PROOF

COMMONWEALTH OF AUSTRALIA

JOINT COMMITTEE

on

CORPORATIONS AND SECURITIES

Reference: Statutory monitoring of the Australian Securities Commission

CANBERRA

Monday, 27 October 1997

PROOF HANSARD REPORT

CANBERRA

JOINT STATUTORY COMMITTEE ON CORPORATIONS AND SECURITIES

Members:

Senator Chapman (Chair)

Senator Conroy	Mrs Johnston
Senator Cooney	Mrs De-Anne Kelly
Senator Gibson	Mr Leo McLeay
Senator Murray	Mr Sinclair
	Mr Kelvin Thomson

Matter referred by the House of Representatives:

Statutory monitoring role of the Australian Securities Commission

CONDITIONS OF DISTRIBUTION

WITNESSES

JOINT STATUTORY COMMITTEE ON CORPORATIONS AND SECURITIES

Statutory monitoring role of the Australian Securities Commission

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Monday, 27 October 1997

Present

Senator Chapman (Chair)

Senator Conroy	Mr Leo McLeay
Senator Cooney	Mr Sinclair
Senator Gibson	Mr Kelvin Thomson

The committee met at 3.36 p.m.

Senator Chapman took the chair.

CAMERON, Mr Alan John, Chairman, Australian Securities Commission, GPO Box 4866, Sydney 2001

DAY, Mr William Peter, Deputy Chairman, Australian Securities Commission, 600 Bourke Street, Melbourne 3000

LONGO, Mr Joseph Paul, National Director, Enforcement, Australian Securities Commission, GPO Box 4866, Sydney 2001

CHAIR—I declare open this public hearing and welcome Mr Alan Cameron, the Chairman of the Australian Securities Commission, and his colleagues Mr Peter Day, the new Deputy Chairman, and Mr Joseph Longo. The committee holds a regular series of public briefings with the Australian Securities Commission to consider current issues related to the work of the commission and corporate law generally. The purpose of these briefings is to ensure that the committee and, through that, the parliament are kept informed about these issues. At the same time, the meetings also provide the commission with an opportunity to raise various matters of concern to it which may require legislative action. The committee last met with the ASC in March of this year.

I should note that the committee prefers to conduct its hearings in public. However, if any confidential matters arise, we can move in camera on request. So please let us know if that applies to any of the issues that might be pursued at the hearing. Having said that, I now invite you, Mr Cameron, and your colleagues to bring us up to date on anything that you may think is appropriate before we then proceed to some questions.

Mr Cameron—Thank you, Mr Chairman, and thank you for the opportunity to talk to you. I know there are some specific matters you want to talk to me about. But I do want to take the opportunity, since it is now only a day or two since the annual report of the commission was tabled in the House, to say a few words about that. I think we had, in the circumstances, a very good year. It was a difficult year, with resorts and changes to the commission having a significant impact on us. But the year saw the gaoling of both Alan Bond and Peter Mitchell, which I think, pending the return of Mr Oates from overseas to face trial, is a very significant outcome for probably the most prominent single investigation the commission has been associated with. I think it was an excellent result.

The year also saw the first insider trading conviction which the commission obtained in the case of Murray Williams, a public relations consultant from Sydney. It also saw the laying of charges only a couple of months after the episode against a bank executive with respect to insider trading that we alleged in the options in TNT. It has also seen the second referral by the commission to the takeovers panel, being the Tasmanian matter last year involving Gibson's Ltd. Senator Gibson wants me to make it clear that that was not his company or his fault. Nevertheless, it was only the second referral in five years. You would know that very recently we have made the third referral, in the case of trading indirectly, we would say, in securities in John Fairfax Ltd. The panel in fact

decided that there was not an appropriate case there. But there was a successful outcome to that second referral which we think is quite useful.

We have been doing some innovative things during the year that you may or may not be aware of, including holding investor fora around Australia. I think in the financial year we held two or perhaps three. In fact, we held one in Sydney, the second was on the Gold Coast and we have already had one in Melbourne. There is another one due for Hobart in December and for Perth in November. Those fora are gathering literally hundreds of ordinary Australians in one place to talk about share investment. I know that is an aspect, again, that you want to talk about later in the afternoon.

On the information division side, we saw the one millionth live company, and we had a celebration of that. The ASC searches are now available on the Net. The growing preoccupation with electronic commerce I know has not escaped the attention of this committee, but I just mention that in February we held the ASC's electronic commerce conference as part of our second summer school. That was a great success. We have the third summer school organised for early next year.

We also had some significant results I think in the business facilitation side of the business. I would include in that, for example, the two big demutualisations of National Mutual and Colonial Ltd. In the case of Colonial Ltd, you would have noticed that we caused the company to reopen that issue because we believed that it closed contrary to the representations made in the prospectus, disadvantaging about 25,000 potential investors. By causing that to reopen, we ensured that that disadvantage did not continue. We thought that was a very useful result.

We have been doing a lot of work on financial forecasts in prospectuses and making prospectuses simpler. In fact, one of the results of that is the Telstra prospectus, although it has occurred in this current year, which is, as you will have seen, a much different document to the standard 200 to 200 plus page documents that have been coming out in recent years. Bearing in mind that the government deliberately subjected itself to the full rigour of the Corporations Law, nevertheless, for the prospectus to come out in that form is I think a great advance in investor education and that method of investor protection.

So all in all I think, despite the resourcing reductions, we had a very successful year. I should also say that Peter Day has now joined us as deputy chairman and Jillian Segal has joined us as the third commissioner. So the commission is back to full strength.

CHAIR—I might commence by getting your views on the proposed Corporations and Financial Services Commission in response to the Wallis recommendations and perhaps how it will differ from your current structure.

Mr Cameron—I see the ACFSC as adding to the existing market integrity and

corporations role that we have the role of consumer protection across the whole of the finance sector. That is a different sort of role in many ways, but of course investors are also consumers and in fact making a distinction between investor protection and consumer protection is sometimes a bit difficult to do. Perhaps all of these distinctions are not straightforward when you examine them very closely. For example, in the superannuation area we will now have responsibility for all of the disclosure aspects of superannuation. The new prudential regulation authority and the ACFSC will have to work very closely together to make that delineation of responsibilities effective, but we are happy to do that. I think it is a new set of challenges for us.

I suppose one of the problems we have is ensuring that people do not have over-inflated expectations as to what we will do in the consumer protection area. We are taking over the supervision of consumer protection, not the day-to-day delivery of it. The existing internal and external complaints resolution schemes will remain, and we will take the responsibility for monitoring their effectiveness and ensuring that they are properly coordinated, but we are not replacing them. I think that message needs to be got across.

The principal thing we will do, if we can, is arrange for a single gateway to be available to all of those schemes for those who are having difficulty finding the right scheme. Again, it is not replacing any of the schemes and it is not an exclusive gateway. It is simply ensuring that members of the public who do not know where to go when the company concerned has rejected their complaint have some way of accessing the external complaints scheme.

CHAIR—The Treasurer announced that the new structure would be funded from the budget, as is the current ASC. Wallis recommended off-budget funding. Have you got any comment on the advantages or disadvantages of either approach?

Mr Cameron—We have had discussions with the Treasurer about that, and the Treasurer has explained to us that it is really driven as much by constitutional difficulties as anything else. That is a question that we are still discussing with the ISC, and I am happy to come back to it when you return after the division.

Short adjournment

Mr Cameron—When we were interrupted I think Senator Cooney was asking me quite a difficult question about the way in which responsibility for superannuation is going to be divided up. I think it is fair to say that that is still not clear. It is the subject of discussion at the moment between the ISC, the Treasury and the ASC.

The government's policy decision is clear: there should be responsibility for prudential supervision of superannuation vested in the new APRA but the ACFSC is responsible for disclosure aspects. It is easy to say that, but it is more difficult to work out exactly what it means. For example, the supervision of that industry is funded by a levy

that is levied against the industry, and that levy has to be divided proportionately between the regulators who are responsible. The regulators and the industry will care very much about where that line is drawn, and it will have some practical effects, but we do not know yet just what those effects will be.

Senator COONEY—I think the specific question addressed the contributions that are taken out and held onto by employers. I think they can use them, can they not?

Mr Cameron—Use them?

Senator COONEY—They can use the money set aside for their own business.

Mr Cameron—I am not aware that they can do that.

Senator COONEY—That seems to be the gravamen of the complaint; that people use the contributions and then, when they go bankrupt, the money is not there. There is no enforcement to protect the person for whose benefit the money should be forthcoming.

Mr Cameron—It certainly has come to our attention in recent times that, when a company fails, even the compulsory superannuation that is required to be deducted has not in fact been paid into a fund. I hasten to say that this is not a common phenomenon, but it has been known to happen. One of the issues that we will be seeking to resolve in consultation with the new APRA is who will be responsible for that.

The department have made it clear in the consultations that we have been having with them that they would expect the new Prudential Regulation Authority to have an enforcement capacity, an enforcement objective and not merely, as strictly described, a prudential role. This is very much in the discussion phase, but that is their expectation.

Senator COONEY—I do not want to go too much further because I have had a discussion about it, although it was not a wide discussion. I do not want to put it any stronger than it is, but that seems to be the complaint. There seems to be no capacity on the part of the people for whom the money is set aside—the superannuants—to get any relief if it disappears either through bankruptcy or through the employer simply holding on to it in some way. I do not suppose we could get a short paper about that when it is all sorted out.

Mr Cameron—That should be possible, because it is the intention of the ASC and I am sure of the new APRA to seek to inform the industry and the community generally as to what their respective roles will be in superannuation. We will need to sort that out and then announce it. We will be doing that some time before July next year, when it is hoped the scheme will be able to start.

Senator COONEY—I do not want to give you any more work but, if people want

to make enquiries about that, is it reasonable for them to come to you at this stage or should they wait?

Mr Cameron—It is probably a little early. APRA exists only as the Treasurer's announcement. It does not have any reality yet. The split of responsibility will not take effect until APRA is up and running, and the earliest that can happen is July. It is more likely to be a little later than that.

CHAIR—I wish to ask some questions about some of the recent cases you have been involved with. I refer to the Bob Ansett case, where you failed to convince the jury that Bob Ansett put forward a misleading prospectus, even though he did not have the smart lawyers representing him; he was representing himself. What happened in that case?

Mr Cameron—It is an interesting matter. You would be aware that Mr Ansett is not to be tried again. The Director of Public Prosecutions has decided not to have the matter re-heard, so Mr Ansett stands acquitted.

I should also make it clear that the prospectus in question now goes back eight or nine years. The charges were not laid until the beginning of 1993, perhaps late 1992. They then took a very long time to get to a hearing. I am sure that one of the factors in the DPP's mind was that it would have been another significant period before any trial could have been heard, and that would have had an element of unfairness in it.

I do not think it was surprising that the DPP should decide not to re-hear the matter. Mr Ansett, as you say, defended himself. Defendants are entitled to represent themselves and quite often they get quite good results. He is not the only person who has defended himself on an ASC charge and got off.

Senator COONEY—It depends a lot on how the jury take to the people. It helps if they reckon he is not a bad sort of a person.

Mr Cameron—Yes, I think it also sometimes reflects the jury's assessment as to whether any particular—I am not talking now about Mr Ansett—defendant has actually personally profited from the matter with which they are charged. I think juries take that very much into account.

Senator COONEY—I hope you do not get to the point where you think you have to win every case.

Mr Cameron—I do not think that as a matter of fact. I am quite unapologetic about the fact that we did not succeed in that or any other particular case. If we were succeeding in none of our cases, we would want to go back and have another look. If we were succeeding in 100 per cent of them, I would also be more concerned because it would mean that we had become risk averse.

Senator COONEY—Yes, I agree with that.

Mr Cameron—Some recent statistics I saw indicated that we did have a 100 per cent success rate but it was in major civil claims over the last three to six months, where we have not lost one. I am not so concerned about that because you would expect to win civil cases; you do not have the beyond reasonable doubt defence against you and so on and defendants do not fight quite as hard in a civil case as they do in a criminal case.

Senator COONEY—If the DPP did take into account the length of time since the alleged offence—I think that is very proper—in my view, they would have been acting properly.

Mr Cameron—It is also consistent with the government's decision, supported by a unanimous view of this committee that the five-year statute of limitations was not necessary because the courts and, indeed, the prosecution system would ensure that people were not subjected to criminal trials well after the events unless there was a reason why they should be. For example, the events may only have come to light after the five years had expired. We have seen several recent incidences of that.

Senator COONEY—I think there was a fair bit of discussion about that in the Full Court of Victoria recently.

Mr Cameron—Yes, there was.

CHAIR—What is the current state of play with the Yannon investigation? That seems to be dragging out.

Mr Cameron—That is a matter that the commission would prefer to discuss with you in private session. We would be able to say a little more to you about that privately than we can publicly. Certainly, it was a practice we had with matters such as Bond when they were still current—we would have a private session to talk about that.

CHAIR—Perhaps we can do that later.

Mr Cameron—Unless the committee really wants me to try a really anodyne answer.

CHAIR—Perhaps we can do that later in the day.

Senator CONROY—Is it correct that you had a break-in to the room?

Mr Cameron—Not quite. It is true that there was an attempt to break into the building. We are not on the ground floor of the building. An attempt was made to break into the ground floor. We infer that the person did get into the building. I am not sure that

we know or would want to say more than that on the public record. But that is well known and it was well publicised in Melbourne, as I am sure you are aware. But that is as much as I would want to say about it publicly. There is no evidence to indicate that that break-in was related to any particular investigation. The assumptions that were made in the media about that were not backed up by any evidence to suggest that it was directed to any particular investigation.

I do not know whether you know the part of town where our regional office is located, but it is not particularly lively at night. The break-in occurred on a Sunday night. It was dark and it could have been anyone doing anything.

Senator CONROY—Mr Chairman, are we going into a private session today?

CHAIR—Yes, we will do it at the end of the day. We will deal with the public stuff first and what needs to be done privately we will do at the end.

I refer to the agreements to buy shares in John Fairfax, on which you sought a declaration from the Corporations and Securities Panel to declare them unacceptable. The refusal by the panel to do that was commented on as being a slap in the face. What is your reaction to that?

Mr Cameron—That headline reflected a misunderstanding of the role of the commission and of the panel. The panel is in itself an investigative agency. We believe that the circumstances are such that they should conduct an investigation. If they conduct an investigation and in effect come out with a view that there is no unacceptable conduct, that is their responsibility. It is their entitlement and their duty to carry out that inquiry and to pronounce on it.

The only thing that I have difficulty with is that, by their own decision, they have limited the jurisdiction of the panel in a way that I do not think is justified. After a period of reflection, I have sought to make it clear publicly that the commission respectfully disagrees with the panel in several respects.

First they have interpreted the law to limit unacceptable conduct to circumstances where someone has made a general offer to acquire all of the shares in a company—of course, it entirely excluded this transaction, which related to only three per cent or perhaps five per cent of the shares in John Fairfax. At this stage it clearly did not relate to any more than that. They took that as excluding their unacceptable conduct jurisdiction. We think they had misunderstood the law and we have respectfully pointed that out publicly.

We have also said that we do not think the panel is right in believing that they have no jurisdiction to deal with derivatives—to deal with indirect transactions, if you like, that do not immediately impact upon shares in the company but have the economic effect of dealing with shares. That view of the panel is one with which, again, we do not

agree. I have sought to make it clear to the marketplace that if what I loosely call economic warehousing were to happen again, the commission would feel entitled to refer it again to the panel and invite the panel to reconsider their decision.

One of the advantages of them being investigators and not judicial is that they are not bound by their own earlier decisions and nor are we. So, in effect, we feel entitled to ask them to reconsider that when the panel might reconvene on a further occasion. Because there is sometimes a lengthy delay between referrals, we need to make our position publicly clear so that the market is informed as to what view we would take.

Senator GIBSON—Do you think there has been sufficient warning in the industry?

Mr Cameron—Yes. I announced it about two weekends ago on the Gold Coast at a corporate law workshop, which was attended by the leading practitioners in the area. That speech is now circulating in the industry, as was intended, so that the merchant bankers and lawyers involved in this business would know that, if these transactions happened again, we would again refer them to the panel, invite the panel to reconsider.

I have also drawn it to the attention of Treasury in the context of the corporate law economic reform program, on which the government is about to release a paper—I suspect that that paper is already written. When it comes to the law reform that will come out of that, I hope the Treasury will have regard to the problem—if it is a problem—that indirect share trading apparently may not be caught by the corporations law.

CHAIR—You indicated that when you refer that matter to the panel and if the panel disagrees with your view you may seek some legislative change.

Mr Cameron—Yes, for just that reason. We were well aware that we were testing the law, but we take the view that the panel could have decided that it was within the law. They chose not to. We are continuing to send a message to the marketplace that they should not assume from that that the law will not be changed, which is obviously an option, or that the commission would not try it again in front of a differently constituted panel.

CHAIR—Are you putting up some proposals for it or leaving it to others?

Mr Cameron—We also have copied my speech to the Treasury, so they are aware of my views.

CHAIR—I understand that the panel also recommended some reforms, particularly with regard to the use of derivatives and takeovers.

Mr Cameron—Yes, it is my recollection that their law reform proposals were

more directed to ensuring getting rid of the legalism. It is something about which we also feel strongly. Although the panel was deliberately constituted not as a legal body but as a business body, it tended to behave like a legal body. Lawyers and QCs come along and argue as if it is a court and seek to draw evidence as if it is a court. We say it is an investigation. The law was recast in 1994 to make it clear that it was an investigation and not a court type hearing. Clearly, that did not work properly, at least in the Fairfax matter. Perhaps Mr Longo, who was directly involved as our national enforcement director, should also speak on this.

Mr Longo—The panel was seen to be working in the recent ongoing offer by Mr Gutnik for Wiluna. That was settled only a few days ago. Two documents in the public domain, the terms of settlement and the media release which accompanied it, make it perfectly clear that, had Great Central not made available the increased offer price for all shareholders—the second bid, in other words—that would have gone to the panel. We were quite prepared to send it to the panel. It was only because Great Central agreed to do everything we would have asked the panel to do that there was no need to refer it to the panel. But, from the circumstances, it was abundantly clear that that matter would have gone to the panel as well. So one needs to see the panel across a range of experiences. We feel that recent experience shows that the panel can work.

Mr Cameron—As I said, although there were several years when we were not sending anything to the panel, you should not assume that it is not useful as a deterrent. It was there as a threat in the background. Great Central is a good example of how it does work.

CHAIR—Do you support their proposal to have greater access to non-legalistic inquiries?

Mr Cameron—Yes, absolutely. The law was written in an attempt to achieve that result.

Senator COONEY—There have to be some rules about investigations.

Mr Cameron—Yes. It has got to be conducted with fairness. I am not suggesting that it should be conducted in a Star Chamber fashion but, if it is conducted as if the evidence has got to be produced before a court and with full adversarial proceedings, it simply will not work. The London panel upon which it is modelled certainly does not work like that. The difficulty is trying to transplant that London model into the very legalistic Australian federation. The federation is a large part of the problem. London after all, is a totally different market. It is a market in one city operated by market professionals who all belong, in effect, to a club. The Australian system is a scattered market and very legalistic by its nature.

Senator COONEY—Do you think that would be worked out by experience rather

than by legislation? Where the proper bounds to the investigation—

Mr Cameron—The attempt was made. Following the very difficult matter of Titan Hills back in 1991, in an attempt to make it clear that these were inquiries and not court type hearings, the business law division—which was then part of Attorney-General's and is now part of Treasury—recast the law to some extent and the regulations completely. We have now only had those two matters. They are still behaving more legalistically than we had expected—everyone is, perhaps even us. So we are working on trying to ensure that it does behave like an inquiry.

Mr Longo—Perhaps I could give a practical illustration of what Mr Cameron is referring to there. In the Great Central situation we were ready to go to the panel within about three business days of the new bid being launched. We consciously took the view that we were not going to embark upon an exhaustive investigation of our own; rather, we would simply put the then known facts and circumstances to the panel for inquiry. It could form its own view as to what ought to be done or not done, with such assistance as it sought from us and the parties affected. It is very important, as our chairman was saying, that, from our point of view, we treat the panel that way and that we do not try to duplicate its role.

CHAIR—Another suggestion from the panel that came out of the Fairfax issue—it is probably a reiteration of their view—is that parties should be able to refer some matters to them without your intervention. That is something you previously opposed. Have you got any further comment on that issue?

Mr Cameron—Yes, I think on balance I am still opposed to it. It is a matter which is receiving attention from the government at the moment through the corporate law economic reform program. The reason I am opposed to it is that I fear that it may tend to cause the panel to be dragged into matters almost as a matter of course, in the way that some people believe the courts are dragged into matters by way of delaying and vexatious proceedings designed simply to get time for targets to defend themselves—or counter-bidders or whatever. Since the law works on an assumption of reasonably swift action in all this, if the marketplace is constantly critical of the delays introduced by litigation, it will be equally critical if people are able themselves to refer matters to the panel.

I have always understood that putting the ASC in the position of being the only party that can take matters to the panel is designed to do two things. It is designed to ensure that other people do not go around accusing people of unacceptable conduct and, secondly, to ensure that it is limited to matters which do have some apparent substance.

Senator COONEY—That was discussed at the time, was it not?

Mr Cameron—That is going back before my time. I was not here when the panel was created, but I would not be surprised if that was the reason.

Senator COONEY—That sort of resonates in the brain cells from a long time ago.

CHAIR—I might just raise one more matter before Senator Gibson asks some questions. This may be something that you may want to go in camera on again. What is the state of play with the RetireInvest investigation in Adelaide? Is that something you can talk about publicly?

Mr Cameron—We should probably talk about it privately. It is known to be happening, but I do not think we can say much more about it.

Senator GIBSON—Congratulations on reducing costs. I see that your people numbers and your leasing costs for running the organisation have both continued to go down.

You did mention the number of consultants you use. On page 53 you mention that you employed 30 contractors, mainly in IT and you engaged 18 consultants. Is that higher than normal or more than previously? My reason for asking that is related to our strategy discussions of a year or so ago and your intention to bring in more market expertise on short-term contracts.

Mr Cameron—I cannot immediately give you an answer about whether those figures are markedly changed. If anything, the number of contractors in the information technology area has come down, because of a deliberate strategy to get a better mix between salaried and contracted staff. As for the rest of the commission, the figure of 18 consultants looks pretty well standard to me.

But, in answer to your question about your suggestion of a year or so ago, that is certainly actively under attention at the moment. We are looking to use the ASC law employment power, which we have discussed in the past. That has now coincided with the government's push towards AWAs, and so there is some discussion going on as to what is the better way of proceeding. The ASC law was there first, and so there is a bit of a temptation on our part to seek to use the ASC law, which has some flexibility advantages over AWAs. That is still a matter under discussion.

Senator GIBSON—What is happening around the capital cities about pursuing the phoenix companies?

Mr Cameron—The phoenix companies are now being treated overtly as part of the small business program, which is, first of all, now labelled with that name. We have given in to the fact that that is the only name that people will understand.

Secondly, that issue is the direct responsibility of local regional commissioners. The phoenix companies as a phenomenon tend to be localised. It therefore seemed to us that the best way of dealing with them was to make the regional commissioners directly

responsible for the delivery of that program across the country rather than attempting to define national criteria. Mr Longo may wish to add something about our recent experience.

Mr Longo—That remains an issue and a continuing challenge for the commission. This committee would appreciate that the scope of the problem does reflect economic circumstances and what is going on in particular industries.

I can say also that part of the strategy in each region now is to redouble our education efforts. A lot of the difficulties that people experience with phoenix companies are actually preventable if they make proper inquiries ahead of time. Our resources are not great enough for us to be able to take prosecution action or civil action and circumstances do not always lend themselves to taking prosecution action or civil action. Very often there are insufficient assets and there is insufficient evidence for criminal purposes.

Part of our strategy at the moment is to redouble our education efforts. As Mr Cameron has noted, the focus of that is locally driven. We have made a conscious decision to do that. It is the first year that this program is locally driven and not, as it were, nationally coordinated. The regional commissioners themselves are setting the priorities. Our rate of prosecutions for assistants and receivers remains high. We try to maintain a very strong working relationship with the insolvency practitioners. All in all, the effort remains strong, although it is always a challenging issue.

Mr Cameron—I have just taken the chance to find page 22 of our annual report, which is where that is discussed—and also at the top of page 23. The numbers are there, but I think since 30 June there has been a conviction in a phoenix company matter in Queensland. As it says there, there have been numerous matters commenced, but the numbers that have actually got to the point of prosecution and conviction are still few.

Mr LEO McLEAY—I have two questions. One relates to the Estate Mortgage file. Seven years after Estate Mortgage collapsed—and thousands of the unit holders have since died—we still have not seen any money paid out to unit holders. We seem to be seeing some light at the end of the tunnel, but where are we with that?

In light of the collapse of that superannuation company recently, have we learnt anything or got anywhere? We seem to have the same problems with Consolidated Capital that we started out with seven years ago with Estate Mortgage.

Mr Cameron—To deal with Estate Mortgage first of all, my understanding is that the civil settlement there is close to agreement and completion. The commission's role in Estate Mortgage was that, although we commenced investigation early on, the civil proceedings became something in which the commission did not need to be involved. There were new trustees appointed. The new trustees ran those civil proceedings. They have succeeded in getting what looks to us from the outside to be quite a satisfactory

settlement.

Our role was limited to prosecuting people. The two Lews—Reuben and Richard—were both convicted, one of them twice, in fact. They have both been jailed. I think they are probably both now released. The criminal prosecution has been the commission's role with respect to Estate Mortgage. The civil case to which you refer is now, I think, coming to an end. We have helped the civil case by providing them with transcripts and other materials we collected as part of our investigation. Those were given to the civil plaintiffs in order to enable them to run their case. You mentioned ECCCL—I think that is the case you are talking about, the Melbourne based case—

Mr Longo—I think it would be more appropriate to talk about that in private.

Mr Cameron—In order to talk about it individually, we would have to do that.

Mr LEO McLEAY—My question was whether we had learnt anything along the way.

Mr Cameron—Yes, I think we have. It comes back to the fact that the government's decisions with respect to Wallis involve a concerted attempt to bring an enforcement focus as well to superannuation and so on and to have a clear responsibility between the two regulators for this. The collective investments or managed investments decision is also relevant. That was the problem in Estate Mortgage. ECCCL is not like that, because I do not think it was a public offer fund at all. It was a superannuation vehicle being used as a conduit.

The actual amount of money that we are aware has been lost out of superannuation in recent years is still very, very small compared to the amount of money now invested in superannuation. I know that is no comfort to those who have lost their money, but, as I say, from a regulatory point of view, the proportion that has been lost to date is still very small. So, in a sense the regulatory system has to be geared up to cope with the amount of risk that we think we can bear as a community. There is no absolute guarantee for any of these things. That is one of the reasons the commission puts a high priority on educating people about what the risks are.

Mr LEO McLEAY—With only one entity to look at in these collective funds, do you think that there is a better chance of you regulating them and putting a bit more certainty into the situation than there is where there is a promoter on one hand and a trustee? That seemed to give people some inference that somehow or other the organisation was like a bank and their money was safe. I think Estate Mortgage used to say that money with them was safer than with a bank.

Mr Cameron—Yes, well, of course, one of the things Mr Lew was gaoled for was false advertising. To answer your question about the collective investments decision, I

think the government had before it several reports urging that it would be better to have a clear line of responsibility; that the promoter, the manager, should be clearly responsible.

The protection effected by a separate trustee, first of all, is no absolute protection, as was shown in several of the cases, including Estate Mortgage. There, the trustees simply do not have enough assets or insurance to be a complete guarantee. But, secondly, it has caused a lot of the litigation to be more protracted because there is then an argument as to who is responsible, rather than who is actually going to pay.

The commission has sought to make it clear that it is not the policy maker in all of this; that the government had to decide which way to go. The government has opted for the single responsible entity. And the mix of compliance systems that are being proposed through the Treasurer's announcement seems to us to be an effective solution. It is not the commission replacing trustees, as is sometimes portrayed; it is rather that there will be compliance systems, independent directors, compliance committees, auditors of compliance systems and auditors of the funds generally. This will make it a system not unlike the United States investment company model.

The United States investment company model was introduced in 1941, and has had no instance of regulatory failure in that time. There may have been commercial problems. But as a regulatory system, it appears to have been without error. I have not been able to find any example of where it has failed as a regulatory system.

That being so, I think the government was entitled to take the view that it did. But I would seek to make it clear that the commission is not the decision maker; it is the government that has decided to opt for that solution.

Senator COONEY—Following on from Mr McLeay's question, could you give us—not now, but at sometime in the near future—an idea of how well resourced the American body is?

Mr Cameron—Yes. It is the SEC, of course; it is our US equivalent that supervises investment companies.

Senator COONEY—What about the part that would be equivalent to Mr Longo's particular section; how well resourced is that?

Mr Cameron—We could find out for you. I do not know the answer off the top of my head. The SEC, of course, is a much larger organisation in a much larger country. But it has a much more limited role than the ASC does.

Mr LEO McLEAY—But as is the problem with all these things, when you have got a lot of people now wanting to invest in vehicles, and when people are saying that these collective investment vehicles are often better than making these decisions yourself,

if the regulator is never going to be able to pursue people who are on the edge of the law, let alone those who are breaching the law, that is not much good. I suppose one can point to Mr Lew and his son being gaoled. But his son went to gaol for three months; three months was all he went to gaol for.

Mr Cameron—On one change, yes.

Senator COONEY—That is a long time in a gaol; have you been out to Pentridge recently?

Mr LEO McLEAY—Still none of these 46,000 investors have got any of their money back, and Mr Lew has been out of gaol for years now. So I guess those investors would think that maybe the regulator ought to have a bit more ability to regulate than just giving someone a three-month gaol sentence.

You said before that you thought you were doing pretty well on the criminal prosecutions. I do not suppose those people who went broke with Estate Mortgage would think three months in Pentridge—and he probably was not even in Pentridge—was a terrific sort of a penalty for Mr Lew, remembering that he was funnelling 50 per cent of the profits of some of these schemes into his own company, not into their bank accounts. So a lot of it gets back to whether the regulator has the ability to do the regulator's job. That is one of the few ways in which you will get some confidence in the system.

Mr Cameron—The Estate Mortgage thing happened at the end of the 1980s when the ASC was not around. Now that the ASC exists, even without the collective investments proposal, I think the chance of that happening again is significantly less. It is not just that now there is the ASC; the whole climate is rather different.

But I do not want to send a message that there is no risk either, in the sense that people need to take informed commercial risks. One of the aspects of the Estate Mortgage matter was that it was offering very high returns; and what it displayed was that a lot of ordinary members of the public did not understand the relationship between risk and reward. Hence, the desire to educate people. At the end of the day, we cannot protect everybody against all-out risk. We really have to encourage them to make—

Senator COONEY—Do you believe that judges are the proper people to decide sentences?

Mr Cameron—I would put it this way: prosecutors certainly are not the right people to decide sentences.

Senator COONEY—Neither are politicians.

Mr KELVIN THOMSON—You would be aware of recent public interest

concerning the involvement of Victoria's Premier Kennett in public floats of Yates Garden Supplies and Guandong Corporation. My first question is: does the ASC have suggestions about how stockbrokers ought to be conducting themselves to avoid any undermining of public confidence in the integrity of the share allocation process? Given the public concern that Premier Kennett or his wife were given preferential treatment in the allocation of shares by Guandong and by Yates, do you have any thoughts on how sharebrokers ought to be conducting themselves?

Mr Cameron—The question of allocations in popular floats has been an issue which the commission is periodically asked to get involved in, ever since I have been here. Going back to the Crown Casino float—Crown Limited float, for example—there was a very frequent correspondent, I think, to this committee who missed out on that float who continued to write—

Mr LEO McLEAY—She is probably happy now.

Mr Cameron—I do not recall her ever writing to say, 'It's all right: you were right, and I was wrong.'

Senator CONROY—Or 'Thank you for not doing anything'.

Mr Cameron—Yes. But it is an issue. We believe, first of all, that the allocation policy needs to be clearly spelt out in the prospectus, and we would expect people to comply with that policy. It was, for example, a version of that that caused us to have Colonial Limited re-open their float, because they did not make it clear that they could close early. That is an example of it.

But the reality is that a lot of these floats ultimately are sort of allocated among broker clients at the end of the day, the broker having, in effect, said 'one million'—or whatever the number is—'of shares we will take and we will allocate among our clients'. How the broker does that, first of all, does not affect anybody who is not a client of that broker; and, secondly, it is just a matter for their good faith with their clients.

We would have a look at that as a matter of appropriate behaviour for licensees under the corporations law. If people were behaving improperly in that area, that is a matter we would take up with the broker—not as a matter involving any impropriety by the client necessarily, but as a matter of good practice of the broker.

Mr KELVIN THOMSON—That, in effect, is the question I am asking; it is about the conduct of the broker. To come back to those couple of cases, is the ASC investigating the role of the brokers concerning either of those floats?

Mr Cameron—I would rather take any such discussion about a particular case in a confidential session. Can I leave my question at the level though that I have given it

already: that, where there are complaints about share allocations which have been conducted inside a brokerage firm, we may well be interested in looking at the behaviour of the brokers.

Senator CONROY—What would you define as the wrong sort of behaviour? What fails your test of propriety? I am just asking in general.

Mr Cameron—I understand that. That is probably a fair question, but it is a little difficult to answer in the context that has been created. Let me put it this way: if a broker were to decide to allocate all of the shares in a float which they now knew to be highly successful to their own account, and rule out all of their clients, having perhaps created some expectation to the contrary earlier—in fact, even perhaps having collected some money earlier from some of their clients—we would regard that as improper.

Mr SINCLAIR—Would you check them out against the prospectus?

Mr Cameron—It should not affect the prospectus. If it is relevant to the prospectus, then it is a corporations law matter. I am really talking about the situation where they have—as between the directors of the company and themselves and the broker—agreed that the broker will take a particular allocation. The internal division of that allocation could still involve some inappropriate behaviour.

Mr SINCLAIR—So you would say that that existed beyond the terms of the prospectus?

Mr Cameron—Yes, it is outside the terms of the prospectus; it is then a question of fitness and propriety to be a broker. There are certain standards of professional behaviour. Incidentally, that is often judged by the stock exchange and not just by us. It may be the stock exchange that would take that action in due course; not us at all.

Senator CONROY—But you are indicating that it would only be in the case where they allocated a significant amount or all that was available to themselves. You would feel that that would be the only potential breach that—

Mr Cameron—No, I was merely suggesting that as an example. I do not know whether I would want to go any further than that.

Senator CONROY—Surely this is public information. I am not trying to trick anyone here, I am just actually asking generally. Surely stockbrokers must know where the line is; I am just seeking general information.

Mr Cameron—Yes, I understand that. It is rather that this is not a frequent source of complaint. It might seem to you that it has been, in view of recent publicity, but it is not a frequent source of complaint.

Senator CONROY—Certain sources have complained about it.

Mr Longo—Perhaps I could amplify. The interests we are really talking about now are those of private clients of brokers. They are well aware of their rights and concerns and if they have an issue with their broker as to how they were treated in connection with a particular float, then, as Mr Cameron has pointed out, there are at least two people they can talk to: there is us and the ASX. We do a lot of work in the licensing area; disciplinary work. We work very closely with the ASX, and I can only echo what Mr Cameron has said: we do not get complaints of that kind, not to my knowledge, from private clients worrying about how they have been treated by brokers in connection with share allocations.

Senator CONROY—So you do not see any public interest questions?

Mr Longo—I am not saying that it would never occur. Hypothetically, one can think of circumstances perhaps where a private client was unfairly or improperly dealt with by a broker and that might come to our attention, but it is not the sort of thing that we have had to be concerned about in the past.

Mr Cameron—One of the reasons is that there is a third person they can complain to, of course, and that is the broker. At the end of the day it may well be that the private client simply says to the broker, 'If you cannot get me that allocation, I will go elsewhere.' So there are those commercial pressures.

Senator CONROY—I appreciate that you are indicating that there are other places they can go, and I appreciate that advice, but what I am seeking to determine is your role and where you see there being impropriety. You said before that the brokers are aware of their responsibilities. I am really just asking, what are they?

Mr Longo—It is a purely internal matter of good commercial practice. What we are essentially talking about is what should a broker do or not do in connection with the allocation of a particular parcel of shares to one or more private clients. That is really an internal matter between the broker and its clients. One can imagine circumstances, I suppose, where the broker could get that wrong, and get it wrong in a way which would attract our attention. But what we are saying—or at least what I am saying—is that historically that has not been an issue for the regulator. It has been an issue, as I think has already been mentioned, how an issuer might treat those subscribing for shares and whether that has occurred in accordance with what they have said in the prospectus would happen. That, regrettably, has occurred from time to time, but not this other issue that has been raised.

Mr KELVIN THOMSON—But if a person contacts their broker and the broker says there are no shares available, and then somebody else rings up and they say, 'Yes, there are shares available,' is that either a problem for you or is it an issue in which the

Stock Exchange might be interested, or neither of you? Would you both say that that is a private matter and nothing to do with you?

Mr Cameron—The difficulty is that the broker, at the end of the day, might have to decide between clients and, providing that the broker decides between clients is a way that is not misleading or deceptive of their clients, it is not either a matter for the law or a matter for the professional practice.

Mr KELVIN THOMSON—But if they said that there were no more shares available, that the float has closed—

Mr Cameron—But what does that mean? If it simply means, 'I have already allocated them to clients who are higher in the pecking order than you are,' then that is the way it is.

Mr KELVIN THOMSON—But if they say to somebody, 'It's closed,' and then somebody else rings up and they say, 'Well, no, it's not closed', is that—

Mr Cameron—Let me give you an example, since we are having this discussion. Let us say, for example, you asked your broker and your broker said, 'Right, you've got 50,000,' and you rely on that and you go and do something else with the rest of your money or whatever, and they come back and they say, 'No, you haven't really got 50,000. We have taken 30,000 off you and given them to somebody else.' If the representation about the 50,000 was sufficiently firm, we might think that was improper, even though it is not unlawful. But I do have to emphasise that this is not the sort of issue we have had to confront; it has not been a frequent source of complaint.

Senator CONROY—So in your view in general there is no public interest test on how those brokers conduct themselves?

Mr Cameron—To the contrary; I think there is. That is the reason why the Stock Exchange, as the front-line regulator of the behaviour of brokers in that situation, would normally deal with that. We might well have a preliminary look and then refer it to the exchange, or they might refer it to us if they thought the behaviour was such that we ought to be dealing with it as a licensing matter, to do with the fitness and propriety of either the broking firm or the individual representative who was responsible for misleading their client.

Senator CONROY—You gave us an example a minute ago, if we could come back to Mr Thomson's question, in terms of being told there were no shares available and then suddenly somebody else has got shares. By definition, somebody had their allocation reduced.

Mr Longo—Not necessarily.

Senator CONROY—I am a novice in this area. I welcome the educative process.

Mr Cameron—They may have taken it out of their own house account, which is quite a common practice. Brokerage firms frequently keep a part of the allocation for themselves literally to facilitate trading and making it available to clients later down the track and all the rest of it. Quite proper behaviour. And they may decide to eat into that allocation they had reserved for themselves because some favoured client or important client had come along. I cannot imagine we would believe there was anything improper in that.

Mr SINCLAIR—On the demutualisation of the stock exchange, as it occurs are you assuming greater responsibilities, or is the demutualised stock exchange going to be in the same position to exercise controls and general mechanisms of regulation that it has assumed over the course of time?

Mr Cameron—We will assume directly only a small additional role, and that is to supervise their own listing when that occurs, because they cannot be seen to be the body that gives themselves exemptions from their listing rules and monitors their compliance with the listing rules and so on. So we will do that. The government has agreed to that. It is implicit in the legislation, which I do not think has been introduced into the parliament but it has been published, that we get that additional role.

I certainly have the personal view—I am not sure the stock exchange necessarily agrees—that when the stock exchange becomes a publicly quoted corporation and is no longer directly controlled by the broking industry as such, when it is controlled by investors seeking to make a profit out of the trading on the exchange, then the assumptions that you would otherwise have made about the enforcement of professional standards, the role that the stock exchange ought to perform at the moment and does perform at the moment and will continue to perform, the judgments they make in that will be more difficult. They will have a greater tension between their role of immediately trying to make a profit for their investors, for their owners, and the other role of maintaining the credibility of the market.

In the long term they are not in conflict because long term the credibility of the market is crucial to its long-term profitability. But there is a short-term tension at least between those objectives. I think that will mean that a new regulatory paradigm has to emerge when the exchange is privately owned. That will be a process of time. The bill that is being circulated describes the first attempt at that. It may not yet be perfect, it may need further development, but there will be a change. But the most immediate changes is in the supervision of the exchange's own listing.

Mr SINCLAIR—It seems to me they are only partly being confident with their own profit motive once they are demutualised, and then in the regulating aspect of the operations I can see problems emerging. There are two other areas which have struck me.

One is, as a result of Wallis, is there any consequence in your regulation of the industry generally that flows from the extent to which you have additional powers given to some sectors of the finance industry that were not there before, or are they powers that are essentially exercised elsewhere?

Mr Cameron—The main additional power we are supposed to get is the power to accept enforceable undertakings. That is a power we have been asking for, indeed, in the collective investments area, but we think post-Wallis we are likely to get it more generally. It is a power the ACCC has and uses, and we think that is a useful addition to our armoury. I think that is the main one, isn't it, Joe?

Mr Longo—There is some finetuning that I think this process will enable us to ask for. In issues relating to information release and statements from reluctant witnesses and our capacity to share information with others in the public interest, where the existing legislation we feel is a little too constraining—

Mr Cameron—In fact, I have a personal view that in the Wallis era, where there will be three financial regulators—the Reserve Bank; the APRA, the Prudential Regulation Authority; and the ACFSC—the exchange of information among those three has to be as easy as if they were actually one body. That may sound as though it is something that can be done simply under the present law, but it cannot be because under the decision in ASC and Johns there is an obligation to consider the issue of natural justice or due procedure before you share information even with a fellow regulator like the Reserve Bank or the ISC as it now is. I think that simply does not work and that we need seamless financial regulation in the public interest.

The best example I can give of that is the superannuation area, which several of you have been talking to me about. If we have shared responsibility for superannuation in the post-Wallis world, we cannot be stopping to consider whether there is a natural justice element in referring something from the APRA to the ACFSC or vice-versa. We have to deal with it as though we were one body—and in a sense we are. We are, after all, commissions or authorities carrying out—

Mr SINCLAIR—There is no obligation to divulge information. There is no restriction on divulging other than the extent to which your own particular regulating responsibilities might be prejudiced—if you divulge information before you proceed with prosecution.

Mr Cameron—We can be criticised. We were criticised by the High Court for not consulting Mr Johns before sharing information about him with the Tricontinental royal commission. That had no particular consequence in that case because the matter was long since over, but it has set the ground rules as to what the law is. In a future situation we would have to consider whether we would need to consult, for example, the directors or trustees of a superannuation fund before we shared information with the APRA. I do not

think that works.

Mr SINCLAIR—What about the DPP? They come in at the end and, if you were at the stage where you felt your capacity to prosecute would be prejudiced by divulging information before you do anything—

Mr Cameron—Even the High Court I think would say that the content of natural justice in that case is zero. But we do not want to be forced to consider that question any more than we do before referring someone to the DPP, frankly, because clearly it is a nonsense to say, 'Do you consult the accused'—or the potentially accused—'before you even ask the DPP whether to prosecute?'

Mr Longo—The whole area of information sharing is quite a complex one. It arises under a number of guises. There is section 127 of the ASC law, which underlies the High Court's decision in Johns. The same decision also talks about section 25, which is the practical source of power for us to share information with civil private litigants. It was only state launched litigation, for example, that gave us that. That was the gateway, if you like, that enabled us to assist private litigants.

Along the way we can get ourselves into real trouble if we do not accord procedural fairness to people who are affected. So we have put a lot of time and resources into trying to get that right and, even when we do get that right, we do get sued occasionally. So it is an area that creates practical issues for us. We need to be very careful of it. I can only echo what Mr Cameron has said: in this new regime it is very important that we are able to share information with our fellow regulators without any concern about being sued by the very entities that we are there to deal with.

Mr SINCLAIR—The other area of concern to me is that in the aftermath of the 1980s there were all sorts of problems and most of the individual instances you pick are those you prosecuted coming from some of the excesses of the 1980s. One would hope that what is happening in the present fallout in currencies and stock markets is not the same. If there were unexpected areas, would the ASC be able to perhaps prevent some of the abuses of today's climate because of the lessons of the 1980s? I guess what I am really saying is that as a product of marked market movements there is apprehension that irregularities will occur. With the present significant market movements, are you satisfied that you have learnt the lessons of the 1980s and you are adequately placed to be able to identify any such abuses if they should occur?

Mr Cameron—I think it is not only the ASC that is rather different in the middle of the 1990s. It is also the Stock Exchange and the Futures Exchange, both of which are leading world-class institutions. That has not happened by accident. We have certainly attempted to encourage them to get to that point. But, if you look even in this current annual report, you will see evidence of our greater willingness to deal with matters quickly, such as in the Nomura litigation, where we have taken on Nomura with respect to

the trading between the Sydney Futures Exchange and the Australian Stock Exchange where they were, as we say, manipulating the market between that. That is world leading type litigation to take on. The prompt discovery and charging of the person that we think was responsible for the Mark Booth trading sent a very clear message to the community.

I could point to smaller matters than that. When I visit Perth, people still talk to me about the three company directors who were sent to gaol for twelve months each for, in effect, taking company money in the early 1990s. It sent a very clear message because all three of them were well known in the Perth business community and not regarded as—in the common parlance—Alan Bond or Christopher Skase type people. Yet they were comparatively quickly prosecuted, convicted and locked up. So it has not only been investigating and prosecuting action; the court penalties imposed in the middle l990s have been significantly different. So I think those messages have been getting through.

Mr SINCLAIR—Thank you.

Senator CONROY—I draw your attention to a letter from your regional commissioner in Victoria on 10 October to John Brumby. I am particularly interested in the last paragraph, where Mr Mithen states:

Because your letter had wide publicity I propose to send a copy of this letter to Mr Kennett and our Minister Mr Costello.

A fairly unusual thing to do in a private correspondence, would you say?

Mr Cameron—We were under the impression that the letter was not private, since the delivery of the material to us had been accompanied by a very public revelation of it.

Senator CONROY—We are in politics and that is our job.

Mr Cameron—Yes, that is right. We are not.

Senator CONROY—Correct.

Mr Cameron—Therefore, we felt that we should, in the public interest, ensure that people knew precisely what we had said and what we had not said.

Senator CONROY—But you put out a press release as well.

Mr Cameron—The press release—

Senator CONROY—I am just interested as to why a letter addressed to the Leader of the Opposition in Victoria was courtesy copied on top of your press release to Jeff Kennett and Peter Costello, whether or not that would be a common practice and

whether you endorse it.

Mr Cameron—It is not a common practice because we do not often have the very public delivery by one side of politics of a particular complaint to us accompanied by great publicity at that time. The fact that our role is to investigate breaches of the corporations law and nothing else needs to be understood. We felt entitled, if not obliged, to send a clear message as to what we had found. After all, the complaints had the potential to jeopardise confidence in share allocations in the securities market. So, in terms of our statutory role of maximising the credibility of the securities markets, I think it was entirely reasonable for us to have, in effect, gone public with the response, which after all was merely to the effect that there was nothing in the materials provided that gave us reasons to suspect breaches of the law.

Senator CONROY—And your press release on 10 October was not enough?

Mr Cameron—Was not enough?

Senator CONROY—The one headed, 'ASC finds no breaches in Kennett share dealings'.

Mr Cameron—Let me put it this way. If we had copied the letter to Mr Kennett and Mr Costello without saying so to Mr Brumby, I would perhaps understand your concern better. What we were simply doing was saying in effect that we are a publicly accountable regulator responsible to the parliament and if we—

Senator CONROY—I appreciate your view that you are not in politics, and I endorse that. I am just concerned that this seems to be a fairly extraordinary step that drags you into politics by courtesy copying a letter to somebody who has called for an investigation, and whether or not you would as a normal practice issue correspondence. I struggle to understand why you do not consider a letter addressed to an individual to be a private piece of correspondence just because the action by the person calling for the investigation and announcing that he has written a letter is a political act. I am just trying to understand why—

Mr SINCLAIR—It has become a public act.

Senator CONROY—I am not denying that either. I am agreeing that it is a public political act.

Mr SINCLAIR—Once it is public, it does not matter whether it is political or not. If it is public knowledge that you have delivered a letter, it puts it into an entirely different category from being a personal letter, irrespective of whether it is political or apolitical.

Senator CONROY—So any publicity that is received about any case they are working on is therefore public. They could write back to the ASX and say, 'Just because there has been a bit of media speculation about it, we have released it.'

Mr SINCLAIR—It is not the ASX. We are looking at the ASC at the moment; the ASX is all right.

Senator CONROY—I just said that if the ASC wanted to send its answer to the ASX and there had been some media—

Mr SINCLAIR—It is public.

Senator CONROY—A lot of these cases unfortunately do end up in the media.

Mr SINCLAIR—It depends where they begin. You are pursing an inquiry with Mr Cameron; I am just saying to you that I do not see it identified.

Senator CONROY—Your argument is that because it is in the public domain, suddenly—

Mr SINCLAIR—I think if you put something in the public domain, you have to expect an answer in the public domain. That is the point I am making.

Mr Cameron—It is simply as I think I am hearing it said around the table. It is because the complaint was not made privately and related to public figures—

Senator CONROY—That is a judgment that you have made yourselves?

Mr Cameron—I do not think it was a judgment; I think it is a fact.

Senator CONROY—Your judgment is that, because the letter was made public, you were entitled to make a public response.

Mr Cameron—Yes.

Senator CONROY—That is a judgment that you made.

Mr Cameron—Yes, it is not a judgment made by anybody else.

Mr LEO McLEAY—Have you done that before?

Mr Cameron—I cannot actually think of any instance where it has been an issue before. I may be reminded of one.

Mr LEO McLEAY—Is it not a bit strange that if a person who is a senior public figure should write to a regulator and say that they think there might be something here that needs to be investigated, the regulator would respond by press release? In fact, we would be a bit worried about writing the letter, I might say.

Senator CONROY—The press release was issued before the letter was sent?

Mr Cameron—I am not sure the press release was issued before the letter was sent.

Senator CONROY—Brumby actually heard it on the one o'clock ABC news and then the letter arrived.

Mr Cameron—I was not involved in dispatching the letter so I am not aware what the timing of it was.

Mr LEO McLEAY—Maybe you could check that for us. One should expect that one should be able to say something and seek some advice from a regulator. The regulator at least might do you the courtesy of simultaneously advising you and the press, but to advise the press first and to get your answer on the news is a bit rich.

Mr Cameron—I am not sure that has happened, Mr McLeay, but I am happy to make inquiries to see whether that happened. It simply comes down to the fact that this is not a standard matter in any sense. It turns out, on close examination, that the material involved did not disclose any breaches of the corporations law and that the allegations were made publicly about a prominent public figure. In that situation, the commission felt that it should make it clear what the answer was and make sure that it said so itself so its answer was not misunderstood. In fact, the allegations having been made publicly, the person who was the subject of them was also entitled to know what the commission's response to them was.

CHAIR—I think that is the point. The allegations were made publicly so it is quite proper for the response to be made public.

Senator CONROY—On *Four Corners.*

CHAIR—Otherwise you would have allegations standing and no-one knows what the response has been.

Senator CONROY—So *Four Corners* does a story on this and therefore it is in the public domain and it is okay—

Mr Cameron—The delivery of the material to us was publicised at the time that it happened.

Senator CONROY—And you accept and acknowledge that that is a political act. We are just pointing out to you that your response to do so in the same way is a political act. We are just seeking to know whether or not you think that is appropriate behaviour for a regulatory body. That is actually the nub of the case. It is a political act and you then took a political act in response.

Mr Cameron—A public act.

Senator CONROY—No, I am sorry. If you check the transcript, I think you will find it was political, which I then agreed to—that it was a political act by Mr Brumby. The point was that the act in response was a political act by a regulatory body. I am just seeking to know whether or not that is standard operating procedure.

Mr Cameron—In fact, the intention from the commission's point of view was to ensure that it was de-politicised. Hence, the intention first of all was to copy it to the minister to whom we are accountable and, secondly, to copy it to the person who was the subject of the complaint. That was actually an attempt by us to ensure that we were not brought into the politics of it. We were well aware of the political implications. What we were seeking to do was to ensure that the commission was not brought into those political implications.

Senator CONROY—Were there any other communications between the ASC and the Treasurer's office prior to 10 October in relation to this inquiry?

Mr Cameron—I cannot recall any, but I would be happy to take that on notice if you wish.

Senator CONROY—Was there any communication between the ASC and the Victorian Premier or his office prior to 10 October in relation to the inquiry?

Mr Cameron—I am not aware that there was any discussion with the Premier or his staff at all.

Senator CONROY—Was there any discussion with Stephen Mayne?

Mr Cameron—I am happy to find out for you, if you like. In fact, as the letter makes clear, what was done was to examine the material that was presented in order to see whether there was any point in commencing an investigation. I do not believe anybody was interviewed with respect to it because there was not, on the face of the material presented, anything within the ASC's jurisdiction which we could justify investigating.

Senator CONROY—I am just looking at page 21 of your report. There is possibly a box missing. The boxes are 'Complaint received', 'Assessing complaint', and 'Information Gathering'. Should there be a box in there that says 'Decision Made Not to

Proceed'? It goes on from 'Assessing complaint' into 'Information gathering'—'witnesses interviewed', 'witnessed notified' et cetera. There probably needs to be a box in there. This is underneath the heading 'Stages of an Investigation'. It is 'Complaint received'—and you have received a complaint.

CHAIR—This one was dismissed after it was assessed.

Senator CONROY—That is what I just said. I said there probably should be a box.

Mr Cameron—I think the chart is intended to describe the stages of an investigation. Basically in this case it never became an investigation.

Senator CONROY—That is what I am saying. Then 'Complaint received' should probably be above the line 'Stages of an investigation'.

Mr Cameron—Oh, I see what you are saying. You might wish to argue that. On the other hand, the chart is exactly right: these are stages of an investigation, not stages of dealing with a complaint.

Senator CONROY—But you only conduct an inquiry, not an investigation.

Mr Cameron—Yes, because the law draws a distinction.

Mr LEO McLEAY—You assessed Mr Brumby's complaint and decided there was no complaint?

Mr Cameron—Yes, we decided there was no allegation within it of a breach of the Corporations Law.

Mr LEO McLEAY—Then you put out a press release?

Mr Cameron—Yes, that is right.

Senator CONROY—The point I was making is that at the point where you decide that a complaint is not an investigation but was an inquiry—

Mr LEO McLEAY—If I made an adjournment speech tonight and said I thought the way you had behaved on something was terrible and I was going to write to you about it, do you put out a press release when you have found out that I was right or wrong?

Mr Cameron—I am not sure I can answer that in that hypothetical case that you describe.

Mr LEO McLEAY—Mr Brumby is more important than me, I hope!

Mr Cameron—No, it is rather that the commission has a very public policy about publicity. It takes the view—and this is published in the *Digest*—that, as a regulator, one of its important roles is to ensure that there is a regulatory effect from what it does. That is normally talking about positive action so that we will not, for example, settle a matter on a basis that does not involve publicity, because we need to tell people what we are doing in order to get a market impact.

This is a mirror of that case. This is a case where very publicly quite serious allegations have been made about the way in which the share allocation policy works. Whatever you might think about other aspects of it, on examination the material presented does not disclose any breach of the Corporations Law and we think that in the public interest we need to say that. The matter having been drawn to our attention very publicly, we should say so publicly. People all the time complain to us about matters privately, including matters of political interest. We do not publicise those matters. But where the matter is already in the public domain, we think we need to close the loop; and that is all we were doing.

Mr KELVIN THOMSON—Your view is that, even assuming that everything said by Mr Brumby in his complaint was correct, there was no breach of the Corporations Law?

Mr Cameron—That question is put very widely, because I myself have not read Mr Brumby's letter.

Mr KELVIN THOMSON—It mystifies me as to why no witnesses were interviewed or no attempt was made to ascertain whether the allegations were correct or not, and the only way I can make sense of this is if you are saying that even assuming every allegation is true, then no breach of the Corporations Law occurred.

Mr Cameron—I think that is right, but I do not want to give you that as a categorical answer without going back to check precisely what he said. But that is the obvious inference from the letter that we did send.

Mr KELVIN THOMSON—Well, that is the one that occurs to me, but then I really do wonder whether putting out a public statement to that effect improves the integrity or standing of the share market. I would have thought it was to the contrary, in a sense. If people took the view that none of what was being alleged amounted to a breach of the Corporations Law, that might give them a whole lot of confidence in the process.

Mr Longo—If I deal with this hypothetically, then it is not a true principle, either, to say that the regulator will investigate on the basis that it will take as true every serious allegation that is put before it. That is not how we operate. We will assess the complaint

based on a range of issues, but we are not going to accept the truth of the most serious allegations and then start an investigation on that basis. There needs to be some judgment made about whether it is the kind of matter which we should get involved in—whether there are prospects of obtaining evidence, the seriousness, the age. There are a whole range of factors we take into account in determining whether something should be investigated or not. I just wanted to clarify that when we are assessing a complaint we do not start by saying, 'Let us assume everything is true.'

Mr KELVIN THOMSON—No, but given that there were no witnesses interviewed—Stephen Mayne or anybody else, as far as I can tell; the ASC did not contact anybody—then the only way I can make sense of that is to assume that you, having looked at that, thought that even if everything here is true, there is still no breach of the law. If that was not the case, then I cannot understand why you did not interview witnesses.

Mr Cameron—Do I understand that you have a copy of the letter that we sent Mr Brumby?

Senator CONROY—I got it from Jeff Kennett.

Mr Cameron—I did not know that. As far as I know, that letter is not in the public domain. I do not think it has ever been published. I am not aware that it has.

Mr LEO McLEAY—If it was addressed to him, he can give it to whomever he likes.

Mr Cameron—It was addressed to Mr Brumby.

Senator CONROY—And courtesy copied to Jeff Kennett and Peter Costello.

Mr Cameron—If you read the letter, of which I have a copy in front of me—it is a computer generated copy but as far as I know it is exactly the same as the one that went—the letter is explicit as to what we found and what we did not find. I would rather not read that into the public record. What is in the public record is the media release, and the media release is clear that the share allocation had been complied with. We had looked closely at the complaint. There was no evidence that any application for shares made in relation to the company was made outside the offer period or outside the requirement imposed under the relevant prospectus. We looked into the other dealings, apart from those companies, and concluded that there was nothing in the materials provided that gave us reason to suspect contraventions of the Corporations Law.

Mr LEO McLEAY—Did Mr Kennett or anyone from his office contact you about this matter?

Mr Cameron—Certainly not me, but I do not believe the commission was contacted at all.

Mr LEO McLEAY—So you do not think that anyone from Mr Kennett's office contacted the ASC about this matter?

Mr Cameron—I am not aware that they did at any stage.

Mr LEO McLEAY—Can you find that out for us?

Mr Cameron—Yes, we can find that out.

Mr LEO McLEAY—What about anyone from the Treasurer's office? Did anyone from the Treasurer's office contact the ASC about this matter?

Mr Cameron—No.

Senator CONROY—Encouraging you to prosecute Mr Kennett?

Mr Cameron—The answer is no.

Mr LEO McLEAY—Did anyone contact you about this matter and ask you to expedite it, to put out a press release, to give it a bit of a hurry-up?

Mr Cameron—No.

Mr LEO McLEAY—You are sure of that?

Mr Cameron—Absolutely, because the commission took the view that the matter was on the public record, and once we found no breach of the Corporations Law involved in these matters the commission believed that it had a role to make it clear that, as far as the commission was concerned, there was nothing for it to do. In a sense it is a question of expectations having perhaps been created in some quarters and feeling the need to hose them down. It just seemed like this was a clear case of where the normal policy ought to be followed.

Senator GIBSON—I would have thought the public would be expecting a response from the commission.

Mr Cameron—I think we are being criticised for having publicised it at the same time as we—

Mr LEO McLEAY—I think Mr Brumby's problem was that he heard about it on the news before he got your mail. The mail may well have been sent—

Senator CONROY—It was a fax. I think you should be able to clarify it very simply for us if you look at the date and time of the letter being faxed to Mr Brumby's office. Obviously, it was before 1 o'clock on the given day if it was on the ABC radio, because the press release went out before one. Then you would easily be able to ascertain when the letter was faxed. I am not suggesting that it went before.

Mr LEO McLEAY—You are saying Mr Brumby dry gulched you by putting all this out publicly and it might be fair to dry gulch him back by saying, 'Look, you got yours by press release; here's ours by press release.' The naughty thing is putting the press release out before you send the letter. That is particularly naughty and that is a naughtiness that politicians should not even do, let alone public servants.

Senator CONROY—Because they phoned you first.

Mr Cameron—I have no reason to think that he did that.

Mr LEO McLEAY—Can you ascertain for us whether this got on the news before the letter was sent? That is really the crux of this.

Mr Cameron—I can certainly try to find out. As I say, my copy of the letter is not a copy of the physical thing that was sent. There is no evidence on it of dispatch, but I am happy to make inquiries and see when they were respectively issued.

CHAIR—Have we finished on that issue? Can I ask your view on the move to a single responsible entity in terms of collective investments and the protection that affords investors compared with the current regime?

Mr Cameron—Yes. I think the commission takes the view that the government is entitled to take that policy decision. I sought to explain earlier that I think the decision is based on earlier reports. There is a mix of measures that will now be taken to protect investors, including compliance committees, independent directors, auditors of the compliance systems and approval of the compliance plan by the commission, none of which by themselves should be taken as the commission replacing trustees. The government has opted for that and the commission believes that was a realistic, sensible choice that was open to them.

It may sound like a funny way of putting it, but the reason I put it that way is that I do not think the commission ought responsibly be the policy maker in this area. It is the government's role to decide which way to go. The commission has a role in effect of saying so, if we think that is not going to work from a regulatory or an investor protection point of view, but I do not believe that is the case. I think it will work and therefore it will be our job if the legislation is passed to ensure that that is delivered on.

Senator GIBSON—A custodian is not excluded, is it?

Mr Cameron—Custodians are not excluded. What is required by the announcement is that the assets be held separately from those of other undertakings which a manager is responsible for from the manager's own assets. Now, in many cases that will mean that custodians will be needed to satisfy us and we will probably issue a policy to that effect quite early on as well.

But there are instances where that is not necessary or appropriate. For example, film schemes really depend on the investor being the direct investor. There has been a traditional role of a representative in those schemes. I suppose it is partly because you could divide this industry in at least three ways. There is a top end of the market, a middle end of the market and a bottom of the market. At the top end of the market, 50 per cent of the retail funds under management in this country are managed by banks or subsidiaries of banks. Their assets are greater and more significant in many cases than those of the trustees who presently are responsible. So to the extent that the banks are involved for a large part of the business, then their assets should be on the line anyway.

At the bottom end of the market, the trustee company industry has basically abandoned that for good commercial reasons going back some time now. Agricultural schemes in large part are not looked after by members of the Trustee Corporations Association. They are looked after by small nominee companies or a couple of specialist agricultural groups that operate for that purpose and look after quite a few funds between them. But they are not trustee corporations and do not have the standard of assumed protections of trustee corporations. So there will be an issue to the future regulatory protections in that area.

Now in the middle group are the smaller fund managers that are not associated with banks or the independent fund managers that are not associated with banks. Perhaps I should say they will probably come up with some arrangements that include custodians that either are the traditional trustees or the new entrants, like State Street and so on. They will come into that market and it will be a competitive market at a lower price than the traditional trustee role that has been performed.

Senator COONEY—I suppose that trustees say, 'This is untested. You are leaping into the dark.' There have been a couple of disasters with trustee companies, but overall it has served the system well, and they are in fact independent. You have to make a second judgment that gives the person who might lose the potential of suing two different sources of funds—this divided responsibility and all those arguments. The only evidence against that would be the fact that it has run well in America; would that be a fair point?

Mr Cameron—Not really. The aim of the exercise is to ensure that there is somebody who clearly is responsible, and as an investor you can make your decision about whether you are happy with that, whether you trust that person. At the moment, the role of the trustee is defined in the law as including supervising, in effect, the behaviour of the manager, but it is very difficult to see what that means. In the Aust-Wide case and

so on, that has not apparently prevented investments being made that were outside the terms of the trust and which turned out to be unauthorised. So they are in that bad area, if you like.

Senator COONEY—But there are only a couple of examples of that, aren't there?

Mr Cameron—Yes, there are a couple but they are quite large examples. If you ask, 'What do you lose by having the trustee in there?' you will see that the decision making is split in various ways, the responsibility is split, and presumably it is thought to introduce inefficiencies, and so on. As I say, it was not the commission's recommendation as such; it came out of the Companies and Securities Advisory Committee and the Law Reform Commission report and it was adopted by Wallis.

Senator COONEY—I understand all of that. Following what Senator Gibson has said, it is right for us to be concerned about the resources that the system would have to supervise a situation if you do not have trustees.

Mr Cameron—Our increased responsibilities will be to assess the compliance plans when they are lodged, and that will be a resource-intensive process in the first year or so, when all of the collective investment undertakings will have to have their plans approved. I hope we will be able to do so on some generic basis so that, for example, all the funds that are administered by BT or Macquarie, or whatever, will presumably be able to come forward with a reasonably comprehensive overall plan, rather than individual plans. I hope the legislation will permit us to do that.

We have estimated that, once we get over that hump, the increased resources we will need will be no more than 50 people. At the rates that we pay people, that is a minute fraction of the amount of money that is presently paid to trustees for their overall role in this industry. There will be other costs for the industry—the cost of audit, the cost of compliance committees, and they have to locate independent directors and so on. Even with all of that, it is hard to see that it will cost as much as what the trustee fees presently are.

Senator COONEY—Is it right for the community to expect that people who work for the ASC ought to be the Gandhis of the profession?

Mr Cameron—No. Senator Gibson in another role—I have talked about this from time to time. I do not think it is fair to expect that the staff of the ASC should be Gandhis. As our numbers drop, it is the policy of the commission to have fewer, better paid, better skilled and better supported and assisted people, and that is what we are moving to over the current financial year and the next financial year.

Senator CONROY—I want to get clear in my mind the definition or issue that we were talking about before about what is improper behaviour by a broker and what is not.

Guandong is the one I am particularly interested in understanding where the line is. Obviously you have had a look at that, or you are aware of that, and you have formed an opinion that it is within the bounds of propriety. As to issuing a statement saying, 'We're not taking any more' or 'We're oversubscribed' and then subsequently deciding to put somebody in, where does that fall? I am just trying to understand where that falls so I have it clear in my mind. Have I made myself clear, or do you want me to expand on that?

Mr Cameron—I think we might have to go into private session.

Mr Longo—It would take it much further usefully without being inextricably linked with another matter.

Mr Cameron—I know we have to do that anyway—

Senator CONROY—I am happy to go into private session.

Mr Cameron—You must remind me to come back to that, though.

CHAIR—Are there any other questions?

Senator CONROY—Yes. On 3 April 1997—

Mr Cameron—I do not think there is anybody else here. These people are my staff, and that person is from the Treasury.

Senator CONROY—It is a public hearing though; this goes into the transcript.

Mr Cameron—I understand that. We have to go into private session, but I need to answer your question and I cannot do it in public session.

Senator CONROY—The Chair has indicated that we would be going into private session.

CHAIR—When we have completed the public examination.

Mr Cameron—It will only take a moment. There is a particular aspect I would like to respond to while it is fresh in my mind.

Senator CONROY—I promise you I will not forget.

Senator COONEY—I am going to go; I do not believe in private sessions.

Senator CONROY—I am with you but for the sake of information.

Senator COONEY—I will come back because I want to ask you about the staff again.

Evidence was then taken in camera, but later resumed in public—

Senator CONROY—Would you take on notice and supply me, please, preferably before estimates—I am just looking at your pie chart on page 55 and your structure on page 56—a breakdown of your staffing, into those divisions, going back over three or four years so that I am able to make a comparison between staffing levels in different divisions.

Senator COONEY—I just saw that Mr Robinson has left you. Did you give him a proper send-off?

Mr Cameron—Yes, we did. He is now the head of the Victorian Legal Practice Board—the Chief Executive of that.

Mr LEO McLEAY—I just want to finish the Trevor Sykes quote, Mr Chairman. Trevor Sykes said:

If all the lawyers in Australia dropped dead tomorrow, the delivery of justice would be greatly improved.

CHAIR—As we have concluded all the questions, I thank you, Mr Cameron, and your colleagues for your patience this afternoon. The meeting has certainly gone on about an hour longer than we intended when we programmed it, so you have been very patient in meeting the questions that have been put to you. The hearings are a valuable part of our committee's work and we look forward to continuing regular contact with the commission.

Mr LEO McLEAY—I want to record my thanks to James for the paper he prepared on the Estate Mortgage Unlisted Property Trust.

Committee adjourned at 6.02 p.m.