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JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL  
SERVICES

**Reference: Statutory oversight of Australian Securities and Investments  
Commission**

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**JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES**

**Wednesday, 26 November 2003**

**Members:** Senator Chapman (*Chairman*), Senator Wong (*Deputy Chair*), Senators Brandis, Conroy and Murray and Mr Byrne, Mr Ciobo, Mr Griffin, Mr Hunt and Mr McArthur

**Senators and members in attendance:** Senators Chapman, Conroy, Murray and Wong and Mr Ciobo and Mr Griffin

**Terms of reference for the inquiry:**

Statutory oversight of the Australian Securities and Investments Commission

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**Committee met at 4.10 p.m.**

**COLLIER, Professor Berna, Commissioner, Australian Securities and Investments Commission**

**DRYSDALE, Mr Mark, Executive Director, Public and Commercial Services, Australian Securities and Investments Commission**

**IGLESIAS, Mr Carlos, Executive Director, Infrastructure, Australian Securities and Investments Commission**

**JOHNSTON, Mr Ian, Executive Director, Financial Services Regulation, Australian Securities and Investments Commission**

**KELL, Mr Peter, Executive Director, Consumer Protection, Australian Securities and Investments Commission**

**LUCY, Mr Jeffrey, Deputy Chairman, Australian Securities and Investments Commission**

**REDFERN, Ms Jan, Deputy Executive Director, Enforcement, Australian Securities and Investments Commission**

**RODGERS, Mr Malcolm, Executive Director, Policy and Markets Regulation, Australian Securities and Investments Commission**

**TANZER, Mr Greg, Executive Director, International Relations, Australian Securities and Investments Commission**

**CHAIRMAN**—I declare open this public hearing of the Parliamentary Joint Committee on Corporations and Financial Services. Today the committee is conducting its public hearing into the Australian Securities and Investments Commission. The Joint Committee on Corporations and Financial Services is required by statute to oversee the functioning of ASIC. This hearing is part of that oversight.

I note that Mr David Knott has a longstanding commitment interstate which precludes his being present at the hearing today. This would have been his last appearance before the committee as Chairman of ASIC and, in his absence and on the committee's behalf, I wish him the very best during his retirement from the public sector and thank him for his much valued and generous contribution to the committee's work. I have received a letter of apology for his absence today and I note that Mr Knott also referred to his working relationship with the committee, which he was very positive about as well, so we certainly appreciate that acknowledgment from him.

Having said that, I welcome to the hearing Mr Jeffrey Lucy, Deputy Chairman of ASIC, and the other officers of ASIC. Witnesses should note that the evidence given to this committee is protected by parliamentary privilege. I also remind you that giving of false or misleading evidence to the committee may constitute a contempt of the parliament. I now invite you, if you wish to, to make an opening statement.

**Mr Lucy**—No, thank you, Mr Chairman.

**CHAIRMAN**—Thank you for the response that we have received to the questions we gave you on notice in relation to insolvency; and Flightless Birds was the other issue that you addressed briefly. In relation to Flightless Birds, the reason I have listed it is that I have received a follow-up letter from Dr Steward, who is the constituent Mark Drysdale provided the response to, and I note in that response reference is made to the fact that there is a deed of company arrangement. It is open to creditors to terminate that and resolve that the company should be wound up et cetera. I have subsequently received a letter from another investor—not a constituent of mine—from New South Wales, raising similar concerns. Obviously it is not open to the shareholders to do anything in relation to the deed of company arrangement, is it?

**Mr Lucy**—With your permission, I think it might be best if Mark Drysdale responds on a direct basis. He has had the carriage of the matter and is fully familiar with it.

**Mr Drysdale**—That is right, Senator, yes.

**CHAIRMAN**—The allegation is of misappropriation of funds. Has that been looked at at all?

**Mr Drysdale**—It was. We received a complaint about that matter a couple of years ago. It was fully examined at the time. The allegations were around one particular person. What happens is that the complaint is assessed, all the information is evaluated, and then whether or not there are courses of action open to us is considered. In that particular matter, it is the last issue that would be a concern for us, in terms of us taking any action. On the basis of what we knew then and what we know now still, we do not think that there is a course of action that we can take that would assist.

**CHAIRMAN**—You are not saying that there was not a misappropriation of funds. You have just made an assessment that, in your judgment, you are not likely to get a successful outcome.

**Mr Drysdale**—That is right. One of the considerations, always, is whether or not you are likely to be successful if you do take action. I think the particular individual in that case is overseas, so we have some issues about how successful we would be in taking action.

**Senator WONG**—Can we turn to the issue of external administrators' reports. Perhaps someone could clarify for me the statistics which appear at page 52 of the annual report where it states that total reports received for this financial year amount to 6,176 net statutory reports.

**Mr Lucy**—Chairman, again with your permission, we thought it appropriate that the matters that are directed as per particular directorates are responded to by the executive director for that particular directorate.

**Mr Drysdale**—We have provided some information, and I am happy to speak to that as well; we will probably speak to that in answering any questions that you have, Senator. Once you get down to the reports in which there is nothing alleged by the administrator or the liquidator, those are the net statutory reports.

**Senator WONG**—So the vast majority have some concern associated with them?



**Mr Drysdale**—That is right. We have put in the letter three main areas that the administrators or the liquidators refer to. One is the general view that there may be some aspects of insolvent trading or some examples of insolvent trading. Usually that is not accompanied by significant evidence, or even any evidence in many cases, which obviously makes that a difficult issue for us to address. Probably the most reported offence to us is around not keeping adequate books and records, as we speak about in the letter.

**Senator WONG**—You say in your letter that 640 relate to that.

**Mr Drysdale**—Yes.

**Senator WONG**—That is still a very small proportion of the total number of reports where there were issues raised by an external administrator.

**Mr Drysdale**—Yes.

**Senator WONG**—It is not as if all of these reports are detailing potential or possible offences which are what might be called minor in nature.

**Mr Drysdale**—Yes. The three most common we have detailed in this letter, and they add up to three and a bit thousand of the matters that are put to us.

**Senator WONG**—Are you able to provide us with a bit more of an analysis—some of which you go through in your letter—of the categories of offences that were actually reported?

**Mr Drysdale**—Yes. What I can do is provide a further breakdown. This is what we were able to prepare when we knew we were coming to this committee and were looking to try and meet the time frame. That is probably the right way to approach it: we can provide a more detailed analysis. We do not record in our systems all of the allegations that are made or all of the aspects that are listed by administrators in their reports. We have changed to a system now where administrators provide us with an electronic report, in which case they are able to nominate individual offences, which makes them easier to collect, as against the 10- to 30-page letter that we used to receive. I can look at that and provide you with that additional information.

**Senator WONG**—I am interested in the vast majority of them which were identified as being analysed, assessed and recorded. In your letter you go through a bit of a discussion about what that means. At what point is a decision made that no further action is going to be taken in relation to a potential offence? Is it alluded to in a report?

**Mr Drysdale**—It happens after the processes that I have put in the letter. Essentially, you go through a process which involves a review of the information the liquidator provides; a test of whether the individuals involved are people that we may have had an interest in in the past, for example; and a look at what other information is available about the company or the individuals. We weigh that up against our case selection criteria and make a decision either that the matter will not be resourced or that the matter looks worthy of further consideration, in which case it goes on to the decision-making committee, which then decides whether or not it is something that we will take on.

**Senator WONG**—Is that called the enforcement decision-making committee?

**Mr Drysdale**—Enforcement conference.

**Senator WONG**—Do all of these reports within that category go through that process, or only some?

**Mr Drysdale**—Only the matters that get through the first screening.

**Senator WONG**—And the first screening is against what you describe as your confidential selection criteria?

**Mr Drysdale**—Yes.

**Senator WONG**—What are they?

**Prof. Collier**—Those case selection criteria, which are in the process of being reviewed by ASIC at the moment, are confidential. We do not publicise them, for a variety of reasons, so we would rather not describe them at this stage.

**Senator WONG**—I appreciate why you would not publicise them. Can they be provided in camera to our committee?

**Mr Drysdale**—They are provided to the Ombudsman, so I would imagine that they should be able to be provided to the committee.

**Senator WONG**—Thank you. I will be blunt with you. The concern that I have is twofold: first, the number of matters which appear to be, on one analysis, just brushed aside, which is the vast majority of cases; second, in the context of the insolvency inquiry—and I appreciate that it is anecdotal evidence—there have been a lot of complaints from creditors, and issues raised by external administrators, about cases where they considered there was reasonable evidence of breaches of various aspects of the acts which were not acted on. I appreciate it is anecdotal and you have not had the opportunity to respond, and there will be matters in relation to every one of those complaints which quite reasonably led to a decision to not take the matter further, but it does give rise to a concern. I wonder if you would like to comment on that.

**Mr Drysdale**—I am happy to comment, without being able to comment on specifics. The issues that we need to take into account are whether or not you are likely to be successful and whether or not the matter is at such a level of public interest that we should be devoting the resources to it.

**Senator WONG**—What do you mean by ‘level of public interest’? Do you only take cases where you say there is valuable precedent and so forth?

**Mr Drysdale**—No. ‘Level of public interest’ is who is affected; what is the size of the matter; what are the consequences of the matter in particular. We sit here with a certain number of matters that we are able to deal with each year, as you would appreciate.

**Senator WONG**—Do you have a number, based on your resources?

**Mr Drysdale**—No, we do not have a target number for particular matters. It is, in a holistic sense, how many matters we are able to take on.

**Senator WONG**—How many are you?

**Mr Drysdale**—There is not a target number for that. There is a number that we are able to achieve, which is covered in this report.

**Senator WONG**—Which is how many? Half a per cent at the moment? Less than half a per cent?

**Mr Drysdale**—Half a per cent of that particular area; a larger number in other areas.

**Senator WONG**—Is what you are saying to the committee that the way you are currently resourced means that you can only viably take on around half a per cent of the current number of reported concerns in external administrators' reports?

**Mr Drysdale**—What I am saying is that in a comparative sense—compared to the complaints that we receive and the other matters that come to our attention—that is about the volume of matters out of external administrator reports that we feel it is appropriate to take on.

**Senator WONG**—That is a quantitative analysis, though, Mr Drysdale. What if 30 per cent of the external administrators' reports are matters that ought to have been investigated further and/or prosecuted? What you are telling me is your resources simply could not cope with that. Is that right?

**Mr Lucy**—The starting point is the amount of money which we receive on an annual basis. The commission allocates that between the respective directorates and when we make that assessment there is some judgment applied. In the areas of, say, investigation and enforcement, there is a funding within that arrangement, there is a business plan that supports that, and so then there is the ability to take on matters as per that resourced directorate, or in this case two, directorates—investigation and enforcement.

**Senator WONG**—What is the allocation for this area of complaint?

**Mr Lucy**—We do not allocate it down to a specific level of so much for this nature of complaint and so much for that nature of complaint. It is a matter of having a look at complaints in an overall sense and then it is a question of which ones pass our screening—which is obviously information we are going to give to you under the in camera, confidentiality arrangement—and then it is a question of which one is passed through that screening process.

**Prof. Collier**—You might also be interested to know that we have responded in a number of ways to the level of complaints we have received in relation to external administrators' reports. Mr Drysdale might like to expand on this slightly. Among a number of initiatives, we have set up a national insolvency coordination unit, which is looking at addressing the type of activity complained of before a company enters into any form of external administration.

**Mr Drysdale**—That was where I was going to in terms of what is our response approach. What we have done is to look at this and ask, ‘Is responding to individual reports from administrators, often with little evidence and often a year or so after the fact, the best strategic approach that we can take to the problem of insolvent trading?’ Our view is that there are other things that we can do that have a bigger impact. That is what we are currently concentrating on. We are particularly looking at the issue—which is evidence that we gave to the PJC—of what to do about companies that are currently trading but are in danger, that are getting to the stage where there is some risk that they will start to enter into the problems that lead to administrators sending us reports like this. We are much more proactive in what we do now. We have hired people who are basically out in the field looking at companies that are live, assessing their financial position and assisting them at that stage, which is the time when you can actually do something about it.

**Senator WONG**—You are in Public and Commercial Services.

**Mr Drysdale**—That is right.

**Senator WONG**—Just so that I understand what Mr Lucy’s point was: there is a budget allocation within that section for enforcement and compliance. Were they the two terms?

**Mr Lucy**—Complaints.

**Mr Drysdale**—Yes, complaints assessment.

**Senator WONG**—What are the allocations for those two areas respectively?

**Mr Drysdale**—In my directorate, complaints assessment is about 70 people.

**Senator WONG**—They are the ones that do the assessment and reporting?

**Mr Drysdale**—They are the ones who do the assessment, analysis and testing, and make recommendations to enforcement. They also take some of the small-end prosecution action, which is another part of what we are doing in insolvency to provide assistance to administrators. An administrator or a liquidator may have trouble getting reports out of directors, reports as to affairs, or books and records. We have started a program where, every time an administrator or a liquidator comes to us with those problems and is prepared to sign an affidavit, we are prosecuting, and the complaints assessment group also does that work.

**Senator WONG**—There are 70 people in complaints assessment. How many are there in enforcement?

**Mr Lucy**—As at 30 June, 336.

**Senator CONROY**—Mr Lucy, what a lovely photo in the weekend papers!

**Mr Lucy**—Thank you.

**Senator CONROY**—Was that part of the media training, to smile and sit back?

**Mr Lucy**—No, it was unknown. It was a photograph taken totally out of context some time ago.

**Senator CONROY**—You must be happy with it; it looked good. I appreciate you do have constraints on what you can say in relation to the Offset Alpine case, but I wonder if you could give us an update in relation to the investigation—as much as you can say. Can you just give us a general outline?

**Mr Lucy**—It is probably fair to say that, in the media at least, there is some confusion as to the matters that ASIC has addressed in the past regarding individuals that are related to that exercise, and it may be appropriate to ask Jan Redfern to particularly articulate one area. Then having done so, with your permission I can perhaps go back to Offset Alpine and be more specific and address the issues that you raise.

**Senator CONROY**—Sure.

**Ms Redfern**—I think what Mr Lucy is referring to is some recent articles in relation to some information we obtained from Swiss authorities, and in fact the articles are incorrect. The articles suggested that we did not obtain any information from the Swiss authorities. The fact is that we requested information from the Swiss authorities in September 1999 as part of a previous investigation, which I will talk about in a bit more detail, and we obtained that information in 2001 from the Swiss authorities. We had, in October 2000, already taken an enforceable undertaking from Mr Rene Rivkin and a number of related parties. The information we received was quite consistent with what we had known and the information that had resulted in the enforceable undertaking, and was covered off by the enforceable undertaking, so we did not take any further action.

The enforceable undertaking arose out of an investigation that we commenced in September 1999, following a referral from the ASX. It was to do with trading by Mr Rivkin and associated entities which were said to be contrary to various recommendations he was making in his *Rivkin Report*. The concern was that he was marketing the *Rivkin Report* on the basis of: ‘Do what I do and you’ll have as much money as me.’ We had concerns because our analysis of trading in various securities, including Murrin Murrin, revealed that, at the same time as Mr Rivkin was making recommendations about the securities, it appeared that he was selling or acting inconsistently with his recommendations.

As part of the process of the investigation, we commenced licensing action. Mr Rivkin offered an enforceable undertaking, which involved embargoes on trading around the time of recommendations being made, restrictions on trading contrary to the recommendations and disclosures in relation to trading outside those periods that were not contrary. In addition, there were compliance reviews, checking that he was complying with those embargoes, and some of the foreign entities were part of the checking process in terms of any trading through foreign entities. That basically related to that particular investigation, but it has nothing to do with the present issue. I do not know if that clarifies the position.

**Senator CONROY**—There might be some journalists who have listened.

**Ms Redfern**—Hopefully.

**Senator CONROY**—Mr Lucy, I understand you have raided some houses and possibly some offices. Could you just give us a general overview?

**Mr Lucy**—Really there is not much more than was announced in our press release. We did issue seven warrants. We have obtained material as a result of that, which we are reviewing, and the investigation is ongoing.

**CHAIRMAN**—Is there a lot of point in raiding premises, residences and so on some time after this matter has become public? One would have thought that, if there were any incriminating documents in those premises, the targets would have got rid of them. They would have obviously been warned by the public exposure of the issue.

**Mr Lucy**—There is always the risk that material might be destroyed. That is one of the reasons that we do not flag our intentions in advance and that we did not flag in advance what we were intending to do. The whole issue was certainly in the media, and there are other activities which we have programmed which people may or may not anticipate. Again, it comes back to the underlying reasons why we cannot talk about ongoing investigations.

**CHAIRMAN**—But would it not have been better to have been on their doorstep the morning that first article appeared in the *Financial Review*?

**Mr Lucy**—It is not that easy to issue a warrant. We have a process which we are obliged to go through. We cannot just knock on anyone's door on a whim. We must go through processes to determine that we believe that there is something that needs to be followed through in a legal sense and, to reach a point of comfort, we need to approach the court, for the court to also be satisfied that a warrant is appropriate to be issued. It is a serious invasion.

**Senator CONROY**—I asked you last time about the accusations that ASIC had leaked the information, and I think you said, 'Look, we couldn't have, because we didn't have that information.'

**Mr Lucy**—We certainly responded to say that we did not leak it.

**Senator CONROY**—Yes, I know, but I also thought the indication was that you did not have the information that was in the *AFR* articles. I am happy to check the *Hansard*.

**Ms Redfern**—In relation to Offset Alpine Printing?

**Senator CONROY**—Yes.

**Ms Redfern**—Yes; the information that was contained in the articles about Mr Rivkin's evidence?

**Senator CONROY**—Yes. Have you been able to get all of that now? Have you raided the *Fin Review* or have you given them a ring and asked them to hand it over?

**Mr Lucy**—We really cannot respond to that.

**Senator CONROY**—Can I put it this way: have you got all the information you think the *Fin* have? I am hoping that you are better informed than the *Fin*, that is all.

**Mr Lucy**—We have obtained information from a number of sources and we are in the process of obtaining further information.

**Senator CONROY**—Have you spoken to the *Fin*?

**Mr Lucy**—Yes, we have had dialogue with the *Financial Review*.

**Senator CONROY**—Are they cooperating? Are they helping you out?

**Mr Lucy**—I think that is really a question for the *Financial Review* rather than us. It is fair to say that from our perspective we have had good dialogue with the *Financial Review*.

**Senator CONROY**—Have they given you all the documents that they received?

**Mr Lucy**—Again, we cannot go into that level of detail.

**Senator CONROY**—I would not have thought that documents that they publish on a regular basis in a newspaper are a state secret.

**Mr Lucy**—It may well be that there is an article planned for tomorrow and the background to that may be some material that—

**Senator CONROY**—They are drip-feeding you, are they?

**Mr Lucy**—No, you should not draw that inference either. You have asked if we have got all the information that the *Financial Review* have available, and I am responding to say that that is not something which we can give a positive, affirmative response to. We have significant cooperation, but I cannot be specific.

**Senator CONROY**—So you cannot guarantee you have all of their information yet?

**Mr Lucy**—I am not providing that guarantee.

**Senator CONROY**—I am hearing all sorts of rumours, so I want to give you guys an opportunity to rebut them, if you are able to. And, if you cannot I would appreciate it if you would plead the fifth.

**Mr Lucy**—Thank you.

**Senator CONROY**—Could you advise whether Trevor Kennedy will turn state witness and testify against the others involved?

**Mr Lucy**—No comment.

**Senator CONROY**—Could you advise whether Rene Rivkin, Trevor Kennedy or Graham Richardson have offered to turn state witness in relation to the case?

**Mr Lucy**—No comment.

**Senator CONROY**—Aside from those three, who have obviously been identified as holding Swiss bank accounts through Bank Leumi, are you investigating any other people or entities that hold Swiss bank accounts through Bank Leumi?

**Mr Lucy**—No comment.

**Senator CONROY**—I hope you are!

**Mr Lucy**—The next question is: how many? That is why the response is, ‘No comment.’

**Senator CONROY**—No, that was the end of my questions. But feel free to keep answering questions I have not asked! ‘No comment’ seems to be the order of the day. When you appeared before us earlier this month, I raised the issue of General Cologne Re and asked whether ASIC was aware of whether the DPP was considering giving indemnities to various employees of General Cologne Re and the nature of those indemnities. Are you now in a position to advise the committee on this issue?

**Ms Redfern**—You actually asked a broader question. I think I took it on notice, and I am not in a position to provide that response now.

**Senator CONROY**—Not yet?

**Ms Redfern**—At this point of time. I did not come to this committee meeting prepared for that.

**Senator CONROY**—That is okay. Presumably you have spoken now with the DPP, so you would be vaguely across what is going on.

**Ms Redfern**—We speak very regularly with the DPP on a number of issues.

**Mr Lucy**—To the extent that it is a matter that falls within an investigation, our response may well be—

**Senator CONROY**—I am asking what the DPP are doing; I am not asking what you are doing. The DPP are making decisions. I am just seeking, for the public record, what the DPP’s decisions are and whether you have been informed of them.

**Ms Redfern**—But at the earlier hearings I think I indicated that I would take that question on notice. You actually asked a broader question, from recollection, that not only related to the DPP—which is perhaps information outside our control—but also related to us.

**Senator CONROY**—I will ask a more specific question, then. Which employees of General Cologne Re have been granted an indemnity?



**Ms Redfern**—That question assumes that this has happened, so I think all I can say is—

**Senator CONROY**—No; you said to me you are in extensive consultation and discussion with the DPP. You must know the answer to that question, Ms Redfern.

**Ms Redfern**—We are in discussion with the DPP on a number of issues, including in relation to HIH investigations. All I am saying is that at the time of that hearing I did not know the answer—

**Senator CONROY**—No; I am asking now, today.

**Ms Redfern**—and I still do not know the answer to that question.

**Senator CONROY**—You do not know which employees have been granted an indemnity?

**Ms Redfern**—I do not even know whether that is right or wrong.

**Senator CONROY**—That is despite me raising it with you previously and you indicating you have had extensive discussions with them.

**Ms Redfern**—But not about that issue.

**Senator CONROY**—The way the committee process works is that we ask you questions, you take them on notice, which is fine, and you then seek to garner that information.

**Ms Redfern**—Yes.

**Mr Lucy**—Which we are in the process of doing.

**Senator CONROY**—But in the lengthy discussions you indicated you have been having with them, you have not asked that question.

**Ms Redfern**—Not about that particular issue.

**Senator CONROY**—How soon do you think you will have an answer?

**Ms Redfern**—I think that we indicated we would respond to a number of issues on notice and I anticipate that we will provide the responses to those shortly.

**Mr Lucy**—Mid-December we are planning to give you the overall response.

**Senator CONROY**—Okay. Does ASIC have a view on how widespread is the practice of offshore investors manipulating the Australian share market?

**Mr Rodgers**—I do not think we have an overall view about the extent of it. There are some instances, of which probably the best known took place some time ago, where we secured reliable evidence that offshore investors had been involved in manipulating Australian markets,

and we did seek and get court orders in relation to that. But I do not think that I could speculate about the degree of manipulation. What I can say is that, where it has come to our attention and we have been able to secure evidence, we have acted.

**Senator WONG**—I think you will want to take this on notice, Mr Drysdale. Could we get a bit of a breakdown of the reasons that the ‘analysed, assessed, recorded’ were not proceeded with. Obviously you do not want to go through all of them, but I assume you must have some data somewhere which sets out the reasons. They may be as against your criteria, so if that is an issue you might need to come back to us as to whether you want to provide that in camera. The second issue is one of the concerns that again were raised in the context of insolvency inquiries—that is, a lack of feedback to administrators or contact with administrators when issues had been raised. When your complaints staff are going through the analysis, assessing and recording process, do you actually record what contact there has been with administrators? Professor Collier, you look as if you want to say something.

**Prof. Collier**—Yes, I do. What I would like to say is that another initiative which we have commenced this year is the establishment of regional insolvency liaison committees around the country. In fact, after this meeting Mr Drysdale and I are en route to Perth to attend one there. There are meetings every four months, around the country and nationally. That is one of the ways in which we get feedback and provide feedback to insolvency practitioners. The committee is constituted of not only ASIC representatives but also lawyers and insolvency practitioners around the country. We discuss with them and provide feedback to them about the way in which ASIC is dealing on a general basis with insolvency issues.

**Senator WONG**—That is a very positive initiative, Professor. My question related more to the process of analysing the statutory reports and what interaction there was with the administrator.

**Mr Drysdale**—There is an interaction. The complaints staff in each of our capital cities know each other and they know the insolvency practitioners just because of the amount of interaction that they have. For a matter that an administrator or a liquidator is concerned about, where they think there is good evidence, in the early stage the process does not get down to these sorts of reports. What tends to happen is that people pick up the phone to each other. In practice, that is what happens. What we are talking about here are the reports that are coming in six to 12 months afterwards.

**Senator WONG**—I appreciate that, but what about in the context of administrators, either through the statutory report or prior to that, raising a concern such as, ‘Look, I think there might have been a breach of a director’s duty’?

**Mr Drysdale**—Is there feedback to them?

**Senator WONG**—Yes. Let us focus on the statutory reports first. Do you record how many of them resulted in your staff following up with the administrator in relation to further information?

**Mr Drysdale**—As part of the complaints management system we record any additional information that is received. There is not a field that we would be able to strip down to say how many of the 5,000 hit that field in terms of going back, but any additional information that we

receive from the follow-up conversations will be recorded. What I could give you in response—and we will give it to you on notice—is something that goes into if not exact statistics, because we may not be able to pull those off because of the way the system is stored, at least something that is indicative of the way that we do that, and the impact.

**Prof. Collier**—There are a couple of other points which you might find of interest. First of all, we have issued a practice note whereby we encourage insolvency practitioners to lodge with us the reports on a timely basis, because if there are serious offences which they feel need to be brought to our attention, the sooner they bring it to our attention the better. Also, as Mark just indicated, we do suggest to practitioners that they contact us by email or phone if it is something serious, and we have also set up an electronic regime—we call it EXAD—to allow external administrators to lodge reports electronically to allow us to assess complaints on a more timely basis.

I would like to make a general observation about complaints; that is, we could never refer to enforcement every complaint we receive. It just would be impossible. No regulator could do that. As is pointed out in our annual report, complaints across the board have increased 19 per cent in the last year; hence, we have our case selection criteria to allow us to address in an efficient and effective way the complaints which we do receive.

**Senator WONG**—I understand that. I think you are in the process of altering the case selection criteria.

**Prof. Collier**—We are reviewing it.

**Mr Lucy**—We are not necessarily altering it, but we are certainly reviewing it.

**Senator WONG**—If it does change, what I would like to see is both the previous and then the subsequent criteria. I come back to the issue of ongoing follow-up or follow-up with the insolvency practitioner—the external administrator. You are saying you would be unable to capture, in terms of your database, those reports in respect of which there has been further investigation through contact with the administrator?

**Mr Drysdale**—What I am saying is that I would not be able to give you, to a certain percentage, a reliable number just off the database. What we would need to do is look through and assess from the content rather than from the ticking of a field. You cannot pull it off statistically just by interrogating a field. We would need to do it in a qualitative rather than a quantitative way. But we can do that and give you that information. At heart, though, what I am understanding is that there is a concern about the relationship between the insolvency administrators and us.

**Senator WONG**—No, I did not mean to give that impression. I am not concerned with you being too close to them. Is that what you are alluding to?

**Mr Drysdale**—No.

**Prof. Collier**—I thought it was the opposite, actually, and that you were suggesting that we were not close enough.

**Senator WONG**—No; it is more an issue of, as I said, the evidence that we have had before the insolvency inquiry. Again, the caveat applied to that is that I do not know the circumstances of the case and the people before the committee giving evidence may not know all the reasons why ASIC has not followed something up. But, even so, there have been issues raised about a lack of follow-up by ASIC on a number of complaints which have been contained in administrators' reports, so I am keen to understand your systems of dealing with those and to learn about your quality assurance. I appreciate that enforcement is something you cannot do in relation to every matter, but it is not a great number of matters which are taken through to the enforcement stage.

**Mr Drysdale**—We will provide that information. We will also comment, in the information, on the alternative ways in which these matters are allowed to be addressed in the system; which, for example, includes the opportunity for liquidators to take their own action and to conduct their own investigations, and the opportunity for creditors to take their own action. All of those are often the legitimate methods by which the circumstances of a failed company can be addressed, and we can cover that as well.

**Senator WONG**—Did you answer this question about assetless companies?

**Mr Drysdale**—Your question was more about employee entitlements.

**Senator WONG**—I will get to that in a moment.

**Prof. Collier**—I thought there was a question about assetless companies.

**Senator WONG**—I think Mr Drysdale was right. That was in the context of the employee entitlements, I think.

**Mr Drysdale**—Yes. Our answer is that we do not have accurate information but we understand that GEERS might.

**Senator WONG**—Is that something that is in your analysis, assessment and recording? Is that something which is recorded?

**Mr Drysdale**—The EXAD system that Professor Collier was referring to started in the last 12 months and we have a take-up rate at the moment of about 60 per cent of administrator reports coming in electronically. Through that system, we ask administrators or liquidators to nominate at the front end of their investigation what their expectations might be around a couple of these issues.

**Senator WONG**—Whether there are any assets held?

**Mr Drysdale**—Yes, that is right; whether there are assets, whether there are employee entitlements, so that over time we build up a database, because it is an area that we thought we needed more information in.

**Senator WONG**—Major classes of creditors as well?

**Mr Drysdale**—Probably not.

**Senator WONG**—Including employees, I mean.

**Mr Drysdale**—Yes, that is right. We are asking for employees' information. Other information, in terms of classes of creditors, is more the size of the creditors rather than who they are. We are seeking that information now. It is not information that is yet available. In two years time we will probably have something like a 90 per cent electronic break-up rate and some reliable statistical information out of that. The reason we have nominated to you that you might look at GEERS as the source is because they go into this down to the last dollar because of their role in this process and they could give you more reliable information.

**Senator WONG**—From EXAD you could give us some indication of how many of that 60 per cent involved companies with minimal assets or no assets.

**Mr Drysdale**—I could, yes. My caveat is that it is untested. We can give you that information with the caveat above it.

**Senator WONG**—And also how many it applies to, how many are actually within the system.

**Mr Drysdale**—I can give you that, but I did not want to give it to you in writing just because we need to put a bunch of caveats around it because it has only just started.

**Senator WONG**—How long has it been in operation?

**Mr Drysdale**—The system went live in about August of last year. The take-up rate by insolvency practitioners started at zero and we got to about 50 per cent take-up by June.

**Prof. Collier**—We are expanding that system to bring more documents online. At the moment, sections 438D, 422 and 533 reports are online and they are the critical ones where insolvency administrators will report to ASIC a selection of information, including whether or not there are any suspected offences.

**Senator WONG**—Is it possible to identify how many of the reports were assessed against fraudulent phoenix company criteria and referred for consideration under director disqualification provisions?

**Prof. Collier**—Perhaps I can kick off an answer to that. As a general rule, reports of this nature will not necessarily identify phoenix activity. There are a number of reasons for that. First, phoenix activity itself is not per se illegal. If a person has been a director of a company which folds and that person then sets up another company, that is not illegal.

**Senator WONG**—It depends what happens with the Cole commission recommendations, I suppose.

**Prof. Collier**—Indeed. It is a combination of other factors which makes it illegal, including deliberate attempts to defraud creditors. A second issue may relate to insolvent trading, which is more likely, and often but not necessarily insolvent trading may be linked with phoenix activity.

Insolvent trading is something which will be identified in some of these reports, not necessarily all.

**Mr Drysdale**—Phoenix is not a criterion. When you see our selection criteria, you will see that it is not there. And your comment is right: it is an issue that government are currently considering in response to the Cole recommendations, and ASIC and Taxation have been involved in contributing to that consideration.

The second part of your question was about director disqualifications. That is an area where there has been an up and down approach by ASIC. At different stages in the last decade there has been an approach where, on the basis of reports, we have put a lot of resources into banning or disqualifying directors. At the moment we do not do it. We do not do it for a couple of reasons. One was our view of the effectiveness of that program in terms of targeting for that banning action. Instead, what we look at is whether a person being banned is an activity that flows out of a more serious action that we take, and in probably the last two weeks, three people have been banned for acting in the management of companies when they were previously disqualified persons. That is the sort of approach we now take.

**Senator WONG**—Going back to the stats, are you able to indicate how many of the reports gave rise to facts which raised the issue of the possibility of director disqualification provisions applying? Is that part of the filter?

**Prof. Collier**—I think we need to take that question on notice.

**Mr Drysdale**—Yes, I would have to take it on notice. I cannot think instantly of how we would do it. It is not something that is in a chain at the moment.

**Senator WONG**—You have raised a number of the initiatives already, Professor Collier. The committee has alerted us to a speech that you gave at the IPAA conference earlier this year where it was indicated ASIC was going to take more action on these reports, I understand. Are the initiatives that you have raised already indicative of that?

**Prof. Collier**—I can assure you I wrote the speech!

**Senator WONG**—That is very impressive.

**Prof. Collier**—I think it was in May in Adelaide, so unfortunately I do not have it on me. However, the initiatives I have raised would be the issues which we have introduced in response to questions you have raised. Another one is the complaints compliance actions, which I think Mr Drysdale referred to before, whereby, when we have insolvency practitioners in control of a corporation and they are not receiving assistance from the directors of the company, we take action to prosecute. That would be the only addition to the initiatives which I mentioned.

**Senator WONG**—You have zero tolerance on that?

**Prof. Collier**—We do.

**Mr Drysdale**—That is right. In every instance where an administrator is prepared to sign an affidavit—that is the test—we will prosecute, and we have been 98 per cent successful in those prosecutions across the time that we have been running them. The numbers for that for last year are in the annual report.

**Prof. Collier**—And they are in the letter. There were 546 prosecutions in the 2002-03 year.

**Senator WONG**—Can I go back to phoenix companies. You do not track them through the statutory report process. How does ASIC become aware of a repeat offender?

**Prof. Collier**—Only through complaints.

**Mr Drysdale**—We also have a history, and when you are doing the assessment you also look at the history. That was probably your first question I responded to: I said you look at the history of the individuals as well, to see what other activity they might have been involved in. If someone has been a director of a company that failed and then another that failed, when we are doing the complaint assessment on the second company the process that we follow will identify what happened to the first company and the persons involved in that.

**Senator WONG**—We are not talking criminal or civil action here. We are talking activities that ASIC has previously recorded—for instance, the fact of being a director of a company that has been liquidated?

**Mr Drysdale**—That is right, yes—the fact that that person had been a director of that company.

**Senator WONG**—And what happened to the company?

**Mr Drysdale**—That is right. And whatever the administrator might have said at that time.

**Senator WONG**—What happens if your staff come across somebody who has had, say, two or three previous directorships of companies which have been liquidated? Is there any trigger point for further consideration of this person's activities, or what occurs?

**Mr Drysdale**—As I said earlier, it is one of the considerations that goes to whether or not it is a matter that we put forward to the enforcement conference for a decision about resourcing. If it is someone who has a significant history, that will be of interest to us. Of greater interest will be whether or not there is evidence at this particular time of something that you might be able to be successful in and whether or not, in the scale of this particular report, it is a significant offence.

**Senator WONG**—It is relevant only to whether you take action in relation to the possible offences—

**Mr Drysdale**—This time.

**Senator WONG**—that you are currently investigating?

**Mr Drysdale**—That is right. It is one of the considerations.

**Senator WONG**—It is not relevant in terms of them being a fit and proper person to be a director or anything like that. It is relevant only to your inquiry regarding the particular instance.

**Mr Drysdale**—Yes. It is relevant in terms of your decision about what action you would take right now.

**Ms Redfern**—I might add that you also need to have some basis. Under the law, just because someone was a director of a number of failed companies does not necessarily allow a remedy of some sort of a banning action. The provisions also provide that it has to be a cause for the failure, and there are a number of issues that are involved.

**Senator WONG**—Yes, I am aware of that.

**Mr CIOBO**—I have a few general questions to start with. I noticed that on page 42 of your report you made a comment about unsolicited offers for shares. You impose conditions on National Exchange Corp. Pty Ltd and several others. Aside from that, was there any enforcement action taken against other companies or are you seeing an abatement of that process, given that we have also introduced legislation?

**Mr Kell**—We have taken a series of actions in relation to Mr Tweed and National Exchange, but if you are asking about other companies, no, we have not announced any other action against other companies.

**Mr CIOBO**—Are you aware of others or is that the one that has been brought to your attention?

**Mr Kell**—I would have to take on notice whether there have been any complaints whatsoever about any other companies, but there has been nothing of any significance.

**Mr CIOBO**—In terms of policy and legislative changes that will flow through, would the expectation be—to the extent that you can crystal ball gaze—that, as a practice, we will see a reduction in these kinds of unsolicited offers?

**Mr Kell**—Anecdotally, as I set out at a recent hearing, it would appear that the legislative and policy changes that have occurred have certainly contributed to a reduction in the number of consumers that are taking up any such offers, because the current market price has to be more prominently displayed.

**Mr CIOBO**—ASIC's view on the promotion of directors' duties and the level of knowledge I am interested to probe a little bit. There was a case recently in Queensland which involved a private school that went into, from memory, provisional liquidation. Newspaper reports were quoting directors as saying, 'Well, my responsibility was to determine the school uniform and what they would be wearing.' What is ASIC's view on comments like that, and do you see an enforcement role there for ASIC with respect to demonstrating and raising public awareness about the responsibilities that a director has?

**Mr Lucy**—Perhaps I can initially respond to that. Very definitely, part of our enforcement approach is to provide some educative outcomes. You particularly raised directors' duties. When



we have a matter that is relating to directors' duties, one of the reasons why we publicise the outcome is to hopefully serve as a warning and a wake-up call for people that are holding that responsibility elsewhere to reflect on their own circumstances.

**Mr CIOBO**—How, though, is a case like that brought to ASIC's attention?

**Mr Lucy**—Typically, there needs to be a complaint brought to our attention, in which case that investigation and complaint process is started. Alternatively, it may well come to us through our own surveillance activities. We may well have an organisation under surveillance for a particular reason, in which case that sort of an activity may well be brought to our attention by our own staff. But typically it would come through a complaint.

**Mr CIOBO**—If there is not a complaint made, though, you are flying blind to a large extent, are you?

**Mr Lucy**—We need to be made aware of the circumstances, so if a director has breached the director's duties—which I think is again implicit in what you are putting—yes, we need to be made aware of it, otherwise obviously we cannot respond to it. Clearly, we read the newspapers.

**Mr CIOBO**—'Being made aware of it' is the operative phrase, isn't it? What I am quizzing is the extent to which you make yourselves aware of it versus the extent to which it is brought to your attention.

**Mr Rodgers**—There is sometimes a debate in this country about some form of licensing for directors. That is not part of the Corporations Act at the moment. Where we license, for example, in the financial services area—to some degree, too, in the auditors and liquidators area—we do run active programs of surveillance of compliance. There are 1.3 million or so companies. The law supplies some rules of conduct that directors must adhere to but it does not supply anything else. It is not a task that we have never taken on to be active in, except where a matter comes to our attention in some way or another, and indeed it would be a very daunting task for us to do for directors what we do in the licensing and other areas.

**Mr CIOBO**—But is there a trigger for review that might come about, for example, where there is an administration or liquidation?

**Prof. Collier**—Yes, in the sense that if an external administrator lodges a report which indicates that there has been a breach of directors' duties, that is something we will take into consideration in assessing that particular report.

**Mr CIOBO**—Would you ever review that review that was done in terms of the appropriateness of that recommendation?

**Prof. Collier**—I am not sure I understand your question.

**Mr CIOBO**—An administrator lodges a report and they might take the view that there has been a breach of directors' duties.

**Prof. Collier**—Yes.

**Mr CIOBO**—What I am saying is: do you ever probe that recommendation that comes from the administrator?

**Mr Rodgers**—Possible breaches of directors' duties come to us in a wide variety of ways. That is one of them. There are sometimes, in the disclosure area, connections with directors' obligations. In a matter that we were interested in, we would follow up a variety of possibilities. I know from the markets area that sometimes an allegation that a company has not complied with its disclosure obligations often runs together with a breach of duty by one or more directors of the company, so normally we would pick those kinds of things up.

**Ms Redfern**—By way of general comment on enforcement in relation to directors' duties, we have probably taken quite a lot of action in recent years in directors' duties areas, and I think Mr Rodgers is talking about also including continuous disclosure. Last year we took court actions and banned 16 directors, and took action in relation to other directors—criminal prosecutions as well.

I think the perception is, and certainly the feedback from other interested groups is, that there is a high awareness of directors' duties. I think that the comment that you are referring to would be a very unusual comment from perhaps an unsophisticated person who has held office who probably should not have been holding the office. The feedback that we have been getting is that our enforcement outcomes and other interventions have had a significant impact on directors' duties. You only have to look at the invitations that you receive, inviting you to come along to seminars in order to understand directors' duties, and mentioning various cases that we have prosecuted successfully over the last couple of years.

**Mr CIOBO**—I do not ask the question to focus on ASIC. I ask just to know what sorts of triggers there may be—especially with public statements like that from directors—that might in fact initiate some process.

**Mr Lucy**—Without taking this too far, I think the point is that in almost every matter which we look at that involves a company we have questioned whether or not directors' duties are part of the issue that we should be looking at.

**Mr CIOBO**—The overall ambit. Sure. Also, on page 34 of the report you make comments about investment seminars for real estate largely falling outside ASIC's jurisdiction. What is ASIC's attitude to that? I am from the Gold Coast, so maybe I should declare an interest! But it seems to me that from a consumer perspective there is a lot of concern about investment seminars that are run on that basis, and the whole thrust of negative gearing, and so on and so forth. I would invite some general comments on whether or not there is scope there for ASIC to have an enhanced role in those areas, or does it just get too messy with state jurisdiction?

**Prof. Collier**—There are jurisdictional problems, Mr Ciobo. I will invite my colleague Mr Kell to speak in a moment. You would be aware that ASIC does not have jurisdiction over real property advice, for example, unless the advice also involves products or services which do fall within ASIC's jurisdiction. It is my understanding that, if I were to give you advice on real property only, the advice I give is not covered by ASIC's jurisdiction. However, if for example I were to give you advice on real property compared with how you might make money by buying shares, then ASIC's jurisdiction is invoked. Mr Kell, you might like to say something.

**Mr Kell**—I will briefly make a couple of points. This issue was raised, as you may know, in the financial system inquiry report, the Wallis report, as a gap in the regulatory regime covering investments. ASIC reported on it in 2000. Mr Tanzer prepared a report at that stage, again pointing out how there was a gap in the regulatory regime and that there was scope for the states and the territories to become more active in this area. More recently, the Ministerial Council on Consumer Affairs, which has all state, territory and Commonwealth agencies represented on it, set up a working party which is currently looking at how this issue might be addressed and what sort of law reform might be introduced. I think it is safe to say that all agencies, ASIC included, are really quite concerned about the problems in this area and the high-pressure sales that take place. That working party is due to report back to ministers in March next year, including the Commonwealth ministers. It is something that we are looking at. As to who should take on that area, that is ultimately not ASIC's decision. That is a political policy decision.

**Prof. Collier**—Although, Mr Ciobo, ASIC's concern is reflected in actions we have taken in relation to, say, Mr Henry Kaye and the National Investment Institute and our continuing interest in that matter.

**Mr CIOBO**—I noticed as well that you have had some timeshare operators make applications for approvals of their schemes. Is that something that you are seeing across the timeshare industry? Is there an increased willingness from some of the bigger operators, such as Trendwest for example, to license and seek approval for their schemes?

**Mr Kell**—Timeshare operators are covered under the Corporations Act and so will have to satisfy the obligations that are now going to be part of that regime going forward. One of those includes dispute resolution. If what you are talking about is having an adequate ASIC approved dispute resolution scheme in place, they have sought approval for their dispute resolution scheme and we are currently considering whether it meets the standards that we have set out. As to the timeshare industry more generally and the standards that it is meeting, we are in dialogue with them on a range of issues as to how some of the participants in that industry might improve their marketing practices, in part based on enforcement action that we have taken in the last year or so, including against Trendwest.

**Mr CIOBO**—It is an area that has in the past—certainly in the eighties—driven a large number of consumer complaints.

**Mr Kell**—We have had consumer complaints on it more recently and, as I said, we have, within the last 12 months, taken enforcement action in relation to misleading sales practices, the failure to provide disclosure documents, and representations about the resale value of properties. It is an area that we continue to monitor because it is an area that continues to generate some complaints.

**Mr Lucy**—I wonder whether Ian Johnston, executive director of FSR, wants to add anything further?

**Mr Johnston**—I think Mr Kell covered it. While there are still a lot of complaints that come through, there is a little bit of a maturing of the industry, I think, that has taken place. I think that the operators are realising what their obligations are under the legislation, and they do not have a choice: they now have to be licensed and they have to meet those obligations. That is imposed

on them and they are responding, but, as Mr Kell said, it is an area about which we always are concerned because of the number of complaints we receive.

**Mr CIOBO**—Are you aware at all of a case involving Campbell Family Trust, Glebe Quality Printing or Oakderry Pty Ltd by any chance? Do any of those ring a bell?

**Mr Lucy**—Almost certainly we will have to take that on notice.

**Mr CIOBO**—I just highlight it because it is opportune for me to do so. A person approached me. The case involves concern about and allegations against the Corporate Affairs Commission, now ASIC, that date back to the mid to late eighties. They had been talking with ASIC, seeking information on whether or not there had been opportunity for, as it then was, the commission's officers to engage in fraudulent activity in terms of replacing documents and those kinds of things in the commission's records. I might write with further information about that, but I just wondered whether it was a front-of-mind issue at this stage.

**Mr Lucy**—We will take it on notice, if you like, and look forward to your correspondence.

**Mr CIOBO**—Thank you.

**Senator WONG**—In your letter, Mr Drysdale, you cited two reasons why action ought not be taken: (1) there was a lack of admissible evidence and (2) you considered it was more appropriately pursued through civil recovery action.

**Mr Drysdale**—Yes.

**Senator WONG**—Are you able to take on notice to give us figures in each of those categories or do they cross borders as well?

**Mr Drysdale**—Once again, I probably could give you more detail, but it would be largely qualitative.

**Senator WONG**—You make the comment 'in most cases', so I assume you must have some quantitative data to have made the statement.

**Mr Drysdale**—Yes. I will get you some more information; but, once again, I am thinking here of the system in which we record this information.

**Senator WONG**—Perhaps you can explain on what basis you said 'in most cases'.

**Mr Drysdale**—Because that is the experience of the complaints assessors who are reading these reports day to day.

**Senator WONG**—Could you take that on notice?

**Mr Drysdale**—Yes.

**CHAIRMAN**—Can I ask questions in relation to market consolidation. In our report to the parliament on commission disclosure on risk insurance products, we also raised the issue of our concerns about market consolidation and distribution of products, particularly by product manufacturers engaging in their own distribution, either directly or through a wholly owned subsidiary rather than through independent or tied agents. You indicated, I think, at the estimates hearings that there was an in-house review of the external sales of those products under way and that you should have a report on that out by Christmas. What progress are you making on that?

**Mr Johnston**—We will have that report out by Christmas. It addresses the consolidation issue only inasmuch as the purpose of the report is to look at whether the behaviour of the advisers who form part of the distribution chain of the large institutions is any different. It is looking at the advisory arms owned by major banks and life companies and whether or not there are incidences of product pushing taking place and what level of disclosure is taking place of, for example, differential commission arrangements, because there has been a practice with some institutions of paying higher commissions to their tied, for want of a better term, representatives to push in-house product than if they recommend external product. Those are the key issues that have driven the work that we have done, and we still expect a report on that before Christmas.

**CHAIRMAN**—My recollection is that I raised at the estimates an example that had been given to me of an agent who had decided to get his own licence and had been offered two-thirds of the commission to deal with the product manufacturer that he had traditionally dealt with, by being independent in the sense of having his own licence as against becoming an authorised proper authority holder under the wholly owned subsidiary, that product manufacturer. Is that the sort of thing you are looking at?

**Mr Johnston**—I was fortunate enough to be in France on holiday at the time of the last estimates hearing, so I do not recall that.

**CHAIRMAN**—I mentioned it in my address at the insurance advisers conference, too.

**Mr Johnston**—It is that sort of issue that we are looking at, yes. Of course, there is nothing illegal in that, and our obligation is to ensure that licensees and representatives obey their obligations under the law, but we just want to make sure that the right disclosures are being made if the commission is different.

**CHAIRMAN**—This might be straying into a policy area but if that is happening to any great degree—if I might equate it to the fuel industry—does it indicate a need for some sort of terminal gate pricing requirement being introduced in legislation?

**Mr Johnston**—Since we started doing this work and since we expressed an interest in it, I believe that much of the industry has in fact moved its practice, and that is one of the things that should become plain at the time that we publish our report. We will be able to get a better gauge of what the current practice is as opposed to what the practice was at the time that we began the work. I think that market forces might be changing some of the practices and that the work we are doing is influencing some of the practices.

I think you are alluding to the wider issue of the effects of consolidation in the industry. One of the things that we are clearly aware of is that more and more of the financial plans that people

get are being written by fewer and fewer entities at the top of the chain. Something like 80 per cent of all financial plans are written by the top four institutions. We think that that does give rise to some issues that we need to look at—in terms of disclosure particularly, and practice—in terms of the right advice always being provided. Those issues are well and truly under our notice, but I do not think it is our job to shape how the market forces will play out as to who will own the distribution going forward.

**CHAIRMAN**—One of the concerns I have about that consolidation is that, particularly in relation to risk products, if they are marketed direct to the consumer by the product manufacturer as against being marketed by an agent or an adviser, if there is a dispute, then when a claim is made there is no-one to go in to bat for the consumer.

**Mr Johnston**—The consumer, of course, will have the opportunity to go through the dispute resolution scheme. That is legally where their port of call is and the dispute resolution scheme should make a determination on the matter. If the product manufacturer in that case has not met its obligations under the law, then we would get involved, depending on what the law was and what the provision was that was breached. But, yes, if you are dealing direct as opposed to through an intermediary, then perhaps there is a link in the chain that is not there to represent you.

**CHAIRMAN**—Another issue that arises is the issue of cross-endorsements. Are we getting any more joy on that in terms of an agent's capacity to obtain cross-endorsement?

**Mr Johnston**—I think what we are seeing is that the market is not strongly embracing cross-endorsement.

**CHAIRMAN**—My assessment is that the manufacturers do not want it. Is that a factor in why it's not happening?

**Mr Johnston**—I do not know that I can say why it is not happening. That is really a question you would need to ask of the product manufacturers, but there are a number of licensees who are saying that they will not cross-endorse with other licensees for authorised representatives and there are some who are saying, 'We will only do it if the other entities with whom we would cross-endorse meet the specific requirements that are close to our own requirements.' I think it is right to say that it is not happening in as widespread a way across the industry as perhaps the legislation anticipated it would.

**CHAIRMAN**—In practical terms does that have the effect of reducing the number of independent advisers, then, out there in the marketplace?

**Mr Johnston**—I do not know if I would use the term 'independent' because under the law, of course, that has a different connotation, but certainly it might reduce the number of multi-agents who are truly multi-agents. It might well do that.

**CHAIRMAN**—An issue in relation to insolvency was recently raised with me. I will just check with Dr Dermody, but I do not think it is an issue that has come up in our insolvency inquiry. What was raised with me was the issue of a business owner taking a secured debenture

in effect over their own business, then they go into liquidation and they are the secured creditor to the exclusion of other creditors. Has that arisen as much of a problem in your experience?

**Mr Johnston**—I'm looking down the table!

**Mr Lucy**—Obviously there are provisions in respect of preferences. I think probably Jan is the best one to say whether this has been manifesting itself.

**Ms Redfern**—Yes. I'm at the end of the table! I have not come across that particular problem. As the deputy chair says, yes, there are issues of preferences and uncommercial transactions and related party transactions. There would be a number of things that you could attack if there were some problems with them, but I have not come across that, I have to say.

**Prof. Collier**—It is not illegal or unlawful in any way for a person to take a charge over their own corporate entity.

**CHAIRMAN**—It has been suggested that Mr Kaye has done this. Are you aware of that?

**Prof. Collier**—Yes, we are aware of that.

**Mr Lucy**—We have a current investigation on Mr Kaye.

**CHAIRMAN**—So it could be an issue there?

**Mr Lucy**—I could not respond to that.

**CHAIRMAN**—That is all I have at the moment, thank you.

**Mr Lucy**—Chairman, do we need to be concerned about the quorum and privilege?

**CHAIRMAN**—No. Once we have a quorum to start, we are okay unless one of our members raises the issue. No, you are fine.

**Mr Lucy**—Thank you.

**CHAIRMAN**—Why? Was there something you might be going to add in that context!

**Mr Lucy**—No. I just wanted to be clear, that's all, on behalf of my colleagues.

**Senator WONG**—You said that, Mr Lucy, when we got to Henry Kaye!

**Mr Lucy**—No, no coincidence there.

**Senator WONG**—I am glad to hear it. You have a current investigation into Mr Kaye, do you, or into the two companies Empower Group and NII?

**Ms Redfern**—We do, yes.

**Senator WONG**—Did ASIC obtain—and I think I recall this—enforceable undertakings from Mr Kaye that NII would compensate consumers who paid for his training courses?

**Ms Redfern**—Yes, we did.

**Senator WONG**—Are they enforceable? I know you are seeking to enforce them.

**Ms Redfern**—Yes. I might just go back. We commenced proceedings in March of this year in relation to the seminars. We also sought injunctions in relation to the conduct of the seminars. As part of a court resolution, we got undertakings, and court enforceable undertakings, in relation to disclosures and a number of things in relation to conduct. In addition to that, we obtained an enforceable undertaking in relation to the payment of refunds, what we call the compensation system. We actually did commence court action to enforce that enforceable undertaking earlier this year—I think we commenced those proceedings in October—because we were concerned about the way in which the undertaking was being performed. We were concerned that it was not being complied with. Under the legislation we have the power to do that and we commenced those proceedings in October. We do have ongoing investigations—and I think we have issued a media release to this effect—in relation to the affairs of the company and Mr Kaye, and in relation to those ongoing investigations, it is very difficult for us to comment.

On the issue of enforcement of those compensation orders, I think what you might be referring to is the fact that there are now administrators appointed to the companies that offer those enforceable undertakings. It is a bit early for us to say what the position is in relation to those companies. We have had some preliminary discussions with the administrator and the receiver, who have just gone in to assess the position, so we do not quite know what the position is in relation to those companies at this stage.

**Senator WONG**—Leaving aside the issue of how much money the company has and how many assets it has, if any, what is the status of the debts, being the training fees, as a matter of law, given the company is now in liquidation?

**Prof. Collier**—It is not in liquidation yet.

**Ms Redfern**—It is in receivership and administration.

**Senator WONG**—I apologise. I thought it had gone the next step.

**Mr Lucy**—What might be helpful is if Peter Kell provides a little background, because we have done quite a bit in respect of general consumer awareness, including a help line.

**Senator WONG**—I am asking about this, though, Mr Lucy.

**Mr Lucy**—Yes, in this particular area, in relation to this matter.

**Mr Kell**—At this stage, as Ms Redfern indicated, it is early days and we are not in a position to provide a definitive comment on that, but we recognise that, as a matter of high priority, we are going to want to communicate with people who currently are owing money on the courses and therefore may be in a difficult position. We want to communicate with people who may have



claims on the compensation scheme and we want to communicate with people who otherwise became investors through one of these schemes. That is a matter of urgency, but we do not have a definitive view on exactly how those people will be treated under the law right now.

**Senator WONG**—If the company did proceed to liquidation, what would the status of those debts be under the enforceable undertakings?

**Ms Redfern**—They would be unsecured creditors.

**Senator WONG**—So they are at the bottom of the pile?

**Ms Redfern**—Yes. Regardless of whether it was an enforceable undertaking or a judgment debt, it would be the same position.

**Senator WONG**—Are there any related companies which are secured creditors?

**Ms Redfern**—There is a related company to which a receiver has been appointed, and again we have had discussions with the receiver.

**Senator WONG**—Empower Group?

**Ms Redfern**—No. I have forgotten the name of the company; I think we may have referred to it in our press release. But there is a related party. In fact, your very example: I did say I had not heard it before, except in this one particular case where there is a security by way of a loan in relation to a related party to the National Investment Institute, and that is where the receiver has been appointed and we in fact have been in discussion.

**Senator WONG**—Where has the receiver been appointed? The related company or NII or both?

**Ms Redfern**—The related company has appointed a receiver, so we have two administrations. We have the external administration under the Corporations Act process and we have the receiver.

**Senator WONG**—Which was initiated by the company itself, by NII?

**Ms Redfern**—Yes, and we have been in discussions with both the receiver and the administrator.

**Senator WONG**—And the secured creditor company is related in what way?

**Ms Redfern**—By reason of the directorship and shareholding of Mr Kaye.

**Prof. Collier**—For the record, the related company is Group Corporate Services Pty Ltd.

**Senator WONG**—Can I clarify the process, because I have a reasonably sketchy knowledge of this. NII went into voluntary administration?

**Prof. Collier**—Correct, yes.

**Senator WONG**—At the instigation of the directors, presumably.

**Prof. Collier**—Yes.

**Senator WONG**—Group Corporate Services appointed a receiver on the basis of its secured creditor status.

**Prof. Collier**—Correct.

**Senator WONG**—Also a decision in which Mr Kaye was involved.

**Prof. Collier**—Yes, as I understand.

**Mr Lucy**—And one of the issues that the receiver looks at is whether or not the floating charge is valid. That is one of the first responsibilities of the receiver.

**Senator WONG**—I assume it is not the same person.

**Ms Redfern**—No. Mr Hewitt of Grant Thornton is the administrator of the company.

**Senator WONG**—Of NII?

**Ms Redfern**—Of NII. And Mr Andrew McLellan of Prentice Parbery Barilla is the receiver. While I do not want to go into too much detail, we have been in discussions with both the receiver and the administrator and we are considering a number of issues in relation to this very position.

**Senator WONG**—Does NII hold any assets?

**Ms Redfern**—We are not aware at this stage. We just do not have enough detail. That is what we are discussing with the administrator. I think the first meeting with the administrator is due to take place next Tuesday and hopefully by that stage he will have a bit more information.

**Senator WONG**—What is the amount of the debt, the floating charge?

**Ms Redfern**—\$28 million.

**Senator WONG**—Mr Kaye puts one company into administration, then appoints a receiver to seek to enforce the debt owed to his related company of \$28 million?

**Ms Redfern**—That is what appears to have happened in this case.

**Mr Lucy**—\$28 million may or may not be the right figure.

**Ms Redfern**—Yes, I do have to withdraw that. In fact, I have to take that on notice. There are a number of intercompany relations and there is a security by the Group Corporate over the NII company, but I am not certain of the exact sum at this stage.

**Senator WONG**—Are we talking in the millions?

**Ms Redfern**—We are certainly talking in the millions.

**Senator WONG**—Do we have any Mr Kaye carbon copies running around?

**Prof. Collier**—We hope not.

**Mr Kell**—He appears to be a specialist in his field!

**Mr Lucy**—Is it appropriate for Peter Kell to provide some history as to what we have done in respect particularly of Henry Kaye?

**Senator WONG**—What I am concerned about is: as I understand, one of the issues with Kaye and why you chose to pursue him was for false and misleading statements. Was that the action?

**Mr Kell**—One of.

**Senator WONG**—But real property investment advice is not something that—I think as you pointed out before, Professor—you have jurisdiction over.

**Prof. Collier**—Not exclusively.

**Senator WONG**—Are there other people providing this sort of investment advice—I hesitate to call it advice; it is for want of a better term—where these jurisdictional issues are preventing ASIC from properly pursuing it?

**Mr Johnston**—Yes, there are certainly other instances of people who run investment seminars that are directly property related. There is in fact a large, and I think growing, number of them. It is difficult to turn on the radio these days or look in the newspaper without seeing an advertisement for how someone can turn you into an instant millionaire through property.

**Senator WONG**—Without any debt!

**Mr Johnston**—We did conduct a compliance campaign where we looked at some eight of these types of activities. They were mostly outside our jurisdiction, frankly, but we went and looked at them simply by sending people along to the seminars to see what sort of behaviour was taking place, and we are certainly concerned about the sort of activity that we saw. In most cases people are not providing financial product advice as defined under the law that we operate, and therefore there is nothing that we can do about them. There are, I think, a large number and probably a growing number of these types of activities.

**Senator WONG**—How much of it is cause for concern in terms of the sort of advice that is being given?

**Mr Johnston**—Of the eight seminars that we sent people along to, I think we were concerned about seven, if not eight. But it goes back to the point that was raised before about the jurisdiction. Mostly they are regulated by the states. The reason that we sent people along was to see if they did cross the line. Where they did, we have been able to stop some of them. Some stopped voluntarily and some made changes to the way that they were operating, but in most cases we cannot actually do anything about it.

**Prof. Collier**—That earlier intervention with Mr Kaye was because he had crossed the line. He had, for example, made claims that ASIC endorsed his products.

**Senator WONG**—I would buy it if you had endorsed the products!

**Prof. Collier**—But we won't. I'm sorry, we don't do that.

**Senator WONG**—The eight were independent of each other?

**Mr Johnston**—They were independent of each other.

**Senator WONG**—There were eight separate properties?

**Mr Johnston**—In a few different states.

**Senator WONG**—When did you do this?

**Mr Johnston**—Over the past four to five months.

**Senator WONG**—And the primary purpose was to see whether they transgressed to an FSR area.

**Mr Johnston**—That is right, and generally they did not, so there was not a great deal that we could actually do. In some cases we thought that they were close and we warned them off, but in most cases we cannot do anything about it.

**Prof. Collier**—I make the observation also that it is my understanding that if there is misleading and deceptive conduct by property spruikers, for want of a better description, in relation to their products, the ACCC will have jurisdiction, if it is not financial products.

**Mr Kell**—We have taken some action more recently in respect of the sort of credit that is provided in some of these areas and have issued warnings in that area as well. We recently issued a warning about the promotion of no deposit, low deposit and 100 per cent loans and we have recently taken enforcement action in relation to the provision of those sorts of loans where consumers were misled. So it is an area where you have the financing vehicle and the property vehicle interlinked, but it still does not change our lack of jurisdiction over the direct property side of the equation.

**Senator WONG**—But the concerns that you alluded to in seven or eight of the eight were not simply in relation to the financial product advice, if any?

**Mr Johnston**—It was to do with their sales tactics and the pressure under which they put people who attended the seminars.

**Senator WONG**—What about the quality of the advice?

**Mr Johnston**—Because it was not financial product advice, we did not really pay as close attention to that.

**CHAIRMAN**—Earlier, it was suggested that Mr Kell might give us a bit more detail.

**Mr Lucy**—I think you felt earlier that it might be useful just to run through some history in relation to Mr Kaye and the activities which we undertook.

**Senator WONG**—We only have 15 minutes. Are you able to provide that on notice, Mr Kell?

**Mr Kell**—Yes.

**Senator WONG**—Thank you. I understand that you took a question on notice earlier this month regarding the Devine Homes no deposit, no legals, no stamp duty, no cash ads. Is that right?

**Mr Kell**—We did, yes.

**Senator WONG**—What has happened with that?

**Mr Kell**—We are still formulating a response to that as part of the package of questions on notice.

**Senator WONG**—You issued a press release in November warning consumers about the risk of no deposit loans.

**Mr Kell**—Yes, that is right.

**Senator WONG**—Have you done anything else in relation to Devine Homes?

**Mr Kell**—Not in relation to Devine Homes, no.

**Senator WONG**—Can I ask why not?

**Mr Kell**—The matter of Devine Homes was brought to our attention only a few weeks ago at the committee hearing. We have at this stage gathered some of their marketing material.

**Senator WONG**—Of which there is quite a lot.

**Mr Kell**—Yes. We have not had an opportunity to fully assess that, but that obviously is under way at the moment. As I noted, we have literally in the last few weeks taken enforcement action against another provider of these sorts of loans, so it is something that we are concerned about at

the moment. We have issued some warnings on it and we are investigating a series of matters in this area.

**Senator WONG**—If the advertisements were false and misleading, would you have jurisdiction to take action?

**Mr Kell**—If the advertisements were false and misleading, yes, we would have some jurisdiction.

**Senator WONG**—At this stage you are considering the advertisements, but they are still running. It doesn't cause you any concern?

**Mr Kell**—We are obviously concerned if there are misleading advertisements out there, but at the moment we are still assessing this matter, as we are assessing a number of other allegations of misleading advertisements about credit that have been brought to our attention of late.

**Senator WONG**—When do you anticipate action will be taken, if any?

**Mr Kell**—As Mr Lucy indicated, we are looking at providing a response on that issue in December.

**Senator WONG**—No, that is a response to us. Are you considering taking action or not in relation to Devine Homes' advertising?

**Mr Kell**—As I said, we have not formed a view as yet as to whether the advertisements—

**Senator WONG**—When do you anticipate you will do that?

**Mr Kell**—Some time in December.

**Senator WONG**—At the same time you answer our question?

**Prof. Collier**—I suspect the answer to you will reflect the action that ASIC will take.

**Mr Kell**—Yes.

**Senator WONG**—Our committee is inquiring into CLERP 9—we must have done something in a past life! Can I ask why ASIC has chosen not to make a submission to the committee?

**Mr Lucy**—I might ask Malcolm to respond more fully, but my understanding is that we have indicated our willingness to participate and attend your committee. We have provided detailed responses to Treasury in respect of the draft bill.

**Senator WONG**—Are you prepared to provide us with the submission that you provided to Treasury?

**Mr Rodgers**—As we said at Senate estimates a few weeks ago, it is not normally our policy to be publicly engaged in a debate about the underlying policy of legislation which we will be administering and enforcing, as we understand it, within perhaps six months. We do not normally make public submissions on legislation at that stage. What we have provided to Treasury is a series of, effectively, detailed and technical comments on the bill as drafted, and we bring to that our experience as an administrator rather than try to enter into any public policy debate. In a sense, we have provided that advice to the government as part of the legislative process.

**Senator WONG**—It is not advice to government. It is not advice that a minister sought from a department. It is a submission to Treasury, which is considering an exposure draft of legislation which this committee is also considering. I appreciate there might be some sensitivity about what the public perception might be associated with making your submission public. It would be of great use to us, I think, in the inquiry we are undertaking to obtain a copy of your submission to Treasury, even if it were on an in camera basis.

**Mr Lucy**—For it to be in camera would make it, obviously, a lot easier for us. The difficulty, clearly, is that at some point we will be obliged to administer and regulate the legislation as it is finally approved by parliament.

**Senator WONG**—Treasury could then ring you up and tell you why you should be doing some enforcement thing, because you said this in a submission to them.

**Mr Rodgers**—If you do not mind, I would like to let Treasury know that we have been asked to do that. You should understand from me that we provided it to Treasury confidentially and, if you do not mind, I would like to explore it with Treasury. Subject to anything that Treasury might have to say, I am happy to provide it to the committee on that basis. I will come back to the committee on that.

**Senator WONG**—Thank you.

**CHAIRMAN**—Can you give me any information on the investor forums that you ran recently, in terms of their success and the number of people that attended perhaps in each state et cetera?

**Mr Tanzer**—There has not been a nationwide campaign of running investor forums. We ran some investor forums in Queensland, in Western Australia and in South Australia. I do not have the numbers of attendees before me. There were quite a variety. A number of those forums were run in country areas and the numbers there were certainly less than 50. We attended some of those individual forums. From the reports that I have had from the regional commissioners who conducted those seminars, we believe that they were successful. In respect of the people whom we reached, that was welcome, but in addition to that, the fact that we were holding the forums generated some publicity and some media exposure through local radio and television that would have reached a much larger number of people. We regarded them as being quite useful.

**CHAIRMAN**—Do you have any information about the sorts of issues and questions that were raised by people who attended?

**Mr Tanzer**—Speaking personally, at the ones that I conducted the types of issues were some of the ones that we have touched on today: real property investment; issues related to the nature of returns from the market at the moment; other high-yield or wealth creation schemes; and rollover of superannuation into high-yield schemes.

**Mr Kell**—The reports from the officers running those seminars indicate that which financial adviser to go to is a perennial favourite as well.

**CHAIRMAN**—Do you intend to keep running them?

**Mr Kell**—Yes. We have a consumer education strategy that covers a wide range of activities, including running investment seminars, going out and speaking to community groups, going out and participating in money expos. Getting out into the field is part of our consumer education strategy and we are quite hopeful that we will, indeed, be able to expand that in the next year or so.

**Mr Lucy**—Chairman, it is my understanding that that was also undertaken in conjunction with the Institute of Chartered Accountants. Whether or not there were other stakeholder groups involved as well, I am not sure, but certainly the ICA was involved in a couple of states.

**CHAIRMAN**—Thank you.

**Senator WONG**—I will indicate to you, Mr Lucy, that because of time there will be a number of questions on notice regarding the managed funds industry and also the Companies Auditors and Liquidators Disciplinary Board's annual report in which ASIC advises that it has a watch list as an intermediate measure. Rather than ask them now, I indicate that we will put them on notice.

**Mr Lucy**—Thank you.

**Senator WONG**—There was a question, I think, that was emailed through by Dr Dermody—in addition to the letter—which unfortunately did not make it onto the original letter. This is in relation to insurance products.

**Mr Lucy**—I am not aware of it. I am not sure to whom it was sent.

**Mr Drysdale**—I think we received that yesterday. It is in terms of complaints. Is that right?

**Senator WONG**—Yes, it is the number of complaints received in relation to the provision of insurance products. It says: please break down the complaints into product type and the provision of credit cards.

**Mr Drysdale**—We will provide that. I have had a look at whether we can, and we can.

**Senator WONG**—You can?

**Mr Drysdale**—As per the split that you have asked for.



**Senator WONG**—Thank you.

**CHAIRMAN**—As there are no further questions, Mr Lucy and colleagues, thank you very much for making yourselves available for our hearing this afternoon.

**Mr Lucy**—Thank you.

**Committee adjourned at 5.54 p.m.**