and they could call a meeting of Rio Tinto. I think it happened in the case of North. Maybe those 100 shareholders should have at least five per cent. I know the trend is towards greater democracy, and we are in favour of that as long as it is not costing the

companies, and eventually the country, unnecessary amounts of money. So maybe you want 100 or 200 shareholders with five per cent. But as for the other minimum shareholding that could call a meeting, I suggest that we go back to 10 per cent, maybe even 20 per cent.

We talked about a number of small exploration companies here and in Western Australia. Meetings have been called with that minimum five per cent. A little bit of hot air goes on at the meeting and nothing changes, just the cost. And the direct cost of calling a meeting is one thing, but there are indirect costs of the management and the attendants of the meetings, et cetera.

Our other great love-hate relationship is with the prospectus provisions. We have been living with the new prospectus provisions now for about 10 years. Before that, there was no argument that a new float should require a prospectus and no problem with that. But an existing listed company has to issue a prospectus. I have some statistics here from the Stock Exchange which will show that, say, 10 years ago, the majority of equity capital was raised by rights issues. In 1998, the majority of capital—more than 100 per cent—was raised by placements. Why? Because companies of the size of BHP, CSR—again, perhaps Rio Tinto, but Rio Tinto is essentially UK—and so on, are a constantly moving feast. How can they issue a prospectus? Every second day they would have to issue a supplementary prospectus, because the copper price had gone down and the oil price had gone up or vice versa.

We have a short form prospectus, I know—we can refer to it in the annual report—but I have not seen a new share issue by any of the top probably 50 listed companies. Certainly BHP, CSR and the banks have not made any issues. I think the answer is that the prospectus is such a difficult thing at the moment to comply with. New floats should have prospectus provisions. I think they are working quite well. We have a lot of Internet and IT companies being floated at the moment, and that is fine.

We notice that the Stock Exchange is proposing to relax some of the rules regarding the number of shareholders and a few others, which we think is a step in the right direction. Again, we have been leading the world. We are competing with the United States, which has a few exchanges, and Canada, which has a few more exchanges. There you can float with 100 shareholders, but here we have a minimum of 500. More or less on the issue of prospectus is the submission—

ACTING CHAIR—With respect, Mr Ganke, whilst I think you are raising very important and interesting issues, the constraints of time are such that I think that the committee ought to perhaps focus more specifically on the issues that we are currently being charged to look at.

Mr Ganke—I was just going to finish with the excluded offers. I am aware that in the states a person can sign and say, 'I'm an experienced investor, I have had independent advice, and I can make the investment.' In some states, it is $100,000, and in others it is $200,000. If you want to ask me any questions on the other specifics, that is fine. Otherwise, I will not say any more.

ACTING CHAIR—Thank you. Are there any questions for Mr Ganke?

Ms JULIE BISHOP—I was just going to ask one in relation to the calling of a meeting. You are looking at different thresholds, whether it be 100 shareholders, five per cent, 10 per cent or whatever. It has been suggested to us that, if the mischief we are looking to avoid is the improper calling of meetings for improper purposes, perhaps there could be a regime introduced whereby the calling of the meeting has to be subject to ASIC approval. In other words, ASIC would determine whether it has been called for a proper purpose and could weigh up the pros and cons of a meeting being held or being called.

Mr Ganke—May I answer?

Ms JULIE BISHOP—Please.

Mr Ganke—It is better than nothing, but we would not necessarily like it that much either because it is another step in the bureaucratic process and it becomes very much a subjective and discretionary matter. Maybe one officer of ASIC will say, 'Yes, it is a proper purpose,' and another one will not, then people have to make some submissions, and how do you really deal with it? And if they say, 'No, it is not a proper purpose,' do they have an appeal process and so on? I think the simplest part would be to limit it at least to having a certain percentage, so that you do not have 100 shareholders calling a meeting which may be for the most laudable objects but is not a proper purpose, as in the case of North. But if you cannot see your way clear to get that minimum percentage, whatever it may be, then I would say the next best thing would be, somehow or other, ASIC. But can you not see the difficulties of them having—

Ms JULIE BISHOP—Yes, I can. I just wanted your comment on it. It has been put forward to us as a proposal to be considered and I was just looking for your comment.

Mr Ganke—I would think it would be difficult. There are too many discretionary rules, for instance, in the ASX. We do not like it. It is all absolute opinion and subject to discretion. The Corporations Law is basically black letter law. I would always be happy with that. At least it is fairly clear and there are certain sections where you can get waivers or dispensation. Overall, in that respect, it works better than when it is up to some one or two individuals who can say, 'In my opinion, this is wrong,' or, 'In my opinion, this is right.' That is not a good system under which to operate.

Ms JULIE BISHOP—Thank you.

Mr ROSS CAMERON—Mr Ganke, the previous evidence before us, from Mr Easterbrook, suggested that we should actually be having higher levels of disclosures, for example, on remuneration. He suggested there was no evidence at all that the current levels were acting as a disincentive to the injection of talent. I felt a different sort of accent on your remarks, particularly for the majority of listed companies that are not top 100 companies. Is it correct that your argument is that attracting, say, energetic, able executive chairmen is already a problem and that disclosure, for example, on remuneration simply adds to the difficulty of attracting that talent into this sector?

Mr Ganke—That is our point, yes. I did not mention options at all. I should mention that clearly, under our definition and under full disclosure, whatever some accountants may

have considered, I would include under emoluments, remuneration, or whatever you like to call it, the issue of options, even if they are out of money. In fact, I would recommend always that the options are issued out of money. They should act as an incentive to the managers and if they are disclosed in the annual report, it will be said, for example, that Mr X received 100,000 options exercisable at 50c and the price at the moment is 30c. There may a performance hurdle he has to bring in—turnover, or to develop some mine, or whatever—and then he can exercise them. So you have a two-tier step. It is up to the company, of course, and up to the shareholders, but as a general rule we would be against issuing options which are in the money because then it is almost a gift or another form of remuneration. The options should be granted as an incentive.

ACTING CHAIR—Thank you very much for your presentation, Mr Ganke.

Proceedings suspended from 3.15 p.m. to 3.32 p.m.

FOGARTY, Mr Mark Thomas, Director, Environment and Energy, Australian Industry Group

CHAIR—Welcome. We have before us your submission, which we have labelled No. 41. Are there any corrections or alterations you wish to make to that submission before we proceed?

Mr Fogarty—Is that 41 or 41a?

CHAIR—We have 41. Is there a 41a as well?

Mr Fogarty—I have a 41a, which I think is our latest submission, dated 9 June.

CHAIR—This one I have is 14 August 1998.

Mr Fogarty—Submission 41a is the position I would like to talk from today.

CHAIR—I am advised we do have that and that we have a summary of it in our notes. I will invite you to talk to that, if you wish to make an opening presentation, and then we will proceed to some questions.

Mr Fogarty—I will be fairly brief. I think our position is fairly well set out in submission 41a. By way of background, the Australian Industry Group represents some 12,000 member companies throughout Australia and, as such, we are probably the largest of the employer associations, primarily representing the manufacturing and related sectors. We arise from a merger between what was the Australian Chamber of Manufactures and the Metal Trades Industry Association. So we come to the table with a fairly large voice, particularly on environmental issues.

As will be noted from our submission 41a, our position on section 299(1)(f) is somewhat varied from our initial reaction to the process. That is primarily as a result of a fairly strong consultation phase that we embarked upon with the government, particularly the minister, Senator Robert Hill, and with Senator Andrew Murray of the Democrats. It is also as a result of our deliberations within our own respective working groups, which we run on a national and on a state basis—in other words, the voice of our membership—and, more particularly, the position that we were able to address with the Australian Securities and Investments Commission at the end of the day.

We decided from an initial reaction of opposition to section 299(1)(f) to adopt a stance of attempting to work with the legislation and negotiate the most acceptable outcome, as we could see it, between the intention of the provision and the interests in our membership in complying with the section. Our major concern from that position of opposition still remains the lack of a consultation phase with the introduction of this provision. From our perspective, there was not any. The provision was arrived at in an overnight sitting in the winter of last year. That concerns us particularly on the environmental front where we are very much about seeking to develop, maintain and work within appropriate partnerships. Our position is one of prior consultation as best possibly can be afforded.

Our other concern at the time was the damage it would do to the process of voluntary environmental reporting which we believed was beginning to take root in Australian business and show some fairly positive signs. A point that you probably will hear often is that the legal drafting has caused us some concern, particularly that interpretation be given to particular and significant issues and the lawyer's general endorsement for the missing verb, as it has now been described. Nonetheless, given those initial concerns we have highlighted, we have taken a proactive stand.

I have provided for each member of the committee a set of guidelines that industry and a wider perspective of our membership might like to use to more positively embrace the terms of this provision. These are guidelines that we developed in consultation with the government and the Democrats and also the Australian Securities Investment Commission. Whilst they are not in a position to endorse them, there was a process of consultation as we set about trying to determine an interpretation of this provision. We have road-tested this document and the guidelines set out in there with our membership. It seems to be fairly reader-friendly and user-friendly and is currently in the process of being dispatched to our membership and a wider audience.

We see that this is an area that we need to cooperate on. It is an area in which we would like as much clarity as possible in the process. We realise the reality of provisions such as these. You will note in the guidelines that we have put a fairly strong emphasis on the need to supplement mandatory environmental reporting in accordance with section 299(1)(f) with voluntary environmental reporting. Through appropriate tender processes we have secured a contract with the government to roll out and develop some guidelines for national reporting. We are doing that in consultation with another joint venture partner. Whilst there needs to be a clear distinction on what companies must do as a requirement under section 299(1)(f), we would be taking every step we possibly can to encourage additional reporting in terms of the voluntary aspects over and above the particular provision.

We will monitor very closely just how industry goes about responding to 299(1)(f). We have demonstrated our interest in ensuring the most positive interpretation we possibly can on it. We would be asking the committee to maybe set for 12 months time, if the mechanism exists, a further review period to be introduced, just to see how the legislation is being interpreted and whether or not there is a need to go back and redraft or amend the provision accordingly. That very brief summary clarifies our stance and is fairly close to what we outlined on 9 June.

CHAIR—Thank you very much, Mr Fogarty.

Ms JULIE BISHOP—In relation to the provision of this section 2991F reporting, is the audience to whom it is directed the shareholders?

Mr Fogarty—Yes.

Ms JULIE BISHOP—The level of reporting that is required to a regulatory authority is obviously to a different audience. Do you see the conflict in terms of what a company must do in order to make it 'meaningful' to shareholders without getting to such a technical detail that it would have no value to shareholders? On the other hand, if they omit certain technical

information, that may well be the information that should have been given to shareholders because of a longer term consequence. Is there any way of reconciling that?

Mr Fogarty—I think it really lies down the path that we have taken, which is education, education and education. We have now run probably four seminar workshops on this provision. There will be lots of examples that are not covered by the guidelines, but it is really looking at the sorts of things that they should incorporate. Given the approach that we have taken, particularly with the ASIC, we have very much drafted on the basis of what the shareholders should be looking for, in keeping with the need to look at the word 'significant'. For example, we have highlighted in there the need to report on licences and things from the New South Wales, Protection of the Environment Operations Act and how people have trended against that.

Our feeling has always been from the start that this is what it is really about and that is the direction that the amendment was seeking. It was to identify for perspective investors and current shareholders just what sorts of exposure and risks their interests may be exposed to.

Ms JULIE BISHOP—In terms of the use of the word 'performance' as well, there has to be an assessment of entity performance. Do any of your constituents, or the people who are attending your seminars, have concerns with what they are being asked to detail?

Mr Fogarty—Yes, they do. On page two of the document we have talked about environmental risk and what performance areas for consideration may include. We have tried to identify a number of examples. People who hold licences may have those licences not renewed or they may be under some sort of legal notice. I think the companies need to identify just what those licences perhaps are for the purposes of the report. On any history of significant material incidents, one would expect that a major pollution incident that has occurred that may have incurred a breach or may have had a licence not renewed would be an issue that should be reported on.

Ms JULIE BISHOP—How detailed would one have to become in terms of listing the regulation under which somebody operates? It has been suggested by witnesses earlier today that it could run to dozens of different acts that might impact upon a company in terms of emissions, water and ozone.

Mr Fogarty—It could. This is just a rough estimate, but in Australia we have some 1,300 pieces of environmental legislation regulations spread across about nine jurisdictions. It has the potential to do that, but there are some areas, for example, in New South Wales where they have tried to consolidate the approach under the licensing regime. It is possible that you may be able to report generally under licences under the New South Wales Protection of the Environment Operations Act, for example, as to whether or not any significant harm or environmental indiscretions may have occurred under that legislation.

Ms JULIE BISHOP—One last issue I would like to raise is in relation to the international regime. This is confined to laws of the Commonwealth or of a state or territory. Obviously, many companies operate on an international scale, an international scene.

Mr Fogarty—We saw that as an area of confusion. Again, referring to page 3 of our guidelines, we set out there a number of issues that could be considered—and that is the scale and the venture of the overseas operations. So, without a context, something like an Ok Tedi might be an example of something that would need to be reported outside a jurisdiction in Australia. It is really going to be a matter for some discretion, some interpretation, as to whether or not it needs to go in, whether or not, as we have said there, it is covered in other reports, and the type of operations that may be there. It is one of the grey areas.

Ms JULIE BISHOP—Do you reckon you could standardise a report?

Mr Fogarty—Are you saying it should be—

Ms JULIE BISHOP—In terms of a pro forma? This is—

Mr Fogarty—I am not sure that you are going to be able to get that. I do not know that, long term, we are going to be able to become that prescriptive. What we see is that this is certainly a step to an industries approach generally. Whether it is accepted or not, obviously we would rather see less regulation. That is the approach we took when 299(1)(f) was born—that we would like to see less regulation—but we do accept that, at the margins, there is going to be a need for some sort of safety net.

So we would see 299(f) play in that role. The next phase of environmental protection is all about reporting, it is all about communicating, and we have seen some very good examples at the top end of the scale, particularly in the mining sector. We have got to start to translate that back into the manufacturing sector. That is very much what the government's consultancy to us is about—to establish those guidelines so that reporting and communicating on environmental performance becomes very much a part of regular business. We have a long way to go on that score, but that is our objective.

CHAIR—Mr Fogarty, can I perhaps ask you to expand on your comments in submission No. 41a, page 2, under 'Poor Drafting', particularly that second bullet point where you contrast the qualification of when and if you must report with what must be reported?

Mr Fogarty—Section 299(1)(f) states:

. . . subject to any particular and significant environmental regulation under a law of the Commonwealth. . .

What we are basically saying is that that was ambiguous, and most parties that we have talked to, including the Democrats who drafted it, concede that to be the case—exactly what does that mean? We have attempted to put a bit of meat on the bones with a bit of definition to those particular words. Certainly there is room to improve the meaning of those words, but our suggestion was that perhaps it might be prudent that we wait for that period of 12 months just to see how companies go with it to see what sort of reporting we are getting, and then maybe come back to the table with a view to having something that is more easily digestible if that be the need.

CHAIR—Can you tell me what occurred in the discussions with ASIC that caused you to change your view as to the most appropriate enforcement agency?

Mr Fogarty—They have a role to play, and it gets back to Ms Bishop's question about the investors. We certainly see them having a role. What we were concerned about was that we do not introduce into the industrial protection arena yet another policeman. We already have enough of those, and we are in the business of finetuning and minimising those from an industry perspective. But I think it was quite a refreshing approach that we managed to secure from that agency what they were looking for. That probably became the platform for us to become a little more visionary in our interpretation of what this could mean.

Mr RUDD—I am just working through the logic of your separating voluntary and mandatory reporting requirements and cross-referencing that with your document here. I think I understand the distinction you are seeking to make and I understand the constraints which this particular provision of the act creates because of a lack of definitional clarity. I understand that.

But the thrust of your written submission is that mandatory reporting is bad because it diminishes voluntary reporting, to state it at its most stark. You do not actually go on to substantiate the logic of that necessarily being a bad thing. I have looked at your list of voluntary reporting requirements. They seem to cover a range of issues, but I am trying to get at the essence of it from your perspective. Is it that you are just concerned about the time and the resource allocation to company directors to do all this stuff? Are you concerned about conceptual lack of clarity between the two sets of regimes? I am just a bit puzzled.

Mr Fogarty—I think that is probably a fair comment. Our submission is not designed, I guess, to be too bearish on the issue at all. What we are basically saying is that in the issue of environmental protection, we believe—and this is subject to interpretation—that industry is making some strong ground in terms of its approach to more self-regulation. Our traditional position on regulation will be, as I said earlier, we would rather have less, but we accept the need for it. We accept that there are margins and we do need a safety net.

But, if we look at where environmental protection is moving in this country—and we have moved very much from a regulatory model, very much an American command and control approach—we are working through and we see some value in economic instruments. There are emissions trading and other trading schemes that are available to help us address issues. But, we acknowledge very strongly that this is the year of communication and fast communication and that this in itself becomes very much a driver, so that we would see 299(1)(f), if you like, as the cornerstone, the basis, the bare minimum, and we do not think 299(1)(f) is engendered to produced A to K of the telephone book in terms of reporting.

We do accept that there will be additional costs associated with it but, as we say in the document, we do not accept that companies will be just putting in one or two sentences to say that all is well in their organisation. We are trying to engender a more bona fide approach to it on the basis that communicating on environmental outcomes is certainly good for the environment and very good for business as well.

Mr RUDD—To borrow your own language then, you accept that 299(1)(f) provides the bare minimum and your voluntary regime actually is more extensive and expansive than that. On the basis of that logic, you are not therefore really arguing for the repeal of the section—is that right?

Mr Fogarty—We are not really arguing for the repeal at this stage, no. Our initial position was that, but we have moved beyond that.

Mr RUDD—Because your submission says you recommended that it be repealed, 'a position from which we have not shifted.'

Mr Fogarty—I think you might be working off 41, not 41A—41A is our most—

Mr RUDD—It may be that I am looking at a dated one.

Mr Fogarty—Have you got 41A or 41?

Mr RUDD—I have got one dated 9 June.

Mr Fogarty—Forty-one is August 1998.

Mr RUDD—I am looking at your letter to the chairman dated 9 June. It is another one. Okay, that is good, thank you.

CHAIR—No further questions? If not, Mr Fogarty, thank you very much for your appearance before the committee, for your evidence and for your answers to our questions.

[3.56 p.m.]

BEECHER, Mr James David, Member, National Executive, Group of 100

CHAIR—I now welcome Mr James Beecher, representing the Group of 100. We have before us your submission. We have numbered your submission 15. Are there any additions or alterations you wish to make to the submission at this stage?

Mr Beecher—This is a submission in June last year?

CHAIR—Yes.

Mr Beecher—There are no corrections to that.

CHAIR—Would you like to make an opening statement or speak to your submission? At the conclusion of your remarks, we will probably have some questions.

Mr Beecher—Yes, if I may. Group of 100 is an association of senior accounting and finance executives representing the major public companies and government owned enterprises in Australia. Our submission was brief last year. Most of the points we were making were in respect of process. The members we represent, who, as I said, are from the major public companies and government owned enterprises, are looking for certainty and consistency in legislation, regulation and accounting standards so that we know what information we are being asked to provide.

Group of 100 has coordinated a document called *Management discussion and analysis*: Guide to review of operations and financial condition, which we believe is the information that should be provided in annual reports by directors. It is a document which has been picked up by the Australian Stock Exchange. My understanding is that it will be part of the Australian Stock Exchange's listing requirements.

Senator CONROY—We have been waiting for over a year.

Mr Beecher—That basically suggests what should be included or what management should discuss and analyse—that is, what a corporation should give to its shareholders. It is our view that anything significant should be included in there and that the legislation should not be prescriptive. Anything significant—for example, environmental matters, industrial relations, equal employment; anything like that that is significant to an organisation—should be included.

The legislation that has been put out is prescriptive. It is not certain. There are, for example, in the directors and executives emoluments contradictions between the legislation and accounting standards. ASIC came out with a practice note to interpret that, which gives some guidance, but it is guidance to a prescriptive legislation. It is our submission that management and directors should be asked to include in discussion and analysis significant issues that pertain to the company and, therefore, each company can tell their stakeholders the important issues pertaining to that company. There is a lot of confusion at the moment

in respect of the environmental legislation. People are unsure what to include and what not to include. The legislation is unclear. Again, we come back to certainty and consistency. We also come back to due process so that there is consultation and exposure of legislation and standards beforehand so that comments can be made and understanding and issues brought out.

On directors and executives emoluments, for example, there is an Accounting Standards Board project under way on that. We have legislation, we have a standard, we have ASIC practice notes, and there is a project going forward. So what we would ask is that there is due process under the standards board processes where standards are exposed, discussed and consulted on before they are legislated or prescribed.

CHAIR—Thank you, Mr Beecher. I will open the questions with a general one. Most of the issues you addressed relate to the consultative aspect rather than the actual issues. As we are aware, there was no consultation on these particular aspects of the legislation because they were shoehorned in as last-minute amendments. Do you believe that consultative process through this committee is an adequate way of addressing your concern about consultation? Or is there a need for additional consultation on these issues and, if so, with whom and where?

Mr Beecher—I am unsure as to the outcome of this committee or what is going to come from it. Our point is that at the moment we are completing accounts which we need to have comply with the legislation for environmental regulation, directors emoluments, that sort of thing. Corporates are having great difficulty in understanding what it is that we are complying with. There are contradictions, there are differing views, and you are going to get a wide range of differing disclosures. So in answer to your question, yes, if out of this consultation there is going to be understanding of what it is that we need to disclose. We come back to the point that what we want is certainty and consistency.

What we would prefer, and this is why we put together this management discussion and analysis document with a number of other interested parties—the Securities Institute, the Australian Stock Exchange, the accounting bodies—is that what each company should put out and disclose is what is significant to their business, and they should disclose to their shareholders and their stakeholders what is significant to their business and how it impacts their business. Let me give an example on environmental regulation. I work for a bank. Environmental regulation is not particularly significant to my organisation. We have members who are in the extractive industries—for example, large oil organisations. For them, environmental regulation is core to their business and they need to disclose that as a matter of course. But, the way the legislation has been put out, the bank has to disclose information on the same basis as large mining companies or oil companies.

CHAIR—Are you really talking about two streams of consultation, that there needs to be consultation on this legislation as to whether it stays as is or is amended and some of these provisions are withdrawn, but that there should also a second stream whereby, if the legislation is to remain as it is or to a large degree as it is, there needs to be consultation with companies as to the way it is supplied and the way they comply with it?

Mr Beecher—Correct, and what the legislation is actually asking people to disclose, how detailed it is, and how one reconciles the legislation with accounting standards, with ASIC's practice note, et cetera.

Mr RUDD—I am interested in your response to Senator Chapman's question. I think he framed it along the lines that a future consultative process would proceed at two levels—one, those matters which may or may not be repealed from the current act; and, two, on those which remain, further consultation on their operational application. I think that is a fair summary, and I think you expressed some general agreement to that. Taking the first of those points first—those elements of the act which you may be wishing to have repealed—does section 300A fall within that? Do you wish to see it removed? That is the one dealing with emoluments.

Mr Beecher—Our submission was that there were significant disclosure requirements of directors and executives emoluments. We now have additional—

Mr RUDD—You mean prior to this being enacted?

Mr Beecher—Prior to this being enacted. We now have additional disclosure requirements. That additional disclosure is not necessarily consistent with the previous disclosure.

Mr RUDD—What is the difference?

Mr Beecher—I do not have the detail in front of me. But, for example, if you read the ASIC practice note, which I do not have in front of me, they point out the differences in some of the legislation versus previous standards and previous disclosures. So there is inconsistency, there is information disclosed in one and not the other, interpretations between one and not the other. As I said, we now have an ASIC practice note which has made some things clearer but not necessarily all of the things clearer.

Mr RUDD—I suppose there are two sets of issues here. One is the question of principle, and that is the desirability of fully disclosing every element of a director's remuneration/emoluments—we have had a somewhat theological discussion earlier today about the distinction between those terms, but let's just say that to all intents and purposes they are broadly the same. So there is one level of argument, which is about whether in principle it is a good thing to disclose all emoluments and/or remuneration of directors. The second relates to, shall we say, the clarity of rendition of the same, and that goes back to your standards question. On the principle question, does your organisation oppose the principle of the disclosure of all remuneration and emoluments of directors?

Mr Beecher—Can I quote from our written submission?

Mr RUDD—I have got—

Mr Beecher—If I am quoting from the same thing. We state:

We believe that shareholders in a company have a legitimate concern and consistent with current community expectations regarding corporate governance are entitled to expect information about the remuneration of directors and senior executives.

Mr RUDD—Sure, but the key term there, of course, is 'information about'. It does not say 'all'. That is the question of principle I am going to. 'Information about' means you get bits and pieces of it. This goes to the question of the principle at stake here, which is whether your organisation believes that the principle is valid that all remuneration and emoluments be publicly disclosed. There is a separate discussion about how that is clarified in terms of accounting standards, but the principle debate is quite an important one.

Mr Beecher—I would refer back to our submission where we state that shareholders have a legitimate concern and are entitled to expect information on the remuneration of directors and senior executives. I believe that sets out our views that there should be information in the accounts on remuneration of executives.

Mr RUDD—Some, but not necessarily all?

Mr Beecher—It depends upon what is material and what needs to be disclosed.

Mr RUDD—But that is the point, if you think there is a differentiation between those two things. What I am getting at, and what I would like to hear from you, is what should be the delineating principle between that which you disclose and that which you do not. That is what I would like to understand from an operational perspective from the top 100 companies.

Mr Beecher—I believe it should be what is material and what is significant to shareholders—

Mr RUDD—And that is?

Mr Beecher—and the disclosure that has been there in the past has been detailed information.

Mr RUDD—I am a novice to this committee and this is my first trip around the dance floor on this one. In your view, as someone representing the Group of 100, what is material?

Mr Beecher—As I said, I am Financial Controller for the Commonwealth Bank.

Mr RUDD—And my conflict of interest is I bank with you, but go on.

Mr Beecher—Fine. We always welcome customers. How many products do you have? Can I interest you in some more?

Mr RUDD—More than my lending manager is happy with.

Senator CONROY—You have filled your quota.

Mr RUDD—Anyway, go on.

Mr Beecher—We round the rest of our accounts to millions of dollars, under a practice known as an ASIC relief note. We put directors and officers emoluments into the exact dollar or in bands of $10,000. We are putting a lot more detailed information in that area than we do for our profit, for example.

Mr RUDD—Flipping the question to reverse, what are you currently not providing?

Mr Beecher—I do not believe that we are currently not providing any information in the Commonwealth Bank accounts. To the best of my knowledge, we disclose what directors and officers remunerations are and what they are made up of. There is detail, and has been detail, in the accounts setting out all relevant items.

Mr RUDD—Including equity and options for equity?

Mr Beecher—Yes.

Mr RUDD—So from your individual company perspective, as opposed to the Group of 100, you do not see any material problem arising in providing all information?

Mr Beecher—Coming back to the submission, community expectations are that relevant information is disclosed on directors and officers emoluments. I believe that is what has been provided.

Mr RUDD—We are left with the definition of relevant. I give you 15 all on that one.

Mr Beecher—I come back to the document that the Group of 100 put together on management discussion and analysis. That intended to have discussed all significant activities that impact on the company.

Mr RUDD—I am not simply seeking to be seen to be provocative with the line of questioning. I am actually seeking to understand whether there is a question of principle held by the directors of Australia's top 100 companies which says that this element of our emoluments or our remuneration is not material and not relevant to the interests of shareholders. I am trying to understand that or whether it is simply what we are seeking to preserve at the end of the day—some ultimate discretionary provision to allow directors to include most but not all. I am looking for the delineating principle.

Mr Beecher—I cannot speak on behalf of directors or the Commonwealth Bank directors. I am representing an organisation that represents the senior finance executives. I believe the disclosure should be of significant and relevant information.

Senator CONROY—Unfortunately, I have to take issue with the chair's opening and some of the tenor of your remarks. I am actually the mover of these amendments in the Senate. The process by which they have been arrived took some years of consultation. Firstly, the committee itself held extensive consultations on a range of issues to do with the original simplification bill. Senator Chapman, were you the chair of the committee that made the original recommendations in the 1996 report?

CHAIR—What stage of 1996?

Senator CONROY—The one that made the original recommendations unanimously supporting the position. I do not know whether it came down before the 1996 election or after.

CHAIR—I cannot recall.

Senator CONROY—This committee met and heard all the evidence from a range of groups for and against and unanimously recommended support for the amendments. There was then a further public hearing when the final Company Law Review Bill came out in 1998. This committee again heard evidence in both directions. It then split on party lines. Senator Chapman opposed the amendments and the Labor Party and the Democrats supported them. That was in March of 1998. Three months later, after both Democrats and Labor had indicated that they were supporting these amendments still, the bill was debated and the amendments passed.

In terms of consultation, there is a difference between just believing the government telling you, 'We will get our bill through' and the fact that the Senate passed some amendments. But to imply these amendments were shoehorned in with no consultation would be a bit of a breathtaking assumption if you understood all of that. I appreciate that the government would put a spin on it and even the letter sent out announcing this review originally attempted to put a spin on it.

CHAIR—Certainly, some of the amendments that became law were dealt with in committee hearings but there were others that were not even raised with the committee. They were the particular ones I was referring to.

Senator CONROY—Mr Easterbrook's submission to the 1998 and the 1996 committee hearings actually dealt with all of them. If you go back and check *Hansard* and you check the final reports of 1996 and 1998, you will find that Mr Easterbrook has been quite passionate on this issue for a long time, as has the Shareholders Association. I just thought, from the point of view of putting it on the record, that certainly the 'shoehorning' comment required a response. I did not notice Ms Bishop object to that comment at the time.

Ms JULIE BISHOP—I am about to object to yours now.

Senator CONROY—You are not in court and you are not a judge. It is like trying to say, 'I want that recorded in *Hansard*.' Who cares what you want?

Ms JULIE BISHOP—You could have a separate section. You could have a whole page of your objections to this and then we would get it over and done with in one go, as opposed to wasting the time of the witnesses.

Senator CONROY—I appreciate that you are the only person who never wastes the time of the witnesses, in your view, and I appreciate your contribution.

I would just like to move on. I am not especially familiar with the way the AASB determines recommendations to the parliament that become regulations. I am interested in getting in perspective what prompts the AASB to move in a particular direction. I appreciate at the moment that there is a variance between the law and the standard on, say, directors' emoluments. We have had evidence from members of the AASB who have said, 'You should just leave it to us and we'll set the policy on it,' which has confused some of the members of the committee in terms of what is meant when they say, 'We'll set the policy.' I was wondering whether you were able to enlighten us at all on that because I do not understand the process.

Mr Beecher—As I understand it, from the position of being a user of the process, we and the Standards Board do not necessarily always, on a theoretical basis, see eye to eye. But the process, as I understand it, is that they have a number of projects which they do technical research on, theoretical work on, which results in an exposure draft of a new accounting standard. That draft is exposed in the community for comment for a period. People are asked to submit comments. Those comments are put back to the board. The board consider those comments. They then come up with an accounting standard which, as I understand it, then becomes a regulation and sits in the parliament as a regulation before becoming an accounting—

Senator CONROY—Who determines the project? How does a project get created? Is there a reference from the government? Is there a body which sends in a letter—perhaps your own—saying, 'This is an issue we think you should be looking at'? How does that work?

Mr Beecher—No. The Standards Board is an independent board and it determines what projects are going forward. As I understand it, it has a project under way for directors and executives emoluments.

Senator CONROY—When did that come into force? When was that projected created?

Mr Beecher—I am unsure. I do not know the detail.

Senator CONROY—I am just trying to understand whether it arose because these amendments were passed, or whether it was already existing.

Mr Beecher—I am unsure of that. But under some of the CLERP legislation, this process is, as I understand it, to be amended with a Financial Reporting Council overseeing the Standards Board and, up to a point, determining the direction of the Standards Board. At the moment the Standards Board is an independent body and determines what it is going to do and what it is not going to do. A lot of what it has done over the last two or three years has been to harmonise with international accounting standards. There has been a program coming out from the international standards board and the Australian Accounting Standards Board has had a policy to harmonise with that. It has taken international standards and worked on those to come up with Australian standards. But, as I said, it does not necessarily have direction. The Financial Reporting Council has been proposed. It is more than a proposal; I think it is waiting to be promulgated.

Senator CONROY—Do not believe everything they tell you. It has not actually been passed yet.

Mr Beecher—The legislation has been drafted, as I understand it.

Senator CONROY—It has passed the House of Representatives but not the Senate.

Mr Beecher—It would oversee the Standards Board and quite possibly oversee their program. The initiative of the Financial Reporting Council is something that we very much support. There is business input into what the Standards Board proceeds with.

Senator CONROY—I am really just trying to determine whether the Standards Board started looking at this question of emoluments before or after the legislation and what led to them—

Mr Beecher—I am sorry. I am not aware of the detail.

Senator CONROY—You mentioned that, from the Commonwealth Bank's and your own point of view, you consider that complying with the legislation includes options and equity. Mr Rudd asked you and you said yes. From your perspective that is what it required.

From any of the other Group of 100, which part of the following clause out of the legislation do you not understand or does not agree with your definition of it:

. . . details of the nature and amounts of each element of the emolument of each director and each of the 5 named officers of the company receiving the highest emolument.

Is there any part of that unclear to you?

Mr Beecher—If you go to the ASIC practice note you would have to say that it is unclear because they have come out with guidance and they have come out with pages of guidance. They have come out with pages of guidance and say that on some of it they are not going to comment and it is up to other people to interpret it in terms of, for example, valuation of options. They also have, as I recollect it, parts of their practice note which sets out anomalies or discrepancies between the legislation, other pieces of legislation and accounting standards. It basically said that they are not going to interpret which one you have to comply with but you have to comply with them all even though they may be anomalous.

Senator CONROY—I accept there is an argument about how you value. I accept there is a legitimate debating point about how you value. There are three or four different systems used around the world and perhaps even in Australia. In terms of the legislation, which says '. . . details of the nature and amounts of each element of the emolument . . . ', do you see any confusion there that options would or would not be included?

Mr Beecher—I go back to my previous answer.

Senator CONROY—You obviously personally did not.

Mr Beecher—I go back to my previous answer. But as I understand it, in the past companies disclosed details of director shareholdings.

Senator CONROY—It was optional—not everyone did.

Mr Beecher—Options are options.

Senator CONROY—Options reporting was optional.

Mr Beecher—I take your view on that but all of the organisations and all of the company reports I have seen have disclosed directors' shareholdings. That comes back to my point. If it is significant, companies do disclose it.

CHAIR—Any further questions? Thank you very much, Mr Beecher, for your evidence to the committee and your answers to our questions.

Mr Beecher—Thank you.

[4.27 a.m.]

HAMMON, Mr Timothy Edward Douglas, Chief Administrative Officer, Coles Myer Ltd

IRVING, Mr Michael John, Manager, Company Secretariat, Coles Myer Ltd

CHAIR—I welcome the representatives of Coles Myer, Mr Michael Irving and Mr Tim Hammon. We have before us your submission for this inquiry dated 14 July 1999 and which we have numbered 87. Are there any amendments or additions you want to make to that submission before we proceed?

Mr Hammon—There is only one amendment. At page 3 of the submission, under the heading 'Election of Directors', I think I would like to spell out our view in relation to that matter.

CHAIR—We will proceed for you to speak to your submission and make an opening statement. Do you want to make any corrections to the submission itself at this stage?

Mr Hammon—Perhaps just to foreshadow that, when I come to this point, I will point out that we are not presently of the view that this is a matter which should be compelled to be put to shareholders, as opposed to the impression that is given here that this is something that could be put to shareholders. I will elaborate upon that as we go.

CHAIR—No other changes?

Mr Hammon—That is right.

CHAIR—I will invite you to make an opening statement and speak to your submission and at the conclusion of that, we will have some questions for you.

Mr Hammon—Thank you very much. I would like to open by emphasising the point we have made in paragraph 4 of our submission that we do not believe it is this company's role to set the policy of Corporations Law issues. That really is something which rests with the government. Our purpose in being here today is to try and put forward some comments in relation to, I think, four main headings: demonstrated need on some of these proposals and the practicality of what is being proposed—I think as a large public corporation, we can make some comments which may reflect upon the practicality of what is being proposed—and then just simply looking at the cost benefits and whether what is being proposed is consistent with an overall thrust of corporate legislation in recent years of trying to achieve simplicity. I just want to emphasise that point at the outset.

Turning to the submission itself, and really using those broad headings as a guide, our comments in relation to the notice of annual general meeting really have their thrust in the simple practicalities of what is involved in trying to discharge all the printing and practical necessities of forwarding annual reports to our shareholders 28 days in advance of the annual general meeting. We are one of the first reporting organisations and that requirement was

particularly difficult last year. We met the obligation, which is obviously something we focused on doing, but we have suggested that it may be preferable to move to a 21-day time period as a sort of compromise between extending the period so that people have additional time to consider the material, and at the same time not impose a time gap which makes it very difficult, given the size of our shareholders' register, to actually discharge the obligation.

To give you an understanding, we have at present approximately 350,000 shareholders. We are fortunate in that our shareholder numbers are growing, but there is a very large logistical aspect in the simple task of getting out the annual report. So my comments in relation to the notice of the annual general meeting largely concern the practicalities.

In relation to the general heading on disclosure, we believe the primary object of disclosure is to enable material information to be brought to the attention of shareholders. The comment I would make is that when in doubt as to its materiality to shareholders, do not legislate. We have, in our view, a very effective requirement under the listing rules of continuous disclosure of material events. We believe that the focus should be on ensuring that that is complied with and that it is not necessary to legislate for disclosure of materials in annual reports where the materiality of that information to shareholders might be questionable.

Again, as a bit of background information, of our 350,000-odd shareholders, 13 per cent have indicated that they do not wish to receive any annual report, or concise report. Thirteen hundred have requested the full annual report. We now forward to the balance of our shareholders the concise annual report. I am not saying you can draw conclusions from that as to what ought to go in the concise annual report, but it may be useful for people to bear that in mind as they try to assess the materiality of some of this information to shareholders.

Again, and on the disclosure point, I would like to simply point out that if there is to be a disclosure requirement there ought to be clarity in what is required. I have had the opportunity of reading some of the earlier *Hansard* comments. I do not think it appropriate to repeat what has been said, but if there is any ambiguity as to what the legislation is designed to achieve, and I refer here particularly to the environmental legislation, that should be clarified. Again, our proposition would be that, if there is a need seen for there to be an environmental disclosure, materiality is the test, materiality to the company and the shareholders.

The next section I would like to comment on is the election of directors. I indicated a slight amendment to this position and that is that we do not believe at this point that there is a compelling case made out for this to be compulsorily put to shareholders as an issue. There is a concern we have that the proposal being put forward is a complex proposal. It could potentially be very difficult to understand for the various shareholders to whom this is put. We believe it could be costly to administer in the context of the annual general meetings that this company has to go through in terms of size.

There is a concern also that it may create additional conflicts around the boardroom table. You might have groups which are representing sectional interests, and we are trying to step back from those issues. I place not a heavy weight on this concept, but there is a

potential for abuse. Where you have a contested election there could be lots of candidates put up. Again, you have the question of the cost issues looming large.

We have a view that there are appropriate checks and balances in place at the moment—and I am talking here about this proportional voting issue if that is not clear. This company is an example of a company—although I was not there at the time—where institutional shareholders were able to get together to, in effect, implement a change in the composition of the organisation. There are now ASX or ASIC provisions, I am not sure which, which enable institutional voters to vote collectively. They give notice of this to the ASIC. That gives them a mechanism for increasing the weight of their collective vote as opposed to the weight of their individual vote. So, there are some very effective checks and balances in there at the moment.

The other general comment I would make is that there is an issue here which I have not explored fully. There is an economic value attached to one vote, one share, and there is an investment value associated with that. Once that issue is potentially interfered with one needs to understand the impact of that on the economic value of the investment. The proportional voting system, as I understand it at least, has that potential to raise that as an issue. I am not qualified to comment on how far that goes.

My final point is a very practical point. It is open for 100 shareholders to, in a sense, tack this issue on as a resolution to be considered by the annual general meeting under the law as it now stands. One hundred shareholders who have an interest in this matter could simply ask the company at an annual general meeting to deal with it. It is for those reasons that we would say that compelling companies to put this as an issue to shareholders, as opposed to leaving the current mechanisms in place whereby shareholders can if they get 100 together achieve the same outcome, is perhaps unnecessary. We do not think there has been a compelling case made out for that to occur. And on the compelling case, again, when in doubt we should not overlay complexities on the structure.

Turning then to the corporate governance board itself, I would like to refer to the submission at this point. We consider that the suggestion that there should be a separate corporate governance board may demonstrate a misunderstanding of the true role of directors. We certainly believe that if directors are correctly fulfilling their duties there is no need for a separate corporate governance watchdog.

We consider that having a separate corporate governance board could present legal difficulties such as determining which board takes precedence, the division of responsibilities, and the affect on directors' duties. In addition to the legal difficulties there are certain practical difficulties such as confusion for shareholders at elections and the opportunity it provides for board approvals to be overturned giving uncertainty as to a company's commercial decision making processes for the day-to-day running of board operations.

We consider that the current practice adopted by many companies of having a corporate governance audit committee of the board is an effective corporate governance mechanism. By way of elaboration, the ASX listing rules call for the disclosure of corporate governance processes in the annual report. We have, in our view, adequate procedures in the current

legislation for dealing with conflicts of interest. And without going into the full detail there, we have some tried and tested provisions governing related party disclosures, related party transactions, provisions dealing with the disclosure of conflicts, and provisions dealing with material personal interests. These are well understood and well applied. In addition, we have now disclosure of remuneration in our annual reports. There is a lot of information that does come forward which we would submit gives a fair and quite clear transparency to the way companies operate.

Against this background we would say that there is not a demonstrated need for a separate corporate governance board standing separate to the board of directors to be established. We would say that in this case in particular we should proceed with extreme care before we upset the balance which has been established. I would conclude on this particular topic by pointing out that we see the vices that we seek to avoid being reintroduced. There will be increased costs, greater uncertainty, and rather than simplicity, complexity. As a final comment, by introducing this board we would see a clouding of the role of directors and their freedom to manage the company which, at the end of the day, is the essence of a corporate organisation.

For reporting on legal proceedings, I would simply restate our submission. Putting it in a very practical sense, Coles Myer is a large company. Fortunately, it receives a decreasing number of claims and allegations against it in the way it carries on its business, but it is the nature of business that it does receive claims. We believe that the current ASX requirement for disclosure of material events is sufficient protection for all concerned. We have some difficulty trying to understand the cost benefit that will flow from requiring a company such as Coles Myer to list in its annual report not material allegations, as I read the recommendation, but allegations of material breach. I think there is an important distinction between those two points. All we need to have is an allegation of a material breach. Those who are experienced in the ways of litigation will well know that there can be many allegations of material breach which, from a company's perspective, are not material.

If this requirement goes forward, what I see, particularly in my case, is a lot of extra work to list all the litigation that we might have and go into the disclosure issues as to our views of the merits of that case in circumstances where we do not believe that to be at all material to the interests of the shareholder. We believe that, if it is material, we have an obligation to disclose it under the continuous disclosure requirement. Again, looking at the practicalities of this proposal, cost and simplicity, we are really not in favour of this going forward.

Regarding reporting suspicion of fraud or improper conduct to the auditor, clearly it is critical that mechanisms exist for this to occur. I can speak only for a company like Coles Myer in its current structure. I believe it to be typical of most large listed organisations. There are very clear processes in place for dealing with these sorts of issues. Regrettably, we do get allegations of this nature. I felt the actual terms of reference here needed a particular comment. It refers to:

(c) whether directors and executive officers of a company should be obliged to report to the auditor any suspicion—

it is a very onerous task; again, I would like to introduce this concept of materiality—

they might have about any fraud or improper conduct . . .

I find this concept quite imprecise when I look at it from a concept of implementation.

I go back to my earlier comments about disclosure. There is nothing wrong with disclosure. If it is a matter of policy, people see it as important to do. But please do not cast upon us an obligation which is incapable of precise definition, particularly in a large organisation where we have in excess of 150,000 employees. These sorts of matters could produce reams and reams of pages and reports and additional cost to the way we do the business. These compliance costs are a constant issue for us. We are a company very much focused on complying with the law. We believe in good corporate governance, but there is layer upon layer of these things creeping in and it makes it very difficult for us to get on and actually do what we are there to do and sell quality products to our customers.

The other point I would like to point out here is that many allegations or suspicions are based upon a misunderstanding of what has occurred. They could be ill-founded. To report them to external parties could clearly be damaging to the interests of individuals concerned. That is not to say that they ought not be investigated. I would not want the committee to believe that I am suggesting that we do not have processes to review these matters, but to require compulsory reporting of matters which, upon the most cursory of investigation, can be seen to be without foundation is throwing into question the rights of individuals in the process. Again, I think we should be left largely to the systems we have, relying upon the structures which exist. In any event, if we are to proceed down this course, precise definition is very important and concepts of improper conduct need to be questioned. We ought to factor into the consideration this concept of materiality wherever possible. I do not really propose to add anything further to the submission at that point and would invite questions.

Senator CONROY—I want to start at the end. Unfortunately, you were not here for the last witness. I was particularly having a discussion with them about the role of the Accounting Standards Board and how it commenced its projects or determined where it was going. I was particularly gratified to read your comments. You seem to have read the *Hansard* and got the same feeling that the Standards Board felt they should be setting the policy rather than the parliament. I was very pleased to see your comments there, because I did share some of your concern about where they seemed to think they were going.

Mr Hammon—Yes, I think both concepts have a very important role to play, but we should have a very clear understanding of what the policy setting role of the Corporations Law is and when you need to link back to the accounting standards. Both are very important.

Senator CONROY—Sure.

Mr Hammon—I would simply cite that the related party transactions are in an area where the two seem to combine quite well.

Senator CONROY—Yes. I want to go to an area which is probably a little sensitive for you. I am not seeking to create any great argument; I was interested in some of the transactions that have gone on before your time—I think you made that point. Do you think that they would have been avoided if there had been a separate corporate governance board?

If I could put it in a future sense, would some of those transactions which have taken place in the past pass your current corporate governance board? That is not trying to draw you to say anything in particular.

Mr Hammon—I do not propose to comment upon what might have happened in the past or whether a particular transaction may or may not have happened differently or been reported differently.

Senator CONROY—Or been reported at all.

Mr Hammon—I think it is important to note that some of the transactions which have received publicity are still the subject of examination by the Australian Securities and Investments Commission. I will turn to the structure that the company currently has and comment upon that. We have a good combination of non-executive directors and one executive director on the board. We have a very clear and well-publicised committee structure. We have audit committees, which have a government responsibility. We have very clearly defined responsibilities in terms of delegations of authority which occur within the organisation. We have structures for investigating suspicions of fraud and, as someone in the organisation who is largely responsible for the effective operation and set up of those structures, I have a lot of confidence in the structures being able to deal with instances of concern being expressed.

If I could counterbalance that against the corporate governance board, my concern there is that, when you have a good board with the right structures in place, which the legislation currently contemplates and the ASX listing rules require us to disclose, the introduction of the corporate governance board across that will be more confusing and lead to greater problems than would otherwise be the case having directors accountable for the issues and dealing with them day-to-day and up-front. I have already commented upon some of those complexities, but it is very hard to see how a separate corporate governance board could marry its role with that of the directors on a day-to-day management basis. I could elaborate upon that, but I think it is probably only repeating issues that we have said and you have heard.

Senator CONROY—When you made your introductory remarks, I know you indicated you were mainly referring to the environmental disclosure rather than, for instance, the remunerations disclosure. Again, I had this discussion with the previous witness. Part 300A(1)(c) says:

. . . details of the nature and amount of each element of the emolument of each director and each of the 5 named officers of the company receiving the highest emolument.

As someone who was involved in the drafting of that—and perhaps I am too close to it—what was trying to be captured seems fairly straightforward to me. Did you say that you had read the *Hansard* at the time?

Mr Hammon—To be accurate, I have skimmed it. Michael has read it far more closely.

Senator CONROY—I know ASIC have issued a note which some would say has clarified the situation, though others have argued before us today and on previous days that it has not clarified the situation. You make the point about cash versus accrual. Do many businesses still account on a basis of cash?

Mr Irving—Yes. That comes about in regard to the benefits a director receives. The classic is the retiring allowance. We accrue on an annual basis for the retiring allowance, but the disclosure is more on a paid basis. If someone retires and they get a payout of $100,000, we will show that as a retiring allowance paid rather than including the accrued amount.

Mr Hammon—I do not think in the context of Coles Myer it would extend beyond that.

Senator CONROY—That is just one I have not come across before so I am interested in exploring it for a minute, if I can. So you account for it each year?

Mr Irving—Yes. We raise it through our normal profit and loss and the provisions in the balance sheet.

Senator CONROY—So it is recorded in your accounts each year as a line item?

Mr Irving—Yes, it is.

Senator CONROY—And then individually when they retire they receive a lump sum?

Mr Irving—And it is taken back against the provision.

Senator CONROY—Sure. So you are saying you do not think that would be captured by emoluments. I imagine I was trying to capture that when I was discussing the amendments being drafted, so I would be interested in what I think is a legitimate question you have raised.

Mr Hammon—I think, and I will defer to Michael here, it is a receipt. We disclose it at the time of receipt. It is accounted for. That is the approach we believe to be appropriate, and certainly consistent with the view of where we felt the legislation was going.

Senator CONROY—Would you declare it now, given the ASIC note and what you would be comfortable with, or wanting to avoid potentially being in breach of? Would you declare a retirement benefit like that now in an emolument—if they left halfway through the year or whatever?

Mr Hammon—These particular issues ultimately go back to our audit committee and our board for answer. I think all we can do in our status of representing the company here today is to indicate this is one issue in terms of clarity. What the company does in relation to each occasion I think largely still rests with the directors in discharging their duties as to what they believe to be appropriate at that time. So I do not think we are in a position to actually foreshadow what the company will decide at any particular point in time.

Senator CONROY—Let us just say, for the point of discussion, you were not required to declare that, that it was not captured by the words 'each element of the emolument'. You get a balance sheet, you are a shareholder, you are looking through it and presumably there is just a total for each of the directors or each of the people involved in it. How would you be able to identify within your accounts that X director, X chief executive, was receiving that part even though he was not going to actually receive it in the hand until down the track? I am assuming you could not actually identify that within your line item account.

Mr Hammon—It is possible to put footnotes in your accounts to refer to the existence of accruals.

Senator CONROY—If it is part of a package, there is a statement that says you have a retirement allowance coming. There could be some sort of disclosure—perhaps not at the end but within the statement—to say there is 10 per cent or $1,000, or maybe only a trivial amount in terms of the total package. I do not think you are trying to deliberately get around that thing, but I am just trying to work it through so there is no confusion.

Mr Hammon—No. It is quite straightforward, I think. It is simply that you take a view as to what you believe to be a transparent disclosure at the point in time. It is clear that at the point in time when any payments are received they get straight into the accounts and they go through in the disclosure line for the directors' emoluments. On the way through you make it clear if there is no actual value attached and, if you believe it to be appropriate, a footnote to indicate the retirement allowances are received is often put there or can be used.

Senator CONROY—Okay. No value attached. I know there has been some debate about no value attached. The cost to business would be—

Mr Hammon—Sorry, I am not saying there is no value attached to that. At the time a director receives that retirement payment it is fully disclosed in the emoluments as a clear value attached to it. On the way through, though, if you wish to record, and you believe it appropriate, that there is an additional amount that they have not received that year, but they may be entitled to it, and if the directors believe it appropriate, a footnote can always be included in the accounts to that effect to indicate that that does exist.

Senator CONROY—Thanks.

Ms JULIE BISHOP—Mr Hammon, on the matter of the 28-day notice, we have had evidence yesterday and today that the 28 days is too long and, in these days of increased efficiencies and technology, that it is not necessary. This afternoon we had probably one of the first submissions that I have heard since being on this committee as to why at least 28 days is necessary, and that came from a representative of institutional shareholders—and it was put to the committee quite forcibly. We were urged to come up with evidence of where there was a major problem or cost or lost opportunity to Australian listed companies as a result of this extension of the notice period to at least 28 days. Your submission has given examples of the problems caused to you last year and that will be caused to your company this year. Do you see it as an ongoing problem for Coles Myer?

Mr Hammon—We have had particular problems in the last two years because of the forward nature of our planning cycle. Of course, it is always possible to build in longer time periods. I will let Michael comment here because he is closer to the actual practicalities of it but, as a company, we took the view that there is a case for extending the period. Extending it too long places an onus on us as we go through the practical stage of finalising accounts, getting to printers, publishing and distributing to shareholders. It was that 28-day period that we thought was putting on us—not only in this interim period but potentially going forward—too heavy an onus. If we missed that date for a critical period—in our case a mail-out to 350,000 shareholders or whatever proportion is receiving it—costs us significant sums of money. Our proposition was we can understand why people might suggest 28 days. We do not see a compelling need for that. We think 21 days is more than sufficient, and in our case it gives us a degree of flexibility. But I would ask Michael to make any additional comments he would like on that.

Ms JULIE BISHOP—Just before he does, have you had any concrete examples that you could give to us as to institutional investor concern that they did not get enough notice so therefore they did not vote?

Mr Hammon—I am unaware of any in the case of Coles Myer Ltd, but I could take that on notice, if you like, and see whether we have anything in the organisation.

Ms JULIE BISHOP—It would be nice to have that.

Mr Irving—In regard to the 28 days notice, the primary problem large companies have is the meeting venues. There is only a limited number of venues that can accommodate large bodies of shareholders, so you are very much governed by your meeting venue. In Melbourne it is pretty much either the Concert Hall or the Tennis Centre and it depends on what events are booked in. It is very hard, for example, to take an entertainer out of a slot for a company meeting that is going to take two days to set up.

Mr Hammon—We hope that the entertainer will be more entertaining.

Mr Irving—Exactly. In regard to your second question regarding the institutions, last year we sent basically a pallet load, a tonne, of our annual reports straight across to the States by express air courier to make sure that people actually do get all these documents in adequate time. I personally do not see it is a great issue. From talking to Citibank, our depository for our ADR program in the States, we dealt with it quite adequately. They have advance notice of what is going to be put to shareholders, and we have our Internet site which has most of the information on it. We are moving across to the electronic version, but there is a bit of caution just to make sure the system can work properly.

Ms JULIE BISHOP—But you do not see any demand for the extra seven days from, say, 21, as Mr Hammon suggested, to 28?

Mr Irving—No. The 21 days I feel works adequately. It also assists in logistics. There is no doubt about that.

Mr Hammon—I think Coles Myer's perspective is it is not a big issue for us in terms of a policy issue. It is a question of what is practical.

Ms JULIE BISHOP—And the cost benefit analysis.

Mr Hammon—We are suggesting the 21 days gives us a degree of margin for error that we would prefer to have.

Senator CONROY—Can I just follow up on that. I am just trying to get a feel—and I appreciate the amendment was passed very late, especially in your cycle, so it was particularly difficult for you at the time of I think your 1998—

Mr Hammon—Last year.

Senator CONROY—Is it the practicality of trying to build in the dates, the venues and those sorts of things which you are doing one to two years out that is your problem, or is it philosophically the move from 21 to 28 days? If this did not change, would you be able to live with it in the end because it just meant that you had to build in the extra seven days; or do you really feel that the volatility of the market could be affected by the information flow being a bit stale, that there is a danger the shareholders may not get an up-to-date picture? I am just trying to find out whether it is a balance between those.

Mr Hammon—No, our approach is not philosophical.

Senator CONROY—It is just simply the practicalities of booking a venue and those sorts of things?

Mr Hammon—It is the practicality of getting the venue on a date which enables you to set your 28-day notice period in time to finalise your accounts, print the material and distribute it. It is exacerbated probably more in our case than in many others because of the volume and quantity.

Senator CONROY—Absolutely.

Mr Irving—A couple of years back we addressed this very issue of delivery of information to shareholders. We went through the cycle of going to the mailing house, which basically enveloped everything and put it out through the regional postal centres, but we found that there was a difficulty in delivery at the local post office. There was a weight restriction on the awards, and the guys on the bikes could not deliver if they had to carry more than 15 kilograms. The practice was that they would leave that and deliver the Christmas cards and the business mail, and all the annual reports would just stack up in the post office. I think it is probably more an issue of the slowness of delivery rather than anything else.

Ms JULIE BISHOP—That is interesting.

Mr RUDD—On the question of disclosures, a lot of the discussion today has focused on a lack of clarity relating to the provisions concerning compliance with environmental

regulation. There is a general view emerging around the shop that some greater degree of clarification is necessary on that, but I cannot speak for others.

On the other question which relates to disclosure on emoluments, I was taken by your exposition on the principle of materiality—materiality, as you defined it, as it relates to the interests of the company and the interests of shareholders. At least that is what I wrote down. Using that principle of materiality, do you believe there is any element of the emoluments of directors which would possess no element of material interest to shareholders and therefore should not be subject to disclosure?

Mr Hammon—It is difficult for me to express a view in any capacity other than a corporate capacity, and therefore I am really not in a position to express a corporate view as to whether there is any element of a package which is or is not material. I think the company accepts quite willingly the legislative requirement for there to be disclosure of emoluments. It is not an issue that it wishes to raise with this committee. I do not seek to put to this committee any connection between emoluments disclosure and materiality, and if I have given that impression I pull that back. The issue I am seeking to raise is simply that, particularly in the context of any new disclosures that people seek to bring forward, there ought to be some consideration given to the materiality of that information to shareholders as we go into the production of producing it, tracking it, et cetera. When it comes to emoluments, we do not have any comment other than to say that the legislation exists and we accept the legislation. I do not think the company would have a view—certainly I do not have a view—as to whether it is material or otherwise. We just accept that.

Mr RUDD—Your written submission goes to, shall we say, the operation of the principle of disclosure of emoluments, and you raise two specific sub-issues. One is methodology, which is cash versus accrual, being one which Senator Conroy touched on. The other issue goes to the scope of who is covered, and you go there to the format of disclosure with advisers and auditors. If I read your written submission correctly—and I refer to the last paragraph at the bottom of page 2—I think you are raising questions about application rather than principle.

Mr Hammon—That is precisely correct. As I said at the outset, we do not draw issue on policy; it is practical operation and clarity.

CHAIR—You refer to the costs of complying with some of these new provisions. Have you actually done any detailed analysis of the additional costs that it is imposing on Coles Myer, or is it too early to be able to do that?

Mr Hammon—No. I should add that we have systems which track not just that which is required to be disclosed. We also track that which we believe the directors and other managers in the organisation ought to be kept aware of. I would not want to give the impression that we focus only on complying with that which ought to be disclosed. We track a lot of information. But, at a practical level, whenever we are compelled to undertake an additional step in terms of analysing material, adding value to that material or introducing a third party to the process, we are compelled to make sure we have proper audit trails, systems to track the information and people to add value to that information wherever it might be necessary. It is a cumulative task.

I can indicate to you the cost of having compliance officers in businesses—that is, the cost of the individuals concerned—and systems issues. They are factors you need to bear in mind. Compliance is a factor of doing business. We accept that. I think the proposition I am trying to make here today is that, whenever we look to add an additional formal disclosure requirement or reporting requirement, we must bear the costs in mind because, without trying to put a figure on them, they are real. We have to ask ourselves the question: is it something that the shareholders will materially benefit from when they receive it? I cannot be more specific, I am sorry. I can give you assurances, though, that the costs I am referring to are real in terms of time and employees.

Ms JULIE BISHOP—Your point about the company having to report proceedings against it for breaches of Corporations Law or trade practices, summary of the allegations and the company's position could be one example of that. Currently, under the continuous disclosure, a company would report any material matters anyway?

Mr Hammon—Correct.

Ms JULIE BISHOP—This goes further, obviously, and requires a summary of the allegations and standard trade practice breach statements of claim. You can pretty well recite the allegations that can be levelled against a company, and then this would require a response to a certain level of detail. Would it require a response to every particular that is alleged?

Mr Hammon—I read in some material on the proposals or in *Hansard* that one of the witnesses was suggesting you may need to, as you put out your view of the claim—I think the proposal is that you list the claim and then you put forward your view of the claim—

Ms JULIE BISHOP—It says 'the company's position', doesn't it?

Mr Hammon—Yes, in very broad terms.

Ms JULIE BISHOP—I do not whether that means its actual defence or its view that it is rubbish, that the allegation is vexatious.

Mr Hammon—You would certainly need to have one of your legal team liaise with various people in the organisation to look at the legal position and, presumably, the commercial position in relation to that claim and then form a view as to whether it ought to be commented upon. We do have the courts, which are designed to deal with these matters. I think the company has quite a strong view in relation to embarking upon a whole bundle of information which one could question at this point: what benefit does it serve for the shareholder?

Ms JULIE BISHOP—Does the shareholder, and hence the public, need to have recited to it every allegation that somebody has made? It could be a disgruntled ex-employee; it could be a disgruntled customer.

Mr Hammon—Against the background of the company being obliged to disclose material claims.

Ms JULIE BISHOP—It is not confined to just prosecution by a regulatory authority?

Mr Hammon—Not at all. It is very hard to see how a shareholder, called upon to assess the performance of Coles Myer and his or her investment in Coles Myer, or an institutional investor, can benefit from this information, particularly against a background of the requirement being to disclose alleged material breaches and not material claims. And there is a clear cost issue there to assess each claim.

Ms JULIE BISHOP—And the potential prejudice that a company might make an admission early on that later advice or strategic legal advice would say should not have been made.

Mr Hammon—I can only repeat what is in our submission: it gives credibility to a range of claims which might otherwise be frivolous.

Ms JULIE BISHOP—One cannot assess the impact of that in the marketplace.

Mr Hammon—What would be of interest to the company would be to understand what is the rationale for disclosing all these claims—against the background of the continuous disclosure obligation.

There is one other issue that I have actually overlooked, and I apologise for that. We did extend beyond the terms of reference to comment briefly upon the law, as it currently stands, relating to the convening of a general meeting.

Senator CONROY—We have now extended the terms of reference. It was announced in all the weekend's papers.

Mr Hammon—That was mentioned to me. I think our submission is reasonably clear on this point. We do not know where the magical cut-off line is. In our case, 100 shareholders could be viewed to be a very small number, leading to the incurring of a very large cost. We have put forward an alternative. We are not saying we know the magical cut-off point. That is a suggestion or a proposition. It is something that we felt we certainly had a view about and wished to draw to the attention of the committee.

CHAIR—As I recall, this issue was raised with us by the NRMA in earlier hearings.

Senator CONROY—They will probably want to come and talk to us again about it.

CHAIR—I think there is some suggestion of a ministerial discretion being part of the legislation which would allow that to be dealt with.

Mr Hammon—I think the flexibility would be great. The precise number may be uncertain in terms of the objectives of the legislation.

CHAIR—Are there any questions on that matter from our committee members? No, there are not. Thank you very much, Mr Hammon and Mr Irving, for appearing before the committee and answering our questions.

Committee adjourned at 5.12 p.m.