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JOINT COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT

Reference: Corporate governance and accountability arrangements for Commonwealth government business enterprises

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JOINT COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT

Friday, 22 October 1999

Members: Mr Charles *(Chair)*, Mr Cox *(Deputy Chair)*, Senators Coonan, Faulkner, Gibson, Hogg, Murray and Watson and Mr Andrews, Mr Brough, Mr Georgiou, Ms Gillard, Ms Plibersek, Mr St Clair, Mr Somlyay and Mr Tanner

Senators and members in attendance: Mr Charles, Mr Cox, Ms Plibersek and Mr St Clair

Terms of reference for the inquiry:

The corporate governance and accountability arrangements for Commonwealth Government Business Enterprises (GBEs). The JCPAA will explore the following matters:

. whether additional parts of current GBE governance arrangements should be the subject of legislation;

. whether more GBEs should be companies;

. whether governance arrangements are being reasonably applied to GBEs undergoing sale or restructuring;

. the form and content of GBE statements of corporate intent and the process of Parliamentary scrutiny including scrutiny of the financial affairs of GBEs;

. whether governance arrangements relating to GBEs' management of risk need to be strengthened;

. the adequacy of proposed annual reporting requirements for GBEs; and

. whether administrative law should apply to GBEs.

WITNESSES

Committee met at 9.16 a.m.

CHAIRMAN—The Joint Committee of Public Accounts and Audit will now take evidence, as provided for by the Public Accounts and Audit Committee Act 1951, for its inquiry into corporate governance and accountability arrangements for Commonwealth government business enterprises.

I declare open this public hearing of the Joint Committee of Public Accounts and Audit inquiry into corporate governance accountability arrangements for Commonwealth GBEs. The importance of good corporate governance has been highlighted in the private sector by the corporate excesses of the second half of the 1980s in Australia and overseas and the need to meet the challenges of global competition, technological progress and increasingly integrated markets. In the public sector, recent reforms to efficiency and effectiveness such as commercialisation, corporatisation and privatisation of government organisations and the role of the board in governing significant assets have focused attention on the need for various new models of corporate governance.

This inquiry will focus on the governance and accountability arrangements for Commonwealth government business enterprises which have been in place for the two years since 1 July 1997. These arrangements were adopted as part of the government's acceptance of most of the key recommendations of the Humphry review of GBE governance arrangements of March 1997.

The purpose of the inquiry is to assess the adequacy of the existing governance arrangements and identify areas where improvements can be made. In making this assessment the committee will consider a range of comments from GBEs, departments of shareholder ministers and other interested groups.

The committee will consider the extent to which the governance arrangements should apply to organisations competing with private sector companies and the application of competitive neutrality provisions in such situations. In addition, the inquiry will address the appropriateness of the governance arrangements when the Commonwealth shareholding is less than 100 per cent. This issue is particularly relevant in the case of Telstra.

Also of interest to the committee is the representation of the Commonwealth's interest by two shareholder ministers, namely a portfolio minister and the Minister for Finance and Administration. This arrangement was implemented for the first time from 1 July 1997, and the committee will assess how it has worked in practice.

In addition to these matters, the JCPAA will investigate particular areas of governance arrangements, including the adequacy of the GBE corporate governance framework, parliamentary scrutiny of GBEs and the adequacy of reporting arrangements, GBEs' management of risk and the extent to which the administrative law should apply to GBEs.

Today, the JCPAA will take evidence from the Department of Defence, the Defence Housing Authority, the Department of Transport and Regional Services, the Australian Rail Track Corporation, the Attorney-General's Department and the Australian Government Solicitor.

Before swearing in the witnesses, I refer members of the media who may be present at this hearing to a committee statement about the broadcasting of proceedings. In particular, I draw the media's attention to the need to fairly and accurately report the proceedings of the committee. Copies of the statement are available from secretariat staff present at this hearing.

[9.20 a.m.]

DUNN, Major General Peter, Head, Defence Personnel Executive, Department of Defence

TONKIN, Mr Robert Henry, Deputy Secretary, Resources and Management, Department of Defence

WILLIAMS, Dr Ian Sidney, First Assistant Secretary, Resources and Financial Programs, Department of Defence

LYON, Mr Keith Thomas, Managing Director, Defence Housing Authority

CHAIRMAN—Welcome. Do you have a brief opening statement, or shall we proceed to questions?

Major Gen. Dunn—Please proceed to questions.

CHAIRMAN—Your submission states:

It is the Authority's view that its 'current status as a GBE would more appropriately suit its unique function and operating arrangements with certain modifications such as the required rate of return and the applicability of the competitive neutrality provisions.'

Would you like to expand on that statement?

Mr Lyon—The authority was established to provide housing for the Department of Defence at a time when housing was a major issue some 12-odd years ago. So it is a single-purpose organisation. It needs to meet defence operational needs. In doing so, it needs to operate in a commercial way under its legislation. To date, it has not been operating in the same way as GBEs are expected to operate in producing rates of returns, payment of all taxes and the like. But these are now matters which are under discussion with ministers. They are under discussion in the context of the authority and the Department of Defence negotiating a service-level agreement which covers the defence requirements over a significant period of time.

CHAIRMAN—Without attempting to totally interrupt you, please tell us what a service-level agreement is.

Mr Lyon—It is a contract between the Department of Defence and the Defence Housing Authority on what housing services are required, their price and the risk sharing and the like that go into that type of arrangement. That also provides the context for addressing these commercial aspects, because they have to be built into the pricing arrangement.

Major Gen. Dunn—Mr Chairman, may I add a couple of points?

CHAIRMAN—Please do.

Major Gen. Dunn—I chaired the 1998 review of Commonwealth ownership of the Defence Housing Authority. During that review and subsequently, as we looked at the operations of the authority as a GBE, the particular issue on rate of return has been that, under the Humphry recommendations, we would be required to provide a rate of return of somewhere in the order of 12 to 15 per cent, which is just a normal commercial expectation.

The authority is dealing in the residential housing market, which traditionally returns a rate of return of net three to four per cent only. The issue that is flagged—and you have raised it in your first question to us—is that if we follow the Humphry recommendations, the rate of return is something that will never be attained by the authority. As a consequence, if dividends and the like based on that rate of return are demanded when the real rate of return is only three to four per cent net, there will be a significant drain of funds, capital and the like out of the authority to meet that normal commercial rate. In other words, the rate of return demanded of the authority, if it was to operate under a GBE context, should be consistent with the market in which it is operating. That should therefore be benchmarked against the retail residential housing market, and it would be significantly different from that which is applied to other GBEs.

Mr COX—Just to complicate things, a fair proportion of stock has been securitised and sold off, hasn't it?

Major Gen. Dunn—That is correct. We have been moving in the authority to reduce the amount of capital tied up in the housing property we own—that is, the stock. We are doing that through a sale and lease-back program. Through that, we sell the property back to private investors, not to institutional investors. They take a six-, nine- or 12-year lease—it varies; some are as short as three—and they are guaranteed rent throughout that period. There are make-good provisions at the end of the lease and the like. So, in that sense, we are using private investors to fund the housing stock and therefore reduce the amount of Commonwealth capital that is tied up.

Mr COX—Is the only stock you own on defence bases or do you still own a significant amount of property elsewhere?

Major Gen. Dunn—Yes, we still own a number of properties. In the order of 1½ thousand to 2,000 properties are actually on base. There will always be some on-base housing and, therefore, it cannot be sold because title cannot be given; it is on Commonwealth land. That level of stock is really dependent on the operational requirements. That is the fundamental determinant. For example, if people on an air base are required for safety or the operation of that base 24 hours a day, if necessary, then those people have to be located very close to their place of work. There are still a number of houses on bases around the country that are occupied by people who do not have an operational requirement to be there, and we are constantly trying to decrease that.

Mr St CLAIR—In the authority control you have some $3½ billion worth of housing assets. Does that take into account those assets that are on a base?

Major Gen. Dunn—Yes, it does.

Mr Lyon—Of the $3½ billion, roughly $2 billion is owned by the authority, and of that $2 billion there is about $200 million that is on base.

Mr St CLAIR—So the vast majority is off base.

Major Gen. Dunn—That is right. If I might add, it is defence policy that we locate our families off base wherever possible.

Mr COX—What is the reason for that?

Major Gen. Dunn—So that we actually integrate and retain the integration of defence forces with the community. We feel it is fundamentally important that we do not create a defence force that is isolated from the community that it serves.

Mr Tonkin—That represents a fundamental policy shift. If we had had this discussion 25 years ago, exactly the reverse posture would have been argued. You would have been told that it was important to maintain people on base, close to the security and coherence of their service communities, et cetera. So it is a big shift.

CHAIRMAN—That was universal around the world, wasn't it?

Mr Tonkin—Yes.

CHAIRMAN—I cannot comment about Europe specifically, but I can about the United States because I lived in a defence area as a teenager, and that was the policy there.

Mr Tonkin—It is a radical shift and what you see now is the tail of the old policy operating—which is the 2,000 or so houses on base, with the bulk of them being off base. That also means that you can then have an entity like the housing authority operating in what I would describe as a quasi-commercial fashion. The aim is to have it operate to the maximum commercial extent possible rather than having housing provided simply as an exercise of the bureaucracy. That has proved to be a highly successful process, but there are constraints. It is not the same thing as somebody trading in the market selling services in a competitive fashion, such as Telstra might do compared with other providers. There is no-one else standing in the market to provide institutionally based housing.

Mr St CLAIR—Do you see the department getting out of ownership of housing altogether—in other words, just having lease arrangements with the private sector?

Major Gen. Dunn—There will always be a level of stock that we would need to own; in fact, that could be for several reasons. For example, we have bases such as the naval fleet base in Sydney that is surrounded by prime residential areas, and we need people to operate ships alongside, to do machinery repairs and things like that, and they will need to be in proximity. Usually, it turns out to be cheaper to own some of that, particularly if we have owned those properties for a long time, rather than rent at excessively high prices. But there is a judgment call to be made there. It is not always the case. So we will own some.

Mr St CLAIR—Who makes that judgment call?

Major Gen. Dunn—That is usually made by the authority. But I come back to the operational requirement issue: Defence does have the ability, in a sense, to require of the authority that properties are guaranteed within a certain location. An example of such a property is within 20 minutes of one of the headquarters at Potts Point so that operational staff are able to get in very quickly for certain emergency situations.

Mr St CLAIR—Is there also a dollar factor built in?

Mr Tonkin—Absolutely. Thank you for raising that. In Defence, we are concerned to provide quality housing to defence families in a cost-effective manner, and what we do not want is to have the cost of housing escalate over time as a drag on what is, at the moment, a capped defence budget. Housing is an overhead. You want to try and get the quality in the right way and so you need to balance ownership in areas where you have price escalation with ownership in those parts of the country where there is no market. There is not a robust market for housing operating at Woomera, Alice Springs, Exmouth or even Singleton to some extent, whereas it is a different equation in Sydney, Melbourne and Canberra.

So all the time there is this economic tension, which comes back to Keith Lyon's point about the development of a service level agreement. We have worked in a sort of informal way over the last decade. There are a number of defence members on the board of the authority so you get quite a close operating relationship. But as the authority is being asked to become more and more commercial and to address issues of rates of return, et cetera, the authority has an imperative to make commercial decisions. It is appropriate that we now, therefore, regularise and formalise the nature of that relationship. We had a meeting before this meeting to discuss the nature of what that service level agreement might look like and where the risk factors might lie and, on one part of the defence side of the equation, the risk factor is cost.

Mr COX—Could you take a question on notice on something that has interested me for a long time. How many houses have you got in Sydney? What proportion of them are occupied by naval personnel? What is the value of them? What is the rent on them?

CHAIRMAN—Why don't you put the question on notice?

Mr COX—I am.

CHAIRMAN—I mean in the *Notice Paper*.

Mr COX—This is a convenient place to do it.

Mr Tonkin—Your questions are about how many houses we have, what proportion are occupied by Navy and what the value of those houses is.

Mr COX—And what is the rent paid on them every year?

Mr Lyon—We will take that on notice. In broad terms, the authority has about 5½ thousand houses in Sydney.

CHAIRMAN—One of the things that interested me in your submission was that you have a staff of 263. What do they do? And I am not being rude.

Mr Lyon—Of the 260 staff, we have about 163 either directly or indirectly tied up in property management activities—that is, looking after the tenants. The direct staff are located in 13 housing centres which we have around the country. The remainder are tied up in supporting acquisitions, disposals and selling properties under sale and lease-back provisions. We do that directly rather than use agents, for the very good reason that we are worried about the need to keep integrity with the lessors and—

CHAIRMAN—With the what?

Mr Lyon—With potential purchases and purchasers—the people who actually buy the properties. This is an industry in which one has to be very careful in making promises in terms of returns and so on because we have had some unfortunate experiences where that has been done outside of the organisation.

CHAIRMAN—Do you mean to tell me that you cannot find trustworthy real estate agents?

Ms PLIBERSEK—It is hard to believe really, isn't it?

CHAIRMAN—I am incredulous, Mr Lyon.

Mr COX—Stop defending your branch members.

CHAIRMAN—It has nothing to do with my branch members—I used to be married to one.

Mr Lyon—Also, there are significant commission payments made, so there is an economic argument as well.

CHAIRMAN—Struth! I will not wear that one either. That does not make any sense. Perhaps you should manufacture pencils for the Army and ballpoint pens for the Navy.

Mr Lyon—Apart from internally doing our own accounts payments, which have been centralised, all the acquisitions and all the legal work—in fact, almost all the support activity that the authority needs—is provided by specialists from the private sector. Basically, we are a contractual management operation—our people are involved in organising the maintenance that is needed, and so on.

Mr Tonkin—Mr Chairman, if you were to visit a Defence Housing Authority centre, you would see that it is actually quite reasonable. Defence has been very interested in seeking to encourage the Defence Housing Authority to minimise its overheads on the basis that that is a cost that flows through in the rental-stream cost to us.

CHAIRMAN—I would have thought so.

Mr Tonkin—We have been pretty satisfied that there has been a strong effort by the housing authority to drive down its overhead costs. They really are a contract management agency out in the field as well as dealing with their clients. There is a fair demand by service families to have a point of contact where they can express concerns about the maintenance. There are allocations issues and a range of things like that. Where you have quite a proportion of one part of the family absent, you need to have a robust mechanism to respond to needs. The authority over its life has benchmarked its performance to a significant extent on the basis of user satisfaction—remembering that we started back in 1987 with a high degree of dissatisfaction with the way in which housing was provided. So it has been driven that way.

Mr St CLAIR—What is the situation with local and state government charges? Is there any dispensation? Do you pay all the normal fees if you own those houses? What is the story with regard to that?

Mr Lyon—We pay some charges like rates, but we do not pay others like stamp duty and land tax. I can provide the committee with details of that, if you wish.

Mr St CLAIR—What effect does that have when you start to sell the properties off and then lease them back—where the owner of that property is obviously up for the whole of the stamp duties, et cetera and wants a rate of return on that investment?

Mr Lyon—The sale-lease-back arrangements have two elements. There is a surcharge that takes into account that the authority commits itself to make good the property at the end of the lease-back period. That involves specific agreements to repaint and recarpet, typically for medium-term leases. There is a surcharge to specifically cover that. There is also a 15 per cent management fee which the authority charges because it also picks up the responsibility for maintenance, but the owner still has responsibilities for meeting local rates.

Mr St CLAIR—So you have to maintain the property over the period of the lease?

Mr Lyon—Yes.

Mr St CLAIR—And you also have to restore that property to its original condition at the end of that lease?

Mr Lyon—Yes. That is right. The way in which this works in this market is that the owner is guaranteed a rent for a specific period of time and, unlike any other area of residential property, they are guaranteed that the house will come back in a decent condition. So it is quite appealing from that point of view.

Mr COX—Have you heard any feedback from the states about not paying stamp duties and land tax?

Mr Lyon—Not in the short period that I have been managing director, but the Commonwealth does have arrangements with the states in a wider context. It is in that sort of context that we will be seeking to reach understandings with the two shareholder ministers.

Mr Tonkin—There are these tax equivalent payments. The proposition is the authority would make a payment which would equate to some extent to the state taxes which otherwise would be chargeable. This goes back to the ongoing debate about where the Defence Housing Authority sits within the spectrum of types of government business enterprises. Part of the Defence submission was to indicate that in its view you need to have a variable approach to the management of government business enterprises to reflect the nature of the business in which the enterprise is in, and DHA sits in a special case.

Mr Lyon—And indeed so do the state housing authorities. Some of them also have land development organisations as well. As I understand it, they are in a similar sort of situation.

Mr COX—Has the old Commonwealth-State Housing Agreement 'D' evaporated completely now?

Mr Tonkin—I think so, apart from one.

Major Gen. Dunn—That is right.

Mr Tonkin—In terms of how it relates to the defence area, I am just trying to bring to mind whether we ever finalised the arrangements with South Australia. But we went through a process six or seven years ago to progressively get out of the Commonwealth-State Housing Agreement in respect of each state.

Mr COX—Taking a proportion of the stock.

Mr Tonkin—There was a deal done progressively with each state, so that ceased to be and the authority picked up the loans liabilities.

Mr Lyon—I believe it has finished, but I can confirm that.

Mr COX—Another operating thing I am interested in is the vacancy rate within Defence housing across the whole stock.

Major Gen. Dunn—We have two vacancy rates that we describe. One is the manageable stock and the other is the total stock. There is an element of stock which we define as unmanageable—that is, where we are moving off a base and we are not putting people back in there. It is purely an internal definition; it does not imply some difficulty with the stock at all. If we take the total stock across the country, our vacancy rate is about seven per cent to eight per cent of the total stock. Manageable stock is now down to two per cent to three per cent vacancy. We are pulling down that total vacancy rate by the removal, the sale or the excision of a base and then sale of that unmanageable stock. There is an active program at the moment to get down to the objective of two per cent to three per cent, and we are rapidly heading towards that.

Mr St CLAIR—Who sets your goals? Who sets those sort of targets? Is it the board that sets them or is it you that sets them?

Major Gen. Dunn—In this instance the vacancies are essentially managed by Defence. We have a set two per cent or three per cent as the rate. That is done in very close conjunction with the authority, but we need that vacancy rate of about two per cent or three per cent to allow the normal postings to occur.

Mr St CLAIR—Is that benchmarked against some other similar industries or similar businesses, or is it just a figure you have decided on?

Major Gen. Dunn—It is not just a figure that we have decided; it is the figure that we need to allow us the flexibility to post people from various parts of the country to other military establishments on either a career or operational need.

Mr Tonkin—One of the features of the service level agreement is that there will be benchmarks set in the mechanism so that you can measure it against the market, presumably on a region-by-region basis. That will be a way of seeing the performance of the Authority. It is also a constraint which applies to Defence. If Defence 'mismanage' its posting—its demand set—then it makes it very difficult for the Authority to manage the provision of the stock, so it has to be a cooperative and structured relationship.

Ms PLIBERSEK—I want to take you back to the issue of managing vacancy. What systems do you have in place to monitor whether particular areas of housing have a consistently high vacancy rate? Do you have a system that would pick that up?

Major Gen. Dunn—Yes, we do. We constantly monitor the vacancy rates. We can tell at any particular time where our vacant houses are. The situation that you describe, where we might get a particular run of vacant houses, is because we are controlling the tenants in the sense of moving them around the countryside. It can always be correlated back to what is happening operationally with a Defence organisation. As soon as the vacancy rates have a possibility of increasing, then we enter into discussions with the authority about either the disposal of or the lease to the civilian community—the broader community—of those properties so that they do not sit empty without rent coming in.

Ms PLIBERSEK—What sort of vacancy rate would trigger that sort of discussion?

Major Gen. Dunn—Anything above the two per cent to three per cent.

Ms PLIBERSEK—For what period of time?

Major Gen. Dunn—Anything over three months.

Ms PLIBERSEK—You will be aware, at least, that we had this problem in Woolloomooloo, which is in my electorate, where the majority of houses were vacant for a period of over 18 months, and certainly that was not picked up until local residents complained quite a lot because there were people moving into the houses and using them as squats. Obviously, there is some problem with the system that it was not picked up in that instance.

Major Gen. Dunn—We were well aware of that problem. There is a fundamental issue with those units that we are talking about. It was a very difficult situation that we had to manage that related to the problems that some of the families experienced living in that area.

Ms PLIBERSEK—I live in the area so don't say anything bad about Woolloomooloo.

Major Gen. Dunn—I am not passing comment on Woolloomooloo at all. We did have a circumstance there where families, for various reasons, refused to live in those apartments.

Ms PLIBERSEK—Yes. I am asking the question because they were vacant for some time before they were actually disposed of. I think it is fair to say that it was only the question on notice here in the parliament that actually triggered the action. That is why I am asking you the question about what systems you have that would normally pick that up.

Mr Tonkin—At the moment, allocations are still not with the Defence Housing Authority but within the Defence Force and the department. It is not the authority's responsibility; in this case, it was the responsibility of the Defence Force to manage that allocation issue. One of the issues we are now looking at aggressively in the service level agreement structure is seeing whether it would be more sensible, given that we have providers and maintainers of houses sitting there with this overhead that the chairman identified, to also have them do the allocation function to get a much closer fit so that we certainly do not have the prospect of a gap that somebody in Defence knows that there is a sector of housing which our customers do not wish to use but it gets hidden because it is low down in the hierarchy somewhere, and that it becomes part of the business relationship which is much more actively scrutinised. The Woolloomooloo instance did identify a defect in the process. We have tended in the past to manage our housing stock as the Navy's housing stock, the Army's housing stock and the Air Force's housing stock instead of the Defence Force's housing stock. That creates inefficiencies and we are overcoming that—or we have overcome it.

Major Gen. Dunn—We have done it.

Mr Tonkin—Yes, we have overcome it. Then there is the question of the relationship between Defence and the housing authority. It is called progressive improvement, I hope.

Ms PLIBERSEK—Could I ask one more question? In that instance I think the period of the lease was something like five years—it was a reasonably long-term lease. We were about 18 months into that lease. What is your arrangement for exiting that lease?

Mr Lyon—It is twofold. We would first talk to the owners to find out whether or not they would like to take back the property, and quite often I understand that is the case. Secondly, if they do not, we will let the property to non-defence tenants. Indeed, we do that throughout the country.

Ms PLIBERSEK—You don't just pay out the lease.

Mr Lyon—No. We adopt a straight commercial approach. In some circumstances the best commercial approach is to make a small payment or to make a part-payment because that is the best commercial outcome. In other situations we would re-let the property.

Mr COX—With the present arrangement between Defence, the services, and the DHA, do the individual services pay the Defence Housing Authority rents for particular houses that are occupied or is it simply a case that they allocate people to those houses?

Major Gen. Dunn—It is done on a Defence-wide basis and it is not done individually by services. It is seen as a single requirement to meet, and the bill is paid as a single bill.

Mr COX—So there are no price signals going to individual services yet?

Mr Tonkin—No.

Major Gen. Dunn—The price signals are the market price signals. We pay market value so we have a very clear signalling process there. It is not up to the individual services because, being the personnel executive, I have the responsibility for the three services and a large number of the civilian policies. I treat that as a whole and it is by far the most effective way to do it. Otherwise we would have the difficulties we experienced some years ago where we did have isolated pockets of vacant housing because a service did not need it whereas, next door, so to speak, you could have another service in a shortage situation.

Mr COX—Are you paying DHA rents only for houses that are occupied or are you paying them rents for all of the houses whether they are occupied or not?

Major Gen. Dunn—We pay rents for the houses that are occupied and there is a period, usually it is three months, where we continue to pay rent if that house is vacant. If the house is vacant for any more than three months then we hand that back to the authority for disposal or lease to the private community.

Mr Lyon—It is in this area that we are actively talking about how we can work together in a partnering arrangement to more efficiently use the stock and also introduce some ways in which tenants also have a degree of choice.

Mr St CLAIR—What is the make-up of your board? You obviously have a board, according to our papers here. What does that do?

Mr Lyon—We have a commercial board which acts like any board would in the sense that it is responsible for all the activities that a commercial organisation would be responsible for. We have a chairman who is independent. At the present time it is Mr Peter Jollie. We also have four other appointed directors with varying expertise who are the commercial directors. In addition to that, General Dunn is an ex officio member of the board as is Dr Ian Williams from the Department of Defence and, at the present time too, the Deputy Chiefs of the Staff are ex officio members of the board. The government is looking at the structure of the board at the present time.

CHAIRMAN—You said you pay market rates. How would you know what market rates are when in fact your agent is the authority?

Major Gen. Dunn—We are able to test that through ABS statistics, through the Real Estate Institute of Australia statistics. We have a system where we do test those regularly and, as the authority is dealing in the market and also we have 15 per cent of our personnel in what we call rental assistance—that is, in the market—we are able to judge that at any particular time during the year.

Mr Lyon—Also, the authority engages independent valuers to assess the market situation. I think we do about a third of the houses each year.

Major Gen. Dunn—That is right.

CHAIRMAN—I hear you but I have to tell you I remain sceptical. In your submission to us, Mr Lyon, you said statements of corporate intent are produced annually but you consider that you have two areas where reporting requirements are excessive. One was because you are classified as a GBE you have to produce an annual portfolio budget statement and you say some of the requirements are not applicable to your activities. Can you give me some idea what that is all about.

Mr Lyon—Basically, unlike the other statutory bodies—and this is driven by the fact that most of the authority's revenue comes from the Department of Defence which is another arm of government—we prepare a portfolio budget statement which goes into the overall budgetary papers. But I think we also said, though, that we are quite capable of preparing that statement, so it is not something I would like to make a big deal of. Indeed, we are talking to the Department of Finance about how we can actually simplify the arrangements in a way that it involves less administration.

CHAIRMAN—And you said DHA is the only GBE required to report monthly to DoFA. Why are you required to report monthly, and what is it you have to report?

Mr Lyon—I would need to get some more briefing on this particular point, but in the month I have been at the authority it has not become an issue to my knowledge. Could I ask my colleagues—

Mr Tonkin—I am not sure. There has been a traditional Department of Finance interest in the area of housing.

CHAIRMAN—I can understand.

Mr Tonkin—It has been considered a significant cost driver and hence you often find an intriguing balance between the notion of the devolution of authority to agencies and the need for central scrutiny. It is not a problem that is unique to the Department of Finance and Administration. Similarly, inside Defence we have a similar philosophy and a similar constraining balance so that we like to let the areas get on with what they are doing. We still like to know what they are doing.

Mr St CLAIR—How big is the business?

Mr Lyon—There are two arms to the business. The property management sort of business is about $270 million a year—that is from the Defence department, basically. The capital acquisition and disposals business last year was $700 million. It is quite a large business and that is—

Mr St CLAIR—Selling and buying?

Mr Lyon—Selling and buying, and of course we are involved in acquisitions from the point of view of land development through construction and spot purchasing and so on, so it is quite a large commercial business.

Mr St CLAIR—A billion dollars a year.

Mr Lyon—Yes, roughly. By the time you have put into the whole equation all the Department of Defence's costs, including taxation and all that, it is. It is a very large business, and that is one of the reasons why we are all very keen to get the arrangement onto a more solid footing.

Mr Tonkin—The housing costs Defence a net $340 million. That includes the rent we pay minus what the families contribute. That is a subsidised rate plus a fringe benefits tax, and fringe benefits tax is $170 million.

Mr COX—Has there been an effort made in the last couple of years to put the level of subsidy on some kind of a structured basis rather than the—

Mr Tonkin—I would measure it over a period of longer than a couple of years, but there has been a continuing policy intent to move the subsidy to a sustainable level. The judgment set at 50 per cent would be a presentationally sustainable level. That is, I admit, simply a pluck as to what is an appropriate rate. It is a matter of what is saleable to all parties concerned. The subsidy lies at the moment at—

Major Gen. Dunn—It is 54 per cent at the moment and we have a very clear program to bring that subsidy down to 50 per cent. We have a very clear timetable to actually get to that 50 per cent, and all the tenants know that.

I would like to make a couple of comments, though, if I may, regarding the use of the term 'business'. The authority has to operate with a number of non-commercialities which would drive any other organisation out of business if they were to actually adopt the role. And I would just like to place on the record that we found before, and every time we reviewed the authority's actions, that it actually is not a business.

The reason I say that is that we, in Defence, require the authority to produce houses in areas that are absolutely non-commercial, to produce them in numbers that would be non-commercial, and to produce them in areas where there is simply no resale value until such time as the communities develop around them. So it does make for a very difficult decision

at various times as to how the funds are distributed and therefore what rents are set because there are no benchmarks in certain remote areas.

The housing is provided to provide operational capability to the Defence Force and that is something that we flag on every occasion because, without the accommodation, clearly we could not have Defence members in those locations—they would simply not go there. The subsidy of 50 per cent does represent an acknowledgment that service people do have families and that, if we want the service men and women to operate under very arduous conditions and be available for very short notice deployment such as we have just seen in East Timor where we have had people literally deployed in matters of days, and they have been away and will be away for anything up to nine months, it is fundamental that we have good quality housing provided for them so that they do not have to worry about their families and they can worry about operations.

The subsidy was at its highest, 57 per cent, and it has been declared as coming down to 50 per cent for some five years now, I think. It has been progressively stepped down and we are about to make the last two steps to the 50 per cent mark.

CHAIRMAN—Does the FBT issue make any sense to you?

Major Gen. Dunn—The FBT exemptions given by government have been welcomed by Defence.

CHAIRMAN—You welcome paying FBT?

Major Gen. Dunn—No, not at all.

Mr Tonkin—Dividends and adjustments.

Major Gen. Dunn—I am talking about the reporting on group certificates. So if I move onto FBT on housing, given that it is an operational capability that it is providing, then we would argue that we should not pay FBT on it and, indeed, for example—just to draw a comparison—that is the case that exists in the United Kingdom where defence housing does not attract the equivalent of FBT.

Mr Tonkin—The money goes around in a circle, but there is a question of competitive neutrality-type issues, of having it quite apparent to everybody—in the way in which the government's accounts are structured—what is the total apparent cost.

CHAIRMAN—I accept that. By the same token I would argue, as I did back in 1986, that charging FBT on company housing in remote mining sites is absolutely ridiculous, and quite frankly it is the same for the Army. Navy just happens to generally be located in high population areas because we like to build houses around natural harbours, and that is a fact around the world. But the Air Force does not have to be in high population centres and neither does the Army, and they sometimes are not. I have never understood it. I did not understand it in 1986 and I still do not understand it.

Mr Tonkin—It comes under that wonderful heading called 'government policy'.

CHAIRMAN—We are going to have to let you go, but you have two shareholder ministers, a portfolio minister and DOFA, John Fahey. Does that cause you problems?

Mr Lyon—I do not believe it causes problems. Obviously the Defence minister is first and foremost interested in the capability question in the provision of houses such as quality, standard, timing. Minister Fahey is principally interested in the commercial aspects.

CHAIRMAN—I bet he is.

Mr Lyon—Including the level of capital and the dividends and so on. So it is a complementary relationship. It adds value to the process by having these two viewpoints operating rather than simply having the Defence minister do it.

CHAIRMAN—I understand the corporate line, but Dick Humphry has a view that two shareholder ministers is probably appropriate but they ought to both be finance ministers. Do you have a view on that? Forget the company law. Just what do you think?

Mr Tonkin—What do I think? I think that would be desirable. If you take the particular case of the Defence Housing Authority, as I say, you would perhaps need to think about each GBE in a separate special circumstance. The Housing Authority exists to provide a critical service to the Defence Force. To have its total policy direction being driven with a fiscal bottom line focus might not necessarily continue over time to produce that sort of outcome.

CHAIRMAN—Then why not just integrate DHA into Defence?

Mr Tonkin—That is where we came from. There is a certain circularity to government policy or institutional structures over time.

CHAIRMAN—What goes around comes around.

Mr Tonkin—But a critical matter is the confidence that the members of the Defence Force and their families have in the quality and responsiveness and the focus on their needs of the provider of this housing. While there may be some superficial attraction to simplifying the arrangements, doing away with the overheads of boards and so on, in fact I am pretty confident that the people who actually deal with this material who actually are the clients would find that a very displeasing prospect. We believe we have, through the authority, established a very effective functioning mechanism to provide this thing, and to overturn it would come under the area of capital R Risk.

Mr Lyon—Also, just to restate, there are a lot of capital transactions and we operate in circumstances that really require strong commercial skills and the flexibility that goes with that. The board, particularly the commercial members in respect of commercial activities, play a significant role.

CHAIRMAN—You are telling me that the Department of Defence and, in fact, the armed services are not particularly commercially oriented.

Mr Lyon—I am simply saying that this is a specialised industry that requires particular skills.

CHAIRMAN—Well said.

Mr COX—Mr Tonkin, would you like to relate to the committee the little story that you have related to me in the past about part of your induction process into the Department of Defence when you were asked who the enemy was?

Mr Tonkin—No, I do not wish to have that on the public record, thank you very much, Mr Cox.

CHAIRMAN—What aspects of administrative law apply to DHA?

Mr Lyon—The normal arrangements like privacy, ombudsman and so on but, in quickly checking the records after talking to Stephen Boyd yesterday, I have to say that there has been almost no use made of the administrative law. I think that is partly because the authority has established its own very close monitoring arrangements of tenant satisfaction and the like and we see ourselves as a service delivery organisation.

CHAIRMAN—So that does not cause you any problem?

Mr Lyon—Not at the moment.

CHAIRMAN—When was the authority formed?

Mr Lyon—In 1987.

CHAIRMAN—And before that it was in Defence?

Major Gen. Dunn—Before that it was in Defence and the housing for our married personnel had reached an appalling state. Since that time, in the very short time of the authority's existence, housing has come to community standard and is one of the major plus morale factors throughout the country. It is definitely an attraction and retention measure for Defence and, without a shadow of a doubt, we could not have increased the readiness of the force in Darwin without the assistance of something like the authority.

The formation of the authority has also allowed us to make sure that appropriate amounts of the dollars, very carefully managed, are put to that aspect of operational capability, and we can avoid a circumstance when suddenly there is simply not enough money for the housing because it is going into some other operational capability. I would like to note that the United Kingdom, the United States, Canada, New Zealand and some other South-East Asian nations have also taken a very close look at the authority. The authority actually sets the world benchmark for the provision of service housing for both the management of the funds and the ability to maintain community standard housing virtually anywhere in a country as wide as Australia.

Mr Tonkin—The United States Department of Defense got right up to the point almost of adoption and tripped at the congressional clearance stage on issues of scale and local factors, which apply there. But they were convinced that the model that we had adopted was the way to go.

CHAIRMAN—I am surprised you did not tell us that in your submission. Thank you very much for both submissions. Thank you for coming and talking to us. We are much more enlightened. Thank you.

[10.11 a.m.]

CLENDINNING, Ms Anna, Assistant Secretary, Legal and Coordination Branch, Corporate Division, Department of Transport and Regional Services

GEORGE, Mr Gregory Clive, Acting Director, Rail Policy, Department of Transport and Regional Services

HARRIS, Mr Peter Noel, Deputy Secretary, Department of Transport and Regional Services

KEANE, Dr Bernard John, Director, Policy Development and Coordination, Department of Transport and Regional Services

CHAIRMAN—I now welcome the representatives from the Department of Transport and Regional Services to today's hearing. Do you have a brief opening statement or shall we ask you questions about your submission?

Mr Harris—No, we do not have a brief opening statement.

CHAIRMAN—We thank you for your submission. I had better apologise now because, I am afraid, I do not find rail track quite as fascinating as defence housing.

Mr Harris—We are probably quite pleased not to fascinate you, Chairman.

Mr St CLAIR—But I can assure you, I do find it fascinating.

CHAIRMAN—But it does not allow much variation any more, does it? We used to have gauges everywhere.

Mr St CLAIR—We do not need those, either.

CHAIRMAN—You said in your submission that:

> The Committee may wish to consider whether the current process of Parliamentary scrutiny (through the Senate Estimates process) provides the most effective means of analysing the performance of GBEs. The Department is of the view that, to the extent the Estimates Committee process scrutinises performance in ways that GBE management may feel place at risk the exposure of commercial strategies, the Estimates Committees may not be the preferred forum. Scrutiny in camera by a Committee such as the JCPAA may be an alternative.

Would you like to expand on that a bit?

Mr Harris—Mr Chairman, that comment was something I put in the submission based on some experience probably over the last 10 or more years with GBEs in working in different departments. From time to time, the issue has been raised primarily by CEOs of the GBEs that I have worked with that they feel it is possible for their competitors to expose commercial strategies or otherwise try and extract commercial information through the Senate estimates process, primarily because estimates is able to take advantage not just of the formal budget estimates presented by the government but also the annual reporting

process which, in the case of some of those GBEs, does allude to—but without tremendous detail in most cases—changes in corporate direction.

I personally have never seen an estimates committee actually stumble into such an area, but I know that it has been the subject of debate between the department and the GBE heads when we say, 'You are on for estimates next month. Be prepared. Here are a few issues we think they might raise.' Occasionally, we do get back this advice which says, 'We would really rather not talk about this change of corporate direction.' We have to advise the GBE head that estimates committees will, in the end, decide what they want to decide. That is the nature of it and they should be prepared to discuss this issue. I put this forward not as an effort to reduce scrutiny. We are quite explicit in saying that we are very much firmly in favour of that scrutiny.

But we do believe that if GBEs have a case then it ought to be that they should be examined, but potentially in camera by a committee that is interested in the commercial strategies and has a good handle on the public interest aspects of that. I recognised at the time it would be controversial but I thought it was better to put it up and potentially enable the committee to ask GBEs as and when they turn up whether they felt a concern in this area themselves.

CHAIRMAN—Maybe it is controversial, but you are certainly not the first one to make such a suggestion to this committee during the course of this inquiry. Telstra and Australia Post are huge fans of not having to show up at Senate estimates committees. They both argue very strongly that it puts their commercial strategies at risk, plus the fact that it is time consuming and expensive. They argue that, because they are true business enterprises, these are areas they should not be involved in.

My question to you, because it is the first suggestion we have had from the department, is: if we, in our wisdom, were to make a recommendation that GBEs be not subject to Senate estimates scrutiny, how would we accomplish it anyway? The Senate is the Senate; we cannot tell the Senate what to do.

Mr Harris—That is true. But if a committee with the status of this committee said, 'We would like to take over that scrutiny', then the primary rationale the Senate has for saying that GBEs should turn up is still met. That is, someone with the public interest representing, effectively, the taxpayer and representing that investment in the GBE and, frankly, someone with somewhat more commercial expertise potentially, will take on and ensure that the role of scrutineer is maintained. Potentially, in my judgment, it might generate a slightly better level of scrutiny of what I might call the financial performance of GBEs by comparison with the very much one-off issues that are occasionally raised, for example, about someone's feeling that they were passed over for a job or something which can go on for a very long time at an estimates hearing. Sometimes when you sit there, you feel a concern that there might be some substantial public interest issues in terms of commercial performance that are being missed, whilst the focus is on some narrow and one-off issues in relation to the passing over of someone for a job or something like that.

CHAIRMAN—I appreciate your advice and your suggestion. I have thought about this and I tend to agree with Telstra and Australia Post that the process is intrusive, that it does

cause them additional expense and trauma that they do not need to go through because they are acting as commercial enterprises, albeit with a lot of regulatory constraint. Your suggestion is the first one we have had of how we might even consider doing such a thing.

Mr Harris—If the government gets a recommendation from the committee it has to provide a response. The government might choose to take it up with the Senate, or the government may choose not to. That is a controversy that I am recognising here, but it seems to me that it is worthy of consideration because this committee provides a venue to ensure that the public interest can be represented in discussions with GBEs about their commercial performance.

CHAIRMAN—Because this is a joint committee, that perhaps has some merit. We will discuss that. Could we have your view of dual shareholder ministers?

Mr Harris—We are in a very unusual position. We have only one GBE—

CHAIRMAN—And heaps of authorities.

Mr Harris—We have heaps of corporate entities which we have listed for you to provide a comparison. Australian Rail Track Corporation is a GBE. The others are entities which on face value it might be suggested—some of them, anyway—should belong in the GBE category. The classic is Airservices, but Airservices has a single shareholder minister and that is our minister. We think that system works quite well. On that basis I would say it is not essential to have dual ministers. We have very active consultation with the Department of Finance on financial issues in terms of passing over drafts of corporate plans and ensuring that Finance views are sent back to Airservices. Airservices itself talks directly to the Department of Finance about its financial performance.

I could not say that it is essential to have dual ministers because we have a highly corporate entity which nevertheless has a single minister. But it is quite different from the model that Dick Humphry put up, which was that you might have dual ministers but they should both be financial ministers. We have a single minister and it is not a financial minister. Circumstances sometimes require that a standard model can and should be varied for what are very good reasons. In the case of Airservices my judgment is that it is primarily because it is not only delivering commercial services; it is also delivering a safety and environmental management service for the government. So it has a very important public interest element in how it goes about delivering those commercial matters. I think the government took that into account when it established the set of GBEs, and Airservices was not one of them.

You can see from Airservices' own submission that they are not a disinterested party, shall we say. They advocate turning themselves into a corporation and they would like to see that happen in the near future. It is a horses for courses thing, particularly where you can identify that it is not simply financial performance which is the reason the government is holding this asset. Then that has to be taken into account in ministerial arrangements.

CHAIRMAN—But in the marketplace, where the shareholder minister is also the regulator there is a perceived, if not actual, conflict of interest.

Mr Harris—In the case of Airservices the regulator is CASA and CASA under its legislation is extremely independent of government—

CHAIRMAN—And controversial.

Mr Harris—But CASA is the regulator. In that sense the minister is quite separate from the regulator in the case of Airservices. Nevertheless, I would not want to mislead the committee and suggest that there are not areas of Airservices' performance where the minister can and does have an explicit, and what I would call a regulatory, interest. That is particularly in environmental management—management of air traffic noise over Sydney and some other parts of the environmental impact of air traffic management. So broadly speaking it would be true to say that the regulator is quite separate from Airservices and from the minister, but not in all cases.

Mr COX—What is the reason for only having a single minister for Airservices Australia and not having the finance minister in there as well?

Mr Harris—Earlier I alluded to my perception because I do not think it was ever explicitly stated to us why that decision was taken. We know it was taken in bilateral discussion between the Minister for Finance and Administration and our minister at the time. My perception—and I have not heard anyone dispute this, including from Finance and from Airservices for that matter—and Airservices was also very keen to find out why—is that it is because there is this substantial, potentially in some circumstances, dominant requirement for safe operation of air traffic management and environmental management, both of which are therefore regulatory functions.

Mr COX—Was it because a minister from Sydney did not want to get involved in flight paths unnecessarily?

Mr Harris—I doubt it. That would have been a possible stratagem many years ago.

Mr COX—I might ask Ms Clendinning about the aggravations and travails of administrative law being applied to these bodies. Do you have a view about that?

Ms Clendinning—The department's submission in relation to GBEs generally says that that they are commercial entities with commercial responsibilities to shareholders and things that would impose a high degree of extra accountability. I will elaborate here. My view is that the principal elements of the administrative law package that people think about are the FOI act and the AD(JR) challenging of decisions and the operation of the Commonwealth Ombudsman. Most of those are targeted as being citizens' remedies, although companies have used the administrative law package to their own advantage. It is available and they can be parties. So often it would not be citizens who would be using it.

But most of the information that people would probably try to seek, through an ombudsman investigation or documents from FOI or reviewing decisions, would be matters that would not be disclosed under that legislation anyway because it would be commercial-in-confidence. So I do not know that there is any benefit to a GBE from that regime being

imposed upon it, and there is not a disadvantage to the community in that there are other methods of accountability for these commercial entities.

Mr COX—In your experience is it an onerous administrative burden on most GBEs in this portfolio?

Ms Clendinning—We only have the one GBE, and ARTC is a Corporations Law entity. So the administrative law package does not apply to it. The other bodies we have here, nothing has been brought to my attention that there is a burden there.

Mr COX—What was the reason for making the ARTC only subject to Corporations Law?

Mr George—The nature of its business was quite commercial. The government was trying to introduce an element of commerciality into the operation of railway, so the corporate structure seemed at the time to be the best to meet those needs and to force it to act commercially. It is a product of being Corporations Law that it is not subject to administrative law. There is no legislation set up specifically for it; it just uses the general Corporations Law.

Mr COX—At the time that decision was placed, had it already been decided to privatise it completely?

Mr George—There has been no decision taken to privatise the ARTC.

Mr COX—There is no intention?

Mr George—The government has no intention.

CHAIRMAN—Australian Rail Track Corporation—your only GBE—did say, and you also commented, that their reporting responsibilities should be no more than those of similar privately owned companies. Can you give us some background to that?

Mr Harris—The only concern I am aware of more generally is in relation to audit. ARTC will obviously want to speak for themselves. That is the only issue I have heard on an ongoing basis that concerns people. My logic is that it remains the case that if there is a taxpayer's investment in the entity then the Auditor-General should be capable of auditing that investment.

CHAIRMAN—So you do not agree with that?

Mr Harris—I would not agree that auditor arrangements should be varied such that the Auditor-General was not capable of auditing an entity in which the taxpayer had an investment.

CHAIRMAN—Yes.

Mr Harris—I would not agree, and that is based on long experience, not just in the transport portfolio but in other portfolios as well. I have worked in a number of departments which have government business enterprises and Corporations Law companies. As I recall it, early on in the GBE reform process in the late 1980s we did deeply and seriously consider this question of audit. We went a long way down that track and probably too far. There is a lot to be said for ensuring that the auditor can, as it were, dig up the bodies, rather than have a private auditor whose job may be to bury them.

CHAIRMAN—That what?

Mr Harris—A private auditor's job may be to bury the bodies rather than to dig them up. The Auditor-General tends to focus, rather, on finding out how things occurred and providing publicly lessons for the future so that problems can be avoided. I do not always see that in the performance of a private auditor.

CHAIRMAN—By the same token, though, the new Audit Act has only been in operation since 1 January 1998. The auditor can undertake a performance audit of a GBE under one of two circumstances: a shareholder minister requests it or we request it, presumably either because we had concerns or on behalf of somebody else. So we would ask him to do a performance audit. But none has ever been performed.

Mr COX—The really big financial disasters with GBEs in this country have been in the states. They have all been in the areas of banking and insurance when the Auditor-General was excluded at looking at those. I asked Dick Humphry that question after we had the hearing in Melbourne because he had been Auditor-General in Victoria at the time that the State Bank of Victoria got into trouble. He had been systematically excluded from having a look at it. The same problem was in evidence in South Australia when the State Bank of South Australia went down and when the State Government Insurance Commission got itself into diabolical trouble as well.

Mr Harris—My logic is that it is an acceptable and reasonable thing to be able to call in a performance audit. But if you know annually that someone—on behalf of the Auditor-General usually; maybe the Auditor's office itself, but certainly on behalf of him—is with the public interest in mind going to audit your accounts, it is an ongoing level of oversight or potential for a level of oversight that is always going to be in the back of the minds of people who are effectively using public funds. I think that is a good system.

Mr COX—There is also the advantage of the Auditor-Generals' access to parliamentary privilege when he tables his report, whereas a private auditor might pull their punches because they think they might get sued. Would you agree that might be a factor?

Mr Harris—Yes. As I said earlier, the Auditor-General, with reporting, attempts when problems are found to provide lessons for how to avoid this in the future. I do not think a private auditor would necessarily fill that role. Their obligation is to the individual entity, not to the broader public interest.

CHAIRMAN—At a practical level the auditor does not have to but he chooses to employ private sector companies to do the financial audits of GBEs rather than doing them

in-house. He saves his expertise for government departments where the private sector has virtually no expertise, or very little.

Mr Harris—I retain confidence in the fact that it is the Audit Office that is employing and, I am sure, directing the efforts of those people. I have no problem with contracting out. By its nature it is undoubtedly a more efficient way of managing it and ensuring that the processes and the quality of skills are kept up in the audit process. I have more confidence, perhaps, than some others. Nevertheless, I have confidence that the auditor is able to do that.

CHAIRMAN—The Department of Transport is reasonably happy with both the CAC Act and the FMA Act?

Mr Harris—Yes. I have no specific criticisms.

CHAIRMAN—As far as you are concerned, they have worked well.

Mr Harris—Nothing has impeded our performance as a result of that legislation.

CHAIRMAN—ANAO recommended in its GBE monitoring practice no. 2 of 1997-98 that portfolio departments should periodically commission an independent assessment of the corporate plans of GBEs in their portfolio to provide objective assurance to the ministers. Have you supported that proposal?

Mr Harris—To my knowledge, ARTC is only a very recent GBE.

Mr George—The ARTC is a new corporation. It has only just recently submitted its second corporate plan. So, it has not been going long enough to start following up on that independent assessment. Certainly, to date it has just been Finance and us that have provided the scrutiny.

Mr Harris—We do not have existing experience. I do not think it is an unreasonable recommendation on a judgment basis, but we have not performed against it to date. With some of our other non-GBEs, for example, Airservices, we have done substantial in-depth scrutiny of the corporate plan to the extent of having sent it back. In other words, we have not just looked over it and saw it all added up and saw it was consistent with government policy, there has been quite a robust exchange between us and Airservices on setting its corporate plan.

CHAIRMAN—What is 'robust?'

Mr Harris—When the board sends a draft corporate plan to the minister, boards naturally have an expectation that the minister is going to say, 'Yes, good job boys.' Sometimes, when that response does not come, there is a feeling that there is a robust exchange going on. Certainly, from my side there was a feeling that there was a robust exchange going on.

We do, therefore, take quite seriously the scrutiny of the corporate planning process, and if we felt the need we would want to get external assistance. I have not felt the need in that

area but, as I say, I do not think it is an unreasonable recommendation from the Audit Office.

CHAIRMAN—Thank you very much for your submission and thank you for coming. We will think about your suggestion about Senate estimates because you are the first one who has come up with any possible way around it.

Mr St CLAIR—I think it is a good one.

CHAIRMAN—Others have complained, but that is all they did, complain.

Mr St CLAIR—There is a difference between receiving government funding and actually reporting to a body.

CHAIRMAN—To date, nobody has offered a suggestion on how we might address it and still keep them under scrutiny. It is worth thinking about.

Mr Harris—Thank you.

CHAIRMAN—Thank you very much.

Proceedings suspended from 10.37 a.m. to 10.49 a.m.

ATKINSON, Mr Geoff, Manager, Finance and Commercial, Australian Rail Track Corporation

CHAIRMAN—Welcome. Thank you for your submission and for coming to talk to us today.

Mr Atkinson—It is a pleasure.

CHAIRMAN—I understand this is a first for you.

Mr Atkinson—Yes, that is correct.

CHAIRMAN—Did you have a brief opening statement you would like to make before we ask you questions?

Mr Atkinson—No, I will just answer your questions.

CHAIRMAN—How long has your corporation been a GBE?

Mr Atkinson—The Australian Rail Track Corporation was incorporated on 25 February 1998, but it only started effective operations on 1 July 1998 when the interstate rail assets of Australian National were transferred to the ARTC.

CHAIRMAN—So you have not got a huge backlog of experience in operating under the act yet?

Mr Atkinson—No, not at all.

CHAIRMAN—In the limited time that you have been a GBE, do you see any difficulty in conforming with the requirements of FMA versus the CAC Act?

Mr Atkinson—The FMA does not apply to the ARTC, but the CAC Act does. I guess that is the theme of our submission, that we see there being unnecessary duplication between the CAC Act, THE Corporations Law and the corporate governance requirements imposed on GBEs. Our submission supports the situation where the Corporations Law prevails and that there is not any requirement for us to comply with the CAC Act simply because everything is picked up in the Corporations Law.

If you look at the CAC Act, most of the document relates to government authorities, and that there are probably about four pages that are specific in regards to Commonwealth companies. In most of those areas, it is a duplication of what is in the Corporations Law. Some of the areas are not, but as the submission states, if you consider the listing requirements for public companies, it picks up those other areas. For example, disclosure to the shareholder of material changes to the operations is picked up by a listed company. So we would comply. Half-yearly reports is also a requirement of listed companies, the argument being, therefore, that perhaps there is not a need for us to comply with the CAC Act if people looked at the Corporations Law, as we are picking up some of the things that relate to listed companies.

CHAIRMAN—You have two shareholder ministers?

Mr Atkinson—Yes, we do.

CHAIRMAN—Has that caused you any problem?

Mr Atkinson—The two shareholder ministers model is preferable to a one minister model. Our concern regarding a one minister shareholder model is that a single minister might choose to interfere in the affairs of the company more than perhaps two shareholder ministers would do. So, it gives a good balance, two shareholder ministers being responsible for the company.

A concern raised earlier was to do with one shareholder minister being a regulator. I certainly endorse that view.

CHAIRMAN—Sorry?

Mr Atkinson—It would give ARTC considerable concern if one of the shareholder ministers was also involved in regulation. That could potentially compromise the minister.

CHAIRMAN—Don't you have that situation?

Mr Atkinson—We have a minister that sets policy and we endorse top level policy for rail, and that is an appropriate approach. When it gets down to, say, safety regulation, the policy minister does not get involved with that, and nor should he. That should be another area of government. The difficulty we see is that if there is a minister involved with regulation of the industry. Therefore, the two-shareholder model is our preferred approach.

CHAIRMAN—Do you prefer that to just having the Minister for Finance?

Mr Atkinson—Absolutely. We feel that it gives a better balance.

CHAIRMAN—How many directors do you have?

Mr Atkinson—At the moment we have four directors, one executive director and three non-executive directors.

CHAIRMAN—Drawn from?

Mr Atkinson—From industry generally. The chairman has considerable experience in large national and international corporations. The other directors have experience in the banking area and the area of public service and commerce. They bring a wide skills base to the organisation. Our CEO is also a director and has worked in government organisations that have been commercialised so he brings a wealth of experience to the company as well. The balance of the board, in my humble opinion, is really quite good and does bring the sort of experience you would hope a board would have.

Mr COX—Can you fill me in on—

CHAIRMAN—We have done that.

Mr COX—You have? You have all the train lines in South Australia and up to Alice Springs—

Mr Atkinson—Yes.

Mr COX—And you have some limited train lines in Tasmania. Do you have any track in Western Australia?

Mr Atkinson—We have no track in Tasmania. That was sold as part of the AN sale. The track that was vested to us from the Australian National Railways Commission extends from Kalgoorlie to Tarcoola, which is in South Australia, north to Alice Springs through to Port Augusta and up to Broken Hill, in New South Wales obviously, and then to Wolseley on the SA-Victorian border. That is the track and the infrastructure we own. We also lease the interstate main line track in Victoria. That is from Wolseley on the border through to Albury-Wodonga, but we have a lease arrangement with the Victorian government. That is putting into effect the state's commitments under the intergovernmental agreement, the instrument that established ARTC.

CHAIRMAN—Have you yet had to appear before Senate estimates committees?

Mr Atkinson—No, we have not.

CHAIRMAN—Not yet?

Mr Atkinson—No.

CHAIRMAN—Lucky you.

Mr COX—What is the value of the corporation?

Mr Atkinson—Are we talking about dollars?

Mr COX—Yes.

Mr Atkinson—The replacement cost of those assets that we own totals $2.3 billion. We are talking the rail corridor and associated infrastructure over that area that I just described. In terms of the consideration that was given to the government when the company was set up, that appeared in our balance sheet at $123.1 million. That was based on the recoverable amounts assets test that looks at future cash flows associated with those assets. That is under an accounting standard. They came into ARTC's books at $123.1 million. In AN's books they were probably about $400 million.

Mr COX—What was the logic for them being $400 million in AN's books?

Mr Atkinson—That was based on the historic cost of those assets written down over the years for depreciation. So it is a strict historic accounting approach to the value of those assets.

Mr COX—Right.

CHAIRMAN—Is there any intent to privatise?

Mr Atkinson—That is up to our shareholders to determine.

CHAIRMAN—There has been no public statement?

Mr Atkinson—No public statement. In the intergovernmental agreement there is a provision for the organisation to be reviewed no later than 2002, and the IGA has a time frame of five years.

CHAIRMAN—The what?

Mr Atkinson—The intergovernmental agreement. The IGA has a time frame of five years. That is the life of that agreement that set up the ARTC.

CHAIRMAN—Back on Senate estimates—you do understand what the Senate estimates process is?

Mr Atkinson—Yes, thank you.

CHAIRMAN—Some GBEs have commented that they do not believe that they should be involved in that process because it puts them commercially at risk in terms of information that might be sensitive in the marketplace. Do you have any objection to appearing before Senate estimates?

Mr Atkinson—I guess commercial-in-confidence information is a concern, as it should be with any commercial organisation. The approach that I think we would favour would be a slightly different approach, again falling back to Corporations Law. Under Corporations Law the shareholders can at any time call a general meeting of the company and can put questions to the directors regarding issues. Given that the government has deemed it appropriate that ARTC should be set up as a Commonwealth company, our argument would be to let Corporations Law prevail. If there are issues, then those issues should be duly put to the directors by the shareholders at a meeting of shareholders, rather than through the Senate estimates committee. That would be our position on that.

Ms PLIBERSEK—I was just thinking about this issue further. One of the problems that we have identified over a period of time is that the issue of commercial in confidence information is sometimes used as to obfuscate, and while a number of the people today have said that they feel that the Senate estimates process might be too onerous a process for GBEs, my fear is that there would be a natural desire for entities to minimise scrutiny because scrutiny is inconvenient. But scrutiny is not necessarily bad. Why should I believe that it is anything other than based on the fact that it is inconvenient to be scrutinised?

Mr Atkinson—We do not mind the scrutiny. That is not perhaps our major issue. The issue is the process through which we are scrutinised. We believe that it should be through the Corporations Law process that the scrutiny occurs rather than through the Senate estimates committee process.

Ms PLIBERSEK—I am sorry to interrupt you, but I will. You know how government works. If you are a relatively small entity it would be very easy for the scrutiny of a particular entity to just slip off the agenda. The thing about the estimates process is that backbench senators and people in the community know that it is coming up. They know that if they do have questions they can put them to a senator to ask in that process. If what you are describing is a situation where a general meeting of shareholders has to be called, that actually means that you need one almighty big problem to initiate that process. There has to be a pretty strong motivator for someone to take the initiative. So why would we, rather than having regular ongoing scrutiny, go to a situation where you need a huge problem to initiate a process of scrutiny?

Mr Atkinson—I take your point. My understanding is that Senate estimates committees are an annual event—I might be mistaken there—and if there is an almighty problem and questions need to be asked, the Senate estimates committees present the once-a-year opportunity.

Ms PLIBERSEK—Under certain circumstances, you do actually have an opportunity in supplementary estimates to tease out issues as well. There is more than one opportunity, but I take your point.

Mr Atkinson—I am trying to sell my model as something that can be done throughout the year if necessary, if there is a problem; whereas Senate estimates committees are held once a year—and I do take on board and thank you for mentioning the follow-up opportunity in the supplementary estimates. So I put that forward as something to consider, and it is consistent with Corporations Law.

CHAIRMAN—On page 2 of your submission you commented that the corporate governance structure requiring companies to report to a board of directors substantially reduces the need for shareholder ministers to operate as second tier. What role do you think your shareholder ministers should play?

Mr Atkinson—It gets back to the reason for the establishment of a Commonwealth company. If it is to be set up as a company then there should not be this form of reporting back to the shareholders. The shareholders have a role to play in general policy direction—that is, to acknowledge and accept it. The shareholder ministers, like normal shareholders, also have a role to play of putting pressure on the company and its directors to maximise profits. That is certainly accepted. It is just this second tier approach which we think we should question and put to you as something that perhaps is not necessary. Again, as we say there, it is the duplication of effort. If there was a compelling reason to establish a Commonwealth company then let the company manage as a company at arm's length rather than having something else the company needs to do.

CHAIRMAN—You do not think the owner has any right to have a say?

Mr Atkinson—Oh yes, the owner definitely has a right and should be heard, but there are processes in Corporations Law—and I keep on going back to that—which allow that to happen. For example, in the corporate governance—

CHAIRMAN—I am pretty fuzzy.

Mr Atkinson—Okay. It is the extent of the say, I suppose. In the corporate governance arrangements for GBEs, there is a section that deals with the fact that the Minister for Finance will determine the rate of return for the Commonwealth company. In my view, it is the role of the directors to determine the rate of return for the company. It probably is not the role of a shareholder to determine the rate of return. The concern is that the shareholders could become too intrusive in a process which should be for management and the directors to control. That is the concern.

CHAIRMAN—Normally, a single shareholder would also be chairman of the board and perhaps the chief operating officer and would certainly determine the priorities for the company—the rate of return, debt equity ratios and all the rest. I really fail to see the difference.

Mr Atkinson—You are quite right of course. If the shareholder was part of the board then that it is quite appropriate. But the shareholder is not, of course. We do not mind the general policy or the general framework, but it is just that line in the sand that, to my mind, tends to get a little fuzzy. There is some intrusiveness, to my mind, in that corporate governance document. It is where that line in the sand is.

CHAIRMAN—Do you have any objection to the Auditor-General being your auditor?

Mr Atkinson—We have external auditors. Our external auditors are Arthur Andersen. They report to our board, to the audit committee. There is a well-structured process there. Arthur Andersen obviously are well known. They audit many large corporates around the nation. What I am getting to is that I do not really see a great need to have the ANAO involved in the process. If external auditors are good enough to audit large corporates and that is accepted by the shareholders, then I would say that the same sort of arrangement should apply to a Commonwealth company.

Ms PLIBERSEK—One of the speakers today said that, in his view, the value of the ANAO is that they see it as their job to dig up the bodies, to find out where the bodies are buried, in contrast with private auditors who may see it as their role to bury the bodies. Do you believe that to be the case? Is that a potential problem with your private auditors? Would they see it as a responsibility to look after your interests in a commercial sense? Isn't there a role for the ANAO, not just in auditing your own organisation but, as a previous speaker said, to draw lessons—if there are any lessons to be drawn—from any problems the auditor discovers?

Mr Atkinson—I am not familiar with the process once the recommendation goes from Arthur Andersen to the ANAO. I am not aware of the sort of scrutiny that the ANAO applies to what Arthur Andersen has done. They could in fact determine whether bodies have been buried. I do not know whether they can pick it. I do not know, despite what one of the

previous speakers said, whether the ANAO is able to perform that role, to carry out that process of due diligence on the audit of an external auditor. I am not familiar with the process. In theory, at least, I certainly accept the potential of that proposal.

Ms PLIBERSEK—I guess what we were talking about was whether the Auditor-General should continue to have the ability to conduct their own audit rather than the relationship between the normal audits that are undertaken in any case.

Mr Atkinson—This is a full audit by the ANAO?

Ms PLIBERSEK—Yes.

Mr Atkinson—I think it should be versus a full audit by an external auditor, whether they should continue to—

Ms PLIBERSEK—No, in contrast to the audits that you would undertake as a matter of course.

Mr Atkinson—An extra audit?

Ms PLIBERSEK—Yes.

Mr Atkinson—I think it is a reasonable proposition that if the shareholders have a concern about aspects of the organisation then the shareholders should have the right to have someone else look at that organisation, be it the ANAO or someone else. I think that is appropriate, yes.

CHAIRMAN—Do you appoint Arthur Andersen or does the Auditor-General appoint him, or do you have two auditors?

Mr Atkinson—No, to the best of my knowledge, it is the ANAO who appoints Arthur Andersen.

CHAIRMAN—What is wrong with that? After all, it is public money; it is not exactly private money.

Mr Atkinson—That is fine, but it is just the ANAO's role in the process, that Arthur Andersen needs to report to the ANAO and they do the final sign off.

CHAIRMAN—Well, we demand that—we, the parliament, on behalf of the people, demand that. You think that is totally inappropriate, that we have no right to subject you to scrutiny?

Mr Atkinson—No, of course you have that right. I am sorry if I am coming across like that.

CHAIRMAN—That is the message I think we are getting.

Mr Atkinson—Then I apologise.

Ms PLIBERSEK—I am sorry, I did not get that message.

CHAIRMAN—Well, I got that message.

Mr Atkinson—I apologise if that is the message you are getting. It is not the intent. Parliament has every right to scrutinise an organisation, but it is who does the scrutiny and who is best placed to do the scrutiny, whether it is the AN Audit Office or whether it is an independent auditor, and it is the relationship between that independent auditor and the AN Audit Office. I question whether the AN Audit Office has a proper role to play in that process, given that you have someone like Arthur Andersen doing the audit for the shareholders.

CHAIRMAN—But the point is that the Auditor determines for himself whether he will undertake to do your audits or he will appoint somebody else. As a matter of practice, he appoints outside auditors into GBEs because they are commercial companies rather than bureaucratic departments, but we ask him to oversight that and we ask him to make the decision, not you.

Mr Atkinson—That is fine. Whether it is the ANAO doing the audit or whether it is Arthur Andersen doing the audit, that is fine. Who does the audit is not a concern; it is the reporting back process if the ANAO does not do the audit, and whether that process is necessary—does the ANAO have a role to play in that feedback process? That is really the point I am trying to make.

CHAIRMAN—I note that the good citizens of Victoria seem to have had something to say on that issue recently.

Mr Atkinson—I understand your point.

CHAIRMAN—And I do not think they would have sided with you, Mr Atkinson.

Mr COX—I have a couple of questions about what sort of commercial organisation the corporation is. How many customers have you got?

Mr Atkinson—We have about a dozen customers. It is a fairly small customer base and the customers are train operators, the principal customer being National Rail.

Mr COX—Do you have a scale of charges that is the same for all of those customers?

Mr Atkinson—Yes. We have a transparent pricing model, it is on the Internet, and every single customer is charged according to that schedule of rates. There is no pricing mechanism other than what is published, so it is a very transparent process.

CHAIRMAN—As there are no further questions, thank you very much, Mr Atkinson, for your submission and thank you for coming to talk to us. We will make sure you get a copy of the report in due course.

Mr Atkinson—Thank you.

Proceedings suspended from 11.19 a.m. to 11.31 a.m.

GOVEY, Mr Ian, First Assistant Secretary, Office of Legal Services Coordination, Attorney-General's Department

LYNCH, Ms Philippa, Assistant Secretary, Office of Legal Services Coordination, Attorney-General's Department

DE GRUCHY, Ms Rayne, Chief Executive Officer, Australian Government Solicitor

RIGGS, Mr David George, Chief Financial Officer, Australian Government Solicitor

CHAIRMAN—I welcome representatives of the Attorney-General's Department and the Australian Government Solicitor to today's hearing. We have received and read your submission, for which we thank you. It was, of course, written before 1 September, when I assume the AGS became a corporate entity. Would you have a brief opening statement you would like to make or will we just ask you questions?

Ms de Gruchy—I will make a very brief opening statement. First of all, thank you for the opportunity to appear before the committee. We welcome the inquiry. I think it is very good to look from time to time at how well things are operating. AGS did, in fact, become a government business enterprise on 1 September. It was prescribed under the Commonwealth Authorities and Companies Act regulations. Some of our corporate governance arrangements are not fully settled at this time, but we are functioning well and in accordance with as close to what the corporate governance arrangements will finally be, and we have done so for some time.

AGS works well with the Attorney-General's Department and the Department of Finance and Administration in the setting up of the AGS corporate governance arrangements. We are very happy to answer any questions that you have for us today.

CHAIRMAN—Are you physically separated?

Ms de Gruchy—We are physically separated. We have our own business premises, which are all over Australia. We have offices in each capital city and in Townsville, and our corporate office is in a separate building to the Attorney-General's Department.

CHAIRMAN—Has either the department or AGS any comment about having two shareholder ministers? Some GBEs—admittedly, they are in the commercial marketplace—have commented about the potential conflict of interest for a shareholder minister also to be one who sets regulations for their market of operations. Do you see any problem with having two shareholder ministers?

Ms de Gruchy—I would have to say at this stage, having operated as a GBE only since 1 September, we have not a great deal of experience to go by in making informed comment. But in our situation, we have a relationship with one of our shareholder ministers, the Attorney-General, because of some specific requirements in relation to his role as first law officer, and he obviously has a keen interest in ensuring that government legal services are provided so that they support that role.

We are quite comfortable with a relationship also with our other shareholder minister, the Minister for Finance and Administration, because we do need to operate in a very commercial marketplace. We are quite comfortable with the rigour and discipline that comes from keeping our shareholder ministers informed of our commercial matters.

CHAIRMAN—And you do not foresee any potential conflict of interest when it comes to the Attorney-General's role in setting regulations?

Ms de Gruchy—To date we have worked cooperatively with both, and we have had many joint meetings with the shareholder ministers' departments. At this stage we have not noticed anything that would lead us to suspect that there would be a difficulty in the future.

CHAIRMAN—You, of course, do not have a board of directors, which makes you a bit unusual, compared to other GBEs. Do you see that as a difficulty?

Ms de Gruchy—No. We are looking forward to having an advisory board in place because we see that the advisory board can offer quite a number of advantages to us in the sense that we will have some people with some skills that will contribute to our think tank, as it were, on our strategic direction and will enhance our performance. We are yet to have an advisory board, so it is a question of ensuring that we do work well and ensure that the advisory board has a very constructive role to play. But that is something that we will have to see in the future.

CHAIRMAN—Most corporate boards of directors would have an audit subcommittee or an audit committee of the board, and it would be responsible for risk management. What arrangements have you made for AGS?

Ms de Gruchy—We will be operating with an audit committee that is likely to have as the chairman of the audit committee one of the external advisory board members. It is likely, also, to have a second external advisory board member on the audit committee. It will also have a representative of the Auditor-General on the committee, and various people from AGS's executive team will participate by providing information and participating in discussions with the audit committee, though not as formal members of the committee. We believe that that structure will be in accordance with the recommendations of the ANAO and will operate well and, in a sense, it approximates the kind of arrangements that would apply in a corporation where the members of the board, particularly external members of the board, would form the committee.

CHAIRMAN—I have to tell you that this committee has been somewhat critical of some departments for not, I guess, placing the degree of importance on the internal audit function that we believe they should, and this has led, in some cases, to unacceptable risk management practices. We expect entities to take risks; we cannot afford the old public sector risk aversion to the point of spending whatever it takes to make sure that there is no risk. We expect operations to run commercially and, therefore, risks have to be taken, and we understand that sometimes they will fail. But we would really like to see that you have put in place a rigorous risk assessment process with an internal audit committee that really has teeth and that you control. Does that make sense?

Ms de Gruchy—I see risk as having two aspects. Certainly in my role as CEO and director of AGS I am a fundamental believer in managing your risks very well, so AGS, from an operational perspective, will be putting in place its risk management strategies. In addition to that, it is very good to have an audit committee to have oversight, so that you have got some external rigour being placed on how good your risk management strategies are, and to have people asking informed questions of management about risk management strategies.

CHAIRMAN—It is better to hear from your own internal people that you have got a developing problem than to hear from the Auditor, isn't it?

Ms de Gruchy—Absolutely.

Mr COX—What is the reason for having a representative of the Australian National Audit Office on the audit committee?

Ms de Gruchy—We see it as good practice to have the Auditor involved in what we do and to be fully open to the Auditor in relation to all of our activities.

Mr Riggs—They are actually not formally a member of the committee; their formal status is as an observer on the committee. They are more comfortable with that and, for the reason that Ms de Gruchy gives, it is important that we have their perceptions available to the audit committee, which are the non-executives.

Mr St CLAIR—On that whole openness and accountability issue for GBEs, we have taken quite a bit of evidence, including from Telstra, over this question of appearing before Senate estimates. In fact, Telstra basically objects to that sort of parliamentary scrutiny. What is your feeling as a commercial enterprise, as a GBE—should you be coming before Senate estimates inquiries or should you be coming before any other body? Where is the level of openness that you would like to see in scrutiny?

Ms de Gruchy—We are comfortable with a level of openness in relation to our activities as a corporate entity. We have obligations to indicate, through a statement of corporate intent, our forward plans. We have reporting obligations, including annual reporting obligations. All of those would be open to the scrutiny of parliament, and we are very comfortable with coming along and answering questions about that.

Where we have some difficulties is in relation to commercially sensitive material that relates to our corporate operations. None of our competitors is under the same kind of scrutiny and, obviously, the information that might become available might be of particular interest to our competitors. So, to some extent, we would hope that the senators were understanding of claims relating to commercial sensitivity at times when we would have to make them. The other area where we have some concern is in relation to questions that relate to the activities of our clients in seeking our advice, because there are then issues of sensitivity that relate to advice and, on a solicitor-client basis, there are times that we would need to ask the senators to perhaps refer questions to client departments.

Mr St CLAIR—In terms of the responsibility for good corporate governance, which is what this committee is looking at, what role could you see for maybe some other vehicle that you could appear before that would look at corporate governance, at what you are doing, not so much at the tick-tacks down the bottom of the line but the way you run your business in reporting?

Ms de Gruchy—In essence, a lot of reporting under best practice should come in your annual report. There should be a pretty good disclosure of how you run your corporate governance and elements of risk that would be of relevance in a publicly available document. In relation to corporate governance itself, it seems to me that the structures that are in place are really those set up under the corporate governance arrangements that are agreed by shareholder ministers and that the appropriate scrutiny there is informed scrutiny. I think the informed scrutiny comes from well-qualified people who are asking questions, requiring further information from AGS as a GBE, and we will provide that information on request by our shareholder ministers and their departments. That is really where I think there is good external scrutiny. I have no particular views one way or the other whether there should be some additional scrutiny. That would be a policy matter.

Mr St CLAIR—I am aware that you are in the middle of a transition period going into a GBE, but I was interested in your comments.

CHAIRMAN—It has been suggested to us—actually by a department—that when we conclude our inquiry and make our report we might recommend that the Senate discontinue requiring GBEs to appear before the Senate estimates process, but that this committee take up that role on behalf of the parliament and hold such inquiries in camera. Would that appeal to you?

Ms de Gruchy—Subject to—

CHAIRMAN—I realise this is on the run, but it was just suggested to us too.

Ms de Gruchy—I do not have a view one way or the other. As I say, I am not personally terribly concerned about the estimates process as it affects AGS, subject to those concerns that I raised before. But if there were another mechanism that achieved similar objectives, that is something that, if that were decided, we would participate in as best we could.

CHAIRMAN—Does the department have a view?

Mr Govey—I would have to endorse what Ms de Gruchy said. That seems to make sense—

CHAIRMAN—I am not asking you for an official statement.

Mr Govey—Sure. I do not think that, at the end of the day, it would matter from our perspective whether the scrutiny was carried out by the estimates committee, except for the fact that the estimates committee cannot take evidence in camera.

CHAIRMAN—That is correct.

Mr Govey—That is obviously potentially very important and relevant.

Mr St CLAIR—And the availability for the committee to actually look at the corporate governance, rather than getting down to who has missed out on a job or whatever it might be.

Mr Govey—Yes. It is perhaps worth noting that the Attorney-General did write to the Speaker and the President last May in relation to AGS's appearances before parliamentary committees. The main focus of that letter was to suggest that in relation to their client matters they should not be subject to having to answer questions themselves, but, rather, it should go through their client departments and agencies. But I think it was also said in that letter that there was certainly no objection to the AGS appearing to give evidence about their operational matters. So I guess in that sense the Attorney-General has a somewhat different view than that being offered to you from Telstra.

Mr COX—I have a few questions about your operations. How long have you been billing departments for legal advice?

Mr Riggs—About 1992.

Mr COX—I understand, from recollection of the time, that it had a few teething problems. Is it now the case that everything is being billed and that it is a reasonably stable business?

Mr Riggs—It is. All our lawyers record time at the end of a matter, or at the end of a period of time. There is a regular billing procedure. It is comprehensive. We get good reports from the system. It is well under control.

Mr COX—And there is reasonable satisfaction from the clients?

Mr Riggs—We have a variety of arrangements with clients, some based on time, some based on fixed quotes and so on, and we endeavour to have a charging and billing structure that suits the clients, so we hope to meet clients' expectations in relation to our billing systems.

Mr COX—And the clients have the freedom to get legal advice from outside?

Mr Riggs—In respect of almost all matters with which we now deal, the client is able to go elsewhere. There are a small number of reserved matters, around Cabinet matters and national security, that are tied to AGS for advice, but 97 or 98 per cent of our business is now capable of being competed for.

Mr Govey—Those tied areas, I should mention, are set out in legal service directions, which the Attorney-General has issued pursuant to the Judiciary Act, under the new legislation, so they are laid down in an instrument for people to see. It is certainly the case that every now and again an issue arises about where the border lies between tied work and

untied work, but in general terms, as Mr Riggs was saying, it is a fairly small proportion of work. Constitutional, cabinet, national security and international law are the areas that are tied, and those are tied because of the fact that they are core areas of government activity.

Mr COX—So any bit of advice that goes into a cabinet submission comes from the AGS?

Mr Govey—Unless an exemption is given, that is the idea. It will come either from the Australian Government Solicitor or, in certain areas, that tied work can also be performed by the Attorney-General's Department. For example, international law is probably primarily done by the Office of International Law within the Attorney-General's Department, rather than by the AGS.

Mr COX—What about discussion of legal opinions given by a private company to a GBE or something like that?

Mr Govey—It depends on the circumstances. There will be some instances where the advice is being provided by a minister to cabinet and, again, unless an exemption is given, that work ought to be tied and therefore given to the Australian Government Solicitor.

Mr COX—What sort of reasons are given for an exemption?

Mr Govey—I think I am right in saying that there have not been any exemptions given since 1 September, although that is not to say that that might not happen. We will have to wait to see precisely what happens on that.

Mr COX—What is the turnover of AGS a year?

Mr Riggs—About $75 million.

CHAIRMAN—How much business are you losing?

Ms de Gruchy—We have not lost any business. If work is going to our competitors, that could be under existing arrangements where some departments have set up panels. We have been competing for a considerable amount of work for a number of years. It was only court litigation that was the last area to be untied on 1 September. In fact our business is operating as well and as profitably as before. Perhaps that means we pick up some work that we did not have before and our competitors pick up some work as well.

Mr Riggs—But we are also alive to the point that, with the untying of litigation from AGS effective from 1 September, many of our clients will be considering their future sourcing arrangements. We are being resourceful and energetic in competing for that work in order to maintain our market position.

Ms PLIBERSEK—What is the potential for you to expand your client base? Can you get work from other sectors you are not currently tapping?

Ms de Gruchy—We have a broader range of entities that we can act for under the recent amendments to the Judiciary Act. The list of entities is specified. The act also says that, in certain circumstances, the Attorney-General may request that we act in relation to a matter. There are constitutional limitations on our ability to act for anyone. We really are restricted to a fairly core area of government departments and agencies.

CHAIRMAN—Constitutional limitations?

Ms de Gruchy—In the sense that AGS is a Commonwealth authority and therefore is limited generally by the reach of any Commonwealth entity.

Mr Govey—Perhaps to put that at its most extreme—I have not looked at it personally—the advice regarded as appropriate in this area is that it would not be possible, essentially, for the Commonwealth to legislate to set up a law firm that did private legal work for members of the public. The AGS has to be doing work for what are purposes within the Constitution, which effectively means for Commonwealth purposes.

Ms de Gruchy—In essence, we are unable to compete for all of the business our competitors compete for. We generally restrict ourselves to government entities or to entities that have some association with government.

Mr COX—Has the total size of the AGS been growing or shrinking in recent years in terms of the number of lawyers and the staff?

Mr Riggs—It has shrunk over the last five years. All legal work was tied to AGS, or to its predecessor at one stage. Work has gradually been untied in the business and commercial area, so that has been one cause for the decline. The second cause for the decline has been the translation to the private sector of many institutions that were formerly part of the public sector.

Ms de Gruchy—To put that in context, the decline has been planned and calculated in response to these changes. For example, a couple of years ago we went through a redundancy program in order to better size AGS for the market that it was then operating in. That is something that we need to manage well as part of our risk management strategy. We need to ensure we have the right number of people to service the demand for the business that we have.

Mr St CLAIR—When you were talking about being able to do only Commonwealth work—within the Constitution, I think you said—does that mean only Commonwealth government work or does that include work for state government or local government bodies? Can you do work that far down the line?

Ms de Gruchy—Yes. Under section 55N(2) we are able to act for a number of bodies. That does include state government entities, generally with a request from the executive government of the state.

Mr St CLAIR—So they would come to you for things such as advice on treaties?

Ms de Gruchy—It could be on a broad range of anything that they believed was within our area of expertise. However, we do act for entities referred to in section 55N.

CHAIRMAN—Mr Govey, on page 5 of the AGS submission there was the comment that government policy is to exempt GBEs from the application of some administrative law applying to government entities. Are you aware of any administrative laws that would cause AGS problems?

Mr Govey—That needs to be answered at two levels. With their setting up as a separate entity under the legislation, the administrative law regime has been excluded. Most of that was done in the Judiciary Amendment Act, but there were also regulations made under the Ombudsman Act so that AGS is in fact exempt. Taking the question at a theoretical level, assuming that they were not so exempt, it would be fair to say that in that situation AGS would be subject to administrative remedies and therefore to costs which their private sector competitors would not be subject to.

CHAIRMAN—Do you have any comment?

Ms de Gruchy—I might just add that we are subject to the common law in relation to administrative law, not to Commonwealth administrative statutory provisions.

CHAIRMAN—To none at all?

Ms de Gruchy—The only one that I understand is broadly in the concept of administrative law is the Archives Act, and we remain subject to the Archives Act.

Ms Lynch—It is worth noting that AGS has not been and cannot be excluded from 75(v) of the Constitution which allows for some judicial review of administrative action by Commonwealth officers. It is conceivable but probably unlikely that an officer of AGS could be found to be an officer of the Commonwealth in some cases. It is very hard to envisage where that would be the case, but of course AGS cannot be excluded because that is embodied in the Constitution.

CHAIRMAN—Are private sector bodies that examine the legal profession generally not able to get access to AGS?

Mr Govey—You are thinking of law societies and the like. I think that is right. I think that any sort of supervision of that kind would need to occur primarily through the Attorney-General. I suppose that in some circumstances, if it related to financial and operational aspects, it would become a matter for both shareholder ministers and their departments.

CHAIRMAN—If a department complained that an officer of AGS had offered the wrong advice, for instance, where would they go?

Mr Govey—They could either go to the AGS itself in the same way as you would and, of course, make that the first point of call.

CHAIRMAN—And AGS says, ‘Get lost,’ then what happens?

Mr Govey—Then the person should come to the Attorney-General because the Attorney-General, as first law officer, has that overall responsibility.

CHAIRMAN—And then he says, 'Get lost,' what happens?

Mr Govey—I think at that point the accountability mechanisms that are in place generally in relation to the Attorney-General's role, both as a shareholder minister—but perhaps more importantly in this context in his first law officer capacity—come into play. In setting up the AGS in the way that it has been, particular emphasis has been given to this first law officer role, and it is a responsibility which the Attorney-General takes very seriously.

Ms De Gruchy—I think perhaps there is a difference between where there may be a claim against AGS, for example, for wrong advice and where, obviously, any person who felt that he or she had been aggrieved in that way has remedies at law against AGS. But, in relation to general conduct issues, then, as Mr Govey says, there are avenues for complaint. In relation to law societies, we have always cooperated in relation to any inquiries relating to conduct of our officers. We have a very cooperative relationship with them. We do not want the conduct of our officers ever to be called into question and we take it very seriously if that occurs.

CHAIRMAN—Does it?

Ms De Gruchy—There have been occasions in the past where inquiries have been made of us.

Mr St CLAIR—I am just trying to get my handle around the issue of changing from what you were into a GBE. You are not really a GBE in the sense that you are responsible back in the open market. You are still responsible back to the Commonwealth. It just takes me a bit of time trying to get my handle around that.

Mr Govey—This was very much the result of the report that was conducted prior to the AGS being set up in this fashion. They looked at the various structures, and the conclusion which was accepted by government was that, taking into account the very different circumstances of the AGS, a Corporations Law structure was not appropriate for them, and they should be set up with the statutory authority.

Mr St CLAIR—So often you see a GBE come before us and you say that it is a business unit and it has to compete in the worldwide area and, of course, you do not quite fit into that.

Mr Govey—Harking back to what was said earlier, it is perhaps worth noting, there being two shareholder ministers for the AGS, that this structure is, of course, very deliberately set out in the Judiciary Act itself. The idea reflected in here is that both the shareholder ministers are given statutory functions in relation to the AGS and, again, that was a reflection of the fact that there were not only operational and financial matters to be borne in mind, but also that the Attorney-General's role in giving legal advice to government

and being responsible generally for Commonwealth legal services would be best reflected in that kind of a structure.

Mr COX—What sort of target rate of return do you have?

Mr Riggs—It is of the order of 15 per cent on equity.

CHAIRMAN—Does this model replicate any model anywhere else in the world? Is it unique?

Mr Govey—I am not aware of it being in place anywhere else in the world. I cannot state that as categorically a statement but that is my understanding.

CHAIRMAN—So do we represent world's best practice?

Mr Govey—Hopefully so.

Mr St CLAIR—I am just trying to come to grips with whether we could talk again in another 12 months to see how that entity that you have actually created is physically delivering results at the end of the day.

CHAIRMAN—Thank you very much for coming and for your submissions. We appreciate your assistance. We recognise that a lot of the questions that we have would be more appropriate 12 months from now, but we just thought that since the acts had been in place for a bit over two years it was time to have a quick look and see if they are functioning in the way that was intended when this committee had something to do with the acts that have been brought into place in the first place. Thank you for your assistance.

Resolved (on motion by **Mr Cox**):

That the committee authorise publication, including publication on the parliamentary database, of the proof transcript of the evidence given before it at the public hearing today.

Committee adjourned at 12.05 p.m.