COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT COMMITTEE ON CORPORATIONS AND SECURITIES

Reference: Company Law Review Act 1998

WEDNESDAY, 18 AUGUST 1999

SYDNEY

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JOINT COMMITTEE ON CORPORATIONS AND SECURITIES

Wednesday, 18 August 1999

Members: Senator Chapman *(Chair)*, Ms Julie Bishop, Mr Cameron, Mr Rudd, Mr Sercombe and Dr Southcott and Senators Conroy, Cooney, Gibson and Murray

Senators and members in attendance: Senators Chapman, Conroy and Cooney and Ms Julie Bishop, Mr Cameron and Mr Rudd

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 9.34 a.m.

O'BRIEN, Mr Mark, Investment Committee Member, Investment and Financial Services Association

RALPH, Ms Lynn Susan, Chief Executive Officer, Investment and Financial Services Association

ACTING CHAIR (Ms Julie Bishop)—Good morning. In the temporary absence of the Chair and Deputy Chair, I welcome you to the hearing. The purpose of this hearing this morning is to take evidence on certain matters arising from the Company Law Review Act 1998. The committee has received about 89 written submissions which it will consider, along with evidence it received yesterday and Monday, in preparing its report. The committee prefers to conduct its hearings in public. However, if there are any matters that you would like to discuss with the committee in camera then we will consider any such request. It is also necessary for me to remind witnesses that the giving of false or misleading evidence may constitute a contempt of the parliament.

We do have a submission from you. Are there any matters that you would like to correct or alter in the submission, or would you just like to make an opening statement?

Ms Ralph—I would like to make a couple of opening remarks.

ACTING CHAIR—Thank you.

Ms Ralph—As you may be aware, IFSA represents the retail and wholesale funds management and life insurance industry. Its 63 members invest over $450 billion on behalf of, we estimate, over nine million Australians through the provision of managed investment, superannuation, life insurance and other financial services. IFSA has been supportive of the reforms introduced by the Company Law Review Act because we believe the act enshrines in legislation a number of important corporate law reforms which will benefit all investors, both large and small.

Some of the items within the committee's terms of reference were not necessarily subject to intense consultation and we have made submission to you on some of those items. I would like to address quickly a couple of points in that respect. The first is in relation to the proposition that directors should be elected by a proportional voting system. IFSA does oppose any amendments to allow directors of a listed company to be elected by a proportional voting system. We believe that that sort of system is in direct conflict with the principle of one share, one vote, and any change to this position would have an adverse effect on the integrity of the Australian capital markets.

The OECD released earlier this year their principles of corporate governance and in those they support the fact that the one share, one vote principle should be supported. Additionally, the international corporate governance network working kit which amplifies those OECD principles also provides that ordinary shares should feature one vote for one share. You may have received a letter in the last day or so jointly signed by IFSA, the Australian Institute of

Company Directors and the Australian Shareholders Association, outlining their joint agreement to oppose the election of directors by a proportional voting system.

In regard to listed companies disclosing information which is disclosed to or required by foreign exchanges, we do support that proposal because we believe, for reasons of equity, that Australian investors should not be in a worse position than overseas investors. There have been instances where companies have refused to disclose to the Australian market information already disclosed to overseas markets. We believed that the current regime was not adequate to provide investors with that sort of information, so we have supported that proposition.

The disclosure in annual financial statements of board and executive remuneration pay is an important aspect of corporate governance. It derives from the fundamental concept that company management and the board are agents of the investors who own the company and are selected to plan and run the company for their owner principals. In order for shareholders to assess the performance of the board and their executives, in particular, and to evaluate the cost of those agents to the owners vis-a-vis their contribution, it is necessary for owners to know the various components of that cost. These components include all forms of monetary remuneration and, if applicable, equity dilution through share options.

IFSA's blue guide, which this week is in fact a temporarily grey guide, and we will leave you with copies of those, has for a long time contained recommendations that a company's annual report disclose policies on, and the quantum of and components of, remuneration for all directors and the highest paid five executives in tabular form. The guideline includes a sample table of how we would suggest that disclosure be made.

We are aware of anomalies in the existing legislation with regard to the disclosure of remuneration and I understand that those anomalies have been widely canvassed before the committee. We believe that the ASIC practice note 68 assists in resolving many of those difficulties. We think that, in combination with market practice guidance notes like our blue book, really resolves many of the difficulties. Therefore, we would be reluctant at this point in time to see any repeal or change to the legislation regarding disclosure of remuneration.

We also strongly advocate that listed companies should be required to disclose more information relating to proxy votes. In the absence of such disclosure, investors are unable to properly fulfil their monitoring role or to comply with client mandates which require reporting on the outcomes of proxy voting activity. We do not believe that disclosure of this information is in any way confidential information of the company which would be against their interest to disclose. Therefore, we do support the disclosure of proxy voting information, including disclosure of that information to the AGM.

Finally, we are not supportive of the various amendments regarding disclosure of compliance with environmental regulation, proceedings against the company or reports to the auditors about fraud as we believe that the existing obligations in the law for directors are sufficient to require disclosure of matters that are material and that to single out any specific issue implies that other issues, like the industrial relations issues, are somewhat less important than those. We do not think that it is necessary to include amendments regarding

disclosure of specific items, given that we believe that the existing obligations on directors would already force that sort of disclosure.

Senator CONROY—One of the issues that has been most heavily criticised in the amendments is the 28 days. There have been many representations put to us that we should amend it back to 21, which was one proposal. There has been criticism that the investment houses should be able to get their act together inside 21 days and that the problem is at the investment houses because you are custodians for shares and you have to pass all the notices back down—so the problem is at your end rather than at the company end. Do you have any views, particularly on the 28 days?

Mr O'Brien—It is very true that there is a lot of work involved in processing the paperwork that comes through. Often a number of parties need to be in receipt of validly signed authorisations relating to voting at company meetings. I guess it is compounded by the fact that you get one period a year where a lot of resolutions come through from quite a number of companies. Within the organisations that you refer to there are relatively few people, if you like, in a position to actually go through the process and deal with each of those appropriately. The time involved in doing that is quite considerable. There is a lot of work to make sure that the time requirements and the deadlines are met.

The proper analysis of the resolutions themselves requires that people in decision-making roles are able to consider those issues within that particular administrative process. Anything that would speed the administrative process up would allow more time for consideration of the actual issues put forward in the resolutions that investors are provided with. The whole context of making sure that there is an appropriate discussion taking place within the investment institution with the end client—if it is something that they also have an interest in, if they have requested their investment manager to appraise them of resolutions which may be contentious or may go against the blue book guidelines or the like—requires a fair bit of opportunity to be made available. It often gets very concentrated.

The risk is that you end up with box ticking if the time frame is relatively tight or non-compliance with the blue book guidelines entirely. In other words, the voting process does not occur. Anything that would speed that process up, such as the introduction of more streamlined or electronic voting systems, would assist in meeting the requirements of companies and investors to cover that workload as efficiently as possible. But at this stage, that is still very much a manual and laborious process.

Ms Ralph—We are aware that 28 days is causing some administrative difficulties at the company end. We certainly acknowledge that. It is somewhat a chicken and egg situation. Improvements to the process will only occur when there are pressures for improvement to the process. We have revisited this issue, having become aware that it was an administrative issue for many companies out there. Obviously, we would like as much time as possible, but we are also cognisant of the fact that if there was more pressure on people to do this job quickly then innovations in electronic proxy voting might actually happen quicker in the country.

On the one hand we would like to see the 28 days stay in place. We have some suspicion that if it were to revert to 21 days that that might put some more pressure on the

marketplace to put electronic systems in place. As I said, we are cognisant of the fact that there are some difficulties being caused for companies in compliance. That is our answer.

Senator CONROY—On the point of putting pressure on to make the change, many companies opposed even having a fax number as a mandatory thing to lodge a fax proxy, but from witnesses we hear that there seems to be a reasonable acceptance of that. Authentication, of course, is a problem and you need to be confident about that. How quickly do you think that it is possible to go to more electronic forms of proxy voting, or notifications in email, and applying that technology? Do you see that happening over the next six months? Is it a two-year thing? Should we revisit this in two years and see if all the new technologies are in? If they are do we then say, 'Look, given the technologies are in now, we can drop back to 21 days. We are comfortable.' Is that a potential solution? Do you see that as happening in the near future?

Mr O'Brien—The electronic messaging systems that are being used in the financial markets more broadly do suggest that it is possible to do this with a concentrated effort. But proxy voting is a very time consuming process by its very nature because each of the resolutions essentially has to be collated, from the custodian's point of view, on behalf of the underlying investors. It is not a high margin business and therefore there has to be an acknowledgment of the cost of doing so. Arguably, the way in which that flows through to the investor has not been addressed in the process of the messaging systems that are currently in place. They are largely for transactions efficiency as distinct from messaging per se.

But there is no reason why it would not be something that could not occur within a reasonable time frame if there was a dedicated effort by the whole investment community to make sure that the processes that are in place now are dealt with in an incremental way. It does not start with a brand new server or a computer system set up for this one purpose, it is actually a finite building of the steps in an incremental sense. For example, establishing fax addresses and email systems may well kick the process off and suit one particular custodian and their associated clients without necessarily becoming driven by industry standards. It is really one matter where it needs to be dealt with on an individual investment manager and custodian relationship as distinct from being prescribed.

Ms JULIE BISHOP—There has been some concern expressed to us that the requirement that listed companies disclose information which is disclosed to foreign exchanges could cause some uncertainty in that the format may well be different, that they might be required to report under different accounting standards and the like, and that could cause confusion at one end and perhaps even mislead at the other end. How would you deal with that concern, particularly given your comments about the material disclosure obligation anyway, that if there was something of a material nature that had been disclosed to a foreign exchange it would be swept up by the continuous disclosure obligations?

Mr O'Brien—The whole notion that information is disclosed in one exchange but not in another, albeit the same information in a different form, is really a red herring to some extent. The boundaryless world, un-uniform information, may potentially advantage better informed shareholders purely because they have access to it. There should not necessarily be

value transferred between potential investors purely because of the location under which documents are released.

It is actually the possibility of new information, not the form, which is the issue. There is an industry in place to analyse the information content in a different report structure. The analyst community and people in the broking world and investors by and large pour over every available piece of information put out by a company irrespective of where it is put together.

By saying that a document released in one jurisdiction is not necessarily required to be released in another, is really making it available only to those who have the resources to get their hands on it to search through it for the potential information content that might be in there. Arguably it is instilling a potential disadvantage to shareholders who do not have easy access. So it is not the actual availability; it is the form and the location under which it is issued which become the problem.

At the end of the day, any information is always open to investor interpretation. The fact that it is in a complex form or in a form which the current domestic investor base is not familiar with should not be a reason in its own right to prevent them from having the opportunity to look at it. There are already a number of people whose job it is to dice and cut every piece of information in every possible way, and they will seek that out anyway. So it is really an issue of not potentially creating a different class of shares by virtue of the way in which information is actually released.

Ms JULIE BISHOP—Yet you seem to have a different view in relation to the environmental reporting and the legal proceedings reporting. In that instance, you think that the current regime is sufficient in order to elicit from the company material information.

Mr O'Brien—If there were a piece of information included in a document released to a foreign exchange that was material in that exchange but not material in a domestic exchange, that would be unusual in the sense that the investors in both regimes have a lot more in common than perhaps would otherwise be expected. Arguably they are interested in the same things: the long-term return on their capital and the way in which management is managing the assets of the business. It would be merely the form of the information, which would be a matter of practice rather than necessarily materiality. The company with the continuous disclosure requirements has an obligation to release material information along the way anyway. There could be an argument put by shareholders that if a particular type of disclosure has material information in it, they are actually not complying with their local obligations to disclose information of a material nature.

Mr ROSS CAMERON—So why do we need a new provision if that is the case?

Mr O'Brien—It is merely from the basis that these days it is a boundaryless world. You are essentially creating a greater opportunity for better informed shareholders, because of the resources they have, to pick through that new form of information to potentially add the one or two pieces of new information which are insignificant by themselves but which, when put in a package, actually help expand and explain what the company is doing.

The more information you get, the more opportunity you have to analyse it. It is the possibility of new information, the possibility of the information content of disclosure, which actually creates a well informed market and good price discovery. If you are basically saying that investors in one jurisdiction have that opportunity but in another they do not, that essentially means that all investors do not have the same ability to use that information to their own requirements.

Mr ROSS CAMERON—Surely the obligation does not lie on the company to establish some sort of democratically uniform standard of information around the world? Surely the onus lies with the investor to inform himself or herself?

Mr O'Brien—Yes.

Ms Ralph—I think there is an issue of perception at play here as well. Whether or not what is in the documents released to the New York Stock Exchange is different from what is released here—we know it is, because the accounting standards are different, but whether there is other information or not—I do not think is the issue sometimes. I think there can be a perception here that there is in fact something different over there and that some investors have access to that and some do not, because of their resources. I do not think we want the sorts of perceptions to creep into our marketplace where investors have, rightly or wrongly, the notion that there is something out there that other people are getting that they find costly to get their hands on. I think we have run that risk before.

Mr ROSS CAMERON—Surely it is not the company's duty to create equality of information in the marketplace?

Ms Ralph—I thought that was exactly what the law is about.

Mr O'Brien—If the company does not create equality of availability for accessing information about them, then nobody else really can.

Mr ROSS CAMERON—All I am suggesting is that if you can afford to pay a small army of analysts to pore over every word that comes out of the offices of a company, it seems to me you are going to be in a better position than a person who cannot afford it. That is just a law of the jungle, isn't it?

Ms Ralph—Different people will choose to make a different investment towards the level of research they do, but everyone has to start from the same point. I think what we are saying is that it has to be a fair game in that everyone has to have the same access to the same information. How many resources you want to throw at that may be a function of the size of the capital you are about to invest, and people will make that decision based on the amount they are investing. Some will apply more resources to it than others because of that, but it has to be a fair game at the start for all. What we are saying is that right now, whether or not it is the case, there is this perception that the game is not quite fair.

Mr ROSS CAMERON—Of the $400 billion that your constituent members have under management, what percentage would be in the top 100 listed companies?

Mr O'Brien—The top 100 represents somewhere in the order of—and these figures may be a little rough—80 per cent of the marketplace as a whole.

Ms Ralph—My understanding too is that, of the listed companies on the ASX, our members are probably controlling somewhere between 40 per cent and 50 per cent.

Mr ROSS CAMERON—Do you have any idea of what per cent of your funds under management would be in the top 10 companies?

Mr O'Brien—On the basis that the top 100 represents about 80 per cent, if you take the first three or four companies, which are six per cent or seven per cent of the market cap, I think the top 10 would account for about 20 per cent to 25 per cent.

Mr ROSS CAMERON—I think it is actually quite a bit higher than that. I think you may find that it is actually closer to 35 per cent or 40 per cent.

Ms Ralph—I just want to make clear that not all of that $450 billion is in equities.

Mr ROSS CAMERON—Yes. We have received evidence from the Listed Companies Association, and they have produced a figure of about 700 or 800 companies, I think, that are publicly listed. Does that sound accurate?

Mr O'Brien—Is that locally listed?

Mr ROSS CAMERON—Yes.

Mr O'Brien—No, there are more than that. There are well over a thousand—perhaps, 1,300 or 1,500.

Mr ROSS CAMERON—You say your constituency is the retail and wholesale, right?

Ms Ralph—Retail and wholesale investment managers, yes.

Mr ROSS CAMERON—One of the concerns that emerged from that evidence is that a lot of the regulatory concentration is at the mature end of the market and, where you have companies that have a long track record, are well-established, have substantial boards and are well-resourced internally, that may well justify a fairly intensive regulatory environment.

There were concerns raised that the vast majority of listed companies that are not in that luxurious position are scraping together every last cent to try to make something viable—to try to create value—virtually from nothing and that there may be, if you like, a conflict of interest between the desire, for example, of investor organisations such as yourself for very high levels of disclosure and governance of the blue-chip sector as opposed to the need for a lightweight, streamlined, minimalist regulatory environment for the other 1,100 companies which are just struggling to get on their feet. How do you react to that?

Mr O'Brien—I think one of the things that makes a market work is confidence. Often you find that large companies, for whatever reason—community obligation but also just

access to the capital markets because they need more capital at the end of the day than perhaps small companies—are required to set standards from which small companies then take a lead. In other words, the cost of developing and, if you like, determining what appropriate standards exist falls to the larger companies. So there is already a benefit transferred through for small companies on the basis that they do not have to pioneer those standards because their access to the capital markets is smaller and the leads have already been shown.

If you tamper with the disclosure that is mandated in the marketplace to investors, you risk changing the way in which that capital is then allocated because confidence is changed. Investors need to have confidence that, if they allocate money to companies, there is a degree of predictability about the way in which that company will use that money and the way in which they disclose their practices. We have the listing rules, the accounting standards and a whole bunch of things there, and that is the cost to those companies of accessing the public markets.

There is a cost in actually getting hold of money from a broad range of investors, none of whom individually has the power to scrutinise that company by themselves. These protections are there for investors irrespective of the size of the company as a whole. I think that is fundamental to the price discovery process working very well and those small companies coming back to the market at some point in the future and saying, 'I've complied. I've delivered all these things. Yes, it's come at a cost, but I'd now like to have an issue where I would like to raise some money and have a reasonable chance of getting it.'

Ms Ralph—I think I would have to agree. It is naive to think that you could create a regime—which you could tomorrow if you so chose—for smaller companies with less protection of the rights of shareholders or less disclosure obligations and that not result in increased cost of capital for those companies. There is a price on both sides of the ledger here.

Mr ROSS CAMERON—Yes, but it seems to me to be the case that the more intensive the regulatory environment, the greater the competitive advantage that offers to mature, established companies as opposed to start-up companies.

Ms Ralph—I think it is of benefit to the entire marketplace. One only has to see the reaction in the recent crisis in Asia of the investment community to the good regulatory regime here in Australia's equity markets to know that everyone benefited from that.

Mr ROSS CAMERON—My concluding two cents' worth would be that I think there is a point at which it is hard to attract good corporate leaders if you are living in a fishbowl. For example, SOCOG struggled for 12 months to find a chief executive after Gary Pemberton resigned from an allegedly dream job. Today we are recovering from a fiasco over poor board leadership over this international bands thing. They went through one chief executive after another, and nobody would put their hand up to take the job.

I do not blame this kind of Corporations Law governance for that problem, but what I am saying is that there is a point, particularly in this emerging sector, at which people will just say this is not worth it. The evidence from the Australian Listed Companies Association

was that the smaller listed companies are desperate to find effective board chairs. They cannot get people to serve as chairmen of those boards. It is not a problem for you as an institutional investor, focusing primarily on the top 15 and ultimately the top 100 listed companies, but it is a problem for the other 1,000 out there.

Mr O'Brien—I think it is actually an issue for the whole marketplace. Obviously institutional investors invest across a lot more than 100 companies.

Mr ROSS CAMERON—It is overwhelmingly the top 100.

Mr O'Brien—There may be more money invested in the top 100 companies but to manage and maintain an investment in any company arguably requires the same amount of work. In fact I would argue that it takes a lot more effort and work to invest in a small company.

Mr ROSS CAMERON—That is why you do not do it. I do not object to that.

Mr O'Brien—The point I am making is that we actually do invest by and large across a much broader range of companies than the top 100 and it is with the acknowledgment that it does take more work to do it. There is less scrutiny of smaller companies' activities and that therefore requires those companies to be more forthright in terms of their own disclosure. If they want to attract the talent and the capital, they have to provide the marketplace with the confidence that they need that that money will essentially be well managed.

Mr ROSS CAMERON—I do not want to give people an invitation to hide things but I also do not want to hold out a succession of bureaucratic hoops that we force people to jump through in order to keep their place at the table. It would be nice if every start-up company could have a single person dedicated to doing nothing but complying with the Corporations Law and requirements of legislators and parliamentary committees like this. But if they do that they will not be generating wealth for Australia. I just think sometimes our perspective is skewed by the fact that the power in the marketplace rests with the top 15, the top 100 and with institutional investors like yourselves who are the lens through which we tend to see these governance issues.

Mr O'Brien—If we want to attract international capital to this market we need to basically be providing those international investors remote from this particular environment with the confidence that their money will not end up being dissipated through differential disclosure routines. It may well be a cost to the small company if they want to access the listed markets but at the end of the day that is essentially the price of attracting global capital to Australia.

Senator COONEY—I had a series of questions apropos of the things you have set out and you might want to take them on notice rather than do it now. The first one is the proportional voting system where you say that this would not democratise the company but have the opposite effect. In a different context—voting for government—in the Supreme Court in the United States, they said trees do not vote. You would have heard all this. Paddocks do not vote and houses do not vote; people vote. Could you apply that proposition to companies or is there another basis upon which you would have to talk about

democratising companies? This is not your actual submission but a precis of that. That is the first one I wanted to ask.

You say the proportional voting system would have an adverse effect on the integrity of the Australian capital system. You might well have answered that already but if you could do that again it would be good.

The next point is about companies reporting on compliance with environmental regulations. You said a single issue like the environmental problems should not be singled out because it may imply that further areas of compliance have been given a lower emphasis but it might not do that. It just does not seem to me to be—I do not say this in a derogatory sense—a reasonable proposition to say, 'We are not going to report on environmental problems because there are other problems as well.' It is a bit like saying you should not send anybody to jail because you cannot jail everybody that has committed the crime. You do have issues like Ok Tedi and the spill of the oil and that sort of stuff. It just seems to me that the reporting on the environment at least starts to develop a culture where companies are good corporate citizens, to use the hackneyed phrase, in terms of the environment. Could you just develop that more?

You say that listed companies should have a corporate governance board and audit committee and, if so, you do not advocate the inclusion of a requirement in law. You said that listed companies should explain their practices in this area in the annual report. Is the annual report sufficient? I do not know whether everybody uses that as bedtime reading.

You also say that you are opposed to directors and EOs reporting suspicion of fraud and improper conduct to auditors. I am a bit inclined to think you should be, because that would give the opportunity for one group of people to damage others simply by accusations. There was a statement by Winston Churchill in a radio address in 1938, as I remember—which you would obviously not remember—where he said that this sort of stuff gave opportunities for damaging people. I would like your comment on that.

Ms Ralph—We will take those question on notice and make a submission.

CHAIR—We have made good time if you want to respond.

Ms Ralph—As I said, I think we have made our position clear in the submission.

Senator COONEY—I know your position, but is there some sort of underlying principle that we can get to as to why you should not report, say, on the environmental issues? Rather than a principle, that seems to be a reason. You would say, 'We do not want to give environmental reports because that would under-emphasise other problems such as industrial relations.' If the union were doing the work, you would not overlook it.

Ms Ralph—Overall, we think the legislation should be there to ensure the establishment of rights of shareholders, and sufficient disclosure and methods such as the length of voting periods and those sorts of issues enable people to participate in the governance of their company and to exercise those rights. I guess one of the underlying principles why we respond to the issue on disclosure of environmental matters or trade practices or whatever is

that those particular things do not seem to necessarily go to the core or people's rights and their ability to exercise those rights in the same way as does our passion about proxy voting periods and the disclosure of proxy votes at meetings. Those things really seem to go to the heart of the establishment of people's rights and their ability to exercise those rights. I am not sure that that next level—and I would put these amendments into the category of going to the next level—should necessarily be enshrined in legislation. I guess that is the principle we are applying.

Senator COONEY—The concept that seemed to arise from that is that Corporations Law is all about internal workings, that it is all the sorts of things a surgeon might be concerned about in the internal workings of the body, whereas it clearly has great social impact. I am just wondering if the culture of corporate Australia is too internal looking rather than worrying about things like Ok Tedi and the spill in the bay and what have you?

Ms Ralph—If that was the case, perhaps we should also be legislating for people to donate a percentage of profits to just and worthy causes. Our principle is that if you establish the right system of rights of shareholders, you put in place the mechanisms for those shareholders to exert those rights, you will indirectly reflect community attitudes towards these issues over time anyway, because the shareholders are part of the community.

If investors value proper environmental behaviour or proper people behaviour towards employees, or proper behaviour towards the community in general, then people will pay for that and investors will, reflecting community values, pay for companies that do behave according to the way they would like them to. That is why you see now the rise of specific investment vehicles focusing on ethical investments or green investments, those sorts of things, because you are having investors out there who do want to direct their investments in that way. It is for the law to establish the framework for that to happen and the marketplace will then decide what price it wants to pay for those values.

CHAIR—Is part of the issue in relation to the environmental reporting aspect the view that it is difficult to get precise analytical information on that issue? If you are talking about financial matters, you can get fairly precise information on that, but on things that are a bit more esoteric it is perhaps not so easy. Is that an issue?

Ms Ralph—Concerning the amendment on auditors and fraud, there is an issue there because it is involves suspicion. Everyone then gets bogged down on what is suspicion and we spend 10 years trying to define that in the courts. There are always shades of grey out there.

When the OECD went through their exercise of establishing the principles on corporate governance, there was a lot of debate about this notion of stakeholders' and companies' obligations to stakeholders other than their shareholders. That is really a reflection of this wider debate we are all having about the roles which companies play in our community and what obligations they have to broad stakeholder groups.

At the end of the day, after much debate, whilst those OECD guidelines acknowledge that companies should consider the needs of various stakeholder groups out there, ultimately it was the relationship with the shareholders which is the key one. What we are saying is in

line with the OECD, that it is the key shareholder-company relationship which you have to get right. Various companies will then take different attitudes to reflect their shareholders' wishes in relation to broader stakeholder issues like the environment or industrial relations or community relations or those other issues.

Senator COONEY—Am I correct in saying that your proposition is that Corporations Law should be all about the internal workings of a company and nothing else? Are you saying that any sort of social obligation they might have or cultural obligation, or obligations of humanitarianism—I am on another committee at the moment talking about humanitarianism—are all sort of irrelevant to the essential purposes of companies?

Ms Ralph—There are other laws to cover all of that.

Senator COONEY—I understand there are others. That is the usual argument, to say there are all these other laws. But what I am trying to get to is find out how you see the nature of that legislation and the common law, for that matter, that underpins companies and makes them what they are and what we should be concerned about. You say, 'No, you should not be concerned about that. In a certain sense this committee should not be concerned about it and the committee that does the environment should be concerned about, not this one.' I am simply trying to get the principle.

Mr O'Brien—I think companies will ultimately reflect the values of the community in which they operate. As Lynn mentioned, they have stakeholders who include customers. Customers purchase products and ultimately they are the ones who will determine the long-term future. In so far as it may take a little time for community values to be reflected through the stakeholder groups to the corporation, evidence is starting to emerge that companies are very sensitive to the environment in which they operate.

Senator COONEY—Yes, I understand that.

Mr O'Brien—In fact, it is good corporate practice to be very sensitive to environmental issues.

Senator COONEY—But am I right in saying that they are the forces that will guide the companies in those areas and, as I understand your proposition, Corporations Law should in no way be concerned with those issues?

Mr O'Brien—Arguably, yes, because the ability to draw the line as to what is correct and what is not correct is very subjective. What you are trying to do is provide certainty to companies so that when they operate they will be complying with the existing law, and the pressures from the stakeholder groups that they are ultimately responsible to will create the context over time.

Senator COONEY—The other principle that I have not quite got from you yet is what you say about one shareholder, one vote, rather than one interest, one vote. You have talked about democracy. Is it democracy in terms of interest rather than people?

Mr O'Brien—It comes back to the role of the director of a company. They are there to represent all shareholders' interests. They should not necessarily be bringing specific interests along with them. The risk in a proportional voting system is that that actually happens because of the amount of votes that can be allocated to a specific director from, say, a large incumbent shareholder. This could well create a situation where the board is not truly unified in the context of all shareholders' interests.

Senator COONEY—The unified board as the significant thing rather than everybody having a say.

Mr O'Brien—Yes; at the end of the day, working together for the interests of shareholders is ultimately the challenge the board has and providing a predictable and clear strategic environment for management to operate in is also important. If there are factions in boards, you can often get a situation where management is somewhat restrained in terms of following what they consider to be the best opportunities in managing the assets they are entrusted with.

Senator COONEY—It is the same with political parties or factions.

Ms JULIE BISHOP—Mr O'Brien, you would see the idea of proportional voting as a challenge to that overriding fiduciary duty that a director has to act in the interests of all shareholders?

Mr O'Brien—There would be possibilities where that would actually be brought out, and that is not a development that shareholders would like, to have to ascertain in determining—when they vote for a director or otherwise—what interests they are really representing.

Senator CONROY—To change the subject slightly, another area where the committee received a lot of adverse comment was one of the amendments to do with executive remuneration disclosure. We have been accused of trying to drive down executive salaries, voyeurism, endangering lives. Apparently, there has been a spate of kidnappings that you might be able to tell us about. Could you comment on any of those criticisms?

Ms Ralph—On the driving down aspect, in some of our internal discussions about this whole topic, we have been concerned that it is more about driving up. In fact, that is one of the risks: when people hear what Joe across the street is earning, they want just as much. You can argue both ways, driving up and driving down. With regard to voyeurism, there is always—

Ms JULIE BISHOP—The issue is actually privacy.

Ms Ralph—At the end of the day, the shareholders of the company need to know the policies of the board and the senior management towards how they are basically sharing the profits with the shareholders, and that is what this is really all about. Mark O'Brien does not need to know every chief executive's salary; he is not really interested. What he is really interested in is the policies that that board and management are applying to incentivising management and to the sharings of profits at the end of the day.

Unfortunately, the only way for shareholders to make an assessment about that is not only to see the quantum—because our policy does not go just to exposing the quantum—but also the policies. We have been very strong at saying that it is not just about the dollar amount—and we do not want to be just voyeurs here. We want to see the policies that lie behind that, that go to whether or not managements' incentives are being aligned with those of the shareholders.

Our blue book guideline very strongly says that we do not want just to see the numbers gained. We want to see the reasons why and the structure behind, so that we can make an assessment about whether the interests of the board and the management are aligned with the shareholders. That is the important bit of disclosure that we all want. In the process of doing that, you have got to see the quantum at the same time as part of that disclosure.

Senator CONROY—You are not aware of any upsurge in corporate kidnappings?

Mr O'Brien—I cannot comment.

Ms Ralph—I grew up in the US and I think it is fair to say that in Australia we have different attitudes towards wealth and salaries et cetera from the US. There may very well be a justifiable community debate that we are all having about the appropriateness of quantums and issues of privacy. In Australia, we will discuss those values in a different way from the US or the UK because they have different attitudes to wealth and privacy et cetera from Australia. I think it is useful for us all to continue to have those debates. Is a well paid executive a good thing or a bad thing? We are going through that community debate right now as they are in other places of the world, and we may come up with our own answer because we are a unique community. At the end of the day, shareholders' ability to effectively exercise their rights as shareholders is a very key issue for us and one that we feel very strongly about.

Mr ROSS CAMERON—Clearly what you are saying is that you have a view on the philosophy of remuneration and the extent to which it reflects an incentive based approach. Is there some salary which is immoral?

Ms Ralph—No. In fact we do not actually have a view on whether there is a right way or a wrong way to do this. The guideline does not say, 'This is the right level or this is the right way to do it.' What our guidelines says is that you should have thought it through. You should have some principles behind how you establish these packages and you should be prepared to tell your shareholders what those principles are. That is really what we are saying. We are saying, 'Give the shareholders a disclosure and let the shareholders decide whether or not that is appropriate.' Different companies will obviously have completely different remuneration levels and structures et cetera. We do not dictate that at all.

Ms JULIE BISHOP—If the shareholders were given the reasoning behind it as you have articulated, but then the remuneration was stated in bands, would that be sufficient, or do they actually have to have the precise dollar value?

Mr O'Brien—The precise dollar value is always going to be subject to interpretation. When you look at long-term incentives or options, attempting to monetise those introduces

the need to discuss all of the underlying assumptions. There could be as much discussion about the assumptions, whether they are valid or accurate, whether or not the boards attempted to monetise them. As it has already been pointed out by Lynn, it is more that the policy—under which the board has set the at risk or the non at risk portion of an executive or director's remuneration—is appropriate to the challenges of the company at that time in its history: the challenges it faces, the differences between itself and its competitors that allows investors to sit back and say, 'Yes, I think that particular person is aligned to the sort of issues that I feel important in maximising the value of those assets for me over a period of time.'

The monetisation may well end up being an attempt to reconcile today's cost, but it is really, from an investor's point of view, whether or not it puts the executive on the same pathway that we would like them to be on, and, at the end of the day, when ultimately they have achieved the performance objectives that we have required, whether we are happy with the dilution to the capital base as a consequence of them exercising their options.

Mr ROSS CAMERON—Your mission says that you want to play a significant role in the development of the social framework in which your members operate. I would have thought something like remuneration of company executives fell pretty squarely in that mission.

Mr O'Brien—From an investor's point of view, we acknowledge that companies operate in different environments. They have different challenges: some are in extraordinary growth curves; some are in a cost environment; some are attempting to reinvent themselves. To be prescriptive about what a senior executive should be paid, you really have to take account of the circumstances they are put in and the challenges put before shareholders. We think it is up to each company to determine that.

Mr ROSS CAMERON—Sure. Let me put it to you a different way. If you live in a culture which, for various historical, venal or whatever reasons, places a kind of salary cap on what executives can be paid because of a social pressure to conform to some kind of Australian egalitarian norm, is that something that is within your charter to participate in the debate about? Do you just say, 'All we care about is the manner in which these things are disclosed'?

Mr O'Brien—Ultimately, it is a competitive environment. Australia needs not only global capital but access to global talent. We export talent, we import talent. At the end of the day, it is up to the company concerned and its directors to make an assessment of what is appropriate, given the assets they are entrusted with. They are the best informed people to make that call. At the end of the day, investors will assess whether they have made the right call, if indeed the policies that they have used in appointing those individuals are clear at the time of their appointment and their performance through time is measured adequately. It can be assessed when the period when they have been put in place has come to pass. It is really the context that allows informed decision making. That is what we would suggest is important.

Mr ROSS CAMERON—My last question is slightly provocative. I think we suffer from a culture in which a large group of Australians are offended by an idea of an individual

earning a certain dollar figure. That provides good news copy for both tabloid and financial journalists. It is like a staple story which you can just run on slow news days—X is earning so much. I have the feeling that it does make us less competitive. I cannot remember the last time I heard any industry body come out and say, 'Companies ought to be free to pay their senior executives whatever the market says they are worth.' Part of the reason is because guys like Barney and I would disagree. Barney will want you guys to fulfil some sort of wider humanitarian social obligation; I will want you to generate wealth. I reckon you guys take the soft option and say, 'All we're concerned about is disclosure issues,' rather than take the debate forward in terms of the cultural value issues. In the long run, you cannot separate social justice from economic productivity. I sometimes think you ought to take that harder option.

Ms Ralph—I think that you are presuming that we do not have as many diverse views within IFSA's membership as those sitting on this committee. We are a reflection of the community in the same way. You will find investment managers out there who take real interest in directing capital to what they see as ethical or community minded companies. At the other end of the spectrum, you will see investment managers who will just want to see the bottom line, and there are the full range in between. Therefore, I think it would be unreasonable to expect an organisation like IFSA, on behalf of quite a mixed and varied group like that, to take a role in that sort of issue. At the end of the day, we would know that out there in the marketplace there will be 100 Mark O'Briens and they all have their personal views, and sometimes those come through into the investments they make.

Mr ROSS CAMERON—What is your mission to play a significant role in the development of the social environment in which your members operate?

Ms Ralph—An example that I would give would be that we take a keen interest in the issue of long-term savings in retirement incomes for the country and the impact on quality of life and the community that insufficient preparation in saving for retirement by the baby boomers may have in the community. That could be seen as an economic issue. There are certainly some regulatory aspects to that because it goes to how super is regulated and that sort of thing. But it is a much broader issue about: what sort of country will we have in 25 years if we have not put a few pennies aside? That is one of the social issues. Because of where we sit in the capital markets we feel we have something to add to the debate about that because we see the patterns of savings or lack thereof.

Senator COONEY—Ross asked the question I was going to ask. It was prompted by what you said before about the different perspective that you might get here and overseas, such as in America. Has any research been done into how different attitudes in different countries might affect the amount of money that country gets or would that be just a feeling you have? People say that, if you are going to pursue an agenda that has got a social dimension to it, that is going to drive away capital or might attract capital. I do not suppose there is any research done on that. Is there any you can think of so it could be put to the test?

Mr O'Brien—I cannot comment specifically on any research. There is the emergence in some countries of sustainable development type funds which seek to invest in companies on things other than economic grounds and they are proving to be quite popular. Admittedly, it

is a small segment of the investment market and the capital base allocated to it is relatively small. It is a bit different to the perception of ethical funds. It is basically saying, companies that show a commitment to the long-term performance, taking into account all of the issues, including the balance sheet, should essentially get a greater share of investors attention. That is definitely on the rise. Would a movement like that exist in a marketplace which was still relatively immature in its structure? It probably would not. It is really probably more a function of investors moving beyond the pure economic return and wanting something other than just the dividends and the capital that comes with it.

Senator COONEY—It is the way that the language is used. Ms Ralph said before that the company has to understand that there is an ageing population, of which I am conscious. We take action according to that, or else you can say that here is a big opportunity whereby we can drive up the share price. The very language can change in respect of the same set of facts. Does your institution ever think about that? Ms Ralph put it a particular way. How often is it put that way rather than in terms of what does the shareholder get?

Ms Ralph—I am struggling with that one, Senator.

Senator COONEY—You made a couple of comments that were very interesting.

CHAIR—Ms Ralph and Mr O'Brien, thank you very much for your appearance before the committee this morning.

Proceedings suspended from 10.40 a.m. to 11.04 a.m.

ELKINGTON, Dr Gordon Bradley, Member, Australian Shareholders' Association Limited

ROFE, Mr Alfred Edward Fulton, Chairman, Australian Shareholders' Association Limited

CHAIR—I now welcome Mr Rofe and Dr Elkington from the Australian Shareholders' Association. We have before us two documents which you have submitted to the committee this morning. Is it your wish that they be received as submissions?

Mr Rofe—I did not really intend that as a formal submission but rather a summary of our conclusions and some material which I thought I might discuss by way of background to some of the issues. If you want to receive it as a submission, I am happy.

CHAIR—We receive the documents as submissions. It is moved by Ms Bishop and seconded by Senator Conroy. I now invite you to make an opening statement. From there we can proceed to questions.

Mr Rofe—What I had planned to do with you if you agree was perhaps just briefly to say something about the Australian Shareholders' Association for those members who have not met us before, then a couple of background points on corporate governance and proxy voting. I thought I might deal then with the specific terms of reference and, if we have time, to pick up a couple of other points that have been mentioned, for example requisitioning meetings, redeemable preference shares and the MD&A.

The Australian Shareholders' Association currently has over 4,000 members. They are mainly individual investors but we do have some listed corporations as members. We have a national board of directors with members from Sydney, Melbourne, Brisbane and Adelaide. We have active committees in all mainland states of Australia. We see ourselves as representing individual shareholders as distinct from institutional shareholders which we see as represented by IFSA.

On the other hand, I would not really classify our members as mums and dads. We did a survey of our members at the beginning of last year and I think it might be fairer to call them in a sense 'professional' investors in that they are serious investors, most of them, who rely on their investments for their income. They are not just people who are having a flutter in the stockmarket. There tends to be a fairly high proportion of what you might call self-funded retirees—as I say, people who rely on their investments for a significant part of their income.

We see ourselves as representing individual investors and IFSA as representing institutional investors. We do have regular meetings with IFSA and the AICD which we see as representing the corporates in which our members invest. What we try to do with these meetings is to reach a common view, so far as we can, on issues of relevance to the industry. We also have regular contacts with other groups like the SIA, ASIC, AIST and so forth.

I suppose the final point to make is that despite our name, we see ourselves as covering all financial investment products, including not only shares but managed investments, superannuation and so forth. It is just a historical accident that we started off as being the Australian Shareholders' Association. Austin Donnelly up in Queensland grabbed the name, Australian Investors Association, so we are sticking to our historical name.

As I said, I would like to just say a few words about corporate governance and I have made some notes there in what I have called appendix A to those notes which have been circulated. I guess the first thing I would like to say is that in Australia we do not need to be ashamed of our corporate governance. Since the late 1980s, when a number of institutions, probably led by Leigh Hall at the AMP, became very conscious of some of the excesses of the 1980s and formed what was originally AIMG, subsequently AIMA and now merged into IFSA, there has been a body of people in institutions in Australia which have put a lot of effort into corporate governance. I think our principles in Australia compare very favourably with those overseas, for example in the UK. In some areas, like the role of independent directors, I think we are even a bit ahead of the US in that regard.

I have mentioned there what I see as the two main sources of corporate governance principles in Australia: what used to be the blue book, although it now is just a floppy disc—Lynn Ralph has called it the grey book for the time being—and the Australian Stock Exchange listing rule 4.10.3, appendix 4A and, in particular, the guidance note which the ASX issued last year.

Apart from that, we have got things like the *Corporate practices and conduct*, issued by the Bosch Committee, other writings by Henry Bosch and various corporate governance papers issued by the Australian Institute of Company Directors.

As I say, I think we do not need to be ashamed of our corporate governance, certainly the principles, in Australia. Also in appendix A, I have reproduced some of what I think are the relevant guidelines for corporations from the blue book. They include guideline 2:

The board of directors of a listed company should be constituted with a majority of individuals who qualify as independent directors as defined in these Guidelines.

Guideline 3—Chairperson to be an independent director.

Guideline 4—. . . Committees of the board should in general be constituted with a majority who are independent directors

and so forth.

Guideline 5: Key Board Committees . . . an audit committee, a remuneration committee and a nomination committee—

Guideline 10: Board and Executive Remuneration Policy and Disclosure—

and that, I suppose you could say, is the forerunner for section 251AA. There is in the guidelines a schedule which sets out the suggested break-up of remuneration disclosure. The AICD guideline on non-executive director remuneration also contains a disclosure table in a very similar format.

Guideline 11: Notification . . . for Shareholder Meetings—

has the 28 days in there.

Method of Voting: voting should be by poll only on the conclusion of discussion of each item of business and the appropriate forms of technology should be utilised to facilitate the proxy voting process.

The first half of that sentence is the one issue on which ASA differs from IFSA. The various editions of the blue book have been prepared by AIMA, and subsequently IFSA, in consultation with ourselves and AIST and public bodies. I think you could say that, with that one exception, the guidelines in the blue book are supported by the ASA. The other point I have listed there from guideline 11 is the disclosure of proxy voting results, and, again, that is the basis of this provision which was introduced by the Company Law Review Act.

That, as I say, is background to some of our views on the specific points in the terms of reference. I have also got there a note, appendix B, on proxy voting. The main point I am trying to bring out there is, firstly, the fact that since the use of directed proxies became common, the proxy voting process, or at least the proxy form, has come to serve two purposes: firstly, as the appointment of a representative to attend a meeting and, secondly, as a form of de facto postal voting. Our submission is that those two functions should be separated. If you have lodged a directed proxy, you really do not care whom you have appointed as your proxy as long as that person actually turns up and votes at the meeting. That problem was the background to subsections (1) and (5) of section 250B.

Along with AIMA, the Chartered Institute of Secretaries and a number of other bodies, I was a member of a working group that proposed what is now subsections (1) and (5) and, also, the model form of proxy which you will see in the AIMA, or now IFSA, guidelines. It was really a compromise to produce a working document which effectively fulfilled these two functions.

The first point I want to make there is that the appointment of a representative of a shareholder should be separated from the function of voting and, if you do that, it facilitates the use of electronic proxy voting—and I have also made some points about that. Indeed, I would go so far as to say that we have the technology now to have electronic voting and, indeed, we could carry it right up to the time of the actual meeting. I think we will see within perhaps 12 to 24 months at the latest that people will have this Web TV, their set top box on their TV set, and they will be able to log into the Internet as easily as they can turn on their TV set. I think we are going to see buttons on the console there that you will be able to press to vote for your favourite pop star or music, or even your company director and perhaps even your elected member of parliament.

I have made two other points there. Firstly, the system of appointment of representatives by a corporate shareholder should be consistent with the right of an individual shareholder to appoint a representative. In other words, an individual shareholder should be able to appoint a representative who can go along to the meeting without having to lodge a proxy form 48 hours beforehand.

On the second page there, I have raised a debate that has a reason under section 249X(1) of the Corporations Law, which says:

A member of a company may appoint a person—

and the question is whether a person includes a body corporate. A lot of people want to appoint the Australian Shareholders Association as their proxy, with the idea that one of our representatives will go along to the meeting. Some companies take the view that in that context a person means an individual and so, therefore, they cannot appoint us. I would like that to be clarified by a minor amendment to section 249X to make it clear that shareholders can appoint the Australian Shareholders Association, or Mr Easterbrook's ISS, or someone else, to go along and vote for them at meetings if they want to.

I have also reproduced there an article by Nick Renton—who, I think, appeared before the committee in Melbourne—about voting electronically. His thesis there is that it is feasible in Australia right now, and he has given a couple of examples of sites in America where it is in operation. I have reproduced there the image you get up if you log onto those sites. You will see that a page comes up and you fill in your reference number and your PIN number and then you can vote electronically.

I have not personally met Mr Cantrick-Brooks from Computershare, who appeared before the committee in Melbourne, but we have had discussions with senior executives of Computershare in Sydney and I am satisfied that Computershare currently has the technology to introduce electronic voting in Australia. Perhaps the only possible stumbling block is this question of recognition of digital signatures. I would certainly support his suggestion that a definition of signature be introduced into the Corporations Law. Perhaps it might need to be by regulation so that it can be a bit flexible to allow for the use of digital signatures.

This year, as you probably know, you can lodge your income tax return electronically using a digital signature. You can lodge your annual return for your proprietary company with ASIC by putting in a PIN number. There is no reason you cannot lodge your vote for company meetings electronically. In fact, the security of digitally encrypted electronic messages and digital signatures is far greater than the security of faxes. Give me a photocopier and a pair of scissors and I will forge an electronic proxy form in five minutes if you want me to.

I am moving now to the specific topics. With regard to election of directors by proportional voting, as I think Lynn Ralph said, we support the principle of one share, one vote for listed companies. One problem here is that a lot of shareholders confuse the idea of the election of directors with, for example, the election of members of parliament. I think we could probably agree that members of parliament are elected to represent the interests either of their constituents or, perhaps, a particular political party, whereas company directors are not. They are elected to direct the activities of a company in the interests of all shareholders.

I think that if one of the shareholders in Rio Tinto walked into the public gallery at Parliament House he would not like to think that that is the way the directors meetings of Rio Tinto were conducted. We are dealing with quite a different situation. Probably the better analogy is the appointment of the ministry. What we are looking for in a board of directors of a company is a team of people with a diverse range of skills who can work together as a team in the interests of all shareholders. They are not there to represent different interest groups.

Senator CONROY—Just for the record, we elect our frontbench.

Mr Rofe—Yes, it is sometimes said that the electors do not elect new governments; they sack unsatisfactory governments. I really think the same sort of thing applies in relation to the election of directors by shareholders. Really, shareholders are not in a position, in most cases, to elect the right people to be directors. I think the election process—its main purpose—is a sort of safety valve to get rid of directors who are not performing. So therefore the quality of a board of directors depends more on the selection process of a nomination committee by which vacancies on a board are filled than on the election process of directors.

If you look at the board of NRMA, just because a person happens to be a famous cricketer, footballer or an Olympic swimmer, or something like that, it does not mean that he or she is necessarily the best person to run an insurance company. Again, I would venture to suggest that the quality of members of parliament depends more on the pre-selection process than on the actual election process. I think there is a bit of a parallel there.

I guess the conclusion there is that if any company, like Shann Turnbull's tractor company, wants to have a proportional voting system, they are welcome to do so. They can do so, but I do not think the Corporations Law should seek to impose on companies, and particularly listed companies, an obligation to have proportional voting.

Senator COONEY—You are not against elections, but against particular systems of elections?

Mr Rofe—As I say, I think that for the election of directors of a listed public company one share, one vote is probably the most sensible and practical approach.

Senator CONROY—But you are not against PR being an option that a company could choose if it wanted?

Mr Rofe—No. Concerning compliance with environmental regulation, I guess this has been pretty thoroughly covered. All I would say is that, as a general rule, I believe the Corporations Law should deal with corporate law matters and environmental legislation should deal with environmental matters. If environmental matters are going to have a significant effect on company results or financial position, the matter should be disclosed under the normal corporate law disclosure requirements like continuous disclosure, disclosure of contingent liabilities, and so forth.

On the other hand, having said that, I think it is fair to say that section 299(1)(f) does seem to have had a valuable educational effect on both companies and their shareholders. I particularly noted, firstly, Jillian Segal's comments about an interesting experience to have boards focus on compliance issues and, secondly, in my own experience—I go to a lot of these conferences on corporate governance and directors' duties, and so forth—nowadays you can almost guarantee there will be a corporate lawyer there talking about compliance with environmental issues. I think, as I say, it has served a useful educational function in drawing the attention of both directors and shareholders to the myriad of environmental regulations that now exist throughout Australia.

I think it is acknowledged there are problems with the drafting of the legislation, but again, these seem to have been overcome for most practical purposes by the discussions which have taken place between ASIC and, in particular, the Australian Industry Group. It seems to me that of the witnesses I have listened to, the only ones that are probably still worried from a practical point of view are the ones that are perhaps not aware of these discussions and of the guidance notes that have been issued, and of the fairly relaxed sort of policy that ASIC seems to be taking here.

What I would suggest here is leave the legislation as it is for the next 12 months or so. I think by that time other bodies will have developed environmental disclosure standards and it will be fairly generally accepted by those companies to which it is relevant. There are obviously some companies like the mining companies to which it is particularly relevant; there are others to which it is minimally relevant. I think that other standards are being developed which will deal with this. I am also a member of the Australian Accounting Research Foundation's Legislation Review Board and I know that we have made submissions on a number of these disclosure standards about environmental issues.

Concerning information disclosed to foreign exchanges, if the information is already lodged with foreign exchanges there should be minimal additional cost in disclosing it to the ASX. I think it is nonsense to argue that shareholders will be confused by additional information. This is the typical argument that people who do not want to disclose information use. They say, 'You'll only confuse the shareholders.' That's a lot of nonsense.

A number of companies already include a reconciliation between US GAAP and Australian accounting standards in their annual reports. Some companies, and I think the latest BHP report may be an example, are preparing their reports in a form that complies with both US SEC requirements and Australian corporate law requirements. The point which a number of people have made is that Australian investors should not be at a disadvantage as compared with overseas investors.

The other point is that publication and disclosure in Australia of foreign disclosure documents will encourage global harmonisation of disclosure standards. If we see what other people are doing, if we compare the standards, it will encourage people to adopt what is good and reconcile the standards. I think probably the experience with the MD&A report is a good example of that. I think more people are becoming aware of the practice in both the US and the UK with respect to MD&A.

Senator CONROY—Last night the Stock Exchange told us that they think the MD&A listing has now been promulgated. I have not seen it yet, they promised to send me a copy, but they say it is in the ones that are about to be—

Mr Rofe—I really would prefer not to rely on the ASX doing it. What I would like to see is the guide to operations, the Group of 100 document, adopted as an accounting standard, or possibly an ASIC practice note. What we have got now currently is the Corporations Law saying that the directors' report should include a review of operations. I think then there should be something like an accounting standard which spells that out in detail.

In the same way as some previous people have suggested in the case of remuneration disclosure, the principle for disclosure of executive and director remuneration should be specified in the Corporations Law and then the details should be spelt out in an accounting standard. As I say, I do not think the ASX is the best body to ensure that these principles are followed. I would like to see something a bit more authoritative, like an accounting standard or an ASIC practice note.

Concerning reporting breaches of the Corporations Law and trade practices law, part of what I said in relation to issue No. 1 is relevant here. I suspect this is partly a knee-jerk reaction to a couple of major trade practices cases in Queensland a few years ago. You will remember that in the building industry there were some $1 million fines imposed on CSR and Pioneer and a couple of other companies. My view is that existing disclosure requirements—again both continuous disclosure and the requirement to disclose significant events, contingent liabilities and so forth—should cover any relevant issues there.

Previous witnesses have outlined the problems of disclosing unsubstantiated allegations in reports and the potential damage to shareholders. I ask: why single out Corporations Law and trade practices matters as distinct from, say, workplace relations issues or Y2K problems or what have you? I think the general disclosure requirements should be adequate.

Concerning issue No. 5, lodging the constitutions of proprietary companies, so far as I am aware it is really only ASIC that has strongly opposed this. They have said, 'We'll be inundated with lots of pieces of paper and so forth.' In fact, it was required until 1991, before we had the modern imaging technology that we have now. It should not really be a major problem for ASIC.

I must say, from when I practised as a solicitor, one of the major problems that typically arose in relation to proprietary companies was finding an authoritative copy of the memorandum and articles of association. The company had been formed 10 years ago, the solicitors or accountants had merged or moved or thrown out all their old documents, and there was a great debate as to just what the articles say. Again, as another one of the witnesses said, external parties dealing with proprietary companies should be able to have an authoritative source to refer to.

My final point on this matter is that the requirement to lodge a copy of the constitution may encourage greater reliance on the replaceable rules. Theoretically, you could say that there is really no need to have a constitution now; that if you want to form a simple proprietary company you could rely on the replaceable rules.

On the matter of the 28 days notice of meeting, again it has been discussed in fair detail. Some of you might have heard Ian Matheson, when he was the executive officer of AIMA, referring to the so-called proxy voting loop, the fact that with institutional investors you have the custodian, the funds manager and the trustee, although perhaps now the trustee might be merged with some of the other bodies. You have got a fairly complex situation there and it just takes time to communicate.

In the case of overseas investors there is a further problem. Mr Easterbrook mentioned the ISS, the US body. There is ISS Australia, Independent Shareholders' Services Australia,

and there is the American body, Institutional Shareholders' Services. Anyway, the ASA does some work for the ISS in the US. They run a proxy voting advisory service and we obtain for them copies of notices of meeting, annual reports and so forth. During the annual meeting season we have one person virtually full-time employed to chase these up and get them over to the US so that they can make their report and distribute it to their US institutional investors. I must say that 28 days is not too long by the time you have chased up someone, phoned them a couple of times, got them to send their report and got it over to the US. In those circumstances, 28 days is really not too long.

It is not only institutional investors. It is a problem in the case of individuals. Let us say we have got Pacific Dunlop who hold their annual general meeting in Melbourne. They send their notice of meeting and annual report out to their shareholder in Western Australia. It arrives on Friday and, as we heard previously, the local postman has got a great pile of these things so he leaves them until Monday to deliver. The shareholder has a look at it. There is a bit of a problem there. They ring the Shareholders' Association and say: 'Look, what should we do about this?' We say, 'We need a copy of the documents to have a look at', so it takes a couple of days to get it either from the shareholder or from the office in Melbourne. We write a letter to the company. They answer us. We have a meeting with the company executives. The shareholder wants to appoint a proxy. Of course, the meeting is on a Tuesday. They do not have a fax machine, so they have really got to post it on the previous Wednesday in order that it will arrive on a business day at least 48 hours before the meeting. The idea of electronic communication is fine but we do not have it in operation yet. Until we do, the 28 days is not too long. Perhaps if we encourage and facilitate the use of electronic communication, then when that is up and running, we could reduce the 28 days.

On the disclosure of proxy votes, I mentioned the IFSA guideline—investment managers should vote on all material issues at all Australian company meetings where they have the voting authority and responsibility to do so. As Sandy's report has shown, they do not. Your figure of 32 per cent of shares voted, if we accept that institutions hold 60 to 65 per cent of the shares, means that in practice less than half of institutions are voting their shares. It is not good enough. We have got two choices: either compel them to do so as is the case in certain situations in the US under the ERISA legislation and the Avon letter and is proposed in the UK or else encourage and facilitate them to do so. Really one of the main rationales behind this proxy voting disclosure is to do just that. Some institutions claim that there is no incentive for them to vote if their vote is not counted. If they lodge a vote and the resolutions are decided on a show of hands, how do they know that their vote counted? That is one of the main rationales for this proxy voting disclosure.

The other point which was raised is the status of the abstain vote and some people have said this is contrary to common law principles and things like that. Again, this is something which was consciously introduced in the model proxy form as an outcome of this working group that I mentioned. The fact is that some institutions consciously use abstention as a means of sending a message to companies. They disagree with a proposed resolution. They are not prepared to go so far as to lodge a no vote but they believe that by formally abstaining, they are sending a message through to the companies concerned. The abstain box is an important element there in the proxy voting process.

There are some interpretation problems in section 251AA and these were brought out very early in the piece when the first two companies to comply with this provision were CSR and BHP which adopted a diametrically opposed interpretation of the requirement about proxies which were not exercised, which were available on a show of hands. It may be useful for ASIC to issue a practice notice at some stage clarifying this. The general principle—we support the retention of section 251AA in its current form.

Some confusion has arisen from some of the witnesses in relation to section 250J1A. That is the provision that requires the chairman to announce the proxy voting at the meeting. In fact, that is only a replaceable rule and will not affect any listed company. So in spite of what some chairmen have said or what their advisers may have erroneously advised them, there is no obligation for company chairmen to announce the proxy votes at meetings. Certainly we have seen this as a problem in the past where the announcement at the beginning of the meeting may intimidate proper discussion of the issues.

In regard to the corporate governance board and audit committee, again it is an alternative model. But I think the concept of a majority of independent directors and an independent chairman, and the ASX requirement for an audit committee, really provides an at least as effective corporate governance model. I am concerned that the introduction of a separate board is likely to lead to more complication and confusion than benefit. The present model is efficient.

In regard to reporting suspicions to external auditors, again I think that has been covered. I think we should rely on general common law situations, principles. It makes me think a little bit of Aldous Huxley's *Brave New World*, and *Nineteen Eighty-Four*. If you have all the staff dobbing in one another—

CHAIR—George Orwell.

Mr Rofe—Well, George Orwell and Aldous Huxley really—both. You have *Nineteen Eighty-Four* and *Brave New World*. There is a bit of totalitarianism in both of them, isn't there? Coles Myer had a major problem and they solved it. I think the way to do this is for companies, in consultation with their auditors, to develop their own internal procedures and corporate culture to deal with these problems.

We support an individual director's power to call a meeting. I think it is unlikely to be used in practice but the existence of this power helps to strengthen the power of the independent director. I would pose the question: if Phillip Bowman had the power to call a meeting of shareholders perhaps the Yannon affair would have been resolved many years ago. In regard to the receipt of proxy documents, again I have spoken about that. As I said, we would support the definition of digital signatures to facilitate the use of electronic communication.

In regard to remuneration disclosure, I won't add anything to that—just perhaps two points. There does seem to be a bit of a difference between Jillian Segal and ASIC on the one hand and Ruth Picker and Ernst and Young on the other as to the extent of compliance. Certainly there has been an improvement in compliance. The two major areas that I see as remaining are, first of all, the accrual of directors' retirement benefits. That was picked up

yesterday by the Coles Myer people. We have a situation where, typically, non-executive directors are entitled to a retirement benefit of, say, three years directors' fees after the expiration of seven years. That provision is accrued each year in the accounts but is not disclosed. I believe it should be, just in the same way as other accrued expenses are disclosed. For example, in the CSR accounts at the AGM they were asking for an increase in directors' fees. They did not disclose that, in fact, apart from the disclosed remuneration there was a $300,000 accrual each year for potential retirement benefits.

In regard to options, I think that has been pretty thoroughly gone over. Any accountant who says that an option has no value unless it is in the money should be struck off the roll of accountants. On the other hand, I have some reservation about using some sophisticated mathematical model to put a single value on options. I think it is still important to disclose the terms of options, particularly where there are performance hurdles and things like that.

I should say something about requisitioning meetings because it is now a formal term of reference. It would be a pity if there were a knee-jerk reaction to the North and Wesfarmers situations. I have certainly seen the North Ltd documents. While the questions that were raised were legitimate questions, which no doubt had been considered by the directors, I think the proposed resolutions could have been knocked out on the grounds that they were not within the proper purpose of a meeting. As I understand it, North did not seek to do so. All they sought to do—and achieved—was to make sure that the EGM was held on the same day as the annual general meeting.

If they wanted to stop the EGM, technically they could have done so. I have not seen the Wesfarmers documents, but it was stated yesterday that there was senior counsel's opinion that the resolutions were not within the proper purpose test and the meeting could have been stopped. As a matter of public relations as much as anything else, both companies made the conscious decision to go ahead with the meetings. A lot of people making this knee-jerk reaction overlook the fact that there is a considerable body of law as to what is the proper purpose of a meeting. It is not going to be as serious a problem in practice as might have been suggested.

I should just say something about the NRMA situation. I did read the evidence that Mr Whitlam gave. To suggest that you should impose a requirement of one per cent of the members to requisition a meeting is to say that members can never requisition a meeting. What is one per cent of 1.8 million members? No-one would ever be able to requisition a meeting of the NRMA. He was asked in his evidence about some of the other motoring organisations with similar memberships—RACQ and the other interstate bodies. Noticeably, they do not seem to have the same problem as the NRMA.

I suggest that any problem that the NRMA has with requisitioning meetings is a problem of the NRMA, not of anything else. It might be a good idea if they could have a meeting and get enough members to vote at the meeting so that they would have a united board which did not spend all its time arguing and suing one another in the courts. I think the NRMA is a special situation. When shareholders or members seek to requisition meetings, it is usually because there is a problem which needs to be solved. Taking away their rights is not going to solve the problem. I think I should stop and let you ask questions.

CHAIR—Thank you. Just briefly, does Mr Elkington wish to add anything?

Mr Rofe—He has a separate point. Probably it would be as well to give him some time too.

CHAIR—Perhaps we could take your point and then we can go to questions.

Dr Elkington—I have two points. One is in relation to section 225. The principal point I am making is about halfway down page two of the written submission. Section 225 of the Corporations Law, which relates to the election of directors, does appear to have the wrong emphasis. In relation to a public company, everybody's interest is best served if all candidates for election as directors at least get a look in to be considered by shareholders. It is in the interests of the shareholders and also appropriate from the point of view of the candidates too.

Section 225, as it presently stands, does at least give the opportunity to a board that wishes to stop people standing to arrange for presentation to the shareholders at a meeting in a particular order and in such a way as to give their mates the best chance of being elected. Section 225 might be redrafted to ensure election of directors is by ballot. That does not address the question of what sort of a ballot it should be. I think that has already been dealt with by other persons.

The other issue, which I think is not on the formal terms of reference, is in relation to section 256B, which now governs capital reductions. The section is intended to simplify capital reductions by essentially allowing capital reductions to be a question for the company itself without the intervention of the court. Dr Boros pointed out that the section really does not think through all the possible types of capital reduction you can have and that leads, in some instances, to absurdities. The section is wrongly based in that it singles out ordinary shares as having some special status in relation to capital reductions. It seems to me, from a theoretical perspective, that there is no difference between one class of share and another as far as capital reductions are concerned. I think you can have selective capital reductions of one class or within a class and that may prejudice the class or other classes. There is virtually no end to the different types of capital reduction you can have.

These are all simply schemes of arrangement, which generally are supervised by the court. These are a special sort of scheme of arrangement, but they do have a lot of characteristics of schemes of arrangement. In her submission, Dr Boros pointed out that in many instances you have to have a scheme of arrangement as well in order to be able to deal with the capital reduction. It is my view that taking away the power of the court to ensure that capital reductions work fairly, as between different classes of shareholders, and replacing that simply by some words in the section that say that the capital reduction has to be fair and reasonable, is very unfair to shareholders because it puts the onus on them if they believe a reduction otherwise complying with the requirements of section 256A, 256B and 256C to take court proceedings.

In a case where property rights or shares may be being taken away or property rights affected—rights to which they themselves have not agreed—where the Corporations Law deals with schemes of arrangement it should equally deal with reductions of capital, because

that is the only real guarantee you have that these schemes really are going to be fair. It is not enough to have those words in the section with no mechanism to ensure that is the way they go.

I would submit that the supervision of the courts should be reintroduced in relation to these capital reductions. It certainly has worked very well for over a century and I think that when one sees the problems that arose even between the introduction of this section and now in the e-trade case, I think it is very important that we should all have the assurance that these capital reductions are going to be done fairly without having the obligation of incurring a lot of legal costs in taking action ourselves if we believe that the reductions are not fair. That is the essence of my second submission and that is all I plan to say.

Senator COONEY—You talked about the method of voting. You had the discussion about that before and I want to take up with that the issue of the environment. It is absolutely necessary to have a framework, but I was wondering, if we do not have ideas from outside which we might get from proportional representation or by having things in there, like the environment, which take director's minds outside the strict legal running of the company, whether you might start lacking ideas.

There was an article in the *Age* yesterday by Barry Jones and Barry in his baroque way was on about it. It does seem to have merit and I was wondering, with all this regulation of companies, that we are getting directors and boards that do not think enough in terms of development of industries that we should have developed in Australia, that everybody knows we should have, and you no doubt say as well, and that the culture of the companies is too inward looking and too cautious. Do you have any comments on that?

Mr Rofe—I think we do have mechanisms for this. The fact that this EGM of North's was called is an example of how a particular group has put forward the particular idea about uranium mining. Whether you agree with it or not, it is out there in the public debate. I think the existing mechanisms do serve that purpose.

Senator COONEY—I was thinking in particular of the development of new industries, and the classic one that is talked about is Silicon Valley in California which we do not appear to be getting here in Australia to the extent that perhaps we ought to.

Mr Rofe—I agree that we ought to encourage that, but I think there are other mechanisms to do so. It may involve questions like taxation relief or grants or other things.

Senator COONEY—I worry about that though. There does not appear to be a culture within the corporate sector to take these initiatives.

Mr Rofe—People talk about corporations as if they were some separate entity. Corporations are really just people, are they not? Their shareholders and their management are people. I think that you have to change the people. The corporation may be an avenue of communication, but really it is question of changing people's culture and attitudes.

Senator COONEY—That is why I was wondering whether a proposition such as proportional voting and having parliament putting in suggestions that you have to think

about, for instance, the environment and educating your people, might not help that culture. I can see the argument against that: that really that is nothing to do with the actual inner workings of the corporation, but I wonder if that is the right approach.

Mr Rofe—As I say, I think that Corporations Law is not the right place to do it. If it is something to do with the environment, I think it should be in environmental legislation and it should not just apply to companies; it should apply to partnerships or individuals or whatever it is that has the influence on the environment.

Senator COONEY—Can you see what I am saying? You are separating the issues. It might be said that this is Corporations Law in the environment, education, Dreaming—if you like—which brings on these things, and that is separate from the companies somehow. You get this culture where companies themselves think the whole time in terms of legal requirements.

Mr Rofe—Again, it is not the companies that are thinking, it is the people. It is the people you have to change.

Senator COONEY—I think that you have to change the people in the company.

Senator CONROY—It has been put to the committee that the section now on executive remuneration should be repealed by some groups and, in particular, some of the arguments are that shareholders will not understand the information that will be supplied to them. They would not be able to understand that a company may be performing badly, or may have static performance but a good profit performance, or that executives in some sections may be doing well but other sections are doing poorly. There could be external influences that the shareholders would be unable to understand and those influences could impact adversely on a company's performance and it is all too complicated for the shareholders to actually understand that.

Mr Rofe—My answer to that is, nonsense. Shareholders are, on average, just as intelligent as most directors and if there is a problem there it is up to the directors to explain to them. There was a debate a couple of years ago about Pacific Dunlop and the selling off of particular non-performing businesses and the argument that the institutions were wrong in taking the line that they did. What was lacking there was a failure of management to convince shareholders that there was a long-term benefit involved. As I say, if there is a problem, it is a problem that directors and management should explain to shareholders and, if they have got a good case, shareholders will accept it.

Mr RUDD—Was that about the sale of the food group?

Mr Rofe—I was thinking of the food group.

Senator CONROY—It may come as some disappointment to know that most of these ideas are contained in the Australian Institute of Company Directors submission to us where they say:

performance may be affected by factors outside directors'/ managements' control . . . bringing in a highly paid executive (individual or team) to salvage a company or turn it around will not produce immediate results (the timing issues must be recognised).

Mr Rofe—I know there is a certain conservative element in the AICD. There was something in this morning's paper about the old boys club of directors. Sooner or later they will retire or die and this modern way will sweep through some of these bodies.

Ms JULIE BISHOP—I have a question for Mr Elkington on that section 256. I am just interested in why we would seek to occupy our courts' time overseeing all capital reductions instead of relying on the requirement in section 256B that a reduction be fair and reasonable. I see why you have argued it but it seems to me that the cost benefit analysis would weigh the other way. Instead of subjecting all companies to court supervision for all capital reductions we should take the assumption that, if it is a requirement that they be conducted, that the capital reduction be fair and reasonable except in more unusual circumstances where it is not, and then you would resort to court intervention. But it just seems to me to be anachronistic and costly and a use of precious court time and I do not see as being necessary in every capital reduction in every case.

Dr Elkington—It is all very well that the capital reductions have to be fair and reasonable but it is not clear upon whom the obligation lies to determine whether they are fair and reasonable. It seems simply a statement of wishful thinking. I think these things do not take very long. There are not a lot of these capital reductions; not a lot of the court's time will be wasted. The simple one—

Ms JULIE BISHOP—It is also the cost to the company.

Dr Elkington—There certainly is a cost to the company, but it affects people's rights and the cost is not enormous in running one of these things. A simple one can be done very quickly. It is not as if there are hundreds of these things being done. They are done, and there is no reason at all why it should not be a cost to the company. It is not an enormous cost.

Ms JULIE BISHOP—There are plenty of statements in the Corporations Law which put requirements on the company to do things in a fair and reasonable way, and yet you do not require court intervention each time to ensure that they have acted in accordance with the provisions of the Corporations Law.

Dr Elkington—I do not know which sections you are referring to.

Ms JULIE BISHOP—There are plenty of instances in the Corporations Law where companies are required to act in a certain way. You do not need court intervention to make sure they have.

Dr Elkington—I would respectfully submit that, in relation to something like this, there is no measure at all. There is no objective measure of fairness and reasonableness. That is a requirement of the section.

Ms JULIE BISHOP—What do you expect the court to do then?

Dr Elkington—I would expect the court to do what it presently does. When I say 'presently', it used to do it. If one of these schemes was presented, the court would look at it. The company would go in there and put the matter to the court—'This is the scheme.' The court would examine it, and if the court had any doubt about it or if it was not fair and reasonable it would not approve it.

Ms JULIE BISHOP—In the majority of cases, does the company not put the entire case for all shareholders? You pointed out that the shareholders are not generally separately represented, therefore the company is making that analysis, weighing it up. In this instance, it is presenting it to the court. It could as easily do that analysis and presentation internally.

Dr Elkington—I do not think that is right. Very often, the person is seeking to press one of these things. You could say the company is doing it, but very often the company is being run by persons for whom the capital reduction might have been put in place and it is very hard to expect them to put something in. Cases of this kind are unusual cases.

The court has, certainly in recent years, what you might call an inquisitorial approach to approving capital reductions, and where the court believes or there is something which appears to the court may not be satisfactory, the court may actually inquire into it. There is only one person there. In any event, it gives the opportunity to people who think they have been hardly done by to go along and present their side of the matter to the court.

Ms JULIE BISHOP—Do they not do that anyway if you do not have court intervention at this level and the shareholder feels hardly done by?

Dr Elkington—They can, of course, take proceedings, but the matter could be over and done with before the shareholder could get himself together. You would be unlikely to be able to restrain a company holding a meeting for the purpose of the capital reduction so you really have to wait until the meeting is over and then you have to move very quickly. There are procedural difficulties and there is a risk of costs. The general approach of the Corporations Law is that, where a person's rights are being affected and they have something genuine to say in relation to their rights, they ought not be subject to the possibility of enormous costs in putting something like this to the court.

Ms JULIE BISHOP—If we took the court out and had a role for ASIC?

Dr Elkington—That would be an improvement, certainly, on what we have at present. At present, these things can be done quietly and small shareholders do not have the resources to take court proceedings. They would have the resources to put a proposal to ASIC, there is no doubt about that. I do not know whether Mr Rofe would like to comment on that.

Ms JULIE BISHOP—I have not raised this with ASIC because this issue has not come before us as far as I am aware. I am just floating ideas and trying to keep court intervention at a minimum.

Mr Rofe—I know ASIC say that they do have a problem with resources in dealing with all the issues that I have put to them.

Ms JULIE BISHOP—Perhaps there is a solution somewhere in between.

Mr ROSS CAMERON—I want to know if Mr Rofe has any evidence for his assertion that shareholders are as intelligent as directors.

Mr Rofe—I issue a standing invitation for you to come along to some of our monthly meetings and meet them in the flesh.

Mr ROSS CAMERON—You represent the professional but small investor.

Mr Rofe—I said 'professional' in quotation marks.

Mr ROSS CAMERON—How many members do you have? Do you have a strict membership or do you just feel you represent the sector as a whole? What is your constituency?

Mr Rofe—As I said earlier, we currently have something over 4,000 members spread throughout Australia.

Mr ROSS CAMERON—Do you have a feeling for how much in funds invested that represents?

Mr Rofe—We have not done a total but, as I said, we did do a survey of our members. I just cannot remember the figure, whether it was 55 per cent that had investments over half a million dollars, or something like that. I cannot remember off the top of my head.

Mr ROSS CAMERON—Presumably their investments are like those of institutional investors, like the structure of the market as a whole, pretty heavily concentrated in the established major—

Mr Rofe—I would not say that. If you look at the proportion of market capitalisation represented by the range of companies in the market, I would say they are probably spread over that. Probably, among individual investors, there would perhaps be less focus on the top 100 companies because, of course, institutions are rather constrained in their investment policies because of liquidity requirements and so forth. They are forced to focus on the top end of the market, whereas our members would not be constrained to the same extent. You would probably find more who would be prepared to invest in a smaller, less known company.

Mr ROSS CAMERON—We are looking at a number of specific regulatory questions here in relation to the process of election, the amount of information disclosed, environmental obligations, which are currently on the margin of the whole edifice of regulation of public companies. In terms of the equilibrium, if you like, that we have struck in this country, as Senator Conroy says, there is a market interest in a coherent regulatory environment that instils confidence among investors but, on the other hand, you do not want to so burden the wealth generators of the economy that you in effect kill the goose that lays the golden egg. Do you have a feeling for, in terms of the level of regulatory imposition, the compliance burden, and the need for confidence in the market, the tension between, on the

one hand, regulating the major blue chip players but at the same time creating an environment that provides real incentives for the creation of new enterprises and new industries? How do you think we are going in terms of hitting the right balance?

Mr Rofe—If a company, large or small, wants to come to the public and be listed, say, on the ASX to raise funds, then it has an obligation to provide full disclosure so that all investors will have confidence in the market. On the other hand, if it seeks to raise funds in other ways, it may be able to find investors who are satisfied with less disclosure. I think this is the philosophy behind some of the current fundraising proposals in the current legislation to offer information statements to sophisticated investors and so forth. But, as I say, if companies are going to come to the public as a whole by becoming listed public companies, there should be a uniform disclosure regime for them all—full and transparent disclosure.

Mr ROSS CAMERON—I am not necessarily just talking about disclosure. I am talking about the whole edifice of regulation. I think in your opening remarks you said something like 'our system is not something we ought to be ashamed of'. You are saying you are basically happy with the balance that we have struck.

Mr Rofe—I think probably most people would agree that Australia is not a bad investment environment.

Mr ROSS CAMERON—And so, in terms of a trend, you think it is just a case of finetuning at the margin. You think we are doing well in the regulatory environment and, if we are going to lift business activity, it ought to be through the tax system or through other measures rather than reducing the compliance obligation on businesses.

Mr Rofe—I think it is important to encourage confidence in the market among both large investors and small and, of course, there are some areas where individual investors feel that they are at a disadvantage to institutional investors. As you may be aware, a particular example we have been focussing on quite a bit lately is the efficient disclosure of information. Some of the areas which are being looked at by ASIC are company briefings and so forth. We have talked about making information available by web pages and so forth. So I think that is important in developing the right sort of environment for confident investment.

On the other hand, as I have said, if we look at some of these IFSA guidelines, corporate governance guidelines, they are essentially rules of thumb. It says that, as a general principle, it is a good idea to have an independent chairman and a majority of independent directors, but it acknowledges that, in particular situations, particularly in the case of smaller companies where you have a start-up company with a board of five, you might be battling to get one or two independent directors. I think it is important, if you are going to be a listed company, to have at least some independent non-executive directors on the board, but I acknowledge that it may not be feasible or appropriate to have a majority. So, flexibility—

Mr ROSS CAMERON—I would be astonished if IFSA had 10 per cent of its funds under management outside the top 100 Australian companies.

Mr Rofe—Well, yes, that might be so, but that does not mean that the principles in the IFSA guidelines are only relevant to those companies or to institutional investors. I think they are, in general, sound principles for encouraging public investment. You can say the same thing about a lot of government bodies, too. As you know, the Wallis committee recommended that ASIC should have some outside directors and I think there is a lot of logic in that, too.

Mr ROSS CAMERON—I suppose it is a case of who funds that compliance cost. Every time you do it, you are making it that much harder. You will have a beautifully regulated small market for major players.

Mr Rofe—No, if you are going to go to the public to raise funds, you have to be prepared to pay the related costs, which include the costs of having fair and open disclosure to investors and potential investors.

Mr ROSS CAMERON—I will not labour this point. Whatever it is, whether you are talking about disclosure or the other compliance obligations, I wonder whether a small prospector in Western Australia ought to be under the same level of obligation as Rio Tinto, North, or whoever it is. What you are really saying is that the market is not sophisticated enough to make a distinction from a regulatory standpoint between a blue chip and a non-blue chip.

Mr Rofe—Well, I think, in basic principles, they do not need to. I think the small prospector should be as honest with its shareholders as Rio Tinto. Of course, it is not going to have the great complex disclosure, but what it does disclose, I think, should be fair and honest to exactly the same degree.

Mr ROSS CAMERON—I am not sure that the level of honesty would differ.

Mr Rofe—I am getting old now. I can remember the 1970s and the Rae report, the gold case and one thing and another. So, historically, there have been problems and we do not want to repeat them.

Senator CONROY—We were not so successful at catching Skase, you might remember.

CHAIR—Following on from Mr Cameron's question, in general terms, the aim of the CLERP process is to simplify and make more friendly the Corporations Law. It still seems to me, after these reforms, to be an incredibly complex body of law. The act we are looking at is three-quarters of an inch thick and that is just one part of the Corporations Law. We talk about how hard the tax act is, but the Corporations Law does not seem to be getting any thinner. New Zealand, in comparison, has a fairly compact simple document. What is your attitude to that?

Mr Rofe—One aspect of that is that they have got a Corporations Law where their takeover provision is different. They have a separate financial reporting act, whereas our Corporations Law deals with a whole range of issues—

CHAIR—Consolidated?

Mr Rofe—including securities, futures, investment advisers and what have you. In fairness, our Corporations Law covers a wider area.

CHAIR—Do you think we are achieving the goal?

Mr Rofe—We are trying, but it is not perfect yet and it probably never will be.

Senator CONROY—When we recently simplified the tax system, do you know how many extra pages of tax were passed by parliament with those 27 bills?

Mr Rofe—There was a problem there and I think there was quite a significant difference between the Corporations Law Simplification Program and the Tax Law Improvement Program. Both of them on the face of it were attempts to simplify the relevant laws, but the problem with the Tax Law Improvement Program was that they were given pretty tough riding rules. It was more a question of simplification of words. Whereas, at least with the Corporations Law Simplification Program, an attempt was made to look at the underlying principles and to say, 'Is this principle still relevant or not?'. And if you look at something like share buybacks, it was shrunk down like that.

Senator CONROY—You do not recollect how many pages the recently trumpeted GST 27 bills add in to that system.

Mr Rofe—Legislation is—

Senator CONROY—A couple of thousand pages, I think.

Mr Rofe—It would not surprise me at all and whether Ralph will do any better remains to be seen. To make two final points before I close, Ruth Picker raised a problem in relation to the legislation and redeemable preference shares. I support the repeal of paragraph (b) of section 254K. It is an historical vestige of the capital maintenance rule that really should have been dropped out when the other simplifications of capital maintenance were dealt with. I am a supporter on that.

The other point I would like to make is I know Mr Fielding has made voluminous submissions to the committee. I know that because he has sent copies of them all to me. My personal view is that a lot of the issues that he has raised are outside the present terms of reference, but nevertheless he does raise some important points. I put on record that I hope at some stage when the committee is performing its functions under section 243B of the ASIC Act to review the annual report of ASIC that it might invite some of the clients of ASIC to appear before the committee. When I look back at the *Hansard* of the last review of the ASIC annual report, the only witnesses who appeared were officers of ASIC. It is a bit like the teacher inviting the students to mark their own exam papers. I think it would be useful, when the committee is reviewing ASIC's latest annual report, to invite some other interest groups to appear before the committee.

CHAIR—We will certainly consider that.

Mr Rofe—I am sure Mr Fielding will jump at the chance.

CHAIR—I thank Mr Rofe and Dr Elkington for appearing before the committee and answering our questions.

[12.25 p.m.]

CAROLIN, Mr Michael, Environment Adviser, Australian Business

ORTON, Mr Paul, Manager, Policy, Australian Business

CHAIR—Welcome. We have before us your submission, which we have numbered 43. Are there any corrections or minor alterations that you need to make to that submission?

Mr Carolin—No.

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

Mr Orton—First, just a couple of words about who Australian Business, as we are known, represents. We have 5,000 members in New South Wales and the ACT from a broad range of industry sectors, both manufacturing and services. We have close links with the major chambers in each of the other states, and especially in the area of environmental regulation. As our submission clearly indicates, we are concerned about the environmental reporting provisions in the legislation. That is what we wish to address our remarks to.

We need to state at the outset that Australian Business and its membership support the principle of corporate environmental reporting. We have been active here in New South Wales in the development of the Environment Protection Authority's guidelines. Similarly, we were also active in the development of national guidelines that are currently on foot. The question is how best to get good information to shareholders and the wider community, at least cost in financial and regulatory compliance terms. In coming to that understanding, it might be worth while to recognise some of the existing reporting requirements and some of the current initiatives that are under way in that area.

Our experience in dealing with both Commonwealth and state involvement in environmental regulation is that harmonisation of both legislative and reporting requirements is a key objective. Currently, we have at least four reporting requirements embodied in both Commonwealth and state legislation. They relate to the NPI, the National Pollutant Inventory, which is a national initiative. Here in New South Wales, and shortly to be introduced in other state jurisdictions, are load based licensing requirements, which have reporting elements attached to them.

We have in New South Wales, and no doubt shortly elsewhere around the country, waste management and minimisation requirements, which have fairly onerous reporting requirements attached to them. Similarly for trade waste discharges to water—there are reporting requirements for those. On top of that, and as well as that, there is the current imperative to move towards some generally agreed voluntary environmental reporting guidelines. There is a national initiative about to kick off to attempt to put together some guidelines that really do get the maximum amount of information into the community on environmental performance.

As a result of all these initiatives, we find a large part of our activity is either in lobbying to maximise harmonisation between all these requirements and/or developing products for our members in order to assist them to cope with the level of reporting requirements. In fact, to assist businesses in the everyday conduct of their activities, we have just published a guideline called *The environmental referee for New South Wales businesses,* which, despite its thickness, is what we perceive to be a summary of environmental regulatory and reporting requirements.

The main point we would like to reinforce is that, while we support the intent of the amendment to the extent that it might help to flesh out existing requirements to report events that are of a material nature, we have got to improve the clarity and the operation of the amendment in a way that does not end up creating another reporting regime that either duplicates or rides across the top of those that I have already mentioned. The two requirements that businesses would have of an enhancement to the existing requirement to report items of a material nature are that we do not create an undue reporting burden and that we do not attempt to duplicate or that the end result is not to duplicate the current initiative, which we see with some enthusiasm and optimism, in relation to voluntary environmental reporting guidelines. I might leave our opening remarks there. I would be happy to expand on them.

CHAIR—Thank you. Questions?

Mr ROSS CAMERON—I think it is a very short, clear statement.

Mr Orton—The measure that we are suggesting ought to be considered, whether it is embodied in legislation or in the ASIC guidelines, is the extent to which companies have been subject to environmental penalties under state or Commonwealth legislation. What we are really looking for is for the bar not to be set so low that the reporting requirement becomes onerous but, by the same token, for it not to be set so high that the requirement in fact subverts the intention of the voluntary exercise that is currently under way and, indeed, the other legislatively required reporting requirements.

CHAIR—So you would see it as an entirely voluntary area?

Mr Orton—To the extent that the amendment might clarify for directors' purposes what is material and what is not, and reinforcing the point that environmental issues may well be material, we support the amendment. I guess we have perhaps remained somewhat agnostic on whether or not you could achieve the same objective through more detailed ASIC guidelines. That is a moot point.

CHAIR—The issue I was going to raise was whether it might be an area that could be left to ASX listing rules.

Mr Orton—Quite possibly. There is a requirement under both those for continuous disclosure and, indeed, under the legislation here to report items of a material nature.

Ms JULIE BISHOP—Perhaps that is where the confusion lies, that whilst one can understand the requirement which is already there—the disclosure requirement which relates

to the financial effects of any matter, whether it be environmental or legal or industrial relations or whatever it is, that impacts on the financial effects—it is another step to go to the environmental effects. I do not know that this particular provision makes it clear as to the end we are trying to achieve.

Mr Orton—Indeed.

Ms JULIE BISHOP—It could be well be argued that the current continuous disclosure material matters already ought to cover any environmental effect that had a financial impact, one way or another, on the company.

Mr Orton—I guess we have assumed that the intent of the amendment was a more tightly defined one along the lines you have just amplified, and we would be very concerned if it was an attempt to second-guess environmental regulatory regimes, both Commonwealth and state, established under different legislation.

Ms JULIE BISHOP—We have heard already from a witness that the US environmental disclosure requirements relate to financial effects, not the environmental effects, which would be a completely different ball game.

Mr Orton—Indeed.

CHAIR—If there are no further questions, thank you very much for your presentation and those responses. I am sorry we kept you waiting so long beyond your appointed hour. Thank you for your patience in that regard and for what you brought before us. That concludes our morning hearing.

Proceedings suspended from 12.36 p.m. to 1.50 p.m.

RATTENBURY, Mr Shane Stephen, Political Liaison Officer, Greenpeace Australia

RICHTER, Ms Monica, Corporate Campaigner, Greenpeace Australia

CHAIR—I welcome the representatives of Greenpeace Australia. We have before us your submission which we have numbered 82. Are there any corrections you would like to make to the submission?

Mr Rattenbury—No.

CHAIR—I now invite you to make an opening statement, at the conclusion of which the committee will ask questions.

Mr Rattenbury—Thank you for having us along today to speak with you about this matter. As you will see from our submission, we have confined our submission exclusively to the section 299(1)(f) provision. Obviously, we are not in a position to really comment on the other matters.

Greenpeace is one of the world's biggest environmental organisations. Here in Australia we have more than 80,000 financial supporters, and we are currently growing rapidly. On top of that we have many people who support us on a regular basis. This morning I saw that our web site received 330,000 hits last month. So we talk to a lot of people and get a lot of feedback from people who are interested in the type of work that we do.

We believe that this new provision in the Corporations Law is an exciting step forward in environmental protection in Australia. We think it presents some interesting opportunities to really make some gains and to help companies achieve those gains, or in some cases perhaps compel them where they are more reluctant. We do acknowledge, as many other people who have given evidence before you have already acknowledged, that there are some teething problems with it and we would like to discuss some of those today.

We think environmental reporting basically represents an opportunity for a number of benefits—benefits for business, the environment and government. We have set out what we believe are the key benefits in our submission. With business we feel there are opportunities for cost savings by identifying areas where money can be saved. We believe that there are opportunities to improve goodwill with the community through being more transparent and more open in the way things are done.

The benefits for the environment are self-evident. Public interest and concern about environmental issues remain extremely high despite the fact that the environment has been off the political agenda a little as compared to the late 1980s and early 1990s. But public concern remains high as recent polling and polling over the last decade has consistently shown.

We believe also that mandatory reporting does represent opportunities for government by providing government with more information, and it reduces a government's needs to enforce laws. If companies are required to report then they will tend to be more keen to fulfil their obligations. We also believe that there are benefits for government in that the community,

when it is better informed, is also able to assist government in enforcing environmental provisions, and perhaps they will not be as concerned as when they do not have the information. As you are well aware, when people do not have the information they tend to be more concerned than if they feel they are fully informed.

One of the key issues around this provision has been whether reporting should be mandatory or compulsory. We obviously think that compulsory reporting is beneficial. We acknowledge that there are companies in Australia that have been doing it on a voluntary basis, companies like Western Mining. They are producing state-of-the-art reports and are really world class in the type of work that they are doing.

However, there are many companies in Australia that are not taking Western Mining's lead. We have identified in our submission a number of empirical reports which have identified the fact that Australian companies generally lag behind world standards in environmental reporting. We do not believe that those companies that are doing it on a voluntary basis should basically be left behind or forced to bear a greater burden because other companies are getting a free ride. We believe that compulsory reporting has the capacity to level the playing field and bring everybody else on board and so avoid having some companies having to bear a burden that is uneven.

Finally, the issue that we would like to address is the other one that has been of major concern to many of the industries submitting to this committee, the lack of clarity and the difficulties with the interpretation of this provision. We acknowledge that the provision is perhaps vague in its wording. We do not believe that that presents a problem. Any new system that is introduced will have its teething difficulties, and we are about to discover that with the new tax system. It is going to take a little time to get it right and to get everybody to fully understand it. That is not a reason for not doing something new. We would make that point very strongly to the committee. This provision should not be removed or repealed simply because of some teething difficulties.

The loose definition should not also present a problem. For decades now, company directors have been required to provide true and fair accounts. That is not a precise definition by anybody's language, but it conveys a meaning. We believe the only companies that will have any problem with these provisions are those that have something to hide. We believe this is an innovative step forward. It is a progressive piece of leadership that we have seen put into this legislation. We would very much like to see it retained. We believe that ASIC should really be more involved in sorting out the teething difficulties and doing more detailed work to provide better guidance to corporations so they can meet these new requirements.

Senator CONROY—We had ASIC here yesterday. I would invite you to get a copy of the *Hansard* because some interesting comments were made on your area which you would be interested in from a positive perspective. The major criticisms that we have been receiving were the points that you have just been referring to: the clarity, the legal issues. I understand that some legal advice will be tabled at a potential hearing we are having next week. You might like to keep your eye out for a submission from the Business Council of Australia on this area. I am told that they have some interesting legal advice.

What does that complexity question mean? We understand that there have been a couple of attempts on that. We had the Australian Industry Group in yesterday and they showed us a paper that they had prepared in consultation with ASIC. Were you involved in the discussions on compiling that or in discussions separately with ASIC that were then reflected into the Australian Industry Group's working paper? Do you have any comment on it? Have you seen it?

Mr Rattenbury—We have seen the Australian Industry Group paper. We have not been involved in putting that together or in discussions with ASIC at this point. We certainly have had some informal discussions with the industry group over lunch, et cetera. I have only looked briefly at the Australian Industry Group paper. I got it only yesterday. To me, it answers some of the concerns. I think they have been able to convey in a reasonably simple format to their member groups the kinds of things that the legislation requires. That overcomes some of the practical concerns that people have been expressing. The AIG have been able to set out how they think this can be dealt with at a practical level for a company which has to sit down and write its report. It appears as though it is possible.

Senator CONROY—Both ASIC and the Australian Industry Group indicated they had been having fairly extensive discussions about the content. Have they invited you or were you intending to talk to them? They have issued a practice note as well as this. I am concerned that, if they are only talking to one side of the argument, they are not necessarily getting a complete picture in terms of those interpretations.

Mr Rattenbury—That was also our thought on some of these difficulties. Rather than repeal provisions, a number of the submitters expressed concerns about the lack of consultation before the provision was added to the legislation. We would respond that, rather than repeal the legislation and say that it is too hard, we would encourage ASIC to perhaps undertake that consultation process themselves. They made it clear in a practice note, and in the media work they have done, that they are not intending to enforce this strictly over the first couple of years as people come to terms with what they are required to do. We believe that there is an opportunity there for them to undertake more extensive consultations to further flesh out that practice note and the advice on how to comply with the provision. We would be more than pleased to speak with them. We should perhaps give them a call because they have not rung us yet.

Senator CONROY—Maybe they lost your phone number.

Mr Rattenbury—Perhaps.

Senator CONROY—Maybe you should visit their office.

Mr Rattenbury—Perhaps not in a classic Greenpeace style.

Senator CONROY—Don't wear suits—scaling from the roof down.

Mr ROSS CAMERON—Were you talking about the classic Greenpeace style? It was Greenpeace that made the intervention into the Prime Minister's residence at Kirribilli, wasn't it?

By that same logic, under what circumstances should corporations be able to breach the law when it suits their objectives?

Mr Rattenbury—I am interested in quite a number of members of the government who have raised concerns about our actions at the Prime Minister's residence. I would stress that, as anybody who would look closely at that matter would be aware, it was an utterly non-violent action; nobody was injured. It was done in a spirit of a conviction to convey a message that we thought needed to be conveyed and also a certain spirit of good humour and good sense. The persons on the action talked with Mr Howard's children on the premises at the time. They chatted with them in a quite amicable way. I do not think anybody who was involved in that action has any concerns. It was a technical breach of the law. We acknowledge that. But those sorts of breaches do not have any detrimental effect on anybody else.

Senator CONROY—Did the detectives plead guilty?

Mr Rattenbury—Yes, they did plead guilty. They fully took responsibility for their actions; there was no question about that. I would say that those breaches of the law do not impact on other people in a detrimental way. They perhaps cause a bit of inconvenience, but they are certainly not the breaches of law that result in significant environmental degradation and which have an impact on the entire community.

Mr ROSS CAMERON—Wasn't one of the security guards sacked as a consequence of that?

Mr Rattenbury—I do not believe so. I think the *Canberra Times* recently ran an article about the head of the Protective Service being sacked and suggested that one of the reasons was his failure to deal with the Greenpeace action adequately. I noticed that the following Saturday the *Canberra Times* expressed an extreme apology in an unprecedented way of putting it on the front page. Normally apologies are on page 4 or 5 because they do not like to admit their mistakes. I do not think that is substantiated at this point in time.

Mr ROSS CAMERON—I do not want to necessarily drag over those coals, but for security at Kirribilli House you put someone in a difficult position. If I were a terrorist or—

Senator CONROY—Did they struggle with that shoot to kill order?

Mr ROSS CAMERON—What do you do? If you issue an invitation to the rest of the world, and as long as you dress up and carry a Greenpeace banner, you put a security guard in an incredibly difficult position. I think it is a strategic decision you make as an organisation and you decide the headline is worth more than the precedent. That may be a good strategic decision for you as an organisation, but I have to tell you that, when you then want to come before the committee and argue for a strengthening of corporate governance, it diminishes your credibility in my mind.

Mr Rattenbury—That is fine. We have come before this committee to give our evidence and say we believe that this is a positive provision. We think that it is a good piece of leadership that this has been added to this legislation. We think there are significant benefits

for corporations in this legislation. Greenpeace has many hats. We do have a classic style which is perhaps the more publicly known one. We also do a lot of work in Parliament House. I have not bumped into you in the corridors, but I am there frequently. Greenpeace does a lot of other work. I guess Kirribilli was the one that made the front page of the *Daily Telegraph* but we do a lot of other things. We are here today to try and work with industry and with this committee to try and find a good solution to this problem.

Mr ROSS CAMERON—It is not my function to give you strategic advice on how to run your organisation. I think you will find that my wife is one of your members.

Mr Rattenbury—Contributors.

Mr ROSS CAMERON—All I am saying is that if you say it is okay to break the law if it is for a good purpose, you will not necessarily strengthen the resolve of corporate Australia to strictly adhere to provisions of corporate governance.

Mr Rattenbury—Are you suggesting that breaches of environmental law are for a good purpose?

Mr ROSS CAMERON—No, I am not. I am just saying that if you, as an organisation, arrogate unto yourselves the freedom to decide when you will and will not obey the law, your voice will not carry a resounding clout when you enter the fray on corporate governance, even if you have a good argument to make. You will wind up weakening your position. I appreciate the fact that you guys are here. Obviously, no-one sitting around the table would dispute the significance of protection of the environment in the next century. Everyone makes decisions about what is the best way to advance the cause and everyone lives with the consequences of the decisions they take.

CHAIR—I guess the issue is whether environmental reporting ought to be compulsory and whether it is appropriate to have it as part of an annual report, which is essentially a report of the financial health of the company to the shareholders—it is not a report to the government. You highlight benefits for government or benefits for the community, but an annual report is essentially a report to shareholders on the financial viability and performance of a company and is a fairly precise document because of that. It has to do the financial analysis with a fair degree of precision, perhaps more so than environmental reporting. I am just wanting your comments on that, the fact that you are not able to be as precise in environmental reporting as you are with financial matters and the fact that the document itself is a financial document, not an environmental document.

Mr Rattenbury—I have a number of comments there. First, the annual report is a good time to do it because it is the one document that summarises where the company is at for a year. It seems like a good place to be reporting on where a company is at environmentally. I think, as we have highlighted in our submission, there are significant economic issues attached to environmental performance. Whether it is at the positive end by reducing inputs, energy usage, whatever, a company stands to basically increase its bottom line by improving environmental processes, and there are numerous examples that I am sure our industry colleagues could share with us of companies that have made profit advancements from doing their environmental things.

The negative end of it, of course, is the potential for breaches of laws, fines, being sued and that kind of thing. In our view, that also has an impact on the financial bottom line. Shareholders need to be informed of those things.

CHAIR—Isn't that covered by the requirement to report on any material matter that affects them?

Mr Rattenbury—It may well be, but I think it is valuable to make it far more explicit. It is an area of increasing likelihood where companies are going to run into trouble.

Ms Richter—Can I add some comments to that? I think that the annual report is not exclusively for the shareholders to examine. It is something that is becoming a very public document. Communities, stakeholders such as Greenpeace, have a right to know what corporations are doing in this area. I think in this whole area of environmental reporting they have taken in the larger global context of what is actually happening there. The environment was considered to be very much a free good, and what we are seeing now is a movement towards internalising that free good so that it becomes a cost, either to the company or to the community depending on how that line is drawn.

Issues such as emissions trading are going to be very big on the agenda and will change very considerably the practice of some of the very messy or large corporations which impact largely on the environment. That is the other side to the equation. Also, we are here arguing a principle of accountability and public disclosure. We are looking not just at the issue of reporting what is right but also at the principle of environmental performance, which is as important as financial performance if you look at issues like the triple bottom line accounting principle. It is certainly something that is getting more coverage, more leverage with good corporate citizens who are seeing the benefits to them if engaging in that kind of accounting process is widespread, not only internally but also externally.

Mr Rattenbury—I think also that there are a whole lot of companies out there that are not reporting at the moment. By being compelled to actually report, it has the potential of getting them to think about it. Perhaps they have not because of a lack of resources, lack of time or it simply has not occurred to them. By being compelled to sit down and report at the end of each year you can get them thinking. Again that comes back to what the potential opportunities and benefits are for a company if they have to think about it, identify potential cost savings, identify issues that are causing concern to their local community. They can go out and fix those and earn what the WMC calls a social licence in their neighbourhood. That presents tremendous opportunities for corporations as well.

CHAIR—You claim in your submission that government agencies are unable to adequately police environmental laws. Can you give any concrete examples of that?

Mr Rattenbury—Actually I can. I was just in the Environment Protection Agency in the ACT on Monday night, and we went through a series of documents there that are on the public record. We have a government owned corporation in the ACT that is frequently breaching its licence. The ACT environmental authorities had no capacity to do anything about that. Greenpeace was able to go along and read those records, and we are now going

to take that matter up and deal with that incinerator which is emitting high levels of dioxin pollution.

The point we were trying to make there is that a lot of the equivalent EPAs around the country simply do not have the resources to police every entity, and probably would not want to be policing every entity but, where a corporation is required to report, it would be motivated to do the right thing because it does not want to have bad things on its report. Where it is putting that information on the public record, groups like Greenpeace or interested local residents can also access the information and directly pressure a company. I know in some states there are companies that have a community liaison group, that sort of thing.

So that is the point we were trying to make there, simply that we cannot expect government to be crawling around the drainpipes of every single factory in Australia. We would not want them to do that. This is a way of assisting that process.

CHAIR—The example you gave, was that a lack of resources or a lack of legislative provision? They were obviously aware, or resources indicate there are things happening that they are not aware of because they have not the capacity to be out there examining whatever is happening. But you said this was a situation where they were obviously aware of it.

Mr Rattenbury—They were aware of it. I believe the Environmental Management Authority in the ACT is one organisation, and I think on a broad basis it has two or three supporting staff. The ACT is a small jurisdiction, that is a given, and they knew about this but simply had not been able to do it. We were sitting there with a calculator poring through these things saying, 'What about this? What about that?' They were saying, 'Well, we have not had a chance to look at that kind of thing.' That is a very small example of anecdotal evidence. Certainly there have been lots of reports written if you look through the environmental law journals and those kinds of things. Academics who have undertaken these studies frequently report on lack of government capacity to enforce the provisions. They are there.

To be perfectly honest, there is probably enough legislation around at the moment which, if it was fully enforced, would make environmental protection in Australia far better. We would have very little pollution if we fully enforced everything that is currently on the statute books. The reality is we do not, so there is definitely a problem out there.

Senator CONROY—I know you indicated you only saw it yesterday.

Mr Rattenbury—I did.

Ms Richter—I saw it a couple of weeks ago.

Senator CONROY—I was just wondering whether you are comfortable with it. Do you think it falls short, that there are other areas that need refining, or would you start again with it? ASIC, for instance, have a disclaimer on it, saying, 'Look, this is not ours but we support the promulgation of it and discussion of it.' Are you comfortable with how far this goes? Does it meet most of your objectives? I am just trying to get a feel for it.

Ms Richter—Yes. I think on the whole we were very happy with it, the guidance given to companies, but certainly I am prepared to speak to AIG to follow up on your suggestion to liaise further on the issue.

Senator CONROY—You have taken away probably about half of my questions.

CHAIR—Thank you to both of you for appearing before the committee.

Mr Rattenbury—Thank you for taking the time to invite us along.

[2.17 p.m.]

BARRETT, Mr Reginald Ian, (Private capacity)

CHAIR—We have before us your submission No. 5. Are there any corrections you wish to make to the submission?

Mr Barrett—No.

CHAIR—If not, I invite you to make an opening statement and speak to your submission to the extent you wish and then we will proceed to questions.

Mr Barrett—I have been a solicitor for 32 years and very much involved in company law matters. I have been a partner of Mallesons Stephen Jaques for the last four years and prior to that four years as group secretary and general counsel at Westpac. I had 20 years as a partner at Allen, Allen and Hemsley. I am a member of the CASAC and convenor of its legal committee since 1991. I was formerly a member of the predecessor body, the CSLRC. The submission I put in in July 1998 was sent in my personal capacity and I am similarly here in my personal capacity today.

In making this submission I chose to address only some of the items in the list the committee is looking at. I would prefer today to stick to those. There are really three conceptual areas involved, plus the question about a single director convening a general meeting, which I guess makes four. The first is the area of electing directors and the possibility of a form of proportional voting in that context. The basic position I would put there really has three elements: firstly, the process of electing company directors differs from other election processes, particularly parliamentary ones, in the fundamental respect that it does not involve the necessity of filling all the available places. If the members wish to leave some or all of the places vacant or if they simply do not approve of any of the candidates offering themselves then they can proceed accordingly.

Secondly, the decision therefore is not which candidates should fill particular vacancies of the given number, but rather whether candidate A should be elected, candidate B should be elected and so on. Thirdly, the election decision on each candidate should be one that is taken on the same basis as prevails for other shareholder decisions and which the statute itself lays down for the matter of sacking an existing director—that is, a majority of the votes actually cast in respect of the particular person concerned.

The second area or theme in my submission is one about disclosure, or more precisely the role and function of disclosure in the Corporations Law area. This goes to the items about disclosure on environmental compliance, disclosure of alleged breaches of the Corporations Law and the Trade Practices Act and reporting of suspected fraud and the like to the auditors.

Taking the more general issue first, I find it difficult to see why organisations which happen to be companies under the Corporations Law must disclose aspects of their social behaviour and legal compliance that other bodies do not have to disclose, whether they be foreign corporations doing business here, statutory corporations, government departments,

partnerships or whatever. If there is a case for disclosing matters of environmental non-compliance or alleged breaches of particular legislation—and I think that is a question in its own right—then I think it should apply to everybody involved in the relevant field.

The real objective of disclosure requirements for companies is to inform investors and creditors about what are essentially financial and commercial risks. Legal and non-compliance exposures will be reflected in financial disclosure where they have a bearing or financial impact whether actual or contingent. If the disclosure requirements we are talking about are really part of a broader agenda centred upon corporate social responsibility, that is an entirely different thing and a matter to be debated in its own right, which may well go beyond the particular areas of environmental Corporations Law and Trade Practices Act items.

The third general area covered in my submission is that of proxies and, in particular, the new section 251AA which, as I say in the submission, I believe is misconceived and has the hallmarks of something dreamed up by someone concerned with the recording of useless and irrelevant statistics merely for the sake of recording useless and irrelevant statistics. The section also has aspects that are simply unworkable.

The assembling and recording of information about the numbers of votes involved in voting directions in proxy forms lodged before a meeting tells nobody anything useful. Proxy directions become relevant and real only when the persons appointed as proxies actually vote and they will vote only if there is a poll, which presupposes that somebody decides that a show of hands should not be the final result.

When a poll is taken, it is true that proxy votes will be exercised, but so too will the votes of those present and, most significantly, the votes of members who are corporations who have decided to be present by representative. These often include significant institutional shareholders. So, in other words, the state of the voting directions in proxy forms, although it may be roughly indicative of a possible trend, is not conclusive of anything.

I think there is also the point, which I have tried to bring out in my submission, that you can never assume that, when a vote is taken, every appointed proxy will cast all votes according to the directions that have been given, or that all appointed proxies will vote at all. That does not connote anything sinister. There are plenty of good reasons why that may be so.

I think there may be two real issues here. First, the genesis of this provision, on my understanding, lies in some American system of reporting to institutional investors under the American corporate system which, while I do not know its details, seems to be based on assumptions that do not apply under our system. Secondly, there is a growing view that the lodgment of a proxy with a direction in it amounts in reality to a postal vote. This last point is one that may need to be pursued as a separate issue. If the growing perception is that proxy lodgment is really a system of postal voting, then perhaps direct postal voting or other forms of remote voting is an issue that should be taken up and dealt with as a possibility in its own right.

In conclusion, although I am not here on CASAC's behalf today, I can say that CASAC has forthcoming a discussion paper on shareholder participation, including meetings, which I am sure will cover some of these issues.

CHAIR—Thank you very much, Mr Barrett.

Senator CONROY—When do you think the CASAC report will be out?

Mr Barrett—It should be out within the next couple of months. It is a discussion paper at this stage, rather than a report.

Senator CONROY—I have had discussion with the CASAC people at Senate estimates about the differences. '. . . the hallmarks of something dreamed up by someone concerned with the recording of useless and irrelevant statistics merely for the sake of recording useless and irrelevant statistics'—I moved that amendment. How are you?

You indicated that CASAC are looking at shareholder participation. I am just interested in what you think a desirable level of voting is in terms of shareholder participation. In a federal election we have 95 per cent; in America it is voluntary, so we have less than 50 per cent; in England it is around 60 per cent. Do you have a figure that you would think would be a healthy figure or an unhealthy figure?

Mr Barrett—I do not think that I would see anything as healthy or unhealthy. It depends entirely on the matter at hand. There may be matters where a small turnout is quite acceptable and quite appropriate and others where you would expect that there be a greater turnout in participation. I do not know that there is any across-the-board benchmark that one could hit upon.

Senator CONROY—Would you then agree that the current level of voting is low by international standards?

Mr Barrett—I do not know the statistics, to be honest, on what the levels are.

Senator CONROY—We had some evidence yesterday that in the UK at the moment they are looking to try to introduce measures that will boost participation in these situations to 60 per cent. Do you think that is an admirable goal or an idiotic goal? You say in your submission that hallmarks have been dreamed up by someone—

Mr Barrett—I take your point. I do not know whether there is a desirable level. I would be inclined to think that 60 per cent, according to the experience that I have had, would be high.

Senator CONROY—Is more better than less?

Mr Barrett—I do not know that it matters.

Senator CONROY—Okay. I am asking some of these questions because I know that, in trade union elections in particular, my political opponents have frequently criticise the fact

that 10 per cent or 15 per cent of the union membership is all that ever bothers to vote and that union leadership is often unrepresentative because so few people bother to vote. Do you have any thoughts on that at all?

Mr Barrett—No, I do not.

Senator CONROY—If I can help you on understanding the thinking behind the hallmarks, it has been put to the committee over a number of years that this is one way to increase the level of voting. I would probably be someone who subscribes to the view that greater participation is better than less and therefore that this, as well as potentially other moves, would be about increasing that level of participation. I can only speak for myself, but I think the greater the level of participation the healthier a situation is. So if I saw a board that was elected in on 10 per cent of the vote because no-one else could be bothered voting, I would not necessarily view that as healthy—it may be that another board was elected in with 80 per cent. In terms of the thinking behind it, what I am certainly seeking and hoping to encourage by this as a first step—not the final but a first step in terms of shareholder participation—is for institutions, certainly, to increase their participation.

Mr Barrett—My real point is that lodgement of proxies is not an indication of the participation that actually occurs. If you were to say that there should be recording and some form of publicity about votes actually exercised and cast, that would, to me, be a more meaningful thing.

Senator CONROY—Is your criticism there the abstain box? I know others have criticised the abstain box and asked what that truly represents. Equally, we have had people come and argue that institutions, for example, may not want to vote against a proposal but they do not really want to vote for it either, so that abstaining is a conscious decision that reflects an opinion, as opposed to not being bothered.

Mr Barrett—Abstain is a decision that might well also be taken by a person who does not come at all.

Senator CONROY—I accept that it is not completely clear. I would possibly argue that greater transparency in reporting is needed to try and nut out those points, in terms of people who have just not fronted or who turn up and then on the floor decide not to vote. I accept that there are some difficulties in measuring those things. I would probably put to you that that is an argument for greater transparency and disclosure than even this has gone to yet. The US system, you may be aware, actually mandates the participation of many super funds and those types of funds.

Mr Barrett—Yes, they are required to vote.

Senator CONROY—Do you have any views on that?

Mr Barrett—That, to my mind, is a debate certainly worth having. It really goes to the core issue that you are concentrating on, which is the responsibility that goes with being a shareholder. My limited understanding of the American system is that there is something in the industrial laws that lies behind the requirement that pension funds exercise, if you like,

the voting rights of their employee members. If that is a force at work that should require voting, then, as I say, let us have that debate. If there are other forces at work that should make shareholders, particularly institutional shareholders who handle other people's money and are investing other people's money, take a proactive stance, then, by all means, let us have that on the table as an issue.

Senator CONROY—Without wanting you to pre-empt in any way the CASAC report, do some of these issues get canvassed in that report?

Mr Barrett—Not that particular one.

Senator CONROY—You might encourage them to include it, if it is not too late. It is certainly a debate I am interesting in pursuing. I do not think the committee has the time or the energy right at the moment—we have quite a heavy workload over the next few months—but it is certainly one that I would be interested in getting a range of different views on, so you might want to mention that.

Mr Barrett—I will certainly bring it up. I think it has probably missed this boat, but there might be another boat.

Mr ROSS CAMERON—Presumably, low voter turnout could, as a matter of logic, be an expression of support for the status quo and of satisfaction among shareholders.

Mr Barrett—A general lack of concern, yes.

Mr ROSS CAMERON—So, in a way, you could equally as strongly argue, it seems to me, that the lower the turnout the healthier the relationship between the shareholder and the board.

Mr Barrett—They do not feel any need to trouble themselves because all is well—that is certainly a possibility.

Mr ROSS CAMERON—I think politicians tend to have this feeling that power is not really worth having unless it is being fully exercised. I think it was Gandhi who said that the greatest expression of power was to give it away—that was his language. But not to exercise it may well be an expression of comity and trust in a relationship, rather than an expression of disillusionment or indifference.

Mr Barrett—That is always possible.

Mr ROSS CAMERON—Do you think it is the case that we now have the situation in our equities market where such a substantial proportion is controlled by institutional interests representing individuals, who themselves are saving as a matter of compulsion, so that this creates a kind of gap in the sense of ownership which the market experiences?

Mr Barrett—It is not necessarily a gap but a shift of responsibility. If I put my money into some unit trust fund or pension scheme, as I do, I am relying on the managers of that fund to do the best by me in an investment sense and I would expect that, where occasion

demands, that would include their exercising voting rights in a way which they see as necessary or desirable to achieve that aim of maximising the benefit of the fund.

Mr ROSS CAMERON—When you have such high concentrations of ownership or, in this case, management, responsibility, however you want to describe it, in a relatively small number of hands, does it create an impossible burden for those fund managers to be intelligently, rationally, actively participating in board decisions, from one AGM to the next, for the number of funds they have under their management?

Mr Barrett—I would think not at all. The system is such, on my understanding of it, as to enable them to be quite diligent in those respects. While one does not see them come to life all that often in a voting sense, it does happen; more particularly, I think it happens that they come to life before there is voting to bring influences to bear that shape conduct elsewhere. I think they have a better prospect of achieving that than I, with my 100 shares, do who might attend every meeting. They have much greater resources at their disposal and they use them, by way of analysts and so forth, to work out what the issues and pros and cons are.

Mr ROSS CAMERON—Finally, one of my frustrations as a consequence of holding a marginal seat in an environment of compulsory voting is that my fate is really decided by 12 per cent of the population who walk into the polling booth not knowing which way they are going to vote, not caring which way they are going to vote and people cast their votes on that basis. We have to spend time trying to ensure that our 'how to vote' is the top one on the ticket because people are voting on some superficial grounds. We fight with each other over the bunting around a polling booth because it is these sorts of incredibly superficial criteria upon which people are making judgments. Do you think there is a risk that, if you introduce an element of compulsion into shareholder participation, you will get decisions about use of capital, board appointments, or whatever, being made by people in effect against their will on those same sorts of superficial criteria?

Mr Barrett—I can see no place for compulsory voting or compulsory participation at all, I must say. It seems to me that one of the fundamental rights of a shareholder is to do nothing. It is his shareholding, his investment. If he wants to neglect, it is up to him.

Mr ROSS CAMERON—Thank you.

Mr Barrett—That does not apply to the pension fund with my contributions in it where I would expect a different attitude to be taken.

Senator CONROY—I want to follow up and expand on that a bit; I know it stretches a bit outside the terms of reference. There is a growing set of literature now that supports the idea that good corporate governance leads to greater economic return.

Mr Barrett—Yes.

Senator CONROY—Certainly, in terms of the argument about the participation by pension funds or the equivalent in super funds, I am interested and attracted to the idea of wanting to know why they are not pursuing good corporate governance structures within

Australian companies. I think they are possibly in breach of some of their SIS obligations by not actually participating in some of these decision making processes. Maybe they vote and lose or maybe they are not as concerned as I am. Certainly, I think there is a case. I think you can rightly make the case and have the argument, especially given the emergence of that literature which ties good corporate governance to good performance. I think there is a strong case to be made for the pension funds in particular to be active in this field.

Mr Barrett—If we are now foreshadowing the debate that I suggested might happen at some other time, there is certainly a point to be made in that respect. There is also a very interesting piece that I remember reading by one of the English law lords—I forget which member of the House of Lords it was now—but it was in the *Australian Law Journal* in the last two or three years. He put, quite strongly, the same sort of point of view from the perspective of simple trust law that the trustee of a superannuation fund or pension fund cannot do the sort of thing I described in what I said to Mr Cameron of selfishly sitting by and letting the investment take care of itself. He is obliged to take an interest and to pursue certain active steps which would certainly point in the direction that you are implying.

Mr ROSS CAMERON—Presumably he could take an active rational decision to do nothing.

Mr Barrett—Yes, he could do that as a legal matter.

Senator CONROY—That becomes a matter between the fund members and their trustees.

Mr Barrett—Correct.

Mr RUDD—I am just noting your comments in relation to disclosure rules on environmental issues. The heart of your logic seems to be, if you are going to have it, refine it so that it is explicitly linked to the financial impact on the company concerned. Is that a fair summary of your position?

Mr Barrett—That is one possibility, yes. Disclosure in the corporate field really is about financial impact aspects. That is not to say that there should not be a wider debate about corporate social responsibility and the need for corporations to show themselves to be compliant or non-compliant with environmental laws or how they invest in alcohol, tobacco, or whatever it might be. There is a whole moral ethical values regime that companies certainly are not exempt from but to my mind does not play a part in the reporting regime as it is. We are talking about a new and different regime if we are embarking on that sort of thinking.

Mr RUDD—We have had three schools of thought presented to the committee on this question. One is that it has no place at all. The second is that it actually provides a degree of consciousness raising with directives about the general environmental responsibility. The third is somewhat of a logical halfway house, which is, yes, consciousness is raised, but particularly focused at the same time where there is a financial penalty, either actually or potentially arising as a consequence of a particular form of environmental compliance or non-compliance by the company concerned.

In terms of the overall conceptual architecture of the Corporations Law, my own thinking kicks in that direction a bit at this stage because it seems to be broadly logically consistent if the other environmental regulatory burdens are being carried at the same time by other arms of state and other elements of the overall legal machine with which companies must comply.

Mr Barrett—Yes. I am not sure what the question is.

Mr RUDD—It was not a question; it was an observation. The second question goes to a different aspect of your submission which is on the suspicion of fraud point. I do not know whether Senator Conroy touched on this. In some respects, it is partly analogous to the discussion just now on environmental reporting—that is, there are already bodies of law which govern this behaviour and why, therefore, dump a new burden on directors and company office holders in this respect? I suppose the countervailing logic would be this: with public companies in this country, you are dealing with a huge bucket load of money which is not theirs and in terms of the concentration of the capital concerned and, shall we say, a healthy history in this country of some of that capital going missing, maybe we should look at some other correctives such as this. How do you respond to that?

Mr Barrett—My response is that I would not be at all opposed to a reporting requirement. In fact, in New South Wales, we already have a reporting requirement in the Crimes Act which says that it is an offence for somebody with information about the commission of a serious criminal offence not to give the information to the police or other appropriate authorities. I have had occasion more than once to advise clients—most recently a firm of auditors—of their responsibility under that part of the criminal law to bring to the notice of the relevant authorities criminal wrongdoing that they come across in the course of their work.

That concept is one that I think exists already and one with which I have not the slightest quarrel. My concern with the proposal as it stands is the destination of the reporting. To report to the auditor seems to me to be a dead end because there is nothing to say, in the existing law or in the proposal so far as I have followed it through, what the auditor is then expected to do. There are requirements upon auditors to report things to ASIC when they come across them in the course of their audit work and where they involve breaches of the Corporations Law, but this is a wider field of potential wrongdoing which may come to the auditor out of the blue because somebody gives it to him and therefore it is not in the course of his audit work.

The big question in my mind is: what does he do with it? Why is it him, and why do we not go back to square one and say, as the law now says, that somebody with information about criminal conduct must report it to the police or ASIC or some other appropriate enforcement authority?

Mr RUDD—Presumably, the conventional logic has always been that auditors are all decent and respectable chaps and throw this information at them and they will find something decent and respectable to do with it.

Mr Barrett—I suppose they would, after they had been through the difficult thing of working out whether their qualified privilege applied or did not apply and what their legal exposure was and so forth, which seems a sort of unnecessary link in the chain, I think.

Mr RUDD—In other words, your position is to essentially preserve a diarchy whereby you have the general requirements of the criminal law and the narrower requirements of auditors in conducting an audit retained?

Mr Barrett—Yes, on the wider front I suppose this is part of my general approach which says that companies and conduct within, and in relation to, companies is no different from a whole range of conduct in society.

Mr RUDD—Okay, thank you.

CHAIR—Let me ask a question about the issue of voting for directors. I note your opposition to a proportional representation voting system which I assume is, as you say, similar to the Senate provision. But what about a system of either preferential or first-past-the-post voting where you cast a preference for all the candidates for directors' positions rather than having them being put up individually and voted on individually? In earlier submissions the point has been made that this means that there are potential candidates for directors' positions that may not even get considered because of this voting one by one rather than for the group en masse.

Mr Barrett—Taking that last point first, I think that any system whereby certain persons were elected, then the vacancies had run out and further candidates simply were not dealt with at all, would not withstand challenge. I think that that would be quite susceptible to being upset in legal proceedings. The case in point was the case of Brettingham-Moore in Tasmania in the sixties where it was said that that sort of thing would not work but where the particular situation was saved by the fact that the meeting had also passed a resolution at the end saying that the ones who had not been reached, were not wanted—it had dealt with them in some way so that everybody had been dealt with.

One of the fundamental principles must be that all candidates are before the meeting for decision, and there are ways that you can do that other than the sequential one by one. You can put everybody on a single paper and have voting—if there are four candidates—one, two, three or four, as the voter wishes. I am sorry, having said that, I have forgotten your earlier point.

CHAIR—What system would be best to avoid this voting one by one? Obviously, if we want to avoid the proportional representation system which you certainly say is unsatisfactory, and I would probably accept is unsatisfactory, what system can be used to ensure that all candidates get voted upon rather than just the first one or two?

Mr Barrett—I think the one that I had begun to outline there would be one, and I am not suggesting it is the only one, where if there are four vacancies and six candidates you put six names on a paper and each shareholder can cast all his votes for or against, or partly for and partly against one, two, three or four, or none. I say some votes for and some votes against because there are shareholders, of course, who are beholden to the instructions of

others and they may need to split their vote in that way. That is recognised by the Corporations Law as an acceptable approach on any poll, that you do not have to cast all your votes and, of those you do cast, you may cast some for and some against. So it is really just the translation of a one by one onto a paper that has, in my example, all six candidates on it.

Senator CONROY—I am just going to shock a few of my colleagues here who know me reasonably well. You mentioned earlier that you felt the environmental questions should be outside of the strict financial sphere—and I cannot quite remember the term you used. There is plenty of economic theory that would define public goods as free but say that the problem with free goods is what they call 'free riders' and therefore people often abuse what is free. What Greenpeace—that were here before you—certainly argued and what other environmental groups would argue is that what had been external free costs are now being internalised. Therefore, it is perfectly reasonable for issues that do have an external cost that is now being internalised be included at this point.

Do you have any views? I guess it is almost a philosophical point in that this is an issue which value judgments have been exercised that are beyond just a simple financial judgment. It is a value judgment that it is outside the financial sphere and there is a change in value judgment being made in the broader community to internalise some of the costs. For instance, the cost of the smoggy air is being borne by everybody and people are being made to internalise that cost. So there is a shift taking place in the broader community. Sometimes people are winning the argument, sometimes not. I am usually on the side of the timber workers in this argument so I am not advancing it with my personal view. But I am just interested if you have any views on that because you draw a fairly black and white line of what you felt should be in. In my experience, the black and white lines are dictated by value judgments that are not the province of strict financial values. They underlie what you want to put into strict financial judgment but they are changing.

Mr Barrett—I am not sure that I follow all that, to be honest.

Senator CONROY—Sure.

Mr Barrett—I am not sure that I can help you much with it. I did not want to suggest there is a black and white line. I wanted to suggest rather that there is an appropriate province of corporate disclosure and a separate, but equally appropriate, province of general community disclosure. My own inclination is that, except to the extent that the matters we are discussing have some financial impact of the kind that becomes reflected in accounts, then it does not fall within the corporate disclosure concept but rather in the broader community disclosure concept.

Senator CONROY—I probably have not explained myself well enough.

Mr Barrett—I think the shortcoming is mine.

Senator CONROY—I am sure it is mine.

Mr ROSS CAMERON—I did have a question but after Senator Conroy's little adventure there I am completely thrown. I am happy to respond to Senator Conroy's suggestion but I suggest that may be something we should do outside without further taxing Mr Barrett.

Senator COONEY—Can I just take on the thoughts that were coming from Senator Conroy? Your submission is, as I say with great respect, a great submission. It sets out the issues, but it reflects on this concept we have of companies and company laws. The Corporations Law, which is a set of principles and rules set down by either the Parliament or the judges over the centuries, comes from a particular context, it seems to me. In a firm as big as yours you would have separate sections, I take it—the environment section and others. You say they are separate issues which may impinge on each other. You may be the greenest of green firms but nevertheless the concept is that companies ought to be kept within this tight parameter.

If we want a cultural change, if we start considering companies not simply as the vehicles whereby the economy of the country is carried out but whereby there is also a social and environmental concept, isn't it time to mix those two? How would that do violence to the Corporations Law in any event if you do say we have to look at what the company is doing vis-a-vis the environment? Ask the question: has it made any contribution to the teaching of law at the university or to legal centres as it has done in America? Wouldn't that give a new approach and perhaps energise the economy and the life of Australia? At the moment it seems a bit behind. I was quoting this before: Barry Jones wrote a learned article yesterday saying we are not up with the latest in things because we are followers. Given your vast experience, is there any possibility of that being done through the Corporations Law, or are we set to the point where we say no?

Mr Barrett—No, by no means set. In fact, I said earlier—I think before you arrived—that I can see a very proper place for a debate about corporate social responsibility, about the wider expectations upon companies over and above the traditional areas of, if you like, return on investment. I would not at all suggest that the law should remain in a straitjacket. What I would suggest, though, is that the couple of items that have been picked out here by way of environmental compliance and alleged breaches of Corporations Law and Trade Practices Act are in the nature of bits and pieces that form small parts of that much wider debate. I think it would be preferable for the wider debate to occur and for a more systematic, if you like, set of principles or rules—call them what you will—about non-financial matters and non-financial disclosure to be formulated.

I had occasion a couple of years ago now to do quite a bit of work on the literature involving corporate social responsibility. It was interesting to see how it waxed and waned in different places at different times with the theme always bubbling to the top that it is the financial interests of the shareholders that are important.

Nevertheless, a growing perception, inevitably, that companies have a wider role to play—and, interestingly, that the more effectively they play the wider role the better it turns out to be for the bottom line quite often—I think goes to a point that Senator Conroy made earlier, that principles of good corporate governance can reflect enhanced value. So I think

perceptions of greater corporate responsibility in a social sense can reflect in enhanced value, so everybody is happy.

Senator COONEY—The other side of the coin I wanted to ask you about is this issue—which you have dealt with well, if I might say so—of the effect of misprision of a felony. It is the other side of the coin because, again, it arises from this concept that everything has to be narrowed down and blocked off by law because directors and people concerned with companies are liable to do the wrong thing—which again seems to indicate a mean sort of culture and a mean sort of spirit in the whole thing. If the companies were being directed as you would like, you would not have this concept there. This seems to indicate that within the corporate culture there is a suspicion of readiness to spy on each other.

Mr Barrett—Again, that is a wider social issue and there is nothing different. In fact, I saw a decision of the New South Wales Court of Appeal the other day where one of the judges was making the point in some criminal appeal that there is no difference between tax fraud and social security fraud. Fraud is fraud and has to be dealt with as such. I think that is the type of message that I get here. Fraud within companies is no different to fraud elsewhere, and fraud has to be dealt with as fraud wherever it is.

Senator COONEY—But do you want that spying mentality to flourish?

Mr Barrett—I think your reference to the misprision of felony area is the apt one. We do have in New South Wales, as I said earlier, a positive requirement to report people to the police if we are aware that they may have committed a serious criminal offence. That is the law. It was controversial when it was brought in in the early 1990s and it is still being worked through in some areas of it, but that is a legitimate legislative approach if a particular parliament wants to take it.

Mr ROSS CAMERON—On that point, we have 1,000 public listed companies, we probably have 4,000 company directors. In my experience—and we have had this discussion about fraud, about dishonesty and about what provisions ought to govern directors' behaviour and duties of disclosure—the reality is that deliberate dishonesty among public company directors is a tiny fraction of public company directors.

Mr Barrett—Probably a tiny fraction of the community at large, too.

Mr ROSS CAMERON—It is not like we have an avalanche of dishonesty out there that we have to rush around and somehow pen in. We are talking about very marginal, uncharacteristic, atypical behaviour.

Mr Barrett—That would be my appreciation of it, yes.

Mr ROSS CAMERON—I think, for what it is worth, since we have now had two questions on this idea of internalising external costs, the answer to that question in my opinion is that there are plenty of times where risk-taking entrepreneurs actually save the public massively in terms of the environment. For example, the M2 motorway takes 27 sets of traffic lights out of a commuter route between Baulkham Hills and Sydney. There is a whole range of people who do not use that motorway who benefit from that innovation.

They are not paying Abigroup and Obayashi a weekly premium for the benefit of a cleaner environment.

So the problem is that if you are going to start taxing so-called free public groups, it has to work in both directions and it is simply not feasible to do that. I likewise share Senator Cooney's view that yours is an excellent submission and it has definitely benefited the committee greatly.

CHAIR—On that note, if there are no further questions, can I also thank you, Mr Barrett, for your submission and for your evidence before us this afternoon and your answers to our questions.

Proceedings suspended from 3.04 p.m. to 3.16 p.m.

TURNBULL, Mr Christopher Soren Shann, Principal, MAI Services Ltd

ACTING CHAIR (Mr Cameron)—Mr Turnbull, we have a slight moveable feast in terms of the members but thanks very much for your presence throughout today and yesterday and for your several submissions to the committee. I think you are pretty familiar with the protocol. Do you wish to begin with an opening statement?

Mr Turnbull—I am a member of many other associations which I am not here to represent. By way of a background for the evidence I am giving, it may be useful to note that I am a founding life member of the Institute of Directors and a fellow of the Securities Institute, a fellow of the Institute of Management and the senior fellow of the Company Directors Association.

I started my business when I was at Harvard Business School in 1962 and in the next 10 years I was involved in takeovers working with Gordon Barton. I did a couple of dozen acquisitions learning about how boardrooms work and the power game. For the next 10 years I worked in start-up companies and for the last 10 years I have been involved in writing about corporate governance. In 1975 I started one of the first courses for company directors in the world through which I pioneered the study in teaching of corporate governance in 1975. Some of the evidence I am giving is in that course which thousands of Australians have done and so it should not be unusual information for many Australians.

The purpose of my submission is really twofold in the terms of reference. It is headed self-governance and it is focused on two of your terms of reference: the methods of voting and the corporate governance board. I am happy to take questions on any issues within or without the terms of reference, as happened before.

The context of the proposal of getting self-governance on the agenda is to look at IFSA's evidence. They had 63 members. None of those members vote for politicians. They represent, they said, nine million voting Australians who vote for members of parliament. Those 63 members represent a big concentration of power and influence. Most of those members are themselves listed corporations and so you have a cross-linkage of self-reinforcing interests.

I say that in the context of looking at introducing self-governance in a bid for economic democracy. Mr Easterbrook gave evidence that those institutions represent about 60 per cent of the ownership of the 1200 listed companies but their voting is only about one-third. IFSA itself gave evidence this morning that they control about 40 or 50 per cent of all our listed companies. This is a major concern in the UK where it is more concentrated and they see that they really do not have a political democracy if they do not have economic democracy.

Zhu Ronji the present Chinese Premier was in Australia in 1992 and at a public meeting I asked him the impact of privatisation on his political system. His answer was that you cannot get political democracy without economic democracy. According to the Chinese criteria we do not have political democracy in Australia. That is the context in which I introduce the idea of self-determination at the local level of corporations and self-governance.

In my submission to you I had four criteria for self-governance. The stakeholders be they shareholders or other parties need four conditions. One is that they must have the information on which to act and, listening to your submissions over the last two days, everybody is obsessed with information. We have too much information.

It is little use unless the other three conditions are met where people have the will to act, the power to act and the capability to act. You need all four. Whenever you are having submissions about more information, you want to ask: 'What are people going to do with it? Do they have the will to act and if they do have the will to act, do they have the power to act'—they may just be a minority on the board or a minority shareholder—'and then do they have the capability to act? What processes are there in place?' This is the basis of my submission to the UK Company Law Review by the Department of Trade and Industry. I made a submission to them dated 30 July this year which I think has been distributed. Has that been distributed?

ACTING CHAIR—Which one?

Mr Turnbull—It is the submission to the Company Law Review, the Department of Trade and Industry, dated 30 July 1999. It has been distributed to members. They go outside your terms of reference but are still relevant to the two issues that I would like to speak to. I believe there are officers of the Treasury who have gone to England to find out about what is happening with corporate governance overseas. In my submission to the UK Government I said that, because they are not based on a self-governance framework, it will result in their law review process failing to meet its objectives as is currently occurring in Australia. The objectives are, of course, to have greater equity, to maximise competitiveness, to minimise detailed prescriptive law and regulatory complexity and to minimise government supervision, costs and the involvement of the courts. I will read one paragraph from my submission:

> The establishment of self-governance processes provide the only way to simply regulate complexity. Any attempt to simplify the law will fail to achieve its objectives to both protect stakeholders while at the same time make business more competitive unless a self-governance strategy is adopted. This is because business has become too diverse, complex and dynamic to be regulated by direct, simple, static legislation, regulation, rules and codes. Existing corporate codes are misleading, misinformed and misnamed as explained in Appendix 1.

Appendix 1 will be published next month by the Institute of Company Secretaries which says that corporate codes are misleading.

I would then like to move on to the specific terms of reference of your voting system. In your terms of reference it is described as proportional voting and there are many ways of proportional voting. In my submission I am supporting a technique which is mandated by law in some US states called cumulative voting. Cumulative voting is called cumulative because you can accumulate the votes you have on to one or more directors. If there are 10 vacancies on the board, one share gets one vote for each vacancy. It is one vote per share and you have had evidence and witnesses speaking against this because they believe that it is not one vote per share. I think you will find there is evidence from the Shareholders' Association and the IFSA saying, 'We do not like it because it is not one vote per share.' Cumulative voting is one vote per share. Another argument being put forward against it—

ACTING CHAIR—Sorry, it sounds to me like ten votes per share.

Mr Turnbull—Yes, it is. You accumulate the vote. You get 10 vacancies and each share gets 10 votes. You can give one vote to each of ten directors or you could give five votes to one director and five votes to another or 10 votes to one director. You can distribute your votes amongst the slate.

ACTING CHAIR—But every share—

Mr Turnbull—Has one vote per share per vacancy. You have to add the words 'per vacancy'. There is some evidence given to you that we have to be internationally competitive. This is mandated in some states of America. In many parts of Europe, they have sliding scale voting; they do not have our Stock Exchange requirement of one vote per share. There is no radical thing that would scare the horses or investment money from overseas in this idea.

The Stock Exchange understood this cumulative voting in their submission to you and one of their arguments against it was that it can give representation to minority interests whereas a director's responsibility is to the company as a whole. That is the very reason why you need it, because 20 to 30 per cent of all listed companies in Australia, and 20 per cent of the top *Fortune* 500 companies, have a control group. They are in control of electing all directors for the minority. It may only be 20 or 30 per cent. You heard Mr Easterbrook's evidence that a shareholder with 16 per cent could easily appoint all directors of a board, and that is illustrated in the overhead I would like to show.

Overhead transparencies were then shown—

Mr Turnbull—You might have 30 per cent of the shareholders voting but of that 30 per cent you might only have 16 per cent, representing 51 per cent of those present and voting, who control 100 per cent of the board. You get 49 per cent disenfranchised. This control group could be a Coles Myer control group where they are dealing with related party transactions. It could be Qantas, where you have a competitor controlling it. It could be Caltex or Coca-Cola Amatil. Many of our listed companies have a control group with related party transactions and there is no protection. If you are looking for self-governance and self-enforcement, there is no way for these people to have the power to do anything about it. They do not even get represented.

ACTING CHAIR—Did you say that 49 per cent did not vote?

Mr Turnbull—No, they vote, but as it is first past the post, and each director separately—

ACTING CHAIR—Sorry, I misunderstood you.

Mr Turnbull—It is a dictatorship. Lord Halsham calls it 'the dictatorship of the majority.' If you are after a self-governance strategy where you want the private sector to have its checks and balances and resolve its differences in the private sector rather than have ASIC going in or the law requiring it or the law courts, you need to give voice to these people down here.

A classic case was Campbells Soups which, as a white knight, came into Arnotts. A friend of mine and of the Arnott family was on the board, had 15 per cent of the shareholding, but he was there at the grace and favour of the control group. The control group, Campbells, had related party transactions. How was he to protect the family interest? He could not because if he created waves he would not be on the board. He was there at their grace and favour. He might have had the information to act but he did not have the will to act, the power to act or the capability to act. He would have the will to act if he had this cumulative voting because his position on the board would be safeguarded to look after the interests of the company as a whole.

There is a thing called a control premium. I do not know if members are aware of what a control premium is, but those in control get a higher price for their shares. Why do they get a higher price? It is because they get greater benefits. What we are on about is equity and efficiency. Those in control pay millions of dollars for this control premium because they extract value out of the company which the minority shareholders cannot get.

The purpose of much of the takeover law is to distribute that control premium as equitably as possible. We have a very complex takeover law. However, a much better approach is to minimise the control premium by increasing equity. There are two ways of doing that, one is by cumulative voting and the other way is to have a corporate governance board.

ACTING CHAIR—I have not quite got the technical aspect of your cumulative voting in that if every share gets the opportunity to vote once for each vacancy, then surely that is simply pro rata reflected throughout majority share ownership. How does that present a benefit to minorities?

Mr Turnbull—Because if you have a 10-person board with 10 vacancies at elections and you have a 15 per cent interest, as in Arnotts, and they accumulate all of their votes to one person, they can always certainly get one person elected to be a loyal opposition.

Senator CONROY—Is it just the highest 10 vote getters then?

Mr Turnbull—No.

Senator CONROY—Or do you have to pass some threshold to be declared elected?

Mr Turnbull—It is like proportional voting.

Senator CONROY—So there is a quota?

Mr Turnbull—Yes, if you like, there is a quota. There is a formula down the bottom there in small print which defines the quota.

Senator CONROY—I am a pedant on voting issues at a poll.

Mr Turnbull—I was brought up in Tasmania, with my father being the first Independent elected to the Senate, so I was brought up on these voting systems. Hence, I am advocating spreading democracy around the corporate world a bit.

This is a strategy of self-regulation. It is to give some members of the board the will to act independently of the hegemony of the control interests. Somebody mentioned that you might not have had the Yannon affair if Philip Bowman had the power to call an EGM. But nobody wanted to call and EGM because they would not get nominated.

I agree with the evidence this morning of my colleague and friend Ted Rofe who says you do not want just anybody being put on a board. You need some preselection, but the preselection process does not stop you. A corporate governance board actually provides a mechanism for preselection by having an inside, private, confidential assessment of directors. That is impossible with a unitary board where they are judging themselves. You have unconscionable conflicts of interest.

I am just trying to answer the negative arguments against what is called in your terms of reference, 'proportional voting'. I am talking specifically of cumulative voting which has been tried and tested in the United States. It is state law in America and the majority of states had it at the turn of the century. Management gradually got control but it did not suit management because they could not control the people who were going to hire and fire them and pay them their salaries. So management said, 'Let's incorporate in a state where they do not mandate cumulative voting. In that way we can control our external directors who are going to decide, hire and fire us, and give us our great remuneration. We want to make the judges captive to us.' So they changed their place of incorporation to those states of America.

I have a graph showing you how gradually it diminished over the years as different states competed to be more management friendly. But your constituency is those millions of Australian who are feeling disenfranchised and who want to join some minority party or One Nation party because they feel they are not involved in the economic activities of the nation. I do not want to jeopardise competitiveness in any way so therefore I am suggesting that here is a way of enhancing competitiveness by having a loyal opposition internally, privately, to create the checks and balances and to sharpen people up to get the best people possible.

One of the arguments put forward is, 'The board has to be a team. We cannot have people blocking the vote inside the boardroom. Goodness gracious me, how would we handle that?' It is like being a member of your party, you have to be a good team player and you cannot afford to rock and boat. But the same people who say they need a team then promote these corporate governance codes. You have the blue book here. And the Australian Shareholders Association is saying, 'We do not need a corporate governance board because we have an independent chairman or independent directors'.

The assumption is that if you are independent you will be a loyal opposition. My submission to you is that on a unitary board you cannot be independent. The test of independence is having information independent of management to assess them, having the will to act, the independent power to act, and the independent capability to act. It is a misnomer.

There is a lot of rhetoric. The government is at fault with its rhetoric. Treasury puts out press releases about the Management Investment Act. It says we have independent directors. Yes, there are external directors, but they are not independent. Those directors are there at the grace and favour of the control group or shareholders. They cannot act for the minority shareholders and protect their interests. So you are creating more work for the ASIC and more disenchantment.

This reliance on independent directors is inconsistent with saying, 'We want a team.' The reason you want an independent is so he or she is not a team person. Really, what they want is someone they can call independent but who is not going to rock the boat. So you cannot get effective self-governance. There is inconsistency. That is why in my article which I gave to the Department of Trade and Industry in London I said that the corporate governance codes are misleading, misnamed and misinformed. I will share with you why that is.

Overhead transparencies were then shown—

Mr Turnbull—This is just to show you what happens overseas and that there is nothing new in the world. This is where I found the ideas. This is the Anglo system of a unitary board. This is the Dutch and Indonesian system where they have a supervisory board with no employees. This is the German system where the employees elect half the supervisory board. When people discuss this corporate governance board they immediately think that they do not want employees on the board. It is a knee-jerk reaction: throw it out; find arguments against it. You will find in some of your submissions this knee-jerk reaction saying,'We do not want that.'

I know the chairman of the Institute of Directors believes in this type of model. The French—this is what I am on about—have the cours des comptes, state owned corporations. It is like an independent audit committee, a parallel board. It is not vertical or hierarchal, but parallel. Here it is over here, the optional French. In Spain, it is mandated to have this watchdog board in parallel. It is not hierarchal like these boards. When you hear about all these OECD or World Bank codes and international corporate governance network codes, they are covering all these types of differences.

Why is a unitary board a problem? It is because they have absolute power to manage their own conflicts of interest and, as politicians, you know about power corrupting and absolute power corrupting absolutely. All these powers we have up here are not related to adding value for shareholders. All those powers have the potential of allowing directors to siphon value away from shareholders. The role of the board is to add value. By moving some of these powers to the corporate governance board, you are not taking away at all the power-adding value. You are simplifying directors' jobs and duties and their liabilities and it is very much in the interest of the directors.

I have installed this system twice to raise money in start-up companies. Only rogue directors and those who are ambitious for absolute power would vote against this idea. Your colleague, Ms Bishop, would say, 'How about the small mining companies? It is an overhead; it is bureaucratic, et cetera.' I have employed these corporate governance boards in Australia in very small companies. They are too small to get listed. We had 60 investors and a board of five people. For the Jac tractor company, which is mentioned in the evidence, of

those 50 investors, 30 were in the United States. We ran out of money and we had to have a rights issue to raise more money. How were we going to get overseas investors to have the confidence in investing in an unlisted public company where the directors had their snouts in the trough paying themselves fees?

That is when I set up and changed the constitution—you do not need any change in the law to do this. I think some of the people that are voting against it may say, 'It might be good for some companies, but it should not be mandated.'

Senator CONROY—If we do not need to change the law to do it, why don't more companies do it?

Mr Turnbull—Because directors are in the power game. Chief executives spend a whole career climbing up the tree, learning the politics of getting and concentrating power. You do not cut off the branch of that tree, and it increases your discretions.

I am a company promoter and I have promoted a number of start-up companies—Saxonvale Vineyards is one of my start-ups; Barwon Farmlands was another. Both were later listed on the stock exchange. I did not want to run those companies—I started off as a company director—but I wanted to hand them over to people better than me, otherwise I would have reached my level of incompetence.

I am coming at this from a different angle from the Shareholders Association. I am coming out of the boardroom as a company promoter, as somebody who is interested in trading value, adding wealth and making Australia internationally competitive and raising money. People will not volunteer to give up power.

ACTING CHAIR—Your thesis must be that the inherent efficiencies of the market in a process of competitive natural selection, which concentrates resources in the best performing models, are constantly being defeated around the world by the avarice and will to power of company directors. Your model is better than the prevailing unitary model, but it is constantly defeated by the avarice of directors and executives.

Mr Turnbull—Not always. The Italians introduced this idea of a watchdog board just two years ago. It is institutionalised in company law in France and Spain. There are models. I have a couple of the submissions to the Department of Trade and Industry in England where they have surveyed the critique of the Anglo system of unitary boards. Sure, it works, but it could do much better. As politicians interested in looking after your voters and your constituency to avoid the alienation, you want to do much better for them. You have nine million people out there whose voting powers are concentrated in 63 institutions that do not vote you in. They may help your party coffers, but they do not get you elected, even in your marginal seats.

ACTING CHAIR—So are you really saying that you would prefer the Italian economy to the Australian or the American ones?

Mr Turnbull—No, not at all. I think we ought to create our own world's best competitive economy and lead the world. We did not design the system we have and things

have changed. In England they say, 'Look, we got to inherit the system; it is part dependent of our heritage.' Corporations were invented by the English as a way of privatising empire building, not for accumulating capital, and not for providing limited liability. It was a licence to govern foreign territories. So corporations were designed for political purposes, and this is why we have political problems with them. They need to be redesigned.

ACTING CHAIR—I will ask Senator Conroy to have a go in a minute. My recollection is that the corporation emerged as a kind of ingenious way to raise capital, spread risk and avoid personal liability. It seems to me that the unitary board has functioned pretty effectively in terms of building quality of life in western capitalism over a century and a half or so. Hasn't it done pretty well so far?

Mr Turnbull—Yes. We all say it has done well, and so do the critiques of it. But you can do much better politically and competitively. Why accept second-best just because it is there? The conflicts of interest that directors have are quite unconscionable. As a teacher of company directors for 24 years, the reason they do the course is not to add value, but to make sure they do not get sued or personal liabilities. I show them the ethics of a court of law where you separate out the role of the accused from the judge, from the law-makers and the jury. That is an ethical structure.

Then you look at the structure that we have for companies. If the directors have a conflict of interest, and do not have a safe haven like the business judgment rules you are yet to have, what do they do? They appoint the auditor, the judge. They appoint the independent experts that advise on GIO and so on. The accounting standards are set. In America, there are reports that the round table even manipulates the accounting profession. Accounting standards are suited to chief executives, so they do not recognise options as a cost. There is evidence of that by Bob Monks who will be out in Australia later next month.

When the financial reports are given to the investors, who are the jury, they decide if they are going to vote the directors in or out. Everybody thinks accounting things and accounts are a precise science. They are not. It is very subjective, and the directors have control within accounting standards. Directors have the power to allocate costs, revenues, determine the value of stocks, debtors and non-current assets, and select accounting policies within or outside the standards.

So the directors are setting and marking their own exam papers. That is just an unconscionable conflict of interest. We as directors do not want that. We would like it separated to protect us, to simplify our role so we can concentrate on adding value and making wealth for the country. We are burdened with all those conformance duties rather than performance. What directors should be about is performance. We are burdened with all the conformance and conflicts of interest, which was on the last overhead about the unitary board.

So that is the problem. It would be quite unacceptable to have those conflicts of interest. The perception is that directors do not have the best reputation in the community. The corporate governance board solves the problem—and here in the company I set up what I call a corporate senate—by having control of the conformance roles, not adding value. You do not have to be a whiz-kid or MBA; you just need to have some low cunning and

commonsense. You might never meet. You appoint independent experts, you control the auditor and you would not need to clutter up the Companies Act with all those procedures of controlling the auditor, changing the auditor and going to the ASIC, all the business of independent experts and the listing requirements, and having meetings of shareholders to approve changes of capital structure.

You could have it much quicker and faster by delegating those things to the independent corporate governance board. The shareholders still elect both. Because these are elected by cumulative voting you have people who could blow the whistle privately. They do not have to call an AGM, they do not have to go to the ARC, they do not have to go to the police as other witnesses have been telling you. They can have a little private conversation with the corporate senator and say, 'Hey, there is a conflict of interest here. Our constitution says you have power to veto it'. You do it privately and quickly and it protects everybody's reputation. It is a win-win for all parties except rogues and opportunists.

ACTING CHAIR—I think we have the conceptual framework. Senator Conroy do you want to ask a question?

Senator CONROY—I do not want to get in the way of the flow because I know you obviously still have a few more things to—

Mr Turnbull—No, I think they are the only overheads I want to show. I also tabled an article published by JASSA, the Journal of the Securities Institute of Australia, seven years ago. It won a prize. It has these diagrams in it. So it is an idea that has been publicised in most professional journals. It is not a new or unheard of idea.

Senator CONROY—It would be fair to say that, despite it being in the field for seven years, it has not attracted a lot of broad support. Are there any other organisations, institutions or groupings that have picked it up?

Mr Turnbull—No. The answer is no. The credit unions used to have it many years ago as a way of checks. I may add that one of my interests is employee share ownership. A survey done of employee share ownership firms all round the world found that no employee ownership firm was sustainable unless it had a division of power—at least three divisions of power, not just the two I am talking about—so you do not have a situation where the Prime Minister can fire the Governor-General and the Governor-General can fire the Prime Minister in a work alone because the worker can fire the chief executive and the chief executive can fire the workers. You need a division of powers and checks and balances.

In Spain, the World Bank did an investigation of the work alone firms in Mondragon and found they were more competitive than the capitalist model. But when you show people this they say, 'It's more complicated', but what you are really doing is simplifying the individuals within the system. When you look at it on a screen like this you say it is complicated. It is an overhead, and you will find evidence and submissions. We do not want that. What you are really doing is decomposing decision making labour to allow ordinary people to achieve extraordinary results. That is what the World Bank study found in Mondragon.

Senator CONROY—You have sat through the last two days so you have probably heard all the arguments, and you may have even had a chance to read through some of the submissions. Almost every other witness has argued against the concept of a separate corporate governance board on the basis of the legal potential conflict. Do you believe the model you are advancing avoids the sorts of legal conflicts that others have put to us?

Mr Turnbull—I was not aware, in the evidence that I have heard and read, of legal conflicts. What I am aware of is that very few people understand the concept. They have not researched it thoroughly. My second formal submission to you makes the point that there are knee-jerk reactions: 'Let us find reasons for bagging this because it is a threat to our power and prestige because it means that the chairman of the board would not chair the shareholders' meetings.' The chairman of the corporate governance board representing the shareholders to hold the directors to account? Shock, horror! We cannot have that. So you have got to look at the power game.

You mentioned, I think, there are only 13,000 members of the Institute of Directors in Australia. You have got those nine million people out there and you have to see where the numbers are and where the votes are. So there has been a lot of misinformation, a lot of knee-jerk reaction. One of the submissions pointed out that it would reduce the control premium. They are quite right; it does. And they said, 'Shock, horror; this will reduce its value!' Only because it creates greater equity and avoids control groups using green mail to get greater control premiums. It is the very reverse. So there is a lot of alice in wonderland logic out there arguing against it from the state that, 'We do not want to change the system that we have grown up in and carefully honed our whole careers around to get power, prestige and influence.' I mean, you don't want that. You guys want to get rid of the Senate.

Senator CONROY—The conservatives are very strong supporters of the Senate. You made reference to the American situation where the accounting standards board were put under pressure by a supervisory board.

Mr Turnbull—No, not at all.

Senator CONROY—But there is a body that is above them.

Mr Turnbull—No, it is the business round table which has the chief executives of the major companies in America. John Reed, who was Chairman of Citibank and chairman of the business round table, sent out a memo to all his chief executives saying, 'Please use your influence with your auditors, your clients, to change the accounting rules.'

Senator CONROY—They were actually successful to the stage where the body that oversights the accounting standards board, I understand, actually threatened not to give them a pay rise because they had gone in the direction the directors did not want over the issue of the options.

Mr Turnbull—Yes.

Senator CONROY—The accounting standards board, you may be pleased to hear, stood up to them. But I was wondering if you could comment on the current proposal which is

slightly outside what we are talking about. There is a current proposal to introduce a financial reporting council to oversight and to fund, partially at least, our accounting standards board.

Mr Turnbull—My immediate knee-jerk reaction is negative to that. It is just more layers of bureaucracy and activity without accomplishment. I would go back to self-governance because I am sceptical of accounting standards per se because, within accounting standards, you can manipulate your profit by how you value your stocks or your debtors. Westpac had a loss of a couple of billion. It had audited accounts showing profit one year and, six months later, it had new management and suddenly a couple of billion were wiped off because they interpreted the debtors a different way. So it is quite arbitrary and subjective and you can have—

Senator CONROY—I would say AMP are doing that right now.

Mr Turnbull—They could well be doing that. It is quite arbitrary. You can manipulate the profits according to how you interpret the accounting practices. What you need is true independence. You cannot get independence with a unitary board where you are all a member of a club. You do not get nominated for preselection unless you beat the party line. What you want is an independently elected corporate governance board to provide those checks and balances and to increase competitiveness, reduce liabilities of directors and make their jobs easier and focus on adding value.

ACTING CHAIR—Your model proceeds on the proposition that a unitary board concentrates power, concentrates conflicts of interest and is therefore inherently corrupt. Would you differ from, for example, Mr Barrett's evidence before us that the overwhelming majority of up and coming company directors are honest?

Mr Turnbull—No, I do not differ. It is a matter of degrees of how you interpret honesty and how you do things. I write a monthly column on this and I make an example that, if there is a related party transaction and you are an external director, you ask for an independent adviser. That is why GIO had an independent adviser. It is a way for the directors to opt out of committing a view: they hire somebody, at a huge fee, to give independent advice that the takeover price is not fair.

So I would not say that the system is corrupt—I think very few are corrupt; I agree with Mr Barrett in that regard—but the system provides incentives for self-dealing. A lot of people have difficulty in identifying their own conflicts of interest: it is rarely taught what a conflict of interest is. There are your personal ones—the ones that I am talking about—and there are the professional ones with a company. It allows you to interpret things in a way which suits your own biases, and you do not have a loyal opposition to act as Pinocchio, for your conscience, to say, 'Are we really looking after everybody in the best possible way? Let's find a win-win way.'

ACTING CHAIR—Let me put this proposition to you. Francis Fukuyama wrote a book recently—he became famous for it—called *The end of history and the last man*. Then he wrote a subsequent one called *Trust: the social virtues and the creation of prosperity*. He then does a trust index for economies around the world. What he really seeks to demonstrate

empirically is that the presence of high levels of trust, both within organisations and between organisations, is one of the critical indicia for the generation of wealth as an efficiency criteria.

Mr Turnbull—I agree wholeheartedly.

ACTING CHAIR—My problem with your model—and thankfully for you your testimony is on the record and your submissions are on the record and my view is not necessary—is that, if I had loyal opposition inside a company I was running, I would sack him. When you have a small group of people fighting in an incredibly competitive environment against not just your external commercial competitors but this whole regulatory bureaucracy which we are imposing, you are going flat-chat to keep your head above water to generate your first dollar. If you want them to install inside the family camp a professional critic who is going to do nothing but demoralise the team and raise allegations of potential conflicts, my instincts would be to say to that guy, 'You may have a productive role to play in somebody's company, but it's not going to be mine.'

Senator CONROY—Are you talking about Coles-Myer?

ACTING CHAIR—You may say to me, 'Mr Cameron, you're one of these rogues who is trying to protect his vested self-interest,' but I am just saying that I am not persuaded by the cost benefit ratio on an instinctive response to your model.

Mr Turnbull—Think about it a little bit. You have used some emotive terms in your assumptions—

ACTING CHAIR—Some of your language is pretty emotive.

Mr Turnbull—Yes, I accept that.

ACTING CHAIR—'Absolute power breeds absolute corruption and the only way to avoid it is this dual model. The only people who would oppose it are rogues or people with things to hide.' That is pretty strong language.

Mr Turnbull—Of course it is. Back to trust. One way of getting trust is to reduce power differentials. When you have bargaining power—

ACTING CHAIR—If you reduce power, you also reduce the capacity to act decisively.

Mr Turnbull—I appreciate that.

ACTING CHAIR—I want strong corporate leaders who recognise an opportunity—bang! I do not want them going around conducting a conference with every employee, with the secretary, with the bloke walking past on the street, with Greenpeace, with Save the Whales. I want a guy who can make a decision and go.

Mr Turnbull—I agree with you, and that is what I am promoting.

ACTING CHAIR—It looks to me like—sorry, I will not pre-empt your response.

Mr Turnbull—You want decisive leadership. The main role of the board is to select and hire and retire the chief executive—direct and control him. That is the performance role of adding value—direct and control—finding a chief executive and motivating him. You want all of those attributes, and I support all your views about that. You do not want to distract him with all these red tape conformance roles—ASIC, regulations and reporting, and environmental issues.

ACTING CHAIR—How can your model do anything but create another set of problems—self-inflicted ones—for the chief executive to have to solve?

Mr Turnbull—You made a statement earlier about bringing attention to conflicts of interests and the possibility of being a loyal opposition. The way it actually works is that it codifies what are conflicts of interest, first of all, so they become aware of it. People do not go around saying, 'You've got a conflict of interest.' They know that, when there is a self-interest, there is a process in place for them to reduce the perception that their decision making is for their self-interest rather than for the company as a whole. It saves those chief executives from being embarrassed and saying, 'I really can't do that; people might think I'm just doing it for myself', because there is somebody there to review those decisions for the company as a whole and to endorse it. So it encourages more decisiveness for those things that are going to add value.

ACTING CHAIR—My experience is, if someone has a potential conflict, they simply say, 'I've got a potential conflict on this issue; I'm just declaring it.' Having said that, this is my view about the issue. If you have got a concern about somebody else's conflict, you do not have to record it in the minutes. But nothing stops you from privately having a beer over the weekend or making a call on the phone and saying, 'Have you thought through that issue?' If you want to run an organisation, my instinct is that, you select a group of guys—and I use that term generically—whose integrity you have a basic confidence in. If you do not have that confidence, then do not put them on the board.

Mr Turnbull—I agree with all that. I asked Ian Burgess, the chairman of the AMP Society, how he got information independent of management to evaluate management? He said, 'You have just got to trust management.' There is the question of that trust not being misspent. When I was chairman of a listed company, I was told by my chief executive, 'As a chief executive, you can't always be right, but you must never be wrong.' As the chairman of that company, I had to trust him. To get trust, you have got to give trust, but you also want a safety net. What happens if your trust is misplaced? You want someway of a fall-back position. With a unitary law system, you do not have that fall-back mechanism for when you might have made a mistake or for when you want a second opinion. Sure you have got to give trust to get trust. I support all that. Sure you want decisive chief executives. I accept all your assumptions. I am promoting them.

ACTING CHAIR—All right. Lend Lease for many years did not have a human resources department in their organisation. As I understand it, the logic was that they wanted to instil an HR consciousness in every manager up and down the ranks. The idea was that, instead of saying that they have professional people who are concerned about the

development of their staff and their career paths et cetera, they wanted everyone to be HR managers. I like the idea of every director being responsible for his or her own conscience and behaviour in that sense. Isn't it a healthy thing to have a well-developed conscience reflex which directors show by example, by watching others and by exercising it themselves, rather than, in effect, saying, 'This company has a professional conscience which is outside the normal operation of the board of directors'?

Mr Turnbull—I agree with all of that, but you need processes. After the AMP meeting, some directors came to me; they were a bit embarrassed by what went on. The chairman himself admitted that the meeting was not run as properly as it could have been. What recourse do you have? There is no process in place for appeal or review because the directors, the chairman and the chief executive are judge and jury. They set and mark their own exam papers. It is a most difficult and embarrassing situation to be in.

In my experience as a director, I wanted processes in place to correct mistakes if I misplaced my trust, if there was embarrassment or if there were problems. I wanted to have openness and feedback of what was going on. In my corporate raiding days when we took control of a company, if we did not find malfeasance and misreporting, it really meant that we were not looking. You have to find out what is going on in the woodwork, because it was never in the interests of any subordinates to report any problems up the line. There may not be ethical problems. There may just be management ones—stock-outs or mismanagement. It is not in their interests to report mistakes up the line.

It would be hard to get information through the formal chain of command and so you need informal systems and most chief executives develop networks of informal, lateral systems. Board directors are denied that because the codes say, 'We want people to be independent,' which means they have not been associated with the company in any way—perhaps the industry—and so you get these corporate governance codes selectively putting people on boards who have the least knowledge and authority to monitor, assess and evaluate their chief executives. And that is why this word 'independent' is a misnomer and is misleading because they then capture the information provided by the people they are supposed to monitor and assess.

ACTING CHAIR—Finally, your model seems to me to be premised on a view of the character of the company director which is not especially optimistic in some respects and if, as you say, the—

Mr Turnbull—I would correct that. I agree with Mr Barrett's view. It is a bare minority that—

ACTING CHAIR—But if you do a takeover and you do not find evidence of misfeasance and misreporting, then you are probably not looking. That would seem to indicate you regard it as pretty standard.

Mr Turnbull—That was the experience in the 1960s and 1970s.

ACTING CHAIR—If the instinct of the company director is to seek to accumulate power and influence unto him or herself—

Mr Turnbull—I think it is yours, too, as I hear.

ACTING CHAIR—Sure. I am happy to be subject to that scrutiny. If the model proceeds on that assumption, if you create this Senate, why is it not going to be in the Senate's interests to seek to accumulate power unto itself? The only way the Senate can do that is by validating its existence in demonstrating all of these apparent conflicts in the decisions of the other directors. I just do not see how you build a team out of that relationship.

Mr Turnbull—Well, I have been in that situation for 10 years and it worked very well. Once or twice there were serious issues which had to be resolved. Your turn of phrase sort of inferred that there would be concerns, but people did not say, 'You have got a conflict of interest' because it was in the rule book. The rule book said that, if you were discussing direct remuneration, the control of the auditor or conduct of the annual general meeting, it was subject to the veto of the corporate governance board or Senate. It was just in the rule book. You did not have to say, 'You have got a conflict of interest. Oh, gee; isn't that terrible—shock; horror.' But the board making the decision knew it was subject to review.

They always had the power to overturn it. If they thought it frustrated wealth creation, they could always call a general meeting and ask the shareholders to overturn the veto. So you were not taking away the property rights of the investors. But then, if they go to the shareholders' meeting and the expense and hassle of all that, then you have some light on what the arguments of both sides are. You make public the differences. It is a much better way of doing it than giving the power to a single director to call an AGM. It is much better to have a three person shareholders' committee, corporate governance committee, or whatever you like to call it, to be the filter and to sift what should go to shareholders.

The whole purpose is to simplify your corporate law. You could reduce many parts of your corporate law and listing requirements because you could delegate decisions, which might otherwise go to shareholders, to your corporate governance board, and some of the listing requirements.

If you are looking at costs and benefits, it is back in the context of how to get less prescriptive law and that is to set up processes in place for shareholders to look after themselves. The reason a lot of shareholders do not vote is that they feel they do not have any power.

As a member of the Australian Shareholders Association, years ago I tried to run a campaign to get some independent electors to Gollins because Gollins had misreported their profits. The chief executive later went to gaol. It was very hard to get an independent director on that board because the board was a self-selected process.

It is a very small minority, I say again, where you come across those cases, but you want those self-correcting processes in place to reduce the cost to government and the overhead costs of firms. With regard to any argument to say that it is an overhead burden or cost, my experience is that you can do it with very small unlisted companies to reduce the cost of raising funds, and raising confidence and trust, and all those things, and giving decisively leadership to the chief executive, which you dearly love and I support.

Senator CONROY—Okay. I enjoyed the presentation thoroughly.

ACTING CHAIR—It was a very comprehensive collection of submissions. We appreciate it.

[4.12 p.m.]

DUNLOP, Mr Ian Thomas, Chief Executive Officer, Australian Institute of Company Directors

ELLIOTT, Mr Rob, Manager, Research and Policy, Australian Institute of Company Directors

FORSTER, Mr Ronald William, Member, Corporations Law Committee, Australian Institute of Company Directors

HULETT, Mr Tony, Member, Corporations Law Committee, Australian Institute of Company Directors

ACTING CHAIR—Welcome. Would you like to begin by making an opening statement?

Mr Dunlop—Yes, Mr Chairman. I would like to talk to a further letter which we have just lodged and that I believe you have copies of, and briefly cover the points in that letter. Then we would be very pleased to answer any questions you may have and I might call on my colleagues to respond to various aspects of those.

One of the difficulties of this present inquiry is that it has gone on over an extended period of time, so we have taken the liberty of putting into this document what we regard as four key submissions that have previously been lodged with you which cover a fairly wide area. They are listed on the first page. The first item is an overview of matters referred to the PJC and which I think we tabled last August. The second is a commentary on the anomalies arising from the introduction of the CLRA. The third is a specific submission last April on the Corporate Governance Board and on the election on directors which comments on material we had not previously seen at that point. Finally, we have a submission on the mandatory environmental reporting.

Our position overall on the issues that have been referred to the committee remains as set out in those submissions, and I will touch on some of them. But I would like to raise a general concern about the overall direction of legislative reform in Australia, particularly in relation to the Corporations Law, which, as we see it, is exemplified in some of the recent CLRA amendments and the matters that have been referred to the current inquiry. So I would like to talk on some broad issues initially and then come back to some of the specifics that you are addressing.

As we see it, we are in a very different environment today from the one we have seen in the last two or three decades. The rate of change in the economy has never been greater than at present, both here and internationally. The technological changes that are occurring within the economy are enormous, and you would be well aware of those. For us to prosper in this environment requires a concerted effort on the part of all of the players—that is governments, regulators, business and the community—to put in place structures that encourage and reward performance rather than constraining and inhibiting it. It appears to us

that, unfortunately, the practical effect of much of what we have seen in recent times is actually moving us in the opposite direction.

We have a veritable avalanche of legislation moving through the Australian parliaments at the present time. I have given some statistics on aspects of that in appendices 1 and 2. Particularly in appendix 2 there are a couple of graphs that are really quite frightening if you look at their implications. The first of those graphs shows the pages of Commonwealth legislation that have been passed on an annual basis since 1900. The second of those shows the complexity of the laws that are currently being passed, in terms of pages per act. As you can see, an exponential increase has been occurring over recent years in both of those parameters. Corporations Law is part of that overall problem. What is concerning us in particular is the duplication and inconsistency that that legislation is generating. It is not sustainable, in our view, for that level of legislative activity to continue if we are going to prosper as a community in the years to come.

There is an urgent need to move away from our tradition of black letter, prescriptive legislation to a much more market orientated, self-regulatory approach than we have had thus far. In our view, that latter approach should be structured around a minimal effective legislative and regulatory framework. There should be guidance being given on best practice, built around sound principles and flexibility, so that organisations have the freedom to design systems to suit their particular circumstances. Clearly, part of that has to be very high standards of transparency and disclosure to ensure the market is well informed, and it operates effectively. We have set out the rationale for that in the third appendix in some depth. This is work that AICD has been doing in recent times, summarising our thinking on what is happening in the international governance debate and the implications for Australia. I would refer you to that to read at leisure.

I will expand on a couple of comments that are relevant and were touched on in the previous discussion with Mr Turnbull. The issue of power is a critical one in the debate about governance, and so are the issues of performance versus conformance and achieving the right balance. Clearly we have to get the appropriate level of conformance in organisations. You must ensure that the law is met, that the i's are dotted and the t's crossed. That has been a focus of attention of the director education that the institute has done over many years. Even more critical is that we must have the structures to encourage performance of organisations. It is a particular concern of directors that we should be striving for the best possible mechanisms to enable that to happen.

There has been, in our view, a definite transfer of power from boards of directors to owners in recent decades because of what is happening with the key drivers within the economy, which are basically liberalisation, globalisation, technological change. Issues like sustainable development are now core issues for directors. But the issue that is particularly driving this process is retirement funding and the trend from corporations and governments organising retirement funding toward that responsibility resting with individuals themselves. Hence the development of managed funds and the interest in increased direct shareholding on the part of Australians. We now have some 40 per cent of all Australians owning shares. That is a trend going on around the world. It is moving very fast. It is meaning that the search for performance is paramount in all directions. In the process it means that far greater

attention is paid to what boards of directors are doing, and on the governance of corporations, to ensure that performance will be forthcoming.

That is a fundamental change and it means that the arguments on power structures that may have been conducted five to 10 years ago, or longer, are today very different because the structure of the whole debate is different. Power is being transferred away from boards of corporations toward investors and shareholders in the sense of performance seeking. That has wide implications that I would like to come back to in due course. I would urge you to read the paper in appendix 3 because it does present a broad perspective of what is happening around the world on this issue.

If one takes that overall philosophy and looks at the specific points being addressed by the inquiry, I would like first to address the corporate governance board which Mr Turnbull was just talking about. AICD has carefully examined this proposal. We have not just skated over the top of it, we have looked at it carefully because the boards of corporations are continually seeking means of improved performance. Therefore, we should not be sweeping anything under the carpet.

It is clear from what I have said that we agree with many of the things that Mr Turnbull has proposed, in particular the desirability of moving away from prescriptive legislation and encouraging the introduction of more self-regulatory mechanisms. Where we differ in regard to the corporate governance board concept is in the proposed mandatory solution.

We believe that the Corporations Law should be providing a minimal effective legislative framework within which companies have the freedom to choose the particular model that suits their circumstances. These circumstances today are changing rapidly. It is not like the 1960s, the 1970s, or the 1980s where things changed incrementally and you could therefore incrementally modify your practices. The world today is moving much faster than that. Therefore, we need the flexibility to change governance structures accordingly. Something that is appropriate at one point in time can very rapidly become outdated.

Companies must take on responsibility themselves for adopting the governance practice which best suits their circumstances. Each company has to decide what is appropriate, what is important for performance in their context, and also for investor decision making, and then make that disclosure accordingly. The market will then judge each approach as it sees fit. But it is totally inappropriate for company law to be prescribing particular governance structures or procedures for companies. That is not going to work. I would argue that the prescriptive approach has severely hampered Australian corporate performance for decades in a host of areas, which I will be happy to talk about from personal experience at a later stage.

As a general proposition we believe a mandatory corporate governance board is quite unnecessary and would probably be unworkable. It would create additional complexity, cost and uncertainty and have no benefit for shareholders. The conflict of interest consideration which we understand is the prime objective of this mandatory concept is better handled by effective implementation of transparency and disclosure requirements—they currently exist under the Corporations Law and under ASX listing rules—where boards indicate the manner in which conflict of interest will be handled when it arises. If the mechanism that any

particular company adopts is unsatisfactory then shareholders should, and indeed have, indicate as much in terms of their voting practice.

We believe the vast majority of companies do the right thing. You will always have some problems, and unfortunately you will never eliminate abuse, but that is human nature. What we should be doing is ensuring that transparency mechanisms expose abuse as rapidly as possible, not put in place prescriptive solutions that make life more complicated and which will be an impediment to performance. The latter approach comes from the perspective of conspiracy theory, that people are somehow out there to do the wrong thing. That is not our experience, and that is not our view. Where there is abuse it does get headlines, and indeed it should, but it should be recognised and put in context, that that is not the way the majority of the world actually works.

That is not to say that the corporate governance board concept could not work effectively in certain circumstances. The point has been made that it can operate within existing Australian law, that further legislative change is not required. It should be for individual companies to take it up if they think it is appropriate to what they are doing. They are at liberty to try it and, if it works, fine. To us it is inappropriate and contrary to the interests of the economy overall to have that sort of model prescribed in legislation.

It is claimed that thousands of directors have already been exposed to the concept, and to cumulative voting. All we would say is that if it is a superior mechanism then one would have expected it to have been adopted long ago because companies, essentially, are free to do so. Mandatory legislation is not required. For clarification, we do not support the voluntary establishment of the corporate governance board. Rather, it is an option that companies can adopt if they wish to do so.

Just to deviate slightly and take up the point on Fukayama's book *Trust*, the book makes the point that the level of trust in society is critical to performance. To me, what this governance board concept is doing is taking the view, as a starting point, that there are very low levels of trust within the community and within corporations. I frankly do not think that is true in this country. We are fortunate in that the level of trust, in relative terms, is actually high. In fact, that is an aspect of Australian society that we should be building on and not trying to undermine.

The second point is the election of directors. Again, we believe the proposal for the annual election of directors that has been put into the draft legislation is unnecessary and impractical. Appointment as a director, with its attendant responsibilities, requires reasonable tenure to make it a worthwhile proposition. If you had the annual election with cumulative voting I believe it would make it difficult, if not impossible, to attract directors of sufficient quality and make it difficult to retain them. The performance of boards and companies would suffer adversely as a consequence.

I presume that the objective of the proposal is to enable minorities to be elected to the board more readily than previously, but there are a few points that people should keep in mind. Firstly, the law imposes an obligation on directors to act in the best interests of the company as a whole and not in favour of any particular interest group. Any director who is selected to represent the interests of any one group is bound by that overall provision and

should not vote or act to represent an interest group when to do so is not in the best interests of the company overall.

Minority groups already have the benefit of information that the Corporations Law and the listing rules require companies to publish. They can requisition general meetings and they have a remedy in the case of repression. So, there is already a vast amount of information available. In fact, in some ways, there is too much information. As a result, we have reached the point where we are being asked for concise reporting, not more reporting.

The objective must be to appoint the best qualified directors, not representatives of any particular group. This election concept is misguided in that respect. Having one or more groups represented will create disharmony and disagreement on boards when you are looking for collective decision making.

A fractious board is bad from the point of view of both management and shareholders. That does not mean to say that you do not have debate and differences of opinion on boards. It is critically important that you select people who do have different points of view so that you have debate engendered, but at the end of the day there has to be a collective decision to move forward and do something. What we are looking for is robust debate and people who have the perspective and the knowledge to be able to contribute to that. It requires people to make a commitment to organisations, not to be turned on and off annually at the turn of a tap, as it were.

Therefore, we strongly oppose the mandatory requirement for an annual election of directors and the cumulative voting process. Again, we think it is inappropriate for it to be legislated. If companies want to take up these mechanisms then they are liberty to do so. There is nothing in the law that stops them doing that, but it should be a choice that they make in line with their requirements. That follows our general approach of self-determination.

The third point I would just like to touch on is the requisition of meetings. That is causing some concerns at the present time. The changes in the CLRA last year now have the effect that a general meeting can be called at the request of members holding at least five per cent of the votes or 100 members who are entitled to vote, irrespective of their level of shareholding. It opens up the potential for serious abuse by minority groups, single-issue groups or others who may be motivated by concerns that may be quite different from those of the company overall.

We believe that the balance of providing for minority shareholder interests has gone too far toward the minority in the way in which the law is currently cast. It should be brought more into balance by providing adequate recognition for the minorities but also recognising the interest of the company and the shareholders overall. I saw yesterday that you have called for submissions on the issue by 27 August. We will be putting in a further submission on this point, so I will not take up further time at this stage.

The fourth point I would like to raise is mandatory environmental reporting. We are concerned about the requirement that has been introduced for a number of reasons. First, it duplicates the existing reporting requirements on the environment, which are quite extensive.

We already have to report under various state and other legislation. Further reporting is planned under the national pollutant inventory which will be introduced shortly after extensive consultation.

A further concern is the duplication of regulatory authorities. The current environmental arrangements are complex to say the least, with different legislative structures under the different states, and a variety of local, state and sometimes Commonwealth laws under which companies have to report. It is already a confused issue. The effect of the legislation has been to introduce ASIC as a further regulatory body in environmental reporting. Frankly, we just do not believe that is a sensible way to do things. We do not see that the proposal has any clear objective. We do not think it is going to provide additional information to that which is already available. There are also a range of interpretational issues as to the definition of the requirement.

We were particularly concerned about the manner in which this happened because there was no prior consultation, to our knowledge, on this issue. It is a particular concern, given the complexity of environmental issues in general, the extensive existing reporting requirements, and the consultation that was already going on with things like the national pollution inventory.

In our view, there is already an urgent need for streamlining and rationalisation of existing environmental legislation. The introduction of yet a further layer of reporting, with yet a further regulator, is just not helpful in regard to either corporate performance or environmental performance, which presumably is the ultimate objective. We would, therefore, recommend the repeal of this component in the Corporations Law. We do not see that the Corporations Law is the appropriate place for this to be introduced.

The fifth point is the question of privacy of residential addresses. We set out in the original submission we made to the inquiry our views on the director remuneration issues, which has now been enacted. We did not object to that requirement, provided people understood the implications, because they are not all positive. The effect of executive remuneration disclosure now being enacted is probably to ratchet up remuneration around the country. This has been the experience elsewhere.

If you are going to have this disclosure, it does raise major concerns of privacy for listed company directors. We have urged that mechanisms be introduced to avoid the use of residential addresses because there have been some quite difficult circumstances arising for individual directors because of the disclosure of residential addresses that currently exists.

Senator CONROY—In the last 12 months?

Mr Dunlop—Yes, I think there were.

Senator CONROY—Were there instances of what you are describing prior to the enactment?

Mr Dunlop—Yes, because there had been privacy issues—

Senator CONROY—Say picketing of people's homes.

Mr Dunlop—Yes, and worse than that. There had been burglaries and similar incidents. Whilst the remuneration disclosure requirement is now in force, inadequate action has been taken on the privacy issue, and we would urge that that it be taken up in the final recommendations.

The sixth point—and the final one I would like to raise—is something that is not strictly in your terms of reference, but it is something that we believe should concern the committee. It is the recent High Court decision on Wakim and cross-vesting. What that has done is throw the responsibility on corporate law matters back into the state jurisdictions. It has broken down the national approach to Corporations Law that we have had in place since the end of the 1980s. In our view, it makes no sense in any practical commercial context, and it is an impediment to national economic performance.

We see it introducing increased compliance costs and complexity. Inconsistency in decision making will inevitably arise. It has not happened yet, but it will start to happen. The change, in essence, is trying to solve a non-existent problem because the previous system was working. There was nothing wrong with it. I think one of the dissenting opinions said as much in the High Court judgment. Whilst this has the potential to seriously impede corporate performance and the operations of the Corporations law, we appreciate that it is an issue of constitutional law. But we believe it is something that the PJC should take up and we urge them to do so.

Senator CONROY—We have just commenced a process. We are getting some internal submissions. We are hopefully getting a briefing from the agency and then we will possibly go to a public consultation process.

Mr Dunlop—That is good to hear because it is a major problem. Frankly, it tends to make a nonsense of everything we are talking about now because it is all going to be taken back to a different interpretation at state level where we already have enough problems. I can see that the graph will start to go up rather faster.

Those are the key points I want to touch on. We have addressed the other points raised by the committee in the appendices. Our position on these remains the same. We would be pleased to talk those through further at your convenience.

Just as a final comment. The recent reforms in the CLERP program and also the fact that the CLRA have had the objective, as we understood it, of streamlining legislation as a means of improving economic and national performance. We think that is an excellent objective and we said so to the Treasurer at the time. Our concern is that many of the recent amendments have moved in exactly the opposite direction and we are now seeing more pages in the Corporations Law, not less. The same issue is happening in the taxation system. Whilst we are getting major tax reform, the act is becoming a lot more complicated.

We often tend to see ourselves as leading the world in regulatory matters. That is not a desirable objective. We still have one of the most rigid, complex and prescriptive systems in the world, despite the reforms we have had through the course of the 1970s and the 1980s. It

is a major impediment to performance. I think it is a credit to what is happening at the moment that we still are performing well in global terms despite that. But the real issue is how much better we could do if we had a more streamlined system.

We see the real objective being to improve corporate performance, whilst maintaining the integrity of markets, rather than just legislative and regulatory excellence for its own sake. We would urge that, in putting your final report together, the performance implications of the decisions being made should be very much to the fore. This is not just because of the corporate performance aspects but particularly because of the way it ultimately impacts on community wellbeing. Unless we have that economic performance, everybody in the community suffers. Those are the comments I wish to make. Thank you for your time. I would be happy to take any questions.

ACTING CHAIR—As one of 10 on this committee—I do not speak for the whole committee—I find your evidence compelling. I do not think there is anything you have said that I would be able to disagree with. I wish I could implement the entire thing tomorrow. Senator Conroy, what have you got to say?

Senator CONROY—I apologise in advance. I unfortunately am on a 6 o'clock plane and will have to leave here pretty much at 5 o'clock, so I will probably have to rush through things an awful lot faster than I would have liked to.

If it gives you any comfort, the privacy of residential addresses I think is an issue that, hopefully, the committee, and perhaps parliament, will address. There were a couple of points that were made in your earlier submission. On page 6 of your earlier submission where we are talking about listed companies' annual reports which should include discussion of broad policy for determining nature and amount of emoluments, I think what has actually happened there was a typo. It was actually meant to be 'board'. You go on to make the point that perhaps it should have been 'board'. Thank you for further drawing that to people's attention; unfortunately it was a typo when it was finally all put through.

I would, however, probably take issue with you on a range of matters, starting off with your campaign in which you have articulated both publicly here today and in your written submissions that you have concerns about the way in which these amendments were introduced.

I thought, perhaps, seeing as you seem to be uninformed about the bill and the amendments, perhaps I could rehash a bit of history for you. Those amendments were actually the subject of extensive discussion. They were part of an original report that this committee, before I was even a member, unanimously supported in 1996. It actually went on the table in 1996 with the six or seven of those amendments which I personally was responsible for. When the bill was finally released in its completed form, this committee again had a hearing in 1998. It would be fair to say that the committee split on party lines, but it was indicated by both the Democrats and Labor that we would be pursuing these amendments and we again supported the retention of the clauses that became the amendments.

That was three months before the bill was actually debated, so there were submissions and debate in front of this committee on for and against points of view on all of these points. You say that they were passed by parliament in a manner you describe as 'without prior consultation'. Can I put to you there was plenty of prior consultation? The fact that they got up when you did not want them to get up is not the same thing. Surprise at them getting up and 'without prior consultation' are not the same thing. There were almost two years of consultation on these and it is a bit disappointing to see that you have maintained a public campaign on that matter in newspaper articles as well as in your own submissions.

You have attached a couple of extra articles you are working on which I think mirrors an article you wrote in the *Australian Financial Review* and I probably would not have gone to some of these issues but for the fact you have submitted them.

Mr Dunlop—It is the same article.

Senator CONROY—I thought I recognised it. My phone number, just so you know, is 02 6277 7111. That is the switch at Parliament House; they will put you through to me. CLERP was never even submitted to the Senate until almost at the death knell and at that stage the government had a choice about which bills it saw as urgent prior to 30 June. It did not nominate CLERP and the Labor Party did not seek its delay. The government could have chosen, if it had wanted to, to put it on the parliamentary Senate timetable and did not. It is as simple as that.

For you, as you have done again, to maintain a public position that somehow we have caused this bill to be delayed past 30 June, is actually at odds with the parliamentary timetable. You can check with the parliamentary table office as to when the bills were tabled in parliament—

Mr Dunlop—Sure.

Senator CONROY—and whether or not the government nominated them as any of their urgent bills in those last months. I am including CLERP—I am obviously involved in CLERP and I would have been happy to see it passed through the Senate, or at least see the debate begun on that issue. As you continue to write that we are the people that are causing that, I would invite you, rather than to just believe what Joe Hockey tells you or to believe any press release that any of the other ministers like Mr Fahey put out regularly, to just give us a ring and ask me where we are at on it.

Mr Dunlop—I take your point. Firstly in relation to the CLERP issue, the point was not so much an issue of saying whose fault was it and whether it was the ALP or the government. The real point is that business has been involved in an extensive discussion process for about three years on these issues. We were led to believe certain things were going to happen within a certain time frame. Corporations have made provision for that in the way in which they were encouraged to do. Then we get to the point where the whole thing is thrown in the air at the last minute. Whoever is responsible is not really the issue. The fact is we need a better process under which to handle these things than the one we currently have. That is an issue for all political parties, and for the political structure, which

is really the point of the article. I was not intending to take pot shots at any particular group and I think we have covered the field fairly well.

Senator CONROY—We were in the way.

Mr Dunlop—I think the government is mentioned in a few places, too. The major concern is the broader issue of how do we get a better process because the current system is not working. I appreciate the democratic need for debate and the opportunity for people to have their say on these things, and I would argue the same point in regard to the CLRA. How long has this actually gone on for? It is a long time.

Senator CONROY—Four or five years. It started, I think, in 1994 when Lavarch started the simplification process.

Mr Dunlop—The problem is that given the way the world is changing today, this type of process is becoming an impossibility. We have to find some other way of working. I think, with respect to the CLRA amendments, a number of them were talked about prior to the final decisions being made, but there were also a number that were not. A number came through that certainly we were not aware of and we kept our ear pretty close to the ground during that period.

Senator CONROY—I was surprised to see some of the ones that got passed as well if it is any comfort to you.

Mr Dunlop—The problem is that if there is to be genuine consultation on these issues then it needs to be genuine consultation. Business, frankly, is getting somewhat concerned that we are putting enormous effort into this consultation and into debate with all sides of politics—

Senator CONROY—I would like to think that except you have never phoned to ask.

Mr Dunlop—No, but we have talked to other people within the ALP structure. You end up with these last-minute changes. There may be political reasons for them—and I recognise that the balance of power will change these things—but also a lot of inconsistencies emerged that nobody intended because things are done at the last minute which are then implemented. It then takes ages to unfold or unravel all of that and get back to a sensible working mechanism. As you know, once something is in legislation it does not change easily. There are major practical problems with the political mechanism we have working and that was really the object of the article. It is a bigger issue than—

Senator CONROY—I work within the process that we have. I can only suggest to you that you follow more closely the minority reports put down by the non-government senators on the committee. I think I indicated there were a couple of amendments that were accepted that were not sponsored by the Labor Party. Senator Murray clearly identified in March, as I did in March, in minority reports on this committee that we intended to pursue these issues. Unless you are suggesting we should only pursue issues and amendments that we know are going to lose I am not quite sure how you think the democratic process works. We are entitled to say, ‘This is opposition and we are going to move an amendment’ and, to the

surprise of a lot of people, perhaps even ourselves at the time, we were able to get them passed but that does not indicate that they can be described as a raft of ill-considered amendments.

Mr Dunlop—I accept totally there has to be the democratic process. However, there have been a number of amendments go through—and I am happy to talk to you about the detail of that separately—where the implications were not thought through by anybody and because it was done at the last minute we have ended up with confusion which is causing real problems. We need a better way of working which we would like to discuss in depth on another occasion.

Senator CONROY—I would look forward to the arguments on the reform of the Senate. I understand that perhaps you will be—

Mr Dunlop—Absolutely.

Senator CONROY—I take issue with some of the statements that have been made not just by yourself, or perhaps not even by yourself, but I struggle to see which part of the following clause people do not understand, 'Details of the nature and amount of each element of the emolument of each director and each of the five named officers.'

I am struggling to understand how 'options' is not described as an element. I think the Accounting Standards Board will go in this direction anyway, and you advocate that they should be in charge of this, which is another issue I will come back to. But I was involved in the drafting and the moving of these amendments. I was involved in the debate on the floor and, for any of you who have not got exciting lives, the Senate debate at the time is riveting reading. We were given an assurance by the government that the phrasing that is there would cover all aspects. 'Emoluments' was their suggested word, not ours. We had a broader term. They suggested to us that the word 'emolument' was the way to go. I am aware that there has been some confusion about what happens if one of the five named officers is a director as well and those sorts of things. I accept that on an interpretational question ASIC have issued a note on a range of issues to try and clarify some of those points.

But in terms of the fundamental point of each element or emolument, I have been surprised at the Ernst and Young survey that has found that both accountants and directors seem confused. I would have thought it is clear. I accept that ASIC, who were here yesterday, indicated that there could be an argument over the valuation method of an options package. I will happily defer to people who have a much greater understanding than me on that. ASIC have indicated that they are not really going to chase, prosecute, harass in the first 12 months because there is that argument.

In terms of a fundamental, simple message that is in that piece of legislation, to me, as someone who was involved in the drafting of it, it is perfectly clear. I am not a lawyer, so I accept that lawyers can have a field day on these things.

Mr Dunlop—Were you referring to some of the comments in our submission at all, or just a general concern?

Senator CONROY—This is a general concern. You have described creating inconsistencies in the law with attendant cost and complexity which will take years to sort out. I am not sure why that will take years to sort out, other than the technical question of how do you value an options package. Should an options package be valued at zero? Frankly, anyone who tries to argue that an options package has a zero value is having themselves on and no-one else is going to take them seriously.

Mr Dunlop—I do not think we have any problem with that; remuneration was not a point we disputed, rather there were other issues.

ACTING CHAIR—I will read your appendix in relation to international trends on governance and the three drivers you referred to in relation to the shift in power away from the board towards the shareholders—and I recognise Mr Rofe may have an interest in this discussion. Your feeling is that the pendulum has swung too far away from effectiveness of board performance? The pendulum has gone too far, in your submission?

Mr Dunlop—No, I am not arguing that. What I am saying is, whereas there may have been perceptions—there certainly were perceptions in previous decades, and Mr Turnbull has referred to them, that boards were all powerful and could essentially write their own script, as it were—the world is now very different. The corporate sector today is one of the most transparent sectors of society—I would argue much more so than government—because of the changes that have been made in governance structures over the last 15 years. What that has meant is that boards today are much more conscious of the need to have sound governance structures in place, to be transparent about those structures and to recognise that they have to ensure that companies are performing. That is much more the case than it used to be. I am not saying it is perfect, but that is the way that the world is moving. If you look at the way in which, say, boards are being appointed today, at people who are becoming members of boards, there is far greater focus on picking people who genuinely can contribute added value to boards rather than seeing them as a sort of club for the boys, as it may have been historically.

There has been a very big shift, and a large part of that shift has been because of the fact that shareholders are gaining far more power than they have had historically. In previous decades, the shareholding structure was much more concentrated. You did not have the mums and pops, as it were, as shareholders coming through managed funds looking for performance in the way you have today. That is a radical change. It is probably the biggest change that we have seen in this whole arena.

What we need is to ensure that we have highly competitive governance structures in place that encourage performance, that are built around self-regulatory mechanisms, as Mr Turnbull was advocating, but not mandated or prescriptive. There will be a host of different mechanisms emerge, a large number of which we just have not thought of at this point. You think of the implications of technology and how that is going to change the way in which communications take place between corporations and their shareholders, the options that now become open to boards and to shareholders in terms of a better understanding of the way the world is working. What we should be looking for in Australia are innovations that are going to keep our performance capability at the leading edge in a global sense. Therefore, we should not be just automatically picking up what is done overseas as being a solution to our

problem. We should really be looking for innovations that are quite genuinely innovations which are performance focus.

The compliance side of corporate governance has to be done properly—it is critical. We have an issue about streamlining our institutional structures to have effective legislative and regulatory frameworks. But there must be much more focus on performance. I think we are getting it; it is happening. There is a very clear understanding amongst leading companies these days that that is the name of the game, and people are looking for the competitive edge in all of these respects. But to impose some particular governance structure is just plain wrong. It will be a major impediment, a millstone around the neck of this economy, if we were to do that.

Flexibility is the key. Transparency has to go with it. You also have to have far more preparedness on the part of shareholders to exercise their vote, which is another issue that is touched on in one of the papers. You have to have that self-reinforcing cycle, that boards are getting feedback from shareholders on what it is they are doing right or wrong and there are mechanisms in which you can make the appropriate changes.

ACTING CHAIR—The provisions in relation to declaration of proxy intentions have been heavily criticised in the testimony that I have heard over the last couple of days, but they were intended, I think, to be part of the shift in culture towards greater participation by shareholders. What do you recommend as the measures which we ought to be taking there, whether they be generated from within the company or perhaps by regulation?

Mr Dunlop—We would far sooner see market type mechanisms put in place that encourage that to happen, rather than it being legislated for. We are in discussions in various forums on ways and means of essentially doing that. But, again, it is the sort of thing that we would rather not see happen in a prescriptive way. We would rather see it happen in other mechanisms. I do not have the absolute answer to that. We are talking to institutional investors about those types of issues. It does need to happen, and the point has been made that institutions are not voting to anywhere near the extent they should.

Senator CONROY—I can only agree. We had a discussion with Mr Barrett about the need to try and encourage institutions in particular. In America, as you would probably be aware, it is mandated for pension funds to participate. That may be a debate we want to have in this country.

In your original submission to us you said, 'Presumably, this amendment seeks to highlight what some may see as inflated remuneration and poor performance—whatever the latter means.' Then you go on to list a couple of points. After reading those points, I would be a bit disappointed that you have such a lack of faith in the ability of your board to explain those sorts of issues to its own shareholders. You make statements like: performance may be affected by factors outside directors' and management's control; bringing in a highly paid executive to salvage a company or turn it around will not produce immediate results, that timing issues must be recognised; and that executives perceived as highly paid may be doing a very creditable job in particular circumstances in keeping profitability at a static level. They are all perfectly reasonable and sensible arguments. I am just disappointed that

you have such a lack of faith in your own chairman and board of directors being able to communicate that and explain that to your shareholders.

Mr Dunlop—It was not really a lack of faith. What we were doing was just highlighting the fact that, in looking at performance, you have to take account of a wide variety of issues. That is what we would expect boards to be doing. But there has been an assumption in a lot of the debate on remuneration that, by putting this disclosure mechanism in place, what you were essentially doing was putting a cap on remuneration and hence you were controlling the situation. In fact, what is going to happen will be completely the reverse. What is going to happen is that by disclosing it—

Senator CONROY—I have not received any letters from your members thanking me. I have been surprised. I have been expecting letters of thanks from your entire membership.

Mr Dunlop—Okay. But that has been the experience elsewhere. That is not something that boards greet with great enthusiasm because it is another increase in the cost structure of companies that we would rather not have.

Senator CONROY—Can I just reassure you that, if you were sad enough to have read the entire *Hansard* of the debate on it in the Senate, you would not find that either the Democrats or the Labor Party at any stage suggested that they were desiring to introduce a cap. It might have been suggested in some of the other public debate that you might have seen on *A Current Affair* or something like that. But, in terms of the aim of the movers and supporters of the amendments, at no stage did we ever advance that what we were intending to try and do was cap. We actually have had evidence given to us that in fact, much as you have described it, the reverse would be the case.

Mr Dunlop—Yes.

Senator CONROY—So, as I said, I have been expecting an invitation to the big dinner. Maybe it's my deodorant! I just wanted to assure you that there has been very strong evidence around the world now, from the OECD and from other studies, that shows that a good corporate governance regime equates to increased and good performance and outcomes for shareholders, that there is economic return from good governance.

Mr Dunlop—We would agree that there is a general linkage. It is not terribly easy to prove it, but there are some studies on it.

Senator CONROY—There are some studies around now that can point to very good linkages. It is not always perfect—I have seen plenty of examples where it does not work—but there is a growing body of work to support the argument that good corporate governance can lead or does lead to increased economic performance, to economic value for shareholders.

Mr Dunlop—As a general thesis we would agree with that, but the point we go on to make is that good governance is a necessary but not sufficient condition for economic performance. What we need are sound structures that encourage performance within the economy itself, so the legislative frameworks and so on should be enabling performance to

happen, not inhibiting it. It is critical to combine those two. We are not suggesting for a second that what is happening in Australian corporate governance is perfect—far from it; there is a lot of room for improvement. But the basic model is something that we believe is working effectively. What we should be doing is looking for mechanisms to make sensible improvement but not in a prescriptive sense.

Senator CONROY—The amendments were supported publicly and assisted, in terms of the drafting, by the investor community. I think that is the fairest way to describe this. These amendments were sought very strongly by the investor community. The AIMA blue book—it is currently grey; this is the latest one and they have not got the blue on the front yet—is a voluntary code. I think the investor community, after hoping that companies would introduce or work through the points that are in the blue book, have given up. That was the reason they were prepared to go against a tradition—very similar to your own—that it should not be black letter, that it should be self-regulatory, all those sorts of things. I think you need to address that with the investor community. They are the drivers particularly of what I could describe as the Labor amendments, as opposed to a couple of the Democrats', though they may have supported some of those as well.

They actually talked about trust and faith and Fukuyama and all the rest of it. There seemed to be a breakdown between directors and the investor community in that they have given up hope that you will actually introduce what are the voluntary guidelines. They have therefore campaigned publicly over a number of years now for us to move those amendments and, through whatever means you may describe as fair or foul, the Senate and the parliament chose to pass them and they were accepted by the government.

Mr Dunlop—I hear what you say, but we have a different view of the relationship between the investor community and ourselves. A lot of constructive discussion is going on. A lot of changes have been made. There are certain areas where we do not agree, some of those are the ones that you have referred to here, and I guess we will continue to argue those points.

Senator CONROY—I have to apologise because I have to run, but thank you very much.

Mr Dunlop—I would be very happy to follow that up further with you.

ACTING CHAIR—Can I just say that we have benefited very greatly from your testimony. What I find a bit depressing is that many of these measures kind of presuppose an environment of distrust, and I think that they actually become economically counterproductive in that sense. They reinforce that measure and they generate that expectation in people's minds, and it probably makes us less economic and less competitive as a consequence.

Mr Dunlop—Could I make one final comment on that. If you look back over the last 30 years in this country, we have had a prescriptive legislative framework in place which, in my view, has been a major impediment to the performance of the economy. If you look at things like industrial relations and occupational health and safety, the mediocre performance we get comes from exactly that—from having prescriptive structures where people abdicate their

responsibility by passing them up the line to third parties. As a result, you end up getting the types of outcomes we have all been regretting for a long time.

What concerns me in the governance arena is that we do not do the same thing. With things like the Corporate Governance Board, by all means try it where it is appropriate. But if you legislate for it, what you are doing is imposing a structure on organisations which is going to mean that the people who have to work under it abdicate their responsibilities—you have actually touched on this—in a way that, frankly, is quite counterproductive. So the approach should be: try it, if people want to, but certainly do not prescribe it. Keep it flexible for people to experiment and try alternative models, because we will see an awful lot emerging. The law will have to change very fast to keep up.

ACTING CHAIR—I wish we had had your testimony at the start of the day when you would have had a more celebrated committee audience but, thankfully, with the benefit of *Hansard*, it is recorded for all of us. Thank you very much for coming in today. It has been very helpful.

Mr Dunlop—Thank you.

Committee adjourned at 5.07 p.m.