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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 STATUTORY COMMITTEE ON

CORPORATIONS AND FINANCIAL SERVICES

Tuesday, 15 March 2005

Members: Senator Chapman *(Chair)*, Ms AE Burke *(Deputy Chair)*, Senators Brandis, Lundy, Murray and Wong and Mr Bartlett, Mr Bowen, Ms Burke, Miss Jackie Kelly and Mr McArthur

Members in attendance: Senators Chapman, Murray and Wong and Ms AE Burke and Mr Bowen

Terms of reference for the inquiry:

To inquire into and report on:

Annual review of the Australian Securities and Investments Commission

WITNESSES

Committee met at 5.08 p.m.

COOPER, Mr Jeremy Ross, Deputy Chairman, Australian Securities and Investments Commission

IGLESIAS, Mr Carlos, Executive Director, Finance, Australian Securities and Investments Commission

LUCY, Mr Jeffrey John, Chairman, Australian Securities and Investments Commission

CHAIRMAN—I declare open this public hearing of the Parliamentary Joint Statutory Committee on Corporations and Financial Services. Today the committee is conducting its public hearing into the Australian Securities and Investments Commission. Under section 243 of the Australian Securities and Investments Commission Act 2001, the Joint Committee on Corporations and Financial Services is required to oversee the functioning of the Australian Securities and Investments Commission. This hearing is part of that oversight. I welcome to the hearing Mr Jeffrey Lucy, Chairman of ASIC, and the other ASIC officers, Mr Cooper and Mr Iglesias. Do you have any other staff with you?

Mr Lucy—No, we do not.

CHAIRMAN—This is the first statutory oversight meeting that Mr Lucy has attended as Chairman of ASIC, so I particularly welcome you today, Mr Lucy, on that account.

Mr Lucy—Thank you, Chairman.

CHAIRMAN—As official witnesses you will not be asked to give opinions on matters of policy and you will be given reasonable opportunity to refer questions to your minister. You should note that the evidence given to this committee is protected by parliamentary privilege. I remind you that the giving of false or misleading evidence to the committee may constitute a contempt of the parliament. You may proceed to an opening statement if you so wish.

Mr Lucy—We do not have an opening statement.

CHAIRMAN—I have some questions in relation to electronic and telephone banking. You may or may not be aware that, back in February 2001, this committee reported on fees on electronic and telephone banking and made recommendations in three areas of priority. The first area involved a framework for the real-time disclosure of electronic and telephone banking fees. The second area involved transparency of retail electronic and telephone banking. The third area involved the practice and level of interchange fees charged between banks for foreign ATM transactions. There was an ASIC fee disclosure working group charged with the responsibility of developing an appropriate regime for greater transparency with regard to fees for electronic banking, among other things, and it was taking into account the recommendations we made. I want to revisit some of our recommendations and seek your information on progress that has been made through that working group.

Mr Lucy—We are happy to revisit those areas.

CHAIRMAN—Firstly, the committee recommended that the interchange fees between banks in relation to foreign automatic teller machine transactions be abolished immediately and be replaced by direct charging, with the expected effect of reducing foreign ATM transaction fees from approximately $1.50 to 50c. In May last year the Reserve Bank reported on the 2003 results of its annual survey of fee income from the Australian operations of commercial banks. It reported that the average foreign ATM interchange fee charged by Australia's big four banks was $1.45, up from $1.40 in 2001 and 40c in 1995. There was also a bulletin released by the Reserve Bank in July last year entitled 'How Australians Withdraw Cash', which detailed the use of cash as a retail payment instrument and reported that, despite many predictions that cash would decline in importance as a payment instrument in the face of technological innovation, cash continues to be an important means of payment in Australia. That bulletin quoted a survey from the Australian Retailers Association that said around 40 per cent of the value of all payments made at surveyed retailers was undertaken through cash transactions. The bulletin went on to say that 85 per cent of cash obtained by electronic means was accessed through ATMs and approximately 40 per cent of withdrawals from ATMs occurred at foreign ATMs. Can you provide an update on the working group's progress on the surcharging issue?

Mr Lucy—We have pretty much completed a review of all three areas. We have a report that is about to be issued discretely to the industry for their immediate comment as to whether or not there are any oversights in our reviews. We expect to bring that to the point of wider dissemination within the next month.

CHAIRMAN—So this will take account of all the recommendations made by the committee in 2001.

Mr Lucy—Yes. I think you probably know better than anyone in the room that this is a complex area, particularly when it addresses consumer issues. The banking industry has done a lot to address the issue of costs. One of the aspects of that is that, for example, they provide free access to ATMs for a certain number of transactions. That makes disclosure difficult in a practical sense, because it is a question of whether or not you have used up the free quota. Also, some of the banks are introducing what is essentially a retrospective free access, where the most expensive activities undertaken within a month, subject to a cap, are the ones that are rebated. So it is complex. There is also complexity, particularly in the United States and the United Kingdom, which have a slightly different approach, around the fact, which you referred to, that many of the people who are using their cards and accessing ATMs are doing so internationally. Our report provides an update as to where things are in Australia, and it is our expectation is that the Reserve Bank will be taking this further.

CHAIRMAN—My recollection is that at the time of our report, which is now just four years ago, technology was available that would be able to track an individual's fee situation in terms of the transactions that they had undertaken, taking account of their fee-free component and the like. But a lot of the technology that was available had not been installed by banks. Over time, with the change in technology, that would gradually be installed. Are you aware as to where they are at with that technology?

Mr Lucy—My understanding is that the banks are waiting on advice as to what level of compulsion will be required as far as the disclosure, because there is a very high level of capital cost and, obviously, information technology cost. It is all possible. The most difficult area, I

guess, is where they are looking to provide some retrospective benefit. Of course, when you are faced with the ATM itself, it can only let you know what is available at the time—it cannot do it retrospectively. A lot of disclosure now is being provided through bank statements. Our monitoring of the disclosure through bank statements is that that has been undertaken satisfactorily. But the ATM, in particular, of course is real time, and that is more acute and more difficult.

Ms BURKE—How does that fit in with what the Reserve is actually doing in respect of its powers under delegation? The ACCC got it first. It handballed it to the Reserve. You are also doing a report into this. Everyone is having a bite at the cherry. Where does your report fit into what the Reserve is doing as we speak?

Mr Lucy—We have followed it through, as we were asked to do, as a result of the last report we provided. To the extent that the ball was in the area of the Reserve Bank, that is for them, obviously, to comment upon. But we certainly think that there have been very significant developments undertaken within the banking industry following the first exercise, and quite tangible benefits for consumers.

CHAIRMAN—Following on from that, a related issue. In a media release entitled 'Payment System Reform', of 24 February this year, the Reserve Bank of Australia announced that its payment system board decided to release draft standards for EFTPOS and Visa debit payment systems for public comment. It noted that decisions on the final form of any standards would not occur until the completion of the current Federal Court case challenging designation of the EFTPOS process. Will ASIC make a submission to the Reserve Bank on those standards, or would you leave that entirely to the Reserve Bank?

Mr Lucy—We would certainly make available to them all the findings of our surveys, but, frankly, the commission has not formed a view as to whether or not we need to provide our own response to the Reserve Bank.

CHAIRMAN—Has there been any—and, if so, to what degree—interaction between the Reserve Bank and the working group?

Mr Lucy—Yes, I am aware that there has been interaction. Frankly, I could not go into much detail as to the level, but certainly our people who have been running with our report have had interface with the Reserve Bank.

Senator MURRAY—You might remember the committee's report on insolvency.

Mr Lucy—Yes.

Senator MURRAY—The government has not responded to that yet. But I am pretty convinced by the nature of some of your press releases that ASIC has been paying greater attention to some of the areas of insolvency malfeasance, shall we call it. Could you outline for us what you have been doing in that area, and whether you think legislative reform is needed relatively soon to address some of the areas of concern that have been raised by us and by other bodies?

Mr Lucy—I will firstly respond to the question of what we have been doing. We formed a unit called the National Insolvency Coordination Unit. It is a discrete unit. It is modest in size but we have boosted it by a number of secondments—in particular, secondments of competent and experienced insolvency practitioners.

Senator MURRAY—From outside the organisation?

Mr Lucy—Yes. External to ASIC. They are typically from insolvency firms. We then have identified on a rolling basis companies which we believe are in distress, including publicly listed companies and obviously companies down to the smaller end of the market. We have been proactive in visiting those. We have visited nearly 600 companies over the last 12 months. Our response has varied. There has been a reasonable percentage where the companies have responded to our interest, readdressed their directors' duties and looked at recapitalisation and so therefore there has been no further action required by ASIC. But there has been a minority where our interest has led to either some form of administration being entered into or indeed a voluntary administrator being appointed. From our perspective, whilst one does not like seeing that sort of eventuality, nevertheless we view that in a positive way: if a company is heading in the direction of some form of administration, the earlier that occurs the less the ripple effect is likely to be. We think it is better to manage an insolvency quickly rather than let it linger on and cause more pain in the wider community. We believe it has been a successful campaign. We anticipate continuing it. We also, though, support the call for reform. We have been providing Treasury advice as to where we think there should be law reform.

Senator MURRAY—There has been greater activity by the regulator and perhaps also by the ATO, although I am not as aware of that. They have had the phoenix company kind of situation and other situations brought to their attention. I wondered if greater activity by the regulator has kind of lessened the need for the legislative response that we thought was necessary or in fact has highlighted the need for a legislative response.

Mr Lucy—Arguably, it has done both. Firstly, one of the key areas that we identified—particularly at the lower end of the market—is that the liquidators are not inclined to provide a meaningful report to ASIC because of the funding issue. That is one of the key areas that we think needs to be addressed. On the other hand, one could say that the insolvencies have been modest in number and certainly give the impression of being, as it were, well managed. But then we have had strong economic conditions and so therefore one would like to think that the frequency and the magnitude of insolvencies would be fairly modest. There have been some fairly significant ones. Henry Walker Elton is one from an industry which has given all the indications of being active. To see that come to the point of a VA was perhaps surprising. We have been monitoring it closely. We think that the industry is well managed per se but we think there is still an ongoing need for reform.

Senator MURRAY—At the time of GST implementation, there was a view that the requirement for regular GST returns and the accounting practices that businesses would have to get up to speed on would result in a quite significantly larger number of both bankruptcies and insolvencies. In fact, I seem to remember One Nation at the time running around saying that one in three businesses were going to go bust. I do not recall that there was a significant lift in those numbers. I put it into that context because I wanted to ask you about the new accounting standards regime. As you know, books are in many circumstances going to have to be adjusted,

sometimes very considerably—particularly with regard to the way assets, goodwill and leases and so on are recorded. Do you expect any consequent lift in insolvency activity where weak companies are exposed by the result of having to present their accounts in a less creative way than they have been in the past?

Mr Lucy—It is not our expectation. It is obviously a fair point in that there will be in some instances quite significant rearrangements as to the balance sheets and the operating statements. You have identified some assets, particularly goodwill assets, no longer being able to be accounted for and there will be some liabilities that will be brought to account which previously have not been brought to account. Certainly the attitude of the banking industry will be key to that as to whether or not they have a mature approach and understanding of the underlying business not having changed. It is a question of how the business is presented, and our expectation is that the banking industry is across that.

Senator MURRAY—You say that it is an expectation—or is it knowledge? Have you spoken to the banks?

Mr Lucy—Yes, I met with the banks perhaps about a year ago under the umbrella of the ABA. That was in consultation with APRA, looking at the consequences of the introduction of IFRS and their attitude and approach to that introduction. I did not draw then, and continue not to draw, any conclusions that cause me any concern that the banks are going to bring to the table an approach that would perhaps be more radical.

Senator MURRAY—Are you sure of that? I ask you that in this context: sometimes the officers and the senior executives of an organisation may take one view, but if they do not communicate it adequately down you will find the loan officers and the account managers will take a completely different view. They will see a different set of accounts and they will start to squeeze up on the credit lines that companies are using. Are you satisfied that the banks are going to be properly conveying that attitude down the line?

Mr Lucy—I guess our interest is not that acute to the extent that I have not reached a point of being satisfied, as it were. I have certainly had discussions and have provided my own observations. The banks typically have a very keen interest in cash flow and asset management—real asset management—and nothing has changed in either of those. Certainly, it is in the interests of the senior management to make sure that their more junior management within the banks also bring to the table a thorough approach. The banks do not want to convert unilaterally, simply because of a new presentation of accounts, what might be a sound business into something regarded as being something less than sound. I do not have an expectation of there being a problem. I have not come across it in my day-to-day activities, including in discussions with the banks. But I have not reached the point of saying to you that I am satisfied.

Ms BURKE—Changing tack again with choice of super: given that FSR has not been the great success we were hoping it would be—it was meant to be the plank of consumer protection going into choice of super funds—it does not seem that the parties have been able to reach agreement on a set of standards for the way consumers will be protected and how regulation is actually going to happen when we make this leap of faith come June. Do you have concerns about the introduction of choice of funds?

Mr Lucy—It might be best if Jeremy answers those questions. Whilst I have been engaged in FSR to a fair extent, nevertheless Jeremy has been very heavily engaged and it might be best if he answers those questions.

Mr Cooper—The question was whether we had any concerns. I suppose we do; it is a big project and there are a lot of issues at stake. It is not unlike any of the other jobs that we do in some respects. We think the reality is that the FSR regime is a success. There are bits on the fringes that perhaps need tidying up but you never hear anyone criticising the underlying philosophy and what it delivers. It is criticism about piles of paper and often the machinery aspects of it. In terms of the 1 July date coming, we are due to release specific guidance about what we are going to be expecting advisers in the superannuation industry to be doing. We plan to be doing that in early May. We will be undertaking surveillance and we are working with other agencies on a whole-of-government approach. Details of that are on the superchoice.gov.au web site where people will be able to go and see information from us and from the ATO and so on. So, yes, we are concerned. It is a very large amount of money and a large number of consumers are involved in it, but we think we have the programs in place to deal with it, along with other agencies.

Ms BURKE—Do you think there has been enough education for employers who have to administer this very complex set of requirements and for mainstream people who just have super funds?

Mr Cooper—There is no doubt it is complex, but some of the messages coming down the pipeline that I am aware of for consumers basically advise them not to rush in and say that it is okay to still be thinking about it. So, as we get closer to 1 July, I think it will become obvious there is a very good campaign out there to make sure that people do not rush in. Certainly we are going to be undertaking surveillance to try to monitor that.

Ms BURKE—The parliamentary secretary, Chris Pearce, has made some statements recently about changes to FSR. We are heading down this track, but he has made some statements that he is going to be looking at revising and revamping. Do you think that muddies the water and makes it more complicated for planners and policy holders? Is it also more complicated for the super industry to gear up and say to people, 'This is how we are going to be progressing'?

Mr Cooper—I think the message there is that the changes are not wholesale—in other words, we are not going to turn the regime on its head. There has been plenty of consultation, and plenty of issues have been raised from both consumer side and the industry side, so the work that is being done in refining the regime is not going to turn it on its head at all. It is really going to relieve some of the pressure points we are all hearing about.

Ms BURKE—Do you have some concerns about the default mechanism—that the banks will think, 'Yippee, we have finally made it. We're going to be offering our wonderful product that we have been trying to get off the shelf for a long time'? Do you also share the concerns of some employers that, if they are providing the advice, they might be caught up in the firing line of giving bad advice? They are not financial planners but I think a lot of this is going to fall back on employers. There are certainly concerns about small businesses being able to tackle this huge change.

Mr Cooper—I am pretty happy with the level of debate there has already been about the default fund issues, so it is not as if that is a sleeper. That issue is very much out there. Secondly, in terms of the difficulties employers have—even advising on their own fund, for example—we are certainly look at making some changes to make that easier.

Ms BURKE—So you are looking already at some changes about how to make that easier for people and that they are not going through 34 different steps and 500 different bits of paper they have to give to people?

Mr Cooper—Yes.

Ms BURKE—What can you tell me about third line forcing under the Trade Practices Act and how that may be influenced in this debate and about people pushing certain products—again, not wanting to point the finger but maybe talking about banks?

Mr Cooper—Third line forcing is really something that is exclusively with the ACCC, in that it is anti-competitive, it is exclusive dealing. We do have a very tangential involvement with third line forcing in that we have a cooperation agreement with the ACCC where, if they seek an application for authorisation in the financial services industry from a big player, like a bank that has lots of different arms where third line forcing could be an issue, we are, on request, obliged to provide assistance and information, so far as we can, to the ACCC in order for it to properly assess whether or not it ought to grant the authorisation, much like it has to the supermarket chains that will sell you discount petrol but only if you have bought products from their supermarket. That is really the process. Third line forcing is not an issue for us per se, but I suppose the issue would be: if third line forcing is going on, is there proper investment advice? Third line forcing per se is really outside our ambit.

Senator WONG—You are charged, though, with dealing with a number of issues surrounding the move to choice of super.

Mr Cooper—Sure.

Senator WONG—And you would acknowledge that this is an issue that needs to be considered in that context. We do not want to have a situation where financial institutions might engage in this activity in order to achieve a certain outcome on choice of fund. Surely this is something ASIC has turned its mind to or at least discussed with the ACCC?

Mr Cooper—With respect, no, because in our patch it is all about whether appropriate advice is being given in relation to the financial services. Third line forcing looks at competition in markets, which is just way outside our ambit.

Senator WONG—Do you think it would be appropriate for the institution to disclose the fact that the choice of fund on offer has been influenced by a separate commercial arrangement with the employer?

Mr Cooper—That is a whole different thing. We have worked aggressively on policies to—

Senator WONG—So you accept that, yes, that is something that should be disclosed?

Mr Cooper—Yes, indeed. It is all around managing conflicts that licence holders have and that is not a prohibition based regime, it is a disclosure based regime. So those conflicts need to be properly managed, and sometimes it is by not engaging in activities that create conflict and sometimes it is a disclosure matter. Also where a holder of a financial services licence is concerned it goes quite deeply into whether recommending those products is appropriate, particularly if we are in a choice environment. So I guess it is not so much the third line forcing but the appropriateness of the products and their disclosure level.

Senator WONG—But do you think that disclosure is going to be something that employees choosing those super funds are actually going to be able to discern for themselves without getting advice?

Mr Cooper—That is difficult. At the broad consumer level you have people who have not had familiarity with these products necessarily, and I guess that is why part of the campaign is going to be that you do not actually need to rush in and make a choice and will be heavily pushing getting proper investment advice if they do not understand it.

CHAIRMAN—Given the potential and the choice for employees to leave a particular employer mandated fund and go to another fund, the employer may not see it as in their particular interest for an employee to do that and to adequately communicate how they are handling the introduction of choice of funds. Has ASIC plans to include specific communication or surveillance of the way in which employers address that particular issue?

Mr Cooper—Yes, very much so. I guess we would certainly be looking at those sorts of communication just as much as we would be looking at the retail fund communications.

Mr Lucy—As Jeremy has also mentioned, we are working very closely with the tax office, and their prime focus is looking at the responsibilities of the employers' side, so they will be very clear to make sure that the employers understand their responsibilities.

Senator WONG—My next question is on another area.

Senator MURRAY—Can we stay with the FSR for a while?

CHAIRMAN—We have overlapped choice and FSR at the moment. Have we finished everything on choice? That being the case, we can move to FSR.

Senator MURRAY—Let me return to FSR briefly. As you know, there is a fair bit of dust flying as people try and settle into the new systems and come to terms with the expectations of legislation and the regulator and the way in which the market is reacting. It seems to me that people implementing this in the practice of their businesses are torn between the desire to improve areas that they think are perhaps not as helpful as they would hope and the desire for no further change because they have invested a lot of time, money and effort in understanding what is going on. One big area of concern has related to the excessive complexity and the volume of product statements, and we have discussed this at previous hearings, at estimates and so on.

Mr Cooper—Yes.

Senator MURRAY—We were discussing today the motives that lie behind that. I do not think the motives include just trying to gum up the system. I think, to use the expression of Senator Wong, it is driven by risk averse behaviour.

Senator WONG—Did I say that?

Senator MURRAY—You did. It was very good. The lawyers are telling their clients that they could be liable this way and that way, therefore producing a lowest common denominator kind of approach. So my question is: in your discussions with Treasury and the industry as to how to improve this matter, have you focused on the issue of liability and whether the assumed liabilities could be mollified in some way, either through administrative reassurance or through statutory change? It seems to me if people believe they are liable in areas where they are not—if they have taken reasonable business judgments, they should not be liable. I really want to know if you have been looking at that area, because if you can reduce the liability you are going to reduce the risk averse behaviour, and therefore you will reduce the volume of paperwork and the complexity of material.

Mr Cooper—We have looked at that. There are a couple of options available. One is to stick with what we have got and to say, 'We really do mean clear, concise and effective' and actually enforce that. But I think what we are dealing with is a risk aversion. It probably comes from Wall Street. It is definitely a global thing. The participants in the finance industry want to minimise risk as far as they possibly can, and they see voluminous product disclosure statements as the way that is partly achieved. We have asked ourselves whether the liabilities surrounding FSR are actually too harsh and drive this conduct further, but the big question is: how far would you have to reduce them, possibly at the expense of the rights of consumers and other claimants, in order to get the thing settled down? That has led us to think about whether mandating a short form product disclosure statement might work, where the more detailed information is somewhere else—possibly a web site or maybe in some other document that you could ask for. But the short form document would then have to very clearly explain that more detail was located elsewhere, and then a difficult question of how you apportion the liability comes up. Do you make the issue liable for both documents—in other words, the short form that would be handed over as well as the long form material? That is probably the outcome that you would have to follow.

Senator MURRAY—You see, Mr Cooper, this committee has got fair experience, going back many years, in having to address issues of liability which arise from business risk and business judgment—with respect to directors' duties and, of course, with respect to auditors, as two prime examples. It seems to me that here is a class of persons—financial planners and financial product providers—who have suddenly addressed business risk and business judgment in a liability framework, which they have not done before. Speaking for myself, but I have the general impression that it is a cross-party approach, when we embarked on the FSR exercise, in the minds of government and parliamentarians was a desire to drive down the price of products and to radically improve customer information and understanding, and, of course, the provision of more professional services by financial planners.

Number one in our minds was not to say: 'Let's punish those who are giving bad advice.' But in the minds of the lawyers advising the clients as to what to look out for, they have turned it topsy-turvy. What was our third priority, if I can put it in that framework, is now their first

priority. I do not think you can address this issue of bedding it down unless some view and some means of managing that environment is adopted.

Mr Cooper—We are certainly looking at those issues but it is a delicate balancing act between reducing the cost, potentially at the expense of those who might lose money in the system and then become unable to recover it.

Senator MURRAY—Let me be precise and to the point. We do not want you to end up with a system whereby you are implementing law and regulation so that people have 40- or 60-page PDSs. That is just not acceptable because that will not fulfil the intent of parliament or the government.

Mr Cooper—Our very public position is that we have been disappointed with the length. It is just a question of how you encourage or enforce shortness.

Mr Lucy—At the end of the day, much of that will be with the government as to what extent they wish to make any amendments. We think that we are taking the appropriate approach from the regulator's perspective. We are continuing to have no patience whatsoever with inappropriate conduct. As for people who are being overly conservative, we are, as Jeremy said, being very forthright with our statements in saying, 'That does not equal conciseness.' Therefore, we are actively engaged with stakeholders, industry groups and even individual companies talking about the breadth and extent of PDSs and other forms of disclosure.

Senator MURRAY—I am pushing this issue with you not because I do not respect the consulting and the thinking that Treasury will do about this, but they simply will not do the consulting and evaluation in the depth and to the extent that you will, because you are liaising with the industry in a way which Treasury just will not be equipped to. Therefore, if you do not attend to the motives which lead to bad consequences and advise Treasury accordingly, we are not going to make any progress.

Mr Lucy—We have had a high level of dialogue with both Treasury and the government. To the extent that we have developed experiences and views from the marketplace and from our own activities, including surveillance, we have communicated those to both Treasury and the government.

Ms BURKE—So are you in the process of developing new licensing documentation? Have you gone to that level?

Mr Lucy—That is for the government. As you have referred to earlier, the parliamentary secretary has made strong statements as to the approach that the government is taking in this regard. That approach is with the benefit of communications from ASIC.

Ms BURKE—So you have been in dialogue with them, the planners' associations and the various groups at that level as well and have come back and said, 'Yes, there probably do need to be some changes'?

Mr Lucy—We believe that the advice we have given to the government is considered advice and very much represents our own experiences and also the experiences from communications with key stakeholder groups.

Ms BURKE—This is a very cheeky question, but do you know when we might see some new licensing arrangements and some new documentation?

Mr Lucy—It is with the parliamentary secretary and the government more broadly.

Ms BURKE—Going back to my original question, is choice of super on 1 July going to cloud that issue?

Mr Lucy—The parliamentary secretary has given all the indications in the media and generally to us that he has this as a high priority. But it is his own timetable; it is not our timetable.

Ms BURKE—But you have been involved in those discussions. At least you have had some input.

Mr Lucy—Yes, we have.

CHAIRMAN—Do you think in the process of rolling out FSR we have drifted away from the principles based approach and are getting almost into a black letter law approach?

Mr Lucy—Perhaps Jeremy may wish to add something, but I do not think so. I think that the overwhelming response from the industry and the participants is that the FSR regime is the right regime for Australia. But it was a very significant undertaking. Almost everybody acknowledges that there are areas that need to be readdressed. I do not have a feel that that means throwing the baby out with the bathwater. I think it is very much a matter of looking at areas that should be sensibly finetuned.

Mr BOWEN—I would like to ask you about the compliance costs of FSR, particularly for smaller providers. I know one small provider who has gone out of business because, they say, of the compliance costs of FSR. Do you have a view on the potential ways of reducing compliance costs, particularly for small financial services providers? I know the larger organisations—the ABA and the Insurance Council—also say it is an issue for them but at least they have the resources to deal with it. I am talking particularly about the really small providers with two or three employees who are dealing with requirements to bank every day and large paperwork costs et cetera.

Mr Cooper—The difficulty with FSR is that it does span a very broad range of different industries that we now call the financial services industry. We were a little surprised, I think, at the lack of take-up of technology in some areas. You hear a lot of banter about piles of paper and we always say in public seminars, meetings and so on that you are perfectly entitled to use email. You can send in your statements of advice with very basic desktop type technology. You can reduce a lot of the heartache and concern about all these piles of paper just by using basic PCs. We also came up against the fact that the financial planning industry is really a very large number of quite small and lowly capitalised offices. They have found it difficult to catch up with

the regime. Certainly that has been an issue, but it is working through the system and we are getting the message out there that you really do not need these piles of paper and there are electronic substitutes.

Senator WONG—I want to go to the issue of analyst independence. This was an issue which formed the subject of part of ASIC's submission to this committee on the CLERP 9 proposals. In that you made the point that seems to be fairly self-evident—I agree with it—that there are obviously types of conduct which cannot be otherwise effectively regulated by an obligation to manage conflicts or disclose conflicts. I presume that is still ASIC's position.

Mr Lucy—Yes.

Senator WONG—Are you aware that the government has rejected the recommendation of this committee to examine your submission to Treasury and your surveillance report on research analysts?

Mr Lucy—I am not; I am not sure about my colleagues.

Senator WONG—Has there been any discussion by government with you as to their decision to reject the recommendation that they look at your report?

Mr Lucy—We might take that on notice. Whether there has been discussion at officer level we cannot say. I will provide an accurate response.

CHAIRMAN—As I read the government response, I thought it was saying that since that report had been done ASIC had provided further guidelines in relation to analyst independence which in a sense subsumed our recommendation.

Senator WONG—The point is that, if Mr Lucy is correct—and I assume he is—and ASIC remains of the view that there are certain types of conduct which the management of conflicts do not deal with, we still remain with a problem, do we not, in relation to research analyst independence?

Mr Cooper—I refer specifically to our guidance on that. The CLERP 9 rules came in on 1 January of this year. They were phased in to come in later than the general implementation last July. We issued quite detailed policy guidance on managing conflicts. Managing conflicts covered the whole spectrum, so we touched on where you are at, which is that there is certain conduct that you simply cannot do, right across to the disclosure side of things. Depending on how your business is structured, if you cannot deliver a model where the senior management in the organisation is not governing your analyst work and your other services then that is a situation where no amount of management will do it. Unless you change that reporting line, it simply will not be satisfactorily managed.

Senator WONG—Yes, but PS181 went to only the management of conflicts of interest, didn't it? That is what it dealt with.

Mr Cooper—Correct.

Senator WONG—ASIC's submission on the prohibition of certain types of conduct referred to things such as 'trading by an analyst in products that are the subject of a current research report' or 'trading by an analyst against a recommendation or opinion contained in a current research report'. They are examples which ASIC itself gave of conduct where there is no amount of management for the conflict which is inherent in that.

Mr Cooper—I would have to reacquaint myself with the policy statement, but I must admit that, although it is called 'managing conflicts' and not 'prohibiting conduct', I thought that document did articulate some things that were simply not manageable. We were deliberately trying to not be too prescriptive in how an organisation might manage a conflict.

Senator WONG—Do you think there should be prohibitions on certain types of conduct in order to preserve independence?

Mr Cooper—It comes back to how an organisation is structured. I think that what we are saying in our policy is that if you can satisfactorily structure your services so that they do not create conflict—

Senator WONG—I am sorry, I am a bit confused because I thought Mr Lucy said you retained the position that there were types of conduct which would not be effectively managed and that there should be some restriction or prohibition on conduct in order to preserve integrity. Do I now understand you to be resiling from that?

Mr Cooper—No, I think we are on the same page. We are saying that if you had, for example, a CEO within a stockbroking organisation that had two different arms—one being the sort of broking, selling and dealing side of it and the other being the analyst side of it—reporting to him or her, if you read our managing conflicts policy, that is not acceptable.

Senator WONG—Sure. And disclosure does not always manage conflicts.

Mr Cooper—No. But, again, we were trying not to be too prescriptive in how we dealt with that policy. If you look at the broad spectrum of licence holders, in some respects some of these issues were news to people, so we had to roll out the new policy in a way that was going to be constructive.

Senator WONG—Do you recall that ASIC's submission to the committee suggested that certain activity should be prohibited in the legislation?

Mr Cooper—No, I do not personally.

Mr Lucy—No, I do not either.

Senator WONG—I invite you to look at that. The two examples were the ones that I read out: trading by an analyst in products that are the subject of a current research report and trading by an analyst against a recommendation or opinion contained in a current research report. Would it still be ASIC's view that that type of conduct should be prohibited?

Mr Cooper—I suppose you have to take it in the context of the laws that we were given. The law that we are now administering merely says that a licence holder must have a proper system for managing conflicts—

Senator WONG—I understand that, but it is not really an answer. Is it still your position that you think that is a deficiency in the legislation?

Mr Cooper—That has to be a policy question. We have had the law and we are now administering it.

Senator WONG—Surely the regulator has a view about the effectiveness of the regulatory framework.

Mr Lucy—As you said, Senator, we conveyed a view. That view was on the table and it sits on the table.

Senator WONG—So it remains ASIC's view?

Mr Lucy—We have not changed it. In many instances the government makes a decision, moves on and we have to move with it.

Senator WONG—Fair enough.

CHAIRMAN—In relation to a number of the committee's recommendations on CLERP 9, the government's response, which it tabled last week, was that this is a matter for consideration by ASIC. Perhaps at this stage I could raise the recommendations with you and get your response to them.

Mr Lucy—Okay.

CHAIRMAN—The first relates to the whistleblowing provisions. It reads:

The Committee recommends that CLERP 9 require the Australian Securities and Investments Commission (ASIC) to publish a guidance note designed for all companies, using AS8004—2003 as a model, to help further promote whistleblowing protection schemes as an important feature of good corporate governance.

The government said this is a matter for ASIC. What is ASIC's response to that recommendation?

Mr Lucy—We would be generally supportive of providing guidance. We think that the whole area of whistleblowing is a very important one. Indeed, we continue to see instances where people choose to avail themselves of it.

CHAIRMAN—The next one was our recommendation 10, in relation to remuneration:

The Committee recommends that ASIC release as soon as possible a guide that leaves no doubt that the remuneration report is to contain a discussion on the board policy for determining the remuneration of its most senior executives which is to be presented in such a way that links the remuneration with corporate performance.

The government's response is:

> This is a matter for ASIC.
>
> The Government notes that paragraph 300A(1)(b) of the Corporations Act, as amended by paragraph 300A(1)(ba) of the CLERP 9 Act, requires disclosure of the link between the board's remuneration policy and company performance.

Mr Lucy—Our initial response to that would be that we would want to discuss that with the ASX, because matters of disclosure are very much picked up in their governance principles. So we would want to take that up with the ASX.

Senator WONG—You would take that up with the ASX?

Mr Lucy—Yes.

CHAIRMAN—The next one is in relation to the infringement notice regime. It says:

> The Committee notes the many concerns expressed about the proposed infringement notice regime. In particular, the Committee refers to the blurring of ASIC's functions of investigator and adjudicator. In light of these concerns, the Committee recommends that ASIC's guide on issuing infringement notices more fully explain and document the procedures it will adopt to ensure that there is a clear and definite separation of its responsibilities to investigate and to adjudicate.

The government says:

> This is a matter for ASIC.
>
> On 20 May 2004, ASIC released Continuous disclosure obligations: infringement notices—An ASIC guide. The guide provides information to interested parties about ASIC's general approach to the infringement notice remedy and the stages in the infringement notice process.

Do you have any further comment?

Mr Cooper—No, I think that is very comprehensive. The May guidance is almost too comprehensive; it really does detail the whole procedure. As yet, we have not issued a notice.

CHAIRMAN—So you think this sort of separation between investigation and adjudication—the procedures you put in place—are adequate?

Mr Cooper—We think so.

Senator WONG—Are we going to do all 40?

CHAIRMAN—Why not? Not all 40—they do not all relate to ASIC. Recommendation 18, which I think is from part 2, says:

The Committee recommends that the professional accounting bodies should liaise with the Australian Securities and Investments Commission (ASIC) to ensure that their complaints-handling procedures meet benchmarks which ASIC considers are necessary for effective complaints handling.

This is in relation to audit.

Mr Lucy—Yes.

CHAIRMAN—The response is:

This is a matter for ASIC and the professional accounting bodies.

Mr Lucy—We accept that recommendation. We think it is well put. It is obvious, though, that we must all not have an overly high expectation of what the accounting body's disciplinary process can provide, because they do not take evidence under oath, they do not have the right of discovery, and the sanctions are against the member and therefore there is no potential for any redress for any injured party. Within those constraints, we think there is every advantage to ASIC to work with the accounting profession to make sure that their disciplinary processes are as robust as possible.

CHAIRMAN—I think that is it as far as those that were referred to by the government as being ASIC's responsibility are concerned. Thank you for your response.

Senator MURRAY—I will respect any caution from you because it is an operational matter, but I do want you to outline to the committee the importance of the recent decisions on what I will refer to loosely as the Kennedy matter, or Offset Alpine. I think it is relevant not just to this case but to ASIC's ability to operate quite broadly in similar circumstances. Perhaps you will tell me what you consider the importance of that case to be with respect to the specific issue and then with respect to a broader precedent that you might be able to use.

Mr Lucy—We were pleased with the outcome. There were essentially three matters that Mr Kennedy had raised. The most significant, without question, was the last matter that was heard, which was decided last week. That was essentially a constitutional challenge to our ability to take a matter through the courts when that matter referred to conduct that occurred before ASIC was created. Therefore it was very much dealing with the transfer of the judicial powers from the old regime, before ASIC was created, to the new regime. It provided a very clear clarification. The court determined that there were no grounds for Mr Kennedy's appeal to be successful. Quite clear costs were awarded against Mr Kennedy. That certainly did have the potential, had the decision gone in another direction, to provide other matters that were before ASIC, and that had already been dealt with by ASIC, to come back onto the table. Whether or not the government would have responded in that event with law reform is now academic. It would certainly have provided a very significant potential for concern for ASIC.

More generally, the Offset Alpine matter is now before the courts in Switzerland. We understand that there has been a number of appeals on the decision of the magistrate to release information to ASIC. In the Swiss process there is the potential for a decision and for that decision, in turn, to be further appealed. In the event that that is the case then we understand that there is a likely duration of about 12 months before that issue will be finally determined.

Senator MURRAY—What time frame do you have in prospect until this matter is wrapped up? Do you know or do you have a feeling for it?

Mr Lucy—It really hinges entirely on the direction or the attitude of the Swiss courts. In the event that the Swiss courts grant us access then we would anticipate moving very quickly. We have already seen that there is the potential for points to be queried and taken to court along the way. Assuming that we do get access to the documents, our expectation is that it will take a long period.

Senator MURRAY—My interest in this matter is much broader than the issue at hand—as interesting as the issue at hand is. My interest is in the issue of discovering beneficial ownership and who lies behind hidden assets kept offshore. I assume arising out of this will emerge a clearer future in terms of cooperation between Australian and Swiss authorities. Perhaps at government to government level they may well negotiate better access in these respects. You might inform us as to whether or not you know anything about that. There is also a general international interest in fraud, terrorism, money-laundering and so on, all of which are intimately tied up with who owns what and where it is hidden. That is the issue we are discussing here, along with whether this case has ramifications for the way in which discovery and regulation can be better pursued. I would appreciate you advising the committee as to what the specific ramifications are, as far as you understand it, for our relationship with Switzerland with respect to issues like these and for the broader context that I have just outlined to you.

Mr Lucy—Firstly, we do not believe that there is any ambiguity about the Australian laws. Therefore, whether or not there is ever a determination by the Australian courts, we would not see that determination by itself as being particularly important as far as any clarification is concerned. As far as the international arrangements, the IOSCO group, which is the international securities regulators, I think are working very effectively organising other countries to be willing signatories to a memorandum of understanding, which provides an obligation on coregulators to provide access to information. The barrier in several countries, in particular Switzerland and Japan and there are others, is the banking secrecy provisions. There is no doubt that there is significant global pressure on a number of those countries to address their banking secrecy laws. At the end of the day though, inevitably, it is not with the regulator; it is a political decision. It is a decision of the respective parliaments as to whether or not they are willing to prescribe to their regulator the obligation to provide information to coregulators around the world. Certainly there is clearly a move for countries that have that facility to provide that openly through signing a memorandum of understanding. We are also aware that there is significant political pressure on countries that at this stage have not been willing to sign because they are not able to do so.

Going beyond that, I think the next exercise, certainly with the Swiss, is in the area where there is a taxation consequence and their willingness or otherwise to provide information to a third party—another regulator—where there is not an identical criminal offence. At this stage, the Swiss have a process where, if there is not an identical criminal offence, they are not obliged to provide back-to-back disclosure to us. Again, with the circumstances in Switzerland, there is political interest both in Switzerland and in Australia from the Swiss perspective. They are mindful of the fact that they are anxious to provide disclosure. They have taken a very keen interest in this particular matter, and I think that they believe that the way they have followed this through has been to the very highest level of disclosure possible. I guess that is a long answer but, in essence, from an Australian perspective, we are comfortable with the clarity of the

law. From an international perspective, there has already been a level of interest and a willingness for fellow regulators to commit to back-to-back disclosure and, in some countries, there has been a willingness now to take this on politically.

Senator MURRAY—You have indicated to the committee that the importance of one of the three key issues in that case was to establish the continuity in terms of the law from pre-ASIC, as you put it, to the present. Of course, the argument of your opponents in that matter was that that effectively constituted retrospectivity.

Mr Lucy—Yes.

Senator MURRAY—Does that case open up the possibility of reopening other high-profile notorious cases where Australian business people have been able to escape due process because of the way in which their assets, their records and their dealings in a place like Switzerland have been concealed? You know who I am thinking of, do you not?

Mr Lucy—It would probably be best if we keep it hypothetical at this stage. Because it is dealing with some very pure legal issues, perhaps Jeremy might respond.

Mr Cooper—The constitutional challenge that Mr Kennedy ran, which was the issue No. 3 that Jeffrey spoke of, is really just a repeat of the Hughes and Wakim issues that were fixed in 2001. Kennedy's view was that it was not properly fixed, so we had a revisiting of that. I would be not the least bit surprised if litigants run all sorts of arguments against us in the future, but it will not be that one.

Senator MURRAY—But does that have an effect on the Swiss if the Swiss end up signing up to the new regime? For instance, will persons who are forced to accept an insolvency and bankruptcy arrangement because they could not get access to the true information be entitled to go back to Switzerland and say, 'We need access'? Or is that unlikely?

Mr Cooper—No, we see them as being two quite separate issues.

Senator MURRAY—So those who got away with it would continue to get away with it?

Mr Lucy—I think that the reason Jeremy answered in the way that he did is that we see the constitutional side really being quite clear. Mr Kennedy ran it, but other people have not applied that against us. So we have not taken action or we have not done things because of the Kennedy argument, as it were. The fact that it has now essentially been laid to rest forever has just provided that level of clarity. I do not think it does anything as far as the dealings with the Offset Alpine matter or, more generally, between that and the Swiss are concerned. I think that the Swiss would have been interested bystanders, but I do not think the fact that it has been made clear alters their position at all.

Senator MURRAY—Having discussed these matters with ASIC over some years and having watched the outcome, it seems to me that the Swiss in general are more cooperative and more cognisant of the need to be not as strict in terms of bank secrecy as they used to be. It is a fact that settlements were made pre Wakim and Hughes with business personalities because the Australian authorities, both the courts and the insolvency practitioners, could not get at the facts.

They could not get at details of who owned what assets. You had Swiss personalities appearing on television and radio in Switzerland saying, 'It is mine. I gave it as a gift to this person.'

Mr Lucy—I forget the date that it was executed, but I think that the really important turning point was when the Swiss government and the Australian government entered into a memorandum of understanding where there was an acceptance that there would be mutual assistance but with specific exemptions. So, for the mutual assistance to be effective, there needed to be that back-to-back criminal responsibility. In the instance, for example, that the matter was 'simply' tax, that does not trigger the MOU. But where there is a criminal responsibility, as we are suggesting in Offset Alpine, and there is that similar requirement in the Swiss laws, then the MOU is triggered and that is why they want to assist us.

Senator MURRAY—I am expressing community outrage, essentially, that characters from the eighties and nineties were able to escape the force of Australian law and cough up the assets that they shipped offshore. A lot of ordinary people—probably tens of thousands, not just thousands—lost their money and got a minuscule payment in the dollar. What you are dealing with in Offset Alpine is a matter which occurred many years ago—

Mr Lucy—Yes it did.

Senator MURRAY—but where misrepresentations were made if not downright lies told as to who owned the shares and who the beneficial owners were. There are similar cases where that has occurred, so my question is: is there any likelihood of being able to reopen and track back on some of those high-profile, very high-value cases where ordinary people lost their money?

Mr Lucy—As you said earlier, we have got to be careful that we do not get too close to some of the operational issues.

Senator MURRAY—And I will respect that.

Mr Lucy—The question is to the extent that there had been offences under the ATSIC Act or Corporations Law. As far as an obligation to advise of a significant shareholding, that is a requirement of the act. Therefore if that is not complied with that triggers an opportunity for us to take action, so too with people giving us evidence. If that evidence is given otherwise than fully and accurately, then that again has a potential to trigger an offence. Without there being something which we can put our hooks into, notwithstanding the sorts of events that may have occurred in the past and the moneys lost by Australian citizens, then the most recent Kennedy decision is of no particular influence. There still needs to be that underlying opportunity for us to be able to act.

Senator MURRAY—To conclude my questioning on this, I guess at the heart of my question is this: you stumbled onto Offset Alpine because of a Swiss disclosure. In the new changed environment is it at all possible that an Australian authority such as you could go back to the Swiss and say, 'We were told this in respect of this matter in an Australian court. Can you tell us in the new environment whether this was in fact true?' Is that likely to be a possibility?

Mr Lucy—I think it is possible. I am not sure that I would go as far as 'likely'. I would not want to give you that impression.

Senator MURRAY—But you do not rule it out?

Mr Lucy—No, I do not. I have met with the Swiss. They are keen to be seen internationally as a country and a regime that are not willing to support illegal or criminal activities, therefore they are wanting to be seen in a different light.

Senator WONG—I would like to move to HIH. In the estimates committee hearing you gave some early announcement of the Adler—

Mr Lucy—Indeed it was that day.

Senator WONG—Yes, that is right. I suppose one of the issues which are in the public arena is to do with some concern that has been raised as to the number of charges to which a plea was entered, as opposed to the number of possible charges which are said to have arisen from the commission and also more generally. My first question is this: who makes the decision to come to a position where you get a guilty plea on four charges and, I presume, in return for that there is non-pursuit of a number of other charges?

Mr Lucy—Can I deal with that in two parts. There are two individuals, namely Messrs Williams and Adler, who are before the courts. Indeed they appear this month for sentencing. Inevitably there will be statements and facts and matters produced to the court that are not currently in the public arena, so it would be quite inappropriate for us to comment specifically on either of those. But to address your general question—

Senator WONG—Mr Lucy, this is something we are keen to get addressed. I appreciate what you have just said. I would have thought ASIC would also be of the view, given some of the criticisms which have been levied, that it may be appropriate for you to indicate the decisions you made—which may be perfectly appropriate. I am not apprised of the evidence which was there and of the legal decisions which were made. But if it is the case that you feel constrained in answering until after sentencing, obviously the committee can have a discussion about whether it would be better to defer that aspect of questioning to a later time. I think it is an issue in which there is some public interest and I would suggest there is some interest in ASIC rebutting some of the criticism which has been made.

Mr Lucy—We very much appreciate the public interest in this. To the extent that there is criticism or otherwise, it is in the void of actually knowing the facts. Whilst that does cause us some anxiety, the facts are that it remains inappropriate for us to provide any commentary.

Senator WONG—Until when?

Mr Lucy—Until the matter is heard and determined by the courts.

Senator WONG—But it is not sub judice. He has entered a guilty plea and we are only waiting for sentencing—correct?

Mr Cooper—If we were to discuss that we disregarded some charges and pursued others in the plea, it would be inappropriate to be discussing that before he is sentenced.

Senator WONG—You would not have any objection to reconvening after the sentencing or having some discussion about that?

Mr Cooper—No.

Senator WONG—Obviously this is an issue that we would like—

Ms BURKE—Are there any other individuals in the HIH case that will still be pursued post these two having pleaded out?

Mr Lucy—We are vigorously completing our investigations into all the HIH referrals.

Ms BURKE—So this might not be the end of the matter? I put it on notice for when we come back.

Mr Lucy—It is an ongoing investigation and we are completing the ongoing investigation. It might be helpful to answer one aspect of the question, about our process. I think that we could talk about our processes, if you wish, although you might prefer to keep the bundle of questions in respect of this together and deal with them in one—

Senator WONG—If you want to outline that for me, I am happy to hear it.

Mr Lucy—I think that it is important to remind the committee of the role of the DPP. The DPP actually brings the charges so that any charges that are brought are obviously brought with the agreement of the DPP. That is just as important—

Senator WONG—They litigate it.

Mr Lucy—Yes. But more so, they are charged with an obligation to form a view as to the appropriateness of the charges to be laid. They go through a deliberate process where they are obviously made aware of all the facts to the very best of our ability to present them. They form a view as to what the charges should be.

Senator WONG—I appreciate that but I assume the dropping of charges is something discussed with ASIC.

Mr Lucy—It is discussed but at the end of the day it is a decision for the DPP.

Senator WONG—You are the client, essentially, aren't you, but you have an input?

Mr Lucy—Yes, absolutely.

Senator WONG—And the evidence which is gathered is based on the evidence gathered by the ASIC task force—

Mr Lucy—Correct. The DPP are clearly restricted to the information that we provide to them.

Senator WONG—Do you have a policy in relation to these sorts of matters—a policy framework against which one assesses the pursuit of some charges over others, some sort of matrix against which you assess whether this is a good or bad deal?

Mr Lucy—No, we do not. It is something that the three of us are actively engaged in very much, applying our own judgment and our own personal views of what we think is appropriate and inappropriate.

Senator WONG—But you understand that in the broader context there might be broader issues where you might say, 'The legal advice is that this is a fifty-fifty,' and if you were a risk averse litigator you might say that that is not sufficient because of the signal. But on the other hand you might say, 'There are public policy considerations which make it important for this charge to proceed.' Do you not think that it would be useful to have some sort of guidelines or policy against which these individual decisions could be assessed? Otherwise it could become quite ad hoc.

Mr Lucy—In this discussion we are now moving entirely away from HIH, aren't we? This is hypothetical. The facts are that when we look at whether or not we will take criminal action against somebody in most instances, if not nearly all instances, we would obtain independent counsel advice.

Senator WONG—External to the DPP?

Mr Lucy—Yes.

Senator WONG—So this is before you refer the brief to them?

Mr Lucy—Yes. Our decision to embark on an investigation—and certainly to embark on instituting criminal or civil proceedings—is a very significant decision. For example, if it were fifty-fifty I would be amazed in a decision like that if we would take on an action against an individual or a company. There would need to be overwhelming reasons for legal clarification on a particular issue that would justify something like that.

Senator WONG—But this is my point. You have just articulated to me what is a policy position, against which you assessed your decision to take action or not.

Mr Lucy—We have not seen a need to articulate a formal policy in something like this. We think the commission needs to have the flexibility of looking at matters on their facts and determining them based on what in our judgement is appropriate.

Ms BURKE—Is that also advised by your budgetary position and your ability to actually fund these actions?

Mr Lucy—Not really. The budgetary side of it comes in, frankly, at an earlier stage—where we decide whether or not we will introduce a matter into the enforcement area. The stage Senator Wong is leading us to is where we have investigated and reached a conclusion as to whether or not there are prospects of success. I was responding to Senator Wong on the basis of that direction. The money side of it really is not—

Ms BURKE—So success is not driven by considerations like, 'If we lose, it's going to cost us a bomb'?

Mr Davis—No. It costing a bomb is certainly relevant to the extent that we look at our prospects. We are spending taxpayers' money. Apart from the rightfulness of actually invading somebody's life on something that could be described as a frivolous enforcement action, there is also the fact that in the event that we determine that our case is inappropriate we would also have to face the prospect of having to pay their costs, and they can be quite significant.

Senator WONG—So when does it become viable? If fifty-fifty is not, is it 60-40, 70-30 or 80-20? What is the line?

Mr Lucy—That is the point: we do not have a hard and fast rule because—

Senator WONG—But you were very clear and, if I may say so—strident might not be the word—assertive in your response—

Mr Lucy—Forthright.

Senator WONG—that fifty-fifty would not be something you would look at. What is it?

Mr Lucy—Again, and Jeremy may wish to add to this, in my experience rarely are matters absolutely clear cut. There is always an element of grey.

Senator WONG—I have never seen a case that is completely clear cut. If you have, I would like to hear about it.

Mr Lucy—That is where counsellors talk in terms of a reasonably arguable position. That is typically a term that they use. Frequently, we try to get a better handle on what 'reasonably arguable' means and what the true prospects are. That helps me as a person who is not legally qualified assess the real likelihood of success, as distinct from the vagaries of a 'reasonably arguable position'. I look at it from two sides: I look at whether or not it is appropriate to take a particular action, having regard to the consequences of that and also of the fact that we are spending taxpayers' money, and whether or not we are appropriately satisfied of the prospects of success.

Senator WONG—You said that the DPP—and obviously we are talking about criminal proceedings here and not civil proceedings because I presume you are the litigant in civil proceedings—

Mr Lucy—Yes, we are.

Senator WONG—So in a civil proceeding you make the decision after being advised by—

Mr Lucy—Yes, the commission makes the decision.

Senator WONG—And the commission is?

Mr Lucy—Three of us. Berna Collier—

Senator WONG—So Mr Cooper—

Mr Lucy—And Commissioner Collier.

Senator WONG—So in a criminal proceeding the formal decision is made by the DPP but there is consultation with the commission.

Mr Lucy—Yes.

Senator WONG—What form of consultation does that take? Are all commissioners involved in that or is that delegated?

Mr Lucy—No. The commission typically makes the decision as to whether or not we wish to refer it to the DPP.

Senator WONG—But thereafter there are discussions. You indicated to me that there is consultation between the DPP and ASIC—

Mr Lucy—Yes, there is but that is—

Senator WONG—around things such as the withdrawal of charges in return for a guilty plea. Presumably, that is something discussed.

Mr Lucy—If there is any variation then that comes back to the commission.

Senator WONG—Correct. So that is—

Mr Lucy—If the commission signs off on a particular approach and there is dialogue at officer level between the DPP and ourselves within the boundaries of that approach then it does not need to come back to the commission. To the extent that there is any potential move from what was originally agreed then it comes back to us and we approve it.

Senator WONG—I presume if I asked you whether that occurred in respect of HIH you would want to wait until we have heard the sentence in those cases.

Mr Lucy—We must not address HIH, I am afraid.

Senator WONG—Is it the case that part of the plea arrangements with Mr Adler says that he will not testify in cases against other HIH executives?

Mr Lucy—Sorry?

Senator WONG—Is it the case in respect of the plea arrangements with Mr Adler that he will not testify in cases against others?

Mr Lucy—We cannot comment on that at the moment.

Senator WONG—I think it has been stated in the court, hasn't it? It has certainly been reported.

Mr Lucy—There has been a fair bit of speculation in the press about what may or may not have been agreed. The public comment that we have made is that we believe that the pleas appropriately reflect the criminality of the conduct.

Senator WONG—That is not what I was asking, Mr Lucy.

Mr Lucy—I know. We have not made any public comment as to whether or not he has indicated a willingness or otherwise to provide further information to us.

Senator WONG—We are looking at 18 and 29 March.

Mr Lucy—That is right. Mr Williams is before the court this Friday, and Mr Adler on the 29th.

Senator WONG—How many other investigations are current in relation to HIH?

Mr Lucy—I do not believe that we want to be specific about that, because—

Senator WONG—Are there other investigations current?

Mr Lucy—Yes, there are.

Senator WONG—Do I understand that the three and four charges to which a guilty plea has been entered are the end of the litigation against Mr Williams and Mr Adler?

Mr Lucy—The end of the investigations against those, yes.

Senator WONG—But not necessarily the litigation.

Mr Lucy—Correct.

Senator WONG—Can I move to some funding issues. Obviously, enforcement is one of your statutory obligations. It relates to an issue that Ms Burke raised, which is additional funding, I suppose, for investigations. There have been some quite significant additional requests for funding for ASIC investigations in respect of HIH and James Hardie. Can I confirm: what is the total additional appropriation? There is $6.5 million for the 2003-04 HIH task force; is that right? Or is it more than that?

Mr Lucy—To the best of my knowledge. Perhaps I can provide a more complete answer, and hopefully that addresses—

Senator WONG—What I would like to know is for HIH, and I think you referred in Senate estimates to Offset Alpine, OneTel and James Hardie—perhaps you could clarify for us with the relevant financial years the additional appropriation over and above—

Mr Lucy—Yes. For HIH, the total allocation is $28.2 million. That was initially allocated over two years. That is commencing the 2003-04 year, and therefore the 2004-05 year, but we sought approval to extend it over three years. Carlos will advise me if I am incorrect, but I think that the amount you are referring to in relation to HIH is not a new amount of money; it was a reallocation between the years.

Senator WONG—So that is a rephasing of part of the $28.2 million.

Mr Lucy—Yes. Of the $28.2 million, our expenditure in the 2003-04 year was $8 million. The budgeted expense for this year is $12.5 million, which leaves a balance to be carried forward of $7.7 million. We sought additional estimates in respect of James Hardie, OneTel and Offset Alpine of $6.887 million in the 2004-05 year. Those moneys were advanced. We have made a submission in respect of the 2005-06 year for James Hardie, and that is in the process of being considered by the government as part of its normal budgetary process.

Senator WONG—I do not suppose you will tell me what that is, Mr Lucy.

Mr Lucy—No.

Senator WONG—How much more than you got in 2004-05 did you request?

Mr Iglesias—We received everything that we requested in 2004-05.

Senator WONG—So $6.887 million—

Mr Lucy—I think the senator is asking how much more did we ask for the following year. I do not know the answer to that off the top of my head.

Mr Iglesias—In the following year?

Mr Lucy—Yes.

Mr Iglesias—We do not know what we will get in the following year yet. We do not know what we will receive in 2005-06.

Senator WONG—Sorry, for the 2004-05 year, I should say.

Mr Iglesias—For the 2004-05 year we received everything that we had put before the government.

Senator WONG—So you only sought $6.887 million?

Mr Lucy—For those three areas?

Senator WONG—For Hardie, OneTel and Offset Alpine.

Mr Iglesias—For those three matters, that is correct.

Senator WONG—What about HIH?

Mr Lucy—We did not need any more money.

Senator WONG—You already had the $28.2 million.

Mr Iglesias—We had already been appropriated $28.2 million and we sought to reprofile that over three years.

Senator WONG—So what is the $7.7 million outstanding? Is that the outstanding on HIH?

Mr Lucy—Yes, that is confined and quarantined only to HIH.

Senator WONG—What is that being used for?

Mr Lucy—HIH.

Senator WONG—Further investigations?

Mr Lucy—Yes. That is not to say that we will spend it all, but that is the amount that has been allocated.

Senator WONG—How many other enforcement actions have you taken apart from the four that we have been discussing?

Mr Lucy—In respect of HIH?

Senator WONG—No, generally. Are we talking about hundreds, thousands, 10?

Mr Lucy—We would probably have about 200 matters before the courts at any one time. If I can refer to our annual report, we concluded 220 items of litigation and we have commenced 347 investigations.

Senator WONG—What page are you reading from?

Mr Iglesias—A page that is not in the annual report.

Senator WONG—That is helpful.

Mr Iglesias—However, if you go to page 15 of the annual report—

Mr Lucy—Yes, that is where it is coming from.

Senator WONG—There are no figures for litigation commenced. There is litigation concluded and investigations commenced. What is the proportion of the 347 that went on to become litigation commenced? Can you see what I am saying? Does 'litigation concluded' mean all the ones that were actually initiated?

Mr Lucy—My expectation would be that we take about 90 per cent of matters which we investigate through to litigation.

Senator WONG—That is not correct on these figures, Mr Lucy—347 and 220.

Mr Lucy—No, that is litigation concluded.

CHAIRMAN—The bank concluded some of it.

Mr Lucy—There are different issues.

Senator WONG—Can you let me know how many proceedings commenced? If you could take that on notice I would appreciate that.

Mr Lucy—Yes.

Senator WONG—These would include the matters we have been discussing, though?

Mr Lucy—Obviously not under litigation concluded, but under investigations commenced, yes.

Ms BURKE—Does that include any additional investigation into James Hardie?

Mr Lucy—No, because this was the last year, and the James Hardie issue is more recent.

Ms BURKE—So the extended investigation of James Hardie that you made reference to—

Mr Lucy—That is not in the statistics.

Ms BURKE—No, but there is an extended investigation going on.

Mr Lucy—Yes, there is.

Ms BURKE—Do you want to make any comment on where that is and what is going on with that one?

Mr Lucy—Yes. We have established a special purpose task force that is committed to reviewing the James Hardie referrals from Commissioner Jackson. We are not constrained by his referrals. Indeed, we are looking at areas that might be broader than those referrals.

Ms BURKE—Such as?

Mr Lucy—Because it is in the investigation stage, we really would not want to be specific at this stage.

Ms BURKE—Have you asked for additional funds to cover that?

Mr Lucy—Yes, and that is what we were referring to earlier. We asked for money for this financial year, which we have obtained, and we have asked for moneys for next financial year, which is in the budget process.

Senator WONG—That is the one he will not tell us about.

Ms BURKE—Yes.

Senator WONG—Of the $6.887 million that was supposed to be for Hardie, OneTel and Offset, are you able to tell us how much went to each of those investigations? What proportion is for Hardie, OneTel et cetera?

Mr Lucy—I can say that over $4 million went to Hardie, but I am not able to indicate, as I said, how much went to the others specifically. But over $4 million was for Hardie.

Senator WONG—Perhaps you could take that on notice and provide that.

Mr Lucy—Yes.

Senator WONG—I appreciate that. One of the issues that obviously arise is enforcement. It is a core function and, whilst I understand that some of these investigations are quite laborious and quite large, is this a situation where, whenever ASIC is confronted by a substantial set of allegations arising out of a course of conduct or a particular corporate collapse, it will need to go to government to obtain more funding in order to properly investigate these matters?

Mr Lucy—We are substantially funded, with some $200 million. That clearly includes funding to undertake enforcement activity. James Hardie and HIH, though, were really above and beyond what one would normally anticipate as being a requirement within ASIC. We have had in excess of 50 people engaged with HIH.

Senator WONG—We are talking about OneTel, Offset Alpine, HIH and James Hardie.

Mr Lucy—Yes, we are.

Senator WONG—I guess the concern raised—and it is not a criticism of you, Mr Lucy—is about the extent to which ASIC is prepared to meet this core function of enforcement if, every time there are significant allegations of corporate misconduct, you have to go through a budgetary process in order to investigate it.

Mr Lucy—I think the 2004-05 year was unique in that the OneTel and Offset Alpine matters were significant and much broader than our original expectations. We took the opportunity of raising both those issues in conjunction with the James Hardie issue during the 2004-05 year. We do not have an expectation of having to do a similar exercise in future years.

Senator WONG—Is that because you don't think we are going to have another OneTel, James Hardie, Offset Alpine or HIH? I hope you are right.

Mr Lucy—We all do, I am sure. We would say that something like HIH and James Hardie were, by their magnitude, something that we cannot reasonably predict. The other two you mentioned, OneTel and Offset Alpine, are ones that arguably we should be able to reasonably predict.

Senator WONG—But you still had to seek additional resources for those.

Mr Lucy—We did for this year but, as I said, it would not be our expectation of having to do so in future years.

Ms BURKE—If we have fair legislation and regulation in place, with both ASIC and APRA, some of these things should not arise. I would argue that some of the stuff in HIH would not have arisen had we had better regulation in place. So we can hopefully predict that some of these things will not happen because we have a better regulatory regime in place.

Mr Lucy—I think that is a fair point. Rest assured that one of the core areas of interest as far as everybody within ASIC is to do our very best to make sure that such an recurrence does not occur. We very much respect your point.

Senator WONG—Did you say you had 50 people working on HIH?

Mr Lucy—I think I said there were in excess of 50.

Senator WONG—That was full time?

Mr Lucy—Yes.

Senator WONG—Over a period of how long?

Mr Lucy—To date, a year and a half.

Senator WONG—What about James Hardie?

Mr Lucy—I think we have about 15 people.

Senator WONG—Were OneTel and Offset done within existing resources?

Mr Lucy—Both of those two are smaller, particularly Offset Alpine at the moment, because fairly obviously we are waiting on the decisions of the Swiss courts. OneTel is a very significant matter. It is being litigated strongly, and there is a high cost associated with that litigation.

Senator WONG—How many people?

Mr Lucy—It is really in the court process as distinct from the investigation process. I would imagine that we would have about five people working full time on OneTel.

Senator WONG—Are these people that you are talking of—the 50 plus five and a couple more—additional to your core staff allocation?

Mr Lucy—The HIH staff are largely in addition.

Senator WONG—How many of those would be in addition?

Mr Lucy—Essentially all of them. We have transferred people, in which case we have had to backfill the positions within enforcement. Similarly, with James Hardie it is very necessary to staff the task force with competent and experienced people. Largely, we take those from within the existing pool and we have to backfill the existing pool within enforcement.

Senator WONG—Doesn't this create a human capital problem in terms of your core enforcement activity? If you are constantly having to bring in new people to backfill for more experienced people who have been assigned to work on a task force—and I understand why you make that decision—presumably you then have less experienced people dealing with your day-to-day activities. Isn't that a bit of a problem?

Mr Lucy—I would not say it is a problem in the way that you have posed it. It is very definitely a management issue.

Senator WONG—What about the public's view about the ongoing competence and expertise of the people employed by the regulator?

Mr Lucy—We do not believe the public should have any concern about the adequacy and expertise of the people within our enforcement area.

Senator WONG—So all of these people come out of enforcement to work on the task force?

Mr Lucy—Yes, other than some administrative assistance, including IT.

Mr Iglesias—To some extent that funding goes to fund experts that we bring in from outside the organisation, whether they be forensic, accounting and other legal experts—

Mr Lucy—We fund independent counsel.

Senator WONG—Looking from the outside, I suppose one of the concerns that might arise would be what people regard as reasonably core activities—certainly ones that are part of your statutory functions—being the subject of that kind of process, including budgetary submissions, new people coming in and people being moved off. It is not a picture of people being ready and resourced to take on an enforcement activity. A lot of lead time is required. This is no disrespect to your staff, Mr Lucy. I understand that people are working very hard on these matters.

Mr Iglesias—One of the things that all those matters have in common is that they were unforeseen and unavoidable. That is what drives us to seek funding for those matters. In the case

of HIH and Offset Alpine, they occurred during a financial year. We had already had commitments and therefore we sought additional funding from the government to take those on.

Senator WONG—Why was James Hardie unforeseen and unavoidable? There was a reasonable lead time.

Mr Iglesias—Indeed, but when the matter was referred to ASIC for investigation—

Senator WONG—It was not as if you could not see it coming. I just take issue with it being described as unforeseen.

Mr Lucy—If you look at when you make submissions for the NPPs, the NPP process is such that at that stage James Hardie was not foreseen.

Senator WONG—My point is: should your core funding for this core activity be higher than it is?

Mr Lucy—We certainly respect the fact that enforcement is our core activity; it sits right up there as one of the top two or three. We believe that we have provided sufficient resources to enforcement, and we will continue to do so. As I said, the real catalyst for our request for additional funding this year was James Hardie. That is not the normal run-of-the-mill enforcement activity; that is a very significant and very resource intensive undertaking. It included computer systems. For example, the electronic dealing with all the documents is an extraordinarily involved and expensive process.

Senator WONG—You did make some public comments, before the decision was made by government to provide you with that additional funding, that you would require additional funding in order to investigate the James Hardie matters.

Mr Lucy—Yes, I did.

Senator WONG—Prior to making those public statements, was there any discussion with the government about the need for additional funding?

Mr Lucy—Yes.

Senator WONG—But there was no positive decision with respect to that before you went public?

Mr Lucy—It does not work like that. The additional estimates system is a very disciplined process. We do not have an expectation of the government being able to, as it were, knee jerk and respond to requests for funding. They need to go through their due process. From our perspective, we saw it as being a very significant undertaking and one that we were very keen to get behind, and we sought additional funding for it.

Senator WONG—What was the sort of delay?

Mr Lucy—What was the period of the delay?

Senator WONG—Yes.

Mr Lucy—It did not inconvenience us.

Senator WONG—I am not talking about you; I am probably talking about outside people who have an interest in this.

Mr Lucy—I do not believe it has inconvenienced the community either.

Senator WONG—When was the Jackson inquiry finished?

Mr Lucy—Mid last year.

Senator WONG—When was the request to government for more funding?

Mr Lucy—The key issue was whether or not the compensation side of it would be dealt with. You had the Jackson report, which was obviously of a key interest to us—

Senator WONG—But there were enforcement issues arising out of that which were separate to whether or not the compensation issue would be resolved.

Mr Lucy—If the compensation issue is not concluded independently, as it appears to have been through the actions of the ACTU and New South Wales government, if that were not the case, then we would need to consider looking at a compensation approach, which would mean that our role would be materially greater than what it would otherwise be.

Senator WONG—I understand what you are saying.

Mr Lucy—That is why we have been watching very closely—and indeed have been having close dialogue with the New South Wales government particularly—to see what was transgressing as far as the compensation side of it is concerned.

Senator WONG—Do I understand you to mean that you were not going to proceed with investigations or litigation until you were clear about what sort of damages you would be looking at—and obviously the compensation agreement was part of that?

Mr Lucy—Yes.

Senator WONG—I have nothing further on this issue. I would like a discussion about HIH. Are you comfortable, Mr Lucy, with having a short hearing to deal with that at an appropriate time?

Mr Lucy—Yes.

Ms BURKE—I have a question on the overlapping of APRA, ASIC and the ACCC. We are several years after the wonderful Wallis experience. Is having separate entities working, given that the HIH experience has probably highlighted the issue we started with—banking fees and

transactions and the duplication and overlap? Is the memorandum of understanding working between you or do you see some need for us to do a Campbell's grand-daughter or something into the future? Where do we go with all this, in your view from dealing with the day-to-day realities of the three separate entities?

Mr Lucy—I think the system is working well. You are right: we do have memoranda of understanding. They require that there is very real and effective communication and dialogue between the three agencies. Certainly, at commission level and officer level, that dialogue is regular. We believe it is effective, so there is no enthusiasm from ASIC for the government to review the structures. We are comfortable with how things are working and we are not communicating with the government that there should be any change.

Ms BURKE—The end users, the various corporations and financial institutions, are now saying, 'We're paying ASIC fees, APRA fees. If we get whacked around by ACCC, we then pay fines to them.' Are the corporations and entities that you are regulating getting value for money out of the system?

Mr Lucy—Value for money is not really something for ASIC to determine. The commission is really making a point of being close to stakeholder groups and, as I said, the other regulators. But we are not hearing that level of concern. Obviously there is frustration from time to time—the press particularly make a point of that. Certainly, in effect, we do not see there to be a problem.

CHAIRMAN—I understand you had some discussions with Mr Tiner from the FSA. They are obviously still wedded to their single structure.

Mr Lucy—Yes, they are.

CHAIRMAN—Can you advise any of the outcomes of the discussions?

Mr Lucy—Firstly, the good thing is that there is a very healthy dialogue between us and the FSA, which really gives us the opportunity to leverage off some of their experiences and vice versa. It is true that they have a great deal of respect for ASIC, how we are structured and how we go about our responsibilities. But there really are some quite stark differences in addition to the fact that they are the prudential regulator. Their funding is quite different. They raise their funding requirements from the industry at large, so that obviously is different. Also, their mark in the enforcement area, again, is materially different in that they do not take enforcement action until they regard there to be systemic problems, so they do not get anywhere near as engaged as we do in enforcement activities. So there are some differences. John Tiner generously offered us the access to a number of their working documents and processes that they have adopted within the FSA, which we are collecting, utilising and seeing whether or not they are of value to us—and, vice versa, we are exchanging documents with them. Also, over the years there has been a regular exchange of staff, where we have had staff working on secondment in the UK and vice versa.

CHAIRMAN—You are also to meet with the US Public Company Accounting Oversight Board in relation to the impact of Sarbanes-Oxley on the auditors of 30 Australian companies registered in America. Could you outline the results of that meeting?

Mr Lucy—We have had one meeting. They visited Australia with a team of about five or six from the PCAOB. Those discussions were fruitful. They were conducted in a very good spirit and with very open dialogue. There are further discussions next week which will involve not only Australia and the US but also the United Kingdom, and then there will be separate meetings with essentially all the countries that are affected by the Sarbanes-Oxley legislation. The Americans still have the attitude that they would like to fast-track Australia, Canada and potentially the UK with an agreement which provides a process for the reviews of auditors under the Sarbanes-Oxley legislation. We remain optimistic about that and we still think that 1 July 2005 is a time line that is achievable.

CHAIRMAN—Are there any implications for ASIC's regulatory responsibilities under Sarbanes-Oxley?

Mr Lucy—Yes. To the extent that we are looking at auditors and companies under CLERP 9, it goes without saying that we have the jurisdiction to do so. To the extent that we are willing to take on activities for the American regulator, that clearly requires law reform, because without that we would not have the jurisdiction to do so. So at this stage we are identifying the areas in which law reform would be required and that is a matter in which we have engaged Treasury. They are looking at that particularly. Our expectation is that there will probably still be ongoing dialogue and work with the Americans. I do not think that it will be simply ASIC going out to the top 30 countries and looking at their activities from a Sarbanes-Oxley perspective. I think that we will do that from a CLERP 9-ASIC perspective. But to the extent of Sarbanes-Oxley, I think that there will be a dual approach where there will still be some engagement by the American PCAOB.

CHAIRMAN—In relation to the international accounting standards, does ASIC intend to adopt the committee's recommendation to provide an additional month for small and medium enterprises to comply in the first year?

Mr Lucy—We have been invited to look at two areas. The first is whether or not some form of accommodation should be given to auditors dealing with the smaller end of town—in particular recognising the fact that they frequently have a closer relationship with a client than perhaps the larger companies. The other alternative is the extended period. We are looking at both. At this stage, frankly, the suggestion is more likely to be for an extended period as distinct from giving any relief to auditors.

Senator WONG—We have heard from the horse's mouth. I have one more question. Under the act, I think the minister can direct ASIC on certain policy or priority issues—I cannot remember the exact wording in the act. It is a general direction. Have any such directions been issued?

Mr Lucy—In the history of ASIC, I believe that one such direction was given very early. I think that was under the chairmanship of Tony Hartnell. To the best of my knowledge, there has been no other direction given.

CHAIRMAN—As there are no further questions, thank you, Mr Lucy, Mr Cooper and Mr Iglesias, for appearing before the committee and for the time that you have given us to fulfil our statutory responsibilities.

Committee adjourned at 7.04 p.m.