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JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES

Reference: Statutory oversight of Australian Securities and Investments Commission

TUESDAY, 13 SEPTEMBER 2005

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JOINT STATUTORY COMMITTEE ON

CORPORATIONS AND FINANCIAL SERVICES

Tuesday, 13 September 2005

Members: Senator Chapman *(Chairman)*, Ms Burke *(Deputy Chair)*, Senators Brandis, Murray, Sherry and Wong and Mr Baker, Mr Bartlett, Mr Bowen and Mr McArthur

Members in attendance: Senators Brandis, Chapman, Murray, Sherry and Wong and Mr Baker, Mr Bowen and Ms Burke

Terms of reference for the inquiry:

To inquire into and report on:

Annual review of the Australian Securities and Investments Commission

WITNESSES

COLLIER, Professor Berna, Commissioner, Australian Securities and Investments Commission........... 1

COOPER, Mr Jeremy, Deputy Chairman, Australian Securities and Investments Commission 1

LUCY, Mr Jeffrey, Chairman, Australian Securities and Investments Commission.................................. 1

REDFERN, Ms Jan, Executive Director, Enforcement, Australian Securities and Investments Commission.. 1

Committee met at 7.00 pm

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

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

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

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

CHAIRMAN (Senator Chapman)—I declare open this public hearing of the Parliamentary Joint Committee on Corporations and Financial Services. Today the committee is conducting its public hearing into the Australian Securities and Investments Commission. Under section 243 of the Australian Securities and Investments Commission Act 2001, the joint committee is required to oversee the functioning of ASIC. This hearing is part of that oversight.

I welcome witnesses and other officers of ASIC to the hearing. As official witnesses, you will not be asked to give opinions on matters of policy and will be given reasonable opportunity to refer questions to your minister. You should note that the evidence given to this committee is protected by parliamentary privilege, but I remind you that the giving of false or misleading evidence to the committee may constitute a contempt of the parliament.

At about 8.30 pm the committee proposes to move in camera, if that is the wish of ASIC, in order to provide you with additional protection so that you can answer in private any questions you may feel unable to answer in public. The committee prefers that all evidence be given in public. However, if you are asked questions which you feel cannot be answered in public, please advise the committee of the reason you feel unable to answer, and the question may be deferred until the hearing convenes in private. Evidence given during that in camera session should not be disclosed outside the hearing except by order of the committee, the Senate or the House of Representatives. To eliminate any doubt, I advise you that during the in camera session you are still entitled to all of the protection provided by parliamentary privilege, with the additional protection of nonpublication of evidence. I now invite you to make an opening statement, if you wish to do so.

Mr Lucy—At tonight’s hearing, I am once again accompanied by my fellow commissioners Jeremy Cooper and Professor Berna Collier. Also, ASIC’s Director of Enforcement, Jan Redfern, will join the hearing during the questions on Vizard. Thank you for your comments in respect of a hearing in camera. At this stage, our request would be that we deal with issues in session, subject to the ability to go in camera if required.

The past financial year has been an exceptionally busy time for ASIC. We have brought wrongdoers to justice by jailing 27 individuals for more than 96 years, including HIH directors Adler, Williams and Cassidy. We have taken 40 per cent more action on reports of crime and misconduct and answered 40 per cent more inquiries on enforcement, consumer and regulatory

issues. In doing so, we have promoted stronger markets, obtained better disclosure for investors, assessed new financial markets and created more certainty for business.

In the 2004-05 year, ASIC assisted the restructure or merger of companies in transactions worth at least $A41 billion. Over the same period, ASIC has regulated over 1.4 million companies and over 4,000 financial service licensees, conducted 13.4 million data base searches, registered over 120,000 new companies, answered 780,000 telephone inquiries, approved almost 3,000 applications for relief, conducted over 700 compliance checks of financial advisers and financial product issuers, commenced 215 criminal, civil and administrative proceedings involving 300 people or companies and obtained $190 million in recoveries, costs, compensation and fines, with more than $5 million in assets frozen. ASIC also collected $531 million in revenue for the Commonwealth over the past financial year.

I would also like to take the opportunity of placing on the parliamentary record a few facts about ASIC's civil penalty proceedings against Mr Stephen Vizard. As you may know, ASIC commenced our investigation in July 2003 into certain misconduct of Vizard, after allegations were made by Mr Roy Hilliard during his committal hearing in the County Court of Victoria. As a result of our investigation, we identified improper trading in shares associated with Sausage Software, Computershare and Keycorp. Mr Vizard subsequently admitted to breaching his duties as a director of Telstra on three occasions, when he used confidential Telstra information to trade in shares in those companies. He was disqualified by the Federal Court of Australia from managing corporations for 10 years and ordered to pay a penalty of $390,000 and, in addition, pay the costs of ASIC's investigation.

When ASIC announced on 4 July that we were pursuing civil penalties against Mr Vizard, there were some suggestions in the press that we had gone soft or that we had somehow been nobbled by government. I have unequivocally rejected those suggestions. They are entirely without foundation. At that time, however, this case was before the courts and, consequently, I was constrained in my ability to discuss publicly the details of the case, including the reasons ASIC pursued civil rather than criminal charges.

Having said that, I again acknowledge that the press release that we issued at the time of laying charges did not adequately address or explain the background of the proceedings—nor did it explain the separate and important role of the Commonwealth Director of Public Prosecutions. ASIC's job as a corporate regulator is to investigate matters vigorously and, when they involve potential criminal misconduct, refer them to the DPP as the independent Commonwealth prosecutor. In this case, criminal charges were not pursued against Mr Vizard because the DPP was not satisfied that there was admissible, substantial and reliable evidence of the offence and therefore there were not reasonable prospects of securing a conviction.

This is consistent with the DPP's published prosecution guidelines, which apply to all Commonwealth agencies. Whilst this was a decision for the DPP, it was also consistent with senior counsel advice that ASIC had independently received. At the heart of this concern was the fact that we did not have a willing, cooperative and credible witness with sufficient probative value to force this particular matter to go before a jury. Both ASIC and the DPP pursued every avenue available to secure the voluntary evidence of a key witness, Mr Greg Lay.

I will now turn to super choice. ASIC is continuing to monitor compliance with this major policy initiative. As the committee would know, we have already conducted a review of advice given in late 2004 and early 2005 by financial advisers to more than 260 people—out of a sample of over 7,000 pieces of advice—thinking of switching superannuation funds. The super-switching surveillance sought to test the readiness of advisers to give complying super-switching advice ahead of the implementation of super choice on 1 July this year. The findings highlighted some areas where licensees and advisers needed to lift their game. In particular, we identified instances of misconduct during the surveillance, some of which have already led to enforcement action. Various industry organisations, including the Financial Planning Association of Australia, have, without basis, criticised the methodology and timing of this review, perhaps because they do not like the surveillance results. The fact is, however, that some worrying patterns of misconduct were found that go beyond any fine judgment of the law as they involve cases of blatant misselling and flagrant disregard for the interests of the clients involved.

The financial planning industry need to acknowledge this and ensure that organisations adopt an appropriate culture of recognising their responsibilities to their clients—that is, the Australian public. There are many instances of companies, large and small, with approaches that are quite outstanding, but there are also those that deliberately do a material disservice to the Australian community and the industry. ASIC will not bow to the pressure from those who wish to misdirect our efforts. The industry must take their own clear steps to address the deficiencies identified in our review. Advisers are a vital part of the financial system.

Further to this, ASIC has recently started a shadow shopping survey and will in the coming months continue our focus on super choice by, firstly, investigating kickbacks and monitoring advice to employers about default funds and, secondly, monitoring any unlicensed self-managed super fund promoters and misleading advice—targeting conduct and not individuals—and taking enforcement action where appropriate. In addition, ASIC, along with the Australian Taxation Office and Treasury, have run a very successful education campaign on super choice aimed at both consumers and employers. In particular, ASIC have, along with the ATO, distributed nearly 1.5 million copies of *Super choices* in six languages. We have released an employer frequently asked questions publication, provided community sector training about super issues and published average return and fee comparisons information on our web site.

I am pleased to inform the committee that ASIC, under the leadership of Jeremy Cooper, has also played a significant role in the government's FSR refinements process, culminating in the government's refinements paper being released earlier this year. We are working to administer the legislation in a manner that balances both consumer and business interests. I believe there is strong support for the proposed finetuning that will, overall, add significantly to providing the underlying benefits to Australian consumers that the FSR reforms were designed to support.

ASIC have agreed to take the lead on eight projects arising out of the 25 refinement proposals in the government's paper. To this end, we have recently issued an example statement of advice, designed as an illustrative aid, to show industry that SOAs can be clear, concise and effective in 20 pages or less. Indeed, our example SOA is 12 pages long and shows that you do not need a long and complicated document to meet the legislative requirements. In the main, business and consumer feedback on this initiative has been positive and we are encouraging industry organisations to work with their members and advance good disclosure practices across the industry. We are an active regulator and we will remain just that. Going forward, ASIC will

continue to use all the regulatory tools available to us to maintain ongoing confidence in Australia's financial markets.

In addition to our role of enforcing the laws of the Commonwealth, ASIC must also strive to maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs and improving the efficiency and development of the economy.

To that end we have, since our last appearance: finalised our national priorities and business plans for 2005-06; circulated widely our strategic plan for community and industry comment; met face to face with over 200 business leaders; sought input from all leading industry associations about what they see as the main challenges facing their industry and the regulator, and participated in literally hundreds of presentations at industry or professional forums.

ASIC understand the fine balance in the interests of enforcing the laws of the Commonwealth, protecting Australian consumers and investors, and facilitating and improving the performance of Australian business. We understand that we must wisely regulate the broad spectrum by being vigilant, fair and consistent. We also acknowledge our responsibility to be efficient and to use the resources provided to us in the most effective manner possible.

CHAIRMAN—Thank you.

Senator WONG—I would like to go through the time frames around the Vizard investigation. You commenced investigations in July 2003. On what date was a brief first handed to the DPP?

Mr Lucy—With your permission, I would like Jan Redfern, our executive director in enforcement, to join us while we are going through the Vizard matter. I think that will provide the best opportunity for the committee to hear the details they no doubt want to go into.

CHAIRMAN—Certainly.

Senator WONG—Mr Lucy in his opening statement indicated that investigations into the Vizard matter commenced in July 2003.

Ms Redfern—Yes, 2003.

Senator WONG—When was a brief first provided to the DPP.

Ms Redfern—November 2004.

Senator WONG—And was written advice received from the DPP at that point or subsequent to that?

Ms Redfern—Subsequent to that.

Senator WONG—Can you give me the date of the subsequent advice?

Ms Redfern—There was certainly oral advice.

Senator WONG—Written advice?

Ms Redfern—There was written advice, in my recollection, certainly in May, and in June.

Senator WONG—When was the formal notification of the decision not to prosecute?

Ms Redfern—In May there was an indication from the DPP in a letter about concerns about the prosecution. And to a letter that we sent to the DPP, where we consulted with the DPP about civil penalty proceedings—about what their indication was—they responded by letter dated, I think, 29 June. But I might need to take that on notice for the exact date of that letter.

Senator WONG—That is fine. Mr Lucy, do you have any objection—I think it is your privilege to waive—to that advice of May and June 2005 being provided to the committee?

Mr Lucy—I think that we would need to have that referred to the minister because it is privileged legal advice.

Senator WONG—Why is that a matter that goes to the minister? You are a statutory agency. You are the client. The privilege is yours; it is certainly not the minister's as I understand it. But if you want to put that to me I am certainly open to being corrected on that point.

Mr Lucy—My understanding is that under advice 2.32 of the government guidelines for official witnesses matters subject to legal professional privilege are covered within what is essentially a carve-out under the scope for public interest immunity.

Senator WONG—Yes. I am asking you if you will waive privilege, and if not, why not?

Senator BRANDIS—Mr Chairman, before Mr Lucy is pressed to answer that question, he has indicated that he would like to consider the position. Given the gravity of the matter, it does not seem to me to be unreasonable for a witness in Mr Lucy's position to ask for the opportunity to consider the matter and consult whom he considers it is appropriate for him to consult in considering the matter. What in effect Mr Lucy has done is to indicate that he wants to take the question on notice. The procedure of this committee would admit him to do that as a matter of course. Given that that has been his indication I really think that is the end of the matter.

CHAIRMAN—Indeed, Senator Brandis, it is for Mr Lucy to respond to the question as he sees fit.

Senator WONG—Are you taking it on notice, Mr Lucy?

Mr Lucy—Yes, I am.

Senator WONG—Why did you indicate you required a discussion with the Treasurer about whether or not you would release this advice?

Mr Lucy—My understanding is that it is to the minister that we refer, under 2.35, and that it is the minister that makes that determination. I might have that incorrect but that is—

Senator WONG—Who was the advice given to—to ASIC or the minister?

Mr Lucy—Clearly, it was to ASIC.

Senator WONG—You are the client?

Mr Lucy—Yes, we are.

Senator WONG—So whose privilege is it to waive?

Mr Lucy—It is ours.

Senator WONG—Correct. But in determining whether or not to waive it you want to discuss it with the Treasurer?

Mr Lucy—My point was that I would like to take the question on notice so that we can consider our situation.

Senator WONG—That is what Senator Brandis indicated to you, but what you actually indicated was that you wanted to discuss it with the Treasurer—that is what I am clarifying. On what basis is it appropriate to discuss that issue with the Treasurer?

Senator BRANDIS—Senator Wong, in fairness to Mr Lucy, what Mr Lucy told the committee was that he wanted to consider the matter and that the consideration of that matter, as I understood him, may involve referring the matter to the minister. But whether or not he is going to discuss the matter with the minister no doubt is one of the things that he needs to consider, because it is as plain as day that Mr Lucy, taking your question, Senator Wong, and referring to his own guidelines, needs to collect his thoughts about what exactly is the appropriate course for him to determine the mode of answering the question he has taken on notice.

Senator WONG—Is that a question or is that a point of order?

Senator BRANDIS—I suppose it was a point of order.

Senator SHERRY—At the end of the intervention.

Ms BURKE—I am just going to clarify something: this is a hearing—it is not Senate estimates. I am just wondering if, under our standing orders, Senator Brandis is able to take a point of order. It is a new one for me.

CHAIRMAN—Yes, there is.

Ms BURKE—But he did not take a point of order. If he is going to, I want him to establish that. Otherwise we are going to be here all night.

Senator BRANDIS—You may take it that that was a point of order.

Ms BURKE—Thank you very much, but I would like it clarified at the beginning.

CHAIRMAN—If I can resolve the matter, I think Mr Lucy has made it clear that he wishes to take that question on notice, which he is entitled to do.

Senator SHERRY—A point of order, Chairman: is it not for you to determine when a point of order is taken, not Senator Brandis? He is not chairing the hearing, you are.

CHAIRMAN—No, he is not. I was willing to let Senator Brandis—

Senator BRANDIS—Mr Chairman, I submit that you accept what I said was a point of order.

CHAIRMAN—Order! I was willing to accept Senator Brandis's comment in the helpful way that he intended.

Senator SHERRY—For ASIC! He is not here as their defence lawyer.

Senator WONG—I am sure there is enough loyalty on that side of the table to manage this.

Senator BRANDIS—No, Senator Sherry, you know me well enough to know that I—

Senator SHERRY—I do know you very well.

CHAIRMAN—Order! Senator Brandis!

Senator SHERRY—I know you very well.

Senator WONG—He has an obsession with due process.

CHAIRMAN—Senator Brandis, you are not assisting the committee now. Mr Lucy has indicated he wishes to take the question on notice, as is his right to do.

Senator WONG—Can I proceed to my question?

CHAIRMAN—Yes, you can proceed with further questions.

Senator WONG—Mr Lucy, would you agree that this matter, the decision not to prosecute and the handling of the Vizard matter, rightly or wrongly, have been the subject of some public controversy?

Mr Lucy—I agree.

Senator WONG—Do you agree that the public does have a right to understand the basis on which publicly funded agencies choose not to take criminal prosecutions for these sorts of activities?

Mr Lucy—I agree that the public have a right to understand the background of the manner in which the investigation was undertaken. That is not to say that I accept, at this point, that that would include access to privileged information. I think that that is a very significant additional step. We have already placed on the record the background of our investigation and our role. I think the DPP have separately explained their role, and we are here tonight in an open forum to provide background as to whatever information you seek. But, specifically in relation to privileged information, I am taking that question on notice.

Senator WONG—I hear that you are taking it on notice. I am asking about the issues. What I am saying to you is this: this is an issue around which there has been a lot of public discussion and a lot of disquiet about ASIC's decision, rightly or wrongly. In those circumstances, do you not think it would be a good thing for people to understand the basis on which the decision was made?

Mr Lucy—Again, I think that whether or not that extends to the point of us releasing privileged advice, that is something that I am not prepared to determine tonight. I do accept that this whole issue is a matter of keen public interest.

Senator WONG—Yes, it is, and the suggestion of a cover-up has been raised publicly. I do not put that to you as a proposition I support or do not support; I am just saying it has been raised in the public arena. Do you not concede that a refusal to provide the advice on which the decision not to prosecute was based does not—

Senator BRANDIS—Mr Chairman—

Senator WONG—Can I finish my question?

Senator BRANDIS—Mr Chairman, on a point of order—

Senator WONG—I am putting a hypothetical to him.

Senator BRANDIS—I am taking a point of order.

CHAIRMAN—Senator Brandis has a point of order.

Senator WONG—You would.

Senator BRANDIS—My point of order is that what has just been said by Senator Wong misrepresents the witness's position. The witness is not refusing to provide the advice; the witness has said that he needs time to consider whether or not he will provide the advice. The suggestion that there has been a refusal is simply false.

CHAIRMAN—I will uphold the point of order as to how I heard the response from Mr Lucy. Senator Wong, would you frame your question—

Senator WONG—I think it is pretty clear to the public that the government do not want to release this advice.

CHAIRMAN—accurately in relation to responses—

Senator WONG—I have indicated that I accept the question is being taken on notice. I can ask these questions if the refusal is made—and we can have another hearing, if that is what people would prefer. What I am putting to Mr Lucy is this: if he does choose to not waive privilege, I am suggesting to him that, given that the issue of the cover-up has been raised publicly—

CHAIRMAN—That is a more appropriate framing of the question, Senator Wong.

Senator WONG—Thank you. If there is a refusal to waive privilege, given that the cover-up issue has been raised publicly, does that not raise a concern for you? Wouldn't such a refusal simply buy into the public perception, which is there, that there is a cover-up around this? I do not suggest that there has or has not been. I am suggesting that the public perception is there, and would it not be best for the advice to be released so that it could be cleared once and for all?

Mr Lucy—That is a long hypothetical. At this stage, I have not made a decision as to whether we will release it.

Senator WONG—Do you think the public have a right to see the advice?

Mr Lucy—I am not willing to answer that question at the moment. I think it is a very significant decision in any matter to release privileged information and that needs to be properly considered.

Senator WONG—It is privileged information from one publicly funded Commonwealth agency to another in relation to a matter in which the public have a keen interest and in relation to suggestions, rightly or wrongly, that there has been a cover-up. In that context, don't you think that would militate in favour of the release of the advice?

Mr Lucy—I will have regard to all that at the time I sit down and consider this position.

Senator WONG—I assume you would be quite willing to appear again before this committee in the event that you determine to release or not release it?

Mr Lucy—Yes, of course. We are willing to participate any time before this committee.

Senator WONG—Will you provide the advice to the committee on an in-camera basis?

Mr Lucy—Again, you are talking in the future subject to what decision is taken—

Senator WONG—I am asking you now.

Mr Lucy—Could you ask the question again?

Senator WONG—It is very simple. Would you provide the advice to the committee on an in-camera basis?

Mr Lucy—Now, no; I wish to take it on notice.

Senator WONG—To check with the Treasurer?

Mr Lucy—No.

Senator WONG—Have you had discussions with the Treasurer or with the Treasurer's office about the release of this advice previous to this hearing?

Mr Lucy—No.

Senator WONG—Has anyone in your office had discussions with the Treasurer or the Treasurer's office about the release of this advice prior to this hearing?

Mr Lucy—I invite any of my colleagues to speak.

Ms Redfern—No. I think the issue is that one of the trading matters is in fact statute barred, so there are not any issues in relation to that trading matter. I think probably the real area of concern is that there are two matters that are not in fact barred under the Corporations Act, and I guess we would like to review the advices to see if there is any potential prejudice to that position. I appreciate what you are saying and I am happy to answer any questions to try to improve the understanding of what the issues were, what was raised with the DPP and the considerations that we made at the time. I suggest that may be the main concern that we have at this point in time.

Senator WONG—I am not sure that is what Mr Lucy said, but I think that is a cogent response to my request. Mr Lucy, can I now go to the issue of what evidence was or was not provided by Mr Lay through ASIC's investigation. Did ASIC undertake a section 19 interview with Mr Lay?

Mr Lucy—I will ask Jan Redfern to respond.

Ms Redfern—No, we did not. Perhaps I could expand on that. We did approach Mr Lay with a section 19, and he indicated that he was happy to cooperate, and in fact did over several months through taped interviews. Draft statements were prepared. The main issue with Mr Lay was not so much about being prepared to cooperate with us and provide the necessary information we needed but rather that he was not prepared to sign a witness statement because of concerns about his own position. He indicated that for the first time when it came to the crunch in November 2004. I think it was really a period of six months, from November 2004 through to May, when we had a number of discussions with Mr Lay, his advisers and the DPP about satisfying him in relation to his own position.

Senator WONG—What were the concerns?

Ms Redfern—He raised a concern about his own position—whether he needed some sort of indemnity and whether he needed an indemnity for his firm. On a number of occasions we provided him with assurances and letters of comfort, and liaised with the DPP on issues about whether indemnity needed to be provided. But the real issue was that he seemed quite concerned

about his own position and therefore he was not prepared to expose himself by way of signing a statement.

Senator WONG—Just to recap, you originally utilised section 19—

Ms Redfern—No, we indicated we were going to use section 19. He said that was completely unnecessary.

Senator WONG—Sorry, if you would let me finish the question, Ms Redfern. In order to initiate the contact et cetera he indicated he was going to be cooperative, so you therefore did not need to utilise section 19. He then indicated in November that he was not prepared to cooperate. I presume therefore—and this has been in Mr Bugg's public statement and also Mr Cooper might have mentioned this in his public statement—that there were concerns about the lack of a signed statement from Mr Lay. At that stage, where he withdrew cooperation, was there not the option open to ASIC to utilise section 19?

Ms Redfern—We could have asked but it would not have satisfied the issue that was his concern. Just to backtrack a bit—this happens to ASIC on a number of occasions where we have a witness who might be concerned about giving evidence and exposing themselves in some way—we deal with that—

Senator WONG—My question about section 19 is not to satisfy his concerns about indemnity but for the regulator to say, in terms of this investigation: 'We're actually not going to deal with that. If you're not cooperating we're going to utilise the powers which are available to us.'

Ms Redfern—The problem is that he always said he was happy to cooperate, to provide a statement, as long as certain issues were satisfied.

Senator WONG—Which you were never able to satisfy.

Ms Redfern—No, but there were an awful lot of discussions about that and we came very close on a number of issues. Obviously a signed witness statement is far more cogent and reliable than a section 19 which is a question and answer session. What we do in those situations is try to bring a witness along and deal with the issues of concern. In this case one of the obvious mechanisms that we would employ would be an induced statement through the DPP. That was rejected on a number of occasions and particularly by May 2005. So the issue for us at that stage was what would have been the utility in May 2005 of 'section 19ing' Mr Lay in circumstances where he was not prepared to provide a signed statement, where there were real issues being raised about his credibility as a witness and where we had spoken to the DPP and they had indicated that without a signed statement from Mr Lay it would be very unlikely that charges could be laid in the matter? That was the difficulty. There really would have been no point in 'section 19ing' Mr Lay at that point.

Senator WONG—I have to say I do not understand why that is, Ms Redfern. On the one hand you say, 'He was cooperating with us; we were trying to work down the path to resolve the various indemnities being requested on his part and by him on behalf of his firm.' But at some point obviously you get to a stage where you think that, notwithstanding whatever rhetoric there

might be about ‘yeah, I want help but ...’, you have not got to an agreement. Section 19 is a procedure whereby you could have obtained evidence under oath. Is that not correct?

Ms Redfern—Yes.

Senator WONG—The evidence of Mr Lay was a critical issue in the DPP’s decision to determine its prosecution or nonprosecution. Surely it would have been appropriate to avail yourselves of those mechanisms?

Ms Redfern—It could not have been and would not have been used by the DPP as the foundation for laying a prosecution.

Senator WONG—It would have been of no assistance?

Ms Redfern—Yes. That would have been their position.

Senator WONG—Was it discussed with them?

Ms Redfern—Yes.

Senator WONG—Would you take on notice and provide to the committee—if you are able to—the dates on which any discussions between ASIC and the DPP about the use and non-utility of section 19 were had in relation to this matter?

Ms Redfern—I would have to take that on notice.

Senator WONG—I appreciate that.

Ms Redfern—Just to expand on the issue regarding section 19 and its use in cases like these, the fact of the matter is that, in most states in this country, you cannot use section 19 to lay a prosecution or get the matter to the committal stage.

Senator WONG—But it could give you an indication of what evidence might be given. Would it not also be the basis on which you could put a prior inconsistent statement to a witness if they then gave inconsistent evidence and, arguably, a basis on which you could ground a charge of perjury?

Ms Redfern—The issue, though, for the DPP, as set out in their guidelines, is that before they will lay a prosecution there has to be a reasonable prospect of a conviction and that has to be based on reliable, cogent evidence. They did not believe that they had reliable, cogent evidence. That was a real issue. I cannot speak for them, but part of their policy—which we understand—is that, when you have a key witness and that person refuses to sign a statement with all the relevant issues in terms of the oath, they have a real concern about laying a prosecution and getting to that threshold stage.

Senator WONG—I understand your evidence is that the utility of a section 19 interview—is that the phrase? Questioning?

Ms Redfern—A section 19 examination.

Senator WONG—A section 19 examination was discussed between you and an officer of the DPP. Was it discussed on more than one occasion?

Ms Redfern—We had a liaison meeting where we discussed this matter very specifically: the issues we were having with Mr Lay regarding his evidence and the concerns that he had about indemnities. One of the issues that was raised was a concern—and I think it has been subsequently confirmed by Mr Bugg—as to whether Mr Lay's evidence was reliable.

Senator WONG—This liaison meeting—is that what you called it—

Ms Redfern—Yes.

Senator WONG—in which the utility of a section 19 examination was discussed, was that before or after the notification from the DPP of the decision not to prosecute?

Ms Redfern—I think it was leading up to that.

Senator WONG—Prior to.

Ms Redfern—Evidence given in a section 19 examination can be useful in circumstances where a witness wants to be compelled to give evidence but you know, broadly speaking, what their evidence is going to be, or where a witness is not really a key witness in the prosecution. We have often used it in those cases.

Senator WONG—That is not the only basis nor is that the only intention behind the section, surely?

Ms Redfern—Not at all. In terms of prosecution and laying charges and getting to a committal stage, generally the principle of the DPP over many years has been that, if you have a key witness, they require a signed statement. Where witnesses are not key witnesses, they will proceed to lay charges with section 19s and later consider subpoenaing that witness. In situations where someone may be concerned about being seen to be cooperating with us—for instance, on issues regarding insurance—making admissions through signed statements is a concern, and in those situations we have used the section 19 route.

Senator WONG—Should I understand your evidence to be that it was indicated to you by the DPP that a section 19 examination of Mr Lay would not assist in building a case against Mr Vizard?

Ms Redfern—No, we did not seek advice on that. It was something that we discussed in an open conference, where we were discussing lots of issues—

Senator WONG—What is ASIC's view?

Ms Redfern—in relation to Mr Lay. How were we going to deal with this issue? How were we attempting to deal with the issue of giving him a degree of comfort in his own position so he

would actually sign a statement? One of the issues that we talked about was his credibility, and what further utility there would be in proceeding with Mr Lay in circumstances where he was not prepared to sign a statement.

Senator WONG—I will go back to my question: did you form a view that a section 19 examination would not be helpful in building a case against Mr Vizard?

Ms Redfern—At that stage, in relation to Mr Lay, yes.

Senator WONG—Right. Was that a view on which you took legal advice—other than your own, presumably?

Ms Redfern—The other officers who were involved in the matter are also lawyers.

Senator WONG—Within ASIC?

Ms Redfern—Yes, so I suppose there were a number of lawyers sitting together talking about an issue—

Senator WONG—Within ASIC?

Ms Redfern—Within ASIC. They were also discussing it in general terms with the DPP.

Senator WONG—And that view was confirmed by the advice or views of the DPP, who considered it would not be helpful?

Ms Redfern—When we discussed this issue the consensus was that there would not seem to be much utility, given his position. One issue raised was that we had to wonder about his reliability as a witness in those circumstances, where over a protracted period of six months the issue had been raised with him.

Senator WONG—We have a—what do we call it?—redacted statement. It is a letter. Could Mr Lucy be provided with a copy of it? I want to ask him some questions about the MOU. Before I do so, I will ask a question of Ms Redfern. Senator Murray has raised a good point. Is it still your view that a section 9 examination of Mr Lay would not be of any utility in considering any criminal charges?

Ms Redfern—Yes, mainly for the reasons I have talked about. It is also because of concerns about Mr Lay declining to provide evidence even if subpoenaed on the basis that it might incriminate him. That was probably something we would have faced in our civil penalty trial as well, if it had gone to a contentious hearing.

Senator WONG—Mr Lucy, under the memorandum of understanding between the DPP and ASIC, the decision to proceed or not proceed with a criminal prosecution is the DPP's, is that correct?

Mr Lucy—Yes, I believe that is the case.

Senator WONG—What do you mean, you believe?

Mr Lucy—Yes, I understand that is the case.

Senator WONG—Prior to getting written notification of the DPP's decision, did you discuss this case with Mr Bugg?

Mr Lucy—No, I did not.

Senator WONG—Have you ever discussed this matter with Mr Bugg?

Mr Lucy—Yes, subsequent to the charges being laid.

Senator WONG—Which charges? The civil penalty proceedings?

Mr Lucy—Yes.

Senator WONG—Did you have any concerns as to the DPP's decision to not lay any criminal charges?

Mr Lucy—No. The commission had been actively involved in a number of discussions on this matter. We had sought our own independent senior counsel advice and the advice which we received from the DPP was consistent with the advice which we had obtained ourselves.

Senator WONG—Was there a substantial difference between the advice provided by the DPP in relation to the prospects of success and the advice provided to ASIC when you sought independent advice from senior counsel?

Ms Redfern—The advice we obtained from senior counsel assumed that Mr Lay signed the statement that had been prepared.

Senator WONG—Which was provided as part of the brief.

Ms Redfern—Yes. They had concerns about a number of other issues in relation to the case. In some respects, the advice we had received from the DPP was more bullish than the advice we had received from our senior counsel.

Senator WONG—I thought the advice was that they did not want to take any criminal proceedings. Am I incorrect?

Ms Redfern—No. The advice we had received from our senior counsel did not revolve around the issue of Mr Lay; there were a number of other issues.

Senator WONG—Yes; I appreciate that. I am asking about the 'bullish' comment.

Ms Redfern—The advice we had received from senior counsel in relation to two of the matters was that they did not think there were reasonable prospects of a conviction. In the third

matter they considered that there were a number of problems but did not go as far as that. When the DPP looked at a number of those issues they did not feel quite so concerned, although they were of the view that in relation to one of the matters it was finely balanced. This was assuming that Mr Lay gave evidence.

Senator WONG—Am I correct to understand that the DPP's original advice was on the basis of the assumption that Mr Lay's statement would be signed and that he had reasonable prospects of success in relation to at least two criminal proceedings.

Ms Redfern—I thought it was one—that it was finely balanced.

Senator WONG—Were there not three matters on which he sought—

Ms Redfern—There were three. I think it was the DPP's view and counsel's view. We could understand some of these issues in relation to possession of the information on the sausage transaction—that there were some real difficulties with that case. The last transaction, which was the Keycorp transaction, was the one where the preliminary advice we had received from the DPP was that it was finely balanced.

Senator WONG—Mr Lucy, I presume you are familiar with the MOU.

Mr Lucy—Yes.

Senator WONG—Did you have cause to consider this prior to the Vizard matter becoming public?

Mr Lucy—Not specifically, no.

Senator WONG—Presumably you had read it prior to that time.

Mr Lucy—Yes.

Senator WONG—Prior to the Vizard matter, had you ever raised any concerns about the way in which the MOU allocates responsibilities between the two agencies?

Mr Lucy—No, the Commonwealth Director of Public Prosecutions and the Secretary to the Australian Government Solicitor meet during HOCOLEA meetings and at other times to ensure that the protocol established in 1992 is adhered to so that there is appropriate dialogue between the parties. That is a formal discussion and, if ASIC feels that issues exist, that provides the opportunity to put them on the table—and so too the DPP.

Senator WONG—Is it your evidence that the MOU is complied with, is followed in practice?

Mr Lucy—I think it is complied with in the spirit of how it has been established, yes.

Senator WONG—That was not the question. Is it followed in practice or is it outdated?

Mr Lucy—There are examples where it is not strictly adhered to, yes.

Senator WONG—Prior to the Vizard matter being made public, I want to know whether you had raised any concerns about the operation of the MOU or the content of the MOU, either with the DPP or with the relevant minister.

Mr Lucy—I will have to take that on notice and refer back to my notes.

Senator WONG—You cannot recall?

Mr Lucy—No.

Senator WONG—Subsequent to the Vizard matter becoming public, has this been an issue that you have discussed with Mr Bugg or with the relevant minister?

Mr Lucy—Not with the relevant minister, but we have discussed with Mr Bugg whether or not it would be appropriate to review the MOU as to whether or not it might be recast in a different format. At this stage, we have not got to the point of looking at the specifics.

Senator WONG—When have you determined to do that?

Mr Lucy—When we agreed to do that?

Senator Wong—Yes.

Mr Lucy—I would have to take that on notice as far as the exact date is concerned.

Senator WONG—Is it ASIC's view that the decision to prosecute or not prosecute ought be a matter that is retained by the DPP, is it ASIC's view that that is a matter that properly ought to be the client's—ASIC's—to determine or do you not have a view on that, Mr Lucy?

Mr Lucy—I have a view, and indeed I have expressed the view publicly. I think that the role of the DPP is important. It provides an independent check and balance. It sits alongside some of the powers that ASIC has as a regulator. Therefore I and the commission do not have anxiety to see any adjustments made to the role of the DPP.

Senator WONG—I do not think I asked if the role of the DPP was important or not important. The decision to prosecute now under the MOU, as I understand it, is the DPP's, not ASIC's.

Mr Lucy—Yes.

Senator WONG—ASIC is technically the client, I presume.

Mr Lucy—Yes.

Senator WONG—Do you say that is a decision that ought to remain with the DPP or is that a decision that you would look to be given to ASIC in your redrafting of the MOU?

Mr Lucy—My expectation is that we would not make any changes to that fundamental requirement.

Senator WONG—You do not have any concerns about that current allocation of responsibility?

Mr Lucy—No. I think that, as I said before, it is a very important check and balance. I think that we have a role to do with investigation if we do it in a robust manner. I think that for there to be an independent party that views whether or not a matter should be taken to a criminal court is appropriate.

Senator BRANDIS—I think it is important to emphasise we are only talking here about criminal proceedings—aren't we?—not civil enforcement action.

Mr Lucy—Yes, we are—correct.

Senator WONG—Is that a point of order too?

Senator BRANDIS—No, it was a question, Senator Wong. I was intervening to be helpful.

Senator WONG—As always! You will see that at page 3 there is a discussion about recognition of the MOU requiring understanding et cetera.

Mr Lucy—I am sorry; I missed that bit.

Senator WONG—At page 3, halfway down, on that letter with which you have been provided there is 'DPP and ASIC have recognised the MOU requires updating' et cetera.

Mr Lucy—That is right. I believe that is consistent with what I have said.

Senator WONG—Yes, I was not suggesting it was not. Have you determined any changes that you would envisage or would request under the redrafting of the MOU?

Mr Lucy—No, we have not got to that point.

Senator WONG—Mr Cooper, is there something that you would like to share with us?

Mr Cooper—No, it is a little bit hard to read though. As many MOUs are, it is written in a language that is not easy to follow.

Senator WONG—Perhaps you could provide us with a copy and we would be able to look it, because we have actually not been provided with one yet. Would you have any objections, Mr Lucy?

Ms Redfern—It is actually public information now. It has been tendered in cases before the court.

Senator WONG—Sorry, I have not been a party to any matter before a court involving ASIC—touch wood.

Ms Redfern—Sorry, it is a 1992 document.

Senator WONG—I am actually familiar with the history of it. There was a very interesting article that went through that.

Ms Redfern—It does require some reworking in terms of the documents that go together with it, such as the guidelines.

Senator WONG—Given it is public, you wouldn't have any objection to providing that to the committee, Mr Lucy?

Mr Lucy—Chairman, I would like to take that on notice for my own knowledge. I do not know what Ms Redfern has responded. On the basis that what she said is correct, which I am sure that it is, I would have no difficulty, but since the question is directed to me I would need to satisfy myself—

Senator WONG—Is this another matter you might want to discuss with the Treasurer, Mr Lucy?

Mr Lucy—No, I did not say that.

Senator BRANDIS—You will need to do better than that, Senator Wong. That is a Stephen Conroy question.

Senator SHERRY—That is why it is so good.

Senator WONG—This is a memorandum of understanding between the Director of Public Prosecutions and ASIC, and you do not want to give it to us. I do not understand why this is a secretive document. This is a document about the two agencies which are supposed to regulate the corporate sector.

Mr Lucy—Senator, I think I can help. I am happy to make it available.

Senator WONG—Thank you, Mr Lucy. I presume you have not got one here.

Mr Lucy—No.

Senator WONG—It has been suggested, and I am sure you would have seen some of the commentary, that the terms of the MOU and in particular the locus, the prosecutorial decision, have been reasons for the—and this is my iteration of what other people have said—ineffective outcome in the Vizard case. Would you care to give me your view on that?

Mr Lucy—I would strongly disagree with that. Indeed, I think that the community has accepted the fact that the decision that ASIC took to commence civil penalty proceedings was appropriate. It was supported by the Commonwealth Director of Public Prosecutions. I think that the community accepts that the outcome in the case was significant. So I do not accept the point that you are putting.

Senator WONG—I think the issue is whether or not the MOU, and who decides whether to prosecute or not, was—

Mr Lucy—In this particular case, as you know, it was the view indeed of both ASIC and the Commonwealth Director of Public Prosecutions not to proceed with a criminal prosecution.

Senator WONG—Can I go now to the admissions that you obtained from Mr Vizard. What were the terms of the agreement made with Mr Vizard?

Ms Redfern—I will respond to that. You have been addressing most of your questions to Mr Lucy, but—

Senator WONG—Well, he addresses his answers to the chair, so I thought that that was how we operated.

Ms Redfern—I would like to take that on board. In terms of the agreement with Mr Vizard—

Mr Lucy—Admissions—

Ms Redfern—I think that Senator Wong asked, 'What was the agreement with Mr Vizard?' and what I was saying is that—

Mr Lucy—I thought she said 'admissions'.

Ms Redfern——Sorry, did I—

Senator WONG—I am happy for you to answer it as you see fit, Ms Redfern, and I will ask another question if it does not cover the issues I would like covered.

Ms Redfern—We had served on Mr Vizard and his lawyers a draft of a statement of claim, claiming civil penalty orders. In response to that, and after discussions, Mr Vizard, through his lawyers, agreed to make admissions in relation to all of the contraventions that we sought in those proceedings. So it was not really an agreement as such, but a process whereby Mr Vizard, through his lawyers, indicated he would admit to all three breaches we alleged.

Senator WONG—What undertakings, if any, were sought by Mr Vizard or his lawyers in relation to providing those admissions?

Ms Redfern—Mr Vizard, through his lawyers, did seek undertakings in relation to criminal prosecution. We indicated to Mr Vizard, through his lawyers, that that was not within our power to give. Undertakings were sought but not given.

Senator WONG—Were there any other undertakings sought?

Ms Redfern—After it was indicated that the admissions would be given, the issue was raised about what submissions we would make at the trial. We indicated that, based on the evidence that we had and the other cases we had, the sorts of submissions we would make would be in line with the submissions we ultimately made.

Senator WONG—Was there an undertaking sought as to the penalty that you would seek?

Ms Redfern—No. They really raised two issues. They asked for us to suggest submissions about penalty and disqualification which were less than those that we actually submitted to the court, and we indicated that we thought that, based on the authority, that was appropriate. The other issue that they raised was what our view would be if Mr Vizard were to make an application to the court to manage a corporation—

Senator WONG—In the future?

Ms Redfern—in the future. We said that that would be a matter he would have to put before the court, and it would have to be considered on the merits of the case. We certainly said that we were not prepared to have a situation where there were exemptions from the disqualification order. In fact, we said that that was a matter for the court, in any event.

Senator WONG—Were any other undertakings sought?

Ms Redfern—Not as far as I can recall.

Senator WONG—Were any other undertakings provided?

Ms Redfern—No, not as far as I can recall. There were quite a few discussions.

Senator WONG—So no undertakings were provided other than the submissions on penalty—an indication of what you might be seeking?

Ms Redfern—An indication of what we would submit to the court.

Senator WONG—Is there anything more?

Ms Redfern—No, apart from the request that they made in relation to the—

Senator WONG—Future disqualification?

Ms Redfern—Yes, but also they did request that we would provide some sort of undertaking or assist with the DPP. We said that that was not within our power and in any event we would not do it.

Mr Lucy—It is my understanding that they also sought that we would not reinstitute the question of any criminal proceedings in the future. We made it quite clear that, if any

information came to our attention, we would not be willing to give any undertaking that criminal action would not be taken in the future.

Senator WONG—I presumed that was covered by your evidence about—

Ms Redfern—Yes, that was what I—

Senator WONG—That was what you were referring to?

Ms Redfern—Yes.

Mr Lucy—Yes.

Ms Redfern—We made it plain to Mr Vizard and in the court that that was the position.

Senator WONG—When you had these discussions prior to or in the context of the admissions being made, did you advise Mr Vizard's lawyers of the status of Mr Lay's evidence?

Ms Redfern—No.

Ms BURKE—So you are still entertaining the thought of maybe proceeding with criminal activities—I mean criminal proceedings—into the future?

CHAIRMAN—I hope ASIC is not considering pursuing criminal activities!

Ms BURKE—Sorry, I meant criminal proceedings against Mr Vizard into the future. Have you ruled that out, or is that something that is still—

Mr Lucy—No, we have not ruled it out.

Ms Redfern—No, we have not. We have ruled it out in relation to Sausage Software, which was the first trade, simply because, under the legislation at the time, it is a bar to subsequent criminal prosecution. That is not the case with the two subsequent trades of Computershare and Keycorp. That was the position that we made known to both Mr Vizard and the court.

Ms BURKE—Are you still in active discussions with Mr Lay about what it will take for him to sign his statement?

Ms Redfern—We have been, yes.

Ms BURKE—So you have not let that go?

Ms Redfern—No, not at this stage.

Ms BURKE—But it is your evidence that you would not pursue a section 19 to overcome the lack of a signed statement?

Ms Redfern—We do not think it would be helpful. I think the issue is that, if Mr Lay were to agree to give evidence and provide an explanation about his previous reluctance that would deal with some of the issues that both we and the DPP had—and it is not beyond possibility—

Senator WONG—I think the civil penalties sought were for breach of directors' duties.

Ms Redfern—Yes, they were.

Senator WONG—There are civil penalties available for insider trading, are there not?

Ms Redfern—Not at the time that these breaches occurred. They occurred back in 2000, which I have to say made investigation of this case quite difficult.

Senator WONG—I can imagine. Also, the issue that you raised in your opening statement, Mr Lucy—and I do not want to verbal you, because I cannot recall exactly what you said, but I think you conceded that some of ASIC's public statements about this matter could have been more clearly explained. I cannot recall the wording you used, but I wonder if you could explain what you meant by that.

Mr Lucy—Yes. It is our practice that, when we lay charges, we issue a press release and do not comment further because, of course, at that stage the matter is before the court. That was our intention in this instance. As it turned out, our problem was that the crafting of our press release raised a number of questions that had not been adequately addressed, which included the role of the Commonwealth Director of Public Prosecutions and also more fully dealt with the fact that the admission that was made by Mr Vizard regarding insider trading could not be used in a criminal court. It was those deficiencies that created a very significant level of media interest. We responded quickly to the suggestion that we had been influenced by either a state or federal government or business interests in Victoria by saying that that was certainly not the case. That really is the background to that.

Senator BRANDIS—The effect of that press release was to absolutely refute any suggestion of influence?

Mr Lucy—Frankly it was not so much in the press release. The anxiety came following the release of that, and we then held the press conference, where we made some very precise and categorical statements that there had been no influence whatsoever.

Senator BRANDIS—Would you care to reiterate them now—just for the record—since this has been raised this evening?

Mr Lucy—The commission would categorically state that there has been no influence from any state or federal government or from any business interests in respect of the Vizard matter.

Senator BRANDIS—Nor any individual politician?

Mr Lucy—Nor any individual politician.

Senator BRANDIS—Any suggestion to that effect is either ignorant or dishonest?

Mr Lucy—Correct.

Senator MURRAY—Ms Redfern, the judge made some remarks about penalties and the penalties that ASIC had asked be applied. He quite plainly indicated that he felt that there should have been a stronger application from you. Have the judge's remarks caused ASIC to review the level of penalties it will ask for? Do you take the view now that the judiciary are in fact asking for these matters to be dealt with in a more aggressive way?

Ms Redfern—There are really two issues. One is the pecuniary penalty. I cannot remember his precise words, but the judge's comments in relation to the pecuniary penalty were that he may have imposed something higher than $130,000 per contravention—the maximum was $200,000—but the judge then went on to say that it would not have been substantially different. That is the first thing he said in terms of pecuniary penalty. I think on that angle we had formed the view, based on advice we took from counsel and a review of the cases, that the maximum for each contravention was $200,000 and, taking into account that this was at the serious end, something in the order of $150,000 to $170,000 might have been appropriate—some sort of discount—for the degree of cooperation. I think the judge's comments were that he would not have imposed something substantially different, so in that regard I am not sure that we were that far away from the court. I think the real area for us was on the disqualification, and I think what you say is absolutely true. We had based our view on the relevant disqualification period on previous cases that we had had, in particular—

Senator MURRAY—So you were operating to precedent, essentially?

Ms Redfern—Yes—in particular, a leading case of Justice Santo in the Adler and Williams disqualification where the judge had identified three different ranges. One of the issues—and the perceived wisdom at the time—was that disqualification orders were protective in nature. That case was in 2002, and I think since that time there has been a movement. In particular, there was an application in the OneTel case to the High Court where the High Court made some orders in relation to procedural issues and said that disqualification was punitive in nature. In fact, in the case that we had, Justice Finkelstein actually said words that we had not heard before in these judgments: that disqualification orders had a retribution role—certainly a general deterrence but also a retribution role. I guess for us the case really has provided a higher benchmark, which we are pleased about.

Senator MURRAY—And you will follow that in future?

Ms Redfern—Yes, entirely.

Senator MURRAY—Disqualification clearly has a major financial consequence attached to it which you could quantify in some circumstances; isn't that right?

Ms Redfern—Yes. From our point of view we felt it was a good precedent.

Senator SHERRY—I understand that Mr Lucy—this is not a criticism—has not provided a copy of his opening statement to the committee. Could that be done?

Mr Lucy—Yes.

Senator SHERRY—Thank you.

Senator MURRAY—I want to ask about the climate in which you operate in cases like this. Mr Lucy and Ms Redfern might want to make some comment. It appears to me that insider trading issues will often be the subject of notoriety because the nature of the offence may mean that a public figure is involved—a director of a major company or something of that sort. There was a great deal of public comment. The point is made that a lot of publicity can negatively affect a prosecution. But the initial reaction was very positive publicity for the person concerned. Major personalities in the political and business establishment immediately came out in support of Mr Vizard, apparently without regard to the gravity of the offence, and subsequently that was muted. My own reaction was that that was inappropriate because it coloured the climate and helped induce the very negative perception which I thought emerged, which is that leading figures in the community can ‘get off lightly’. This is the perception. Given those general remarks I wonder whether you could comment on ways in which the climate can be better managed, particularly by people in authority who should know better with their remarks.

Mr Lucy—You have raised an interesting point. When we issued warrants against Mr Vizard and visited his home that was probably the first—certainly the first significant—occasion where there was a high level of public interest, including from the political side as well as from the business side, and perhaps that was largely because those people gave Mr Vizard the benefit of the doubt and therefore fell against the role of the regulator in support of Mr Vizard’s position. When it subsequently became clear that we had laid charges the reaction was not necessarily disbelief but question as to whether there was some background to the laying of those charges and certainly anxiety in some quarters that they had been let down by Mr Vizard. Many in the community feel that his role as a director of Telstra, a major Australian public company, was a role that required the utmost dignity and responsibility as far as meeting responsibilities as a director were concerned. Many in the community felt significantly let down.

Senator MURRAY—Are there lessons that ASIC has learnt about its own management? It seems to me that, in the investigatory and possible charging environment the tone and the sort of information that ASIC releases will help manage the reaction—it could be either excessively positive or excessively negative and in both cases have bad consequences.

Mr Lucy—This is a matter we are looking at very closely. We must be a model litigant. Therefore when, for example, we issue a warrant we typically do not publicise that. We do not put on the public record, unless there are specific reasons that support it, that we have issued warrants, again to preserve the independence of the parties which we are investigating. Again, when we serve documents in a court or issue proceedings, we issue a statement and do not further participate in public discussion. Whether or not we need to review that is something which we are currently considering, and that is before us.

Senator MURRAY—Would it also be a subject for potential inclusion in an MOU—namely, the nature of the publicity that you would initiate as a regulator and that DPP might initiate in responding to public interest?

Mr Lucy—Clearly. Of course that is only dealing with criminal. Anything outside criminal, which is civil, is a matter for us, and we do not need to have any regard to the views of the DPP.

You are quite right: on any matter that is before the court that is brought by the DPP on our behalf, we need to have a better and fuller understanding as to the communication issues.

Senator MURRAY—Do you have anything to add, Ms Redfern?

Ms Redfern—Only that I agree with you, Senator Murray. We are in a difficult position when we commence proceedings, because we do not wish to be seen to be pre-empting any court decision. By the same token, I agree entirely that, in this case, in circumstances where Mr Vizard had made admissions, if we had commenced proceedings and he had defended those proceedings and if we were still in court in 2008, it might have been a different position. But I think the problem was that many people did not understand the circumstances where Mr Vizard had made admissions to these particular things. In those circumstances, it became very difficult for us. While the matter was before the court we took a minimalist approach, but I concede that we should have been more expansive—because of those very issues.

Senator MURRAY—Is there a danger that someone who is astute and well advised may manipulate the public furore in such a way as to enable the question of getting a fair trial to be raised—and effectively engineering their own escape? Allegations were made about the spinning that went on surrounding this case.

Mr Lucy—ASIC would have no expectation that a court would be influenced by any spin or media commentary. However, there is no doubt that the public opinion is clearly influenced by the media.

Senator MURRAY—But in a criminal jury trial it may be telling, of course.

Ms Redfern—In a criminal jury trial, that is absolutely right. The issue for us is that in those trials we have to be very careful about public comments that we make. In current trials that we have, web site judgments have been taken down on particular issues where a matter is before the jury. That was the application that Mr Adler made before his criminal trial.

Senator MURRAY—I cannot conceive of how it could be done. Will this matter that we are discussing be a matter that you will raise with Treasury to see if there are any legal methods by which such matters could be better controlled to avoid trials being prejudiced one way or the other?

Mr Lucy—We may well refer to Treasury. At this stage we do not anticipate that we will. In the internal review we have looked very carefully at the whole issue of sub judice and where that might take us.

Senator MURRAY—But you do not exclude it as something to consider?

Mr Lucy—No. I think that indeed we should include the Treasury and perhaps the Attorney-General's office. We need to look at this fully. We need to look at where we can push the envelope. We have got a policy statement, policy No. 47, which sets out our current approach to communication in these sorts of issues, and we are reviewing that now.

Senator MURRAY—You were frowning, Ms Redfern. Didn't you agree?

Ms Redfern—I am sorry—only to the extent of the criminal jurisdiction area. I think it has got broader implications where we have seen other trials aborted because of issues about public disclosure or issues where a juror has, for instance, done some of their own research and the trial has been aborted. And I think that it has got wider implications in the criminal context. But some of the issues that we have been talking about are in the civil context. I think it is a far harder call than a criminal trial and with a criminal process.

Senator MURRAY—But you do accept the point that well-heeled, well-resourced, well-advised and experienced people can engineer an environment which is to their advantage?

Mr Lucy—People and companies.

Senator MURRAY—Yes.

Ms Redfern—It could be possible. We have not experienced it in recent times in a criminal trial.

Senator MURRAY—There was an allegation I have seen made about this trial.

Ms Redfern—Yes.

Senator MURRAY—There was a perception arising out of this case that the law concerning breaches of directors' duties, insider trading and good corporate governance in this area has not always been well drafted, is difficult to apply and regulate and is ineffective. I stress that that is a perception. The only matters the committee are conscious of is in the CAMAC report into insider training dated November 2003, for which there has been no government response yet but where the evidence is that they are cautious about the matter. Secondly, of course, unless there are others my colleagues are aware of, there are the remarks made in the DPP letter, which has been provided to you, on page 3 in the item headed 'Whether the DPP would recommend any amendments to the Corporations Act in order to remove obstacles to just prosecutions', in which they refer to three areas of law reform. The other matter, of course, is the remarks of the judge about penalties, which we have already covered. Could I ask you on notice, unless you have a ready answer, to take a look at the CAMAC report, take a look at the DPP's remarks, integrate it with other things you know and give the committee a view as to whether there are any areas in the law covering directors' duties, insider trading, penalties and even corporate governance matters which, in your opinion, could be brushed up or improved arising out of the circumstances of this case?

Mr Lucy—We will take that on notice and give it the consideration that you ask.

Senator MURRAY—Thank you.

Senator WONG—We would be genuinely interested in your view on this, Mr Lucy—

Mr Lucy—I do understand that.

Senator WONG—given the role this committee has had in terms of the corporate law reform program.

Mr Lucy—I fully respect your interest.

Senator BRANDIS—Ms Redfern, I want to pursue a bit further with you a topic covered by Senator Murray—that is, the civil penalties sought before Justice Finkelstein against Mr Vizard. These were negotiated penalties in effect, were they?

Ms Redfern—No. We take the view that we cannot negotiate penalties and that the question of penalties and disqualification are matter for the court.

Senator BRANDIS—So there wasn't a joint submission from you and Mr Vizard?

Ms Redfern—No.

Senator BRANDIS—You simply sought penalties that you thought were appropriate given the tariff?

Ms Redfern—Yes.

Senator BRANDIS—Your evidence, as I understood it, was that having regard to the penalty principles that had been established by prior cases—I think you mentioned a decision of Justice Santo and the High Court in OneTel—you were satisfied that the penalties you were seeking, judged against the established tariff or benchmark for penalties in like cases, were appropriately severe?

Ms Redfern—Yes, we did.

Senator BRANDIS—And your evidence, as I understood, was that Justice Finkelstein quite advertently and openly in his reasons for judgment declared that he would have regard to a different and harsher principle—the retributive principle—and thereby expressed himself of the view, having regard to that new and different principle, that the penalties could have been higher and had he had a freer hand he would have imposed higher penalties?

Ms Redfern—In relation to the disqualification, he ultimately formed a view in a way that the disqualification had a punitive effect and felt completely free to do what he did and doubled the penalty. He had indicated in his judgment that he felt the guidance we had provided on the pecuniary penalty of $130,000 was a little too low and that he would have imposed a higher penalty, but his words were not substantially different.

Senator BRANDIS—I think the point has been somewhat missed in the public discussion and in the financial press that you have now made—and it is an important point—that Justice Finkelstein, in arriving at that ultimate conclusion, in fact changed the tariff, or changed the principles by reference to which the tariff was assessed. That is what you are telling us.

Ms Redfern—The High Court decision in Rich was about procedural issues—about whether Mr Rich could be putting on evidence or required to give discovery. So it was about procedural issues. As part of that, the High Court basically found that disqualification of itself was punitive in nature. There were many comments in that High Court decision about general deterrents and the potential retributive effect of that. That had not been adopted by any other court as part of a

sentencing because it was a different issue. When we looked at some of the other cases that we had, Mr Elliott was disqualified for four years, Mr Williams was disqualified for 10 years, but a fully contested trial. Basically we did the comparisons, and that is where we came to—always a matter for the court, and we made that very plain.

Senator BRANDIS—Of course. But to put it in the vernacular, if you will forgive me for doing so, contrary to the public perception that has been promoted by some—that ASIC went easy on Mr Vizard—you are telling us ASIC actually went hard on Mr Vizard in accordance with the sentencing principles as they were then understood.

Ms Redfern—The principles as we understood them. As I said, we were actually very happy with the judgment. We thought it was a very solid judgment and provides us with great opportunity in the future.

Senator WONG—You would concede, would you not, though, Ms Redfern, that the penalty you sought was half what was imposed in terms of the years of disqualification.

Ms Redfern—Yes; that is in fact what happened.

Senator WONG—The judge imposed twice the amount that was submitted by ASIC.

Ms Redfern—Yes, that's true.

Senator WONG—As I understand your evidence, that was on the basis of your professional judgment about sentencing principles or precedents that have been applied to that, but that is a very substantial difference between what the corporate regulator is proposing and what the judge and court imposes. Is that not right?

Ms Redfern—That is true, but the issue was that is what we determined based on precedent and based on counsel advice at the time.

Mr Cooper—There is a slight gloss. We actually told the court two ranges. One was five years, but not taking into account the discount for him having made all these admissions. Don't forget—the only reason we're in court this year rather than, I think, the figure of 2008 that has been proffered was that he made admissions. So we told the court in the absence of those admissions in fact it ought to have been 10 t o12 years but the court obviously decided not to take into account so much the admission and decided on 10. So it is not quite correct to say that we fronted up and just said five.

Senator WONG—If it takes eight years for an arguable breach of director's duties to proceed to charge and prosecution and trial—not prosecution at this stage, but trial and determination—are there not changes that need to be looked at?

Mr Cooper—I think there is one important point to make about this case. Although it has been a very testing case in many ways, not to jump in and rewrite the entire criminal justice system just on the basis of one case.

Senator WONG—That is a good answer, Mr Cooper, but it doesn't really answer the question about other matters. But anyway, I think Mr Lucy took that on notice before.

CHAIRMAN—Could I ask some questions with regard to Lifecare Services? As I understand this case, back in 2002 there were four companies incorporated—these being Mount Warren Park, Morrowfield, Carrara Nominees and Hillcrest Nominees, with Mr Paul Rodda and Ms Marie Maher, wife of the notorious Brian Maher, as directors. The apparent purpose of these companies was to develop four aged care projects in South East Queensland. I think the Morayfield project was subsequently changed to a duplex housing project. For that purpose a builder was engaged to undertake all four developments and also an agreement was reached with Lifecare Services Australia both to provide project management services and also to operate the aged care business when the facilities were completed.

It is also my understanding that a couple of years later, in early 2004, there was an apparent falling out between the builder and the two directors of those four companies, as a result of which all construction work ceased. There was a complete breakdown in that relationship and, as a consequence, the interests of both Lifecare Services Australia and the investors—some $7.1 million having been raised from 69 investors by Mr Rodda and Mrs Maher—were in severe jeopardy. As a result of that, two of the directors of Lifecare Services Australia, Mr Francis and Mr Stoyakavich, stepped in to replace Mr Rodda and Mrs Maher as directors of the four companies that were undertaking the development. It was then discovered that there were no funds left in the company accounts. In fact, approximately $3.8 million in trust moneys had been transferred to other entities associated with Mr Rodda and Mrs Maher.

There was then a series of meetings with investors in Brisbane and Sydney to introduce them to the new directors and to apprise them of the current position of each project. Since then attempts have been made to bring these projects to successful completion—including, as I understand it, by transferring ownership of the real estate to the investors—but the new directors regard the intervention of ASIC as potentially thwarting the desired outcome, both for investors and Lifecare Services Australia, of achieving that objective. In particular, concerns have been expressed by ASIC about the operation of the four companies subsequent to the new directors taking over and I understand that court action has been instituted. Why, as it certainly appears, is ASIC is pursuing the current directors rather than the former directors, Maher and Rodda, in regard to these matters?

Mr Cooper—As you say, the matter is before the court at the moment, on our application, against a number entities involved in this scheme, including the former promoters. So it is not quite correct to say that we are only taking action against the current operators. It is a complex matter and I will, in very general terms, just explain why ASIC is here. The fact is that the scheme is wholly illegal. It is an unregistered scheme. It is a managed investment scheme that is not registered. None of the relevant parties have licences from us to deal in financial products, which these investments are. The funds have been raised without any formal product disclosure statement whatsoever. We also believe that a number of the statements that have been made in relation to this project are misleading or deceptive.

It is harsh on the current participants that they see the regulator intervening in a way that they might think is inconsistent with their interests but we do not have discretion to ignore very serious breaches of the law. Ultimately, we are acting in the interests of the investors—although

they do not realise it—in the sense that we are seeking to place the scheme in competent hands and to rank their interests ahead of the promoters. I cannot say too much more than that except to reassure the committee that that is why we are there. We are simply doing our job.

CHAIRMAN—I understand, Ms Redfern, that you had a meeting last week with some of the directors and investors?

Ms Redfern—Yes.

CHAIRMAN—Can you give me an indication, from your point of view, as to the outcome of that meeting?

Ms Redfern—As the deputy chair says, the difficulty in this case is that the scheme is unregistered and does not have all those protections for investors. The scheme has a life of a couple of years, so there are a couple of important issues that ASIC wanted to put on the table so that not only the current operators but also investors could understand what protections they think they need, what we think they need and what the issues are. As a result of the discussion that we had with the investors, our view is that we do not want to see the operations stop. That would not be in the best interests of anybody. By the same token, we are concerned to make sure that some basic protections are there for investors such as auditing of the accounts and reporting of the moneys paid.

For instance, one of the issues that you raised was that there was a proposal to transfer the real property interest to the investors. One of the difficulties with that is that the financiers are understandably not happy about the real property interest—which is basically their security—being transferred. Ultimately we are trying to work with the investors, who are now separately represented—getting independent legal advice. We will work with the investors together with the current operators to get some agreed orders that will be effectively sanctioned by the court. It is our way of trying to regularise what is effectively an illegal scheme. From our point of view, we joined the previous operators and promoters to the proceedings, and after we resolve some of these preliminary issues we propose to continue with our investigation in relation to those operators.

CHAIRMAN—Would you accept that—at least until this stage—it appears that you have been going after the wrong people?

Ms Redfern—No. We joined all of the operators to the proceedings and had a number of discussions with the current operators as far back as July, in an attempt to resolve the matter by protecting investors but at the same time ensuring that the projects were not wound up. We want to wind the schemes up, but not the projects themselves.

CHAIRMAN—Thank you.

Senator WONG—I do not want to be difficult, but are these not matters which are the subject of some proceedings? I recall when I asked questions about Mr Vizard or other questions, Mr Lucy indicated—and I think appropriately—that they would have to await the resolution of those proceedings. Why are we going into these issues now, in relation to these matters?

Ms Redfern—Because, from our point of view, these matters have been on the record and have been discussed with the court. We anticipate that proposals will be put before the court for consideration about regularising these schemes in a way.

CHAIRMAN—Is it your view that the new directors have been doing their best to protect the investors?

Ms Redfern—I would not go so far as to say that. We have not formed a view on that issue. The key issue for us is: what is the scheme and how can we regularise it and make sure that there are certain checks and balances in place?

CHAIRMAN—One concern that has been raised with me—and as you mentioned a moment ago the issue has been in the public domain—is about information published on the ASIC web site and by a C*ourier-Mail* journalist Anthony Marx. It is had a number of detrimental ramifications for Lifecare Services and for the directors in particular. It concerns the involvement of Griffith University with Lifecare Services, conducting a three-year on-premises research study. Claims were made that the person-centred care approach has been terminated; that Alzheimer's Australia Gold Coast withdrew from the memorandum of understanding which was to transfer their day-care program from Arundel to Lifecare Services Australia's new Carrara venture community; that the potential sources of finance for the Mount Warren project were withdrawn from discussions due to ASIC's allegations, threats of wind-up allegations in the Supreme Court and insolvency claims; and that, because people were unsure of the impact of the ASIC action, there could be detrimental consequences in terms of the Department of Health and Ageing's bed approvals round for Carrara, Hillcrest and Mount Warren aged care sites.

Ms Redfern—I cannot speak about the first things you were talking about, but I can certainly speak about the financing position. I know that the financing position was really caused not so much from ASIC's action but because of the transfer of the real property interest, which was the underlying security. That was really one of the issues. I am confident that, with the advisers now independently advised, these things can be resolved.

CHAIRMAN—So you think there will be a satisfactory outcome?

Ms Redfern—I do. It is hard to predict these things, but our stated position—and we spent a lot of time talking with the investors so that they understand the position—is that we do not want to cause difficulties for the project itself but simply have to make sure that the schemes, which are illegal, are regularised in some way that gives the investors protection. Investors may say now, 'We are happy for these things to proceed,' but the issue for us is that, in two years time, if there are problems they would be entitled to complain.

CHAIRMAN—One of the claims made by the new directors is that ASIC has continually ignored numerous offers to meet with them to discuss and try and resolve these issues.

Ms Redfern—That is not true.

CHAIRMAN—So you would refute that claim?

Ms Redfern—Yes.

Senator SHERRY—Ms Redfern, I understand that you have become actively and directly involved in this matter in recent weeks.

Ms Redfern—Yes, I have.

Senator SHERRY—I acknowledge that. I want to go to the issue of the two former directors. I understand there is an allegation that $3.8 million was transferred from this illegal trust fund that was established.

Ms Redfern—That is the allegation.

Senator SHERRY—Have the two former directors been interviewed about this matter?

Ms Redfern—I cannot tell you the detail of the operation, because I do not know it, but we do have an independent investigation in relation to those particular issues. There are two aspects to the case: the civil proceedings to regularise and make sure investors have what they need to know; and there is another investigation in relation to the former operators.

Mr Lucy—Which means we are ready for them.

Senator SHERRY—I understand how far we can go. I am trying to establish the basic fact of whether the two original operators have been interviewed. It does not seem to me that that is creating any particular problem for proceedings.

Mr Lucy—I cannot tell you because I do not know the answer, but I can say that that is the subject of a current investigation and that it certainly formed part of our initial investigation.

Senator SHERRY—I notice that Mr Cooper is leaning forward. Is he able to inform us on that?

Mr Cooper—No, I was going to say very much the same thing. When we are approaching what could potentially be a criminal investigation, even discussing who we have spoken to and who we have not spoken to is potentially getting us into territory we should not be in.

Senator SHERRY—I would not have thought that being able to tell me whether or not the two former directors had been interviewed or not, as a matter of fact, is a particular problem.

Ms Redfern—I do not know the detail.

Mr Lucy—Perhaps we could take it on notice and find out whether or not that is the case and, also having regard to the circumstances of the case, if we are able to respond we will.

Senator SHERRY—The reason I ask is that it struck me that an enormous amount of work is going on—and I acknowledge the role that Ms Redfern, in particular, has played—to try and come to a practical conclusion on this matter for the investors. I am interested to know to some extent what is happening in respect of investigating the two directors who have resigned. What is happening to pursue them?

Ms Redfern—They have been joined to these proceedings. There are some complications when you have current civil proceedings and a criminal investigative process so, from our point of view, it is our desire to try and resolve these matters as quickly as possible.

Senator SHERRY—You say 'criminal investigation'. Has this matter been referred to the local police in Queensland?

Ms Redfern—No.

Senator SHERRY—Why is that?

Ms Redfern—Because we are proposing to undertake the investigation. We could do, but—

Senator SHERRY—I am just interested in how it is being handled.

CHAIRMAN—Do you have any information as to whether the directors of Lifecare Services Australia—who are now also the directors of the four companies—had any knowledge that the four companies that were originally established by Maher and Rodda were in fact illegal schemes?

Ms Redfern—We do not know that one way or the other.

Senator MURRAY—I want to follow up on that matter, but with fewer specifics to the circumstances. In opening my remarks, I want to again compliment ASIC because of my observation of increased policing and regulation of phoenix company activities. You will see the link I am going to make shortly. When you are dealing with phoenix companies, property scams and issues such as we have just been discussing, it seems to me that ASIC is insufficiently assisted by insolvency law. Insolvency law, if it were improved, would allow people to rescue—or allow for the easier continuation of—an enterprise or investment, whilst whoever is the scammer, the crook or whatever is dealt with.

My question arises from the conclusions the committee came to in its insolvency report. We still do not have a response from the government on that report. Bear in mind that, when you go after people in the way you have done in this case, a consequence can be that an investment that people made in good faith may be put at risk, an enterprise may be put at risk or people could lose a great deal of money. They would be assisted if insolvency law were improved along the lines the committee proposed. It would assist ASIC in its management of these issues. With that very long introduction, my question is: are you putting any pressure on Treasury to get going in that area of insolvency and to respond to the views of the committee?

Prof. Collier—We have been in constant dialogue with Treasury in relation to insolvency law reforms. We have a dedicated insolvency unit in ASIC, and of course our enforcement people also have specific insolvency expertise. It is my understanding that the government will be handing down insolvency law reforms sometime this year, on a date that I do not know.

Senator MURRAY—Do you accept the link I make: that that is the flip side of protecting people who are exposed to risk because you are properly pursuing people who have conducted scams?

Prof. Collier—I think sometimes there may be a link, but in cases where there are illegal schemes, money can be frittered away. In that respect, insolvency laws may be of little assistance. Insolvency laws may be of limited assistance. For example, when money in illegal schemes is sent offshore or is spent inappropriately and there is no money left, insolvency laws may not be of any assistance in recovering funds for investors in such situations.

Senator MURRAY—As you know, the committee's recommendations were designed to ensure that enterprises or entities that can be rescued will be.

Prof. Collier—Yes.

Senator MURRAY—It seems that this particular case was less easy than it might have been if the committee's recommendations had been in place. Maybe that is not so.

Ms Redfern—No, I think it is a slightly different issue. I think the problem in this case was not so much one of insolvency but rather how we went about regularising something that was illegal and that did not have those protections in place. We see a lot of different illegal schemes. Some of them are at the end of the market where you may not be concerned about the current operators being fraudulent, but you are concerned because they are operating outside the framework. The framework has a whole series of protections in place.

Senator MURRAY—But there is no mechanism under present law for you to recommend the process of voluntary administration so that whilst you are dealing with directors or others who may have transgressed the law the enterprise can be maintained.

Prof. Collier—We have other remedies—for example, the appointment of a receiver by the court. You are quite right when you say we do not have the ability to put an administrator into a company which, for example, is teetering on the edge of insolvency, but we can go to court and seek the appointment of a receiver—and we do.

Senator MURRAY—My understanding of a receiver is that they are not, in the normal course of affairs, what you would describe as a business manager, somebody who will maintain an enterprise. They are people who will wind up an enterprise. My point is that we want the thing to be maintained.

Prof. Collier—That is not the case. A receiver appointed by the court is an officer of the court. A receiver is there in such a case to implement the orders of the court. That may be to regularise the scheme—for example, to collect money or to administer the affairs of the corporation. Indeed, people who are appointed as receivers would invariably be appointed as administrators. They would usually be insolvency practitioners employed by accounting firms.

Mr Cooper—By way of example, Channel 7 was in receivership for many years during the 1990s as part of the Quintex administration. Also during the 90s many of the large Queensland resorts, hotel properties, Bond University, Mirage resorts and so on, were in receivership and were being actively managed by receivers and managers.

Senator MURRAY—But my concern is not where there is a major enterprise of that size; my concern is where they are small enterprises, operations and investment groups. It seems to me it

is more likely in their circumstances for the process not to look after them correctly. That was one of the points of the insolvency report done by this committee.

Prof. Collier—Ms Redfern has already spoken about illegal schemes. ASIC has taken a role in closing down schemes—I guess that is a possible way of regularising them, although maybe not the best way. We have closed down 76 illegal schemes in the last financial year. That was largely at the smaller end of the market.

CHAIRMAN—Are your statutory obligations, in effect to take a legal or enforcement perspective, in conflict with the commercial reality of trying to get this project to a successful conclusion so the investors do not lose their investment?

Prof. Collier—It would depend upon the facts of the case. If it is an illegal scheme where, for example, money is leaving the country inappropriately and not being spent in accordance with the wishes or the understanding of the investors, it is appropriate for ASIC to take the initiative and seek to close the scheme down rather than try to see a project to a conclusion. There may be no project—

CHAIRMAN—I understand that, but that does not seem to be the case subsequent to the change of directors, at least.

Ms Redfern—We have sought orders that this scheme be wound down by the current operators. The scheme being wound down does not mean that the property development is being wound down. We have sought orders for the current operators to be in control and continue to operate to wind down the scheme. All we have said is, ‘A couple of other checks and balances need to be in place.’ They have taken over the previous promoter’s management fee basis, which will earn $2.4 million over the next couple of years. Nobody denies that they should have the ability to do that, but a few checks and balances need to be in place. The law is there for people to comply with.

CHAIRMAN—That is the point I was making—that you have to apply your statutory obligations. I understand that. I was wondering if there is an area here that the committee could look at.

Ms Redfern—We try to do it flexibly. As Commissioner Collier said, it depends on the circumstances of the case. If it is fraudulent going offshore, we will appoint a receiver.

Senator MURRAY—But my point is that the recommendations of this committee would improve the law, which would assist you more in that endeavour, if you are applying enough pressure on the government on your side to respond to that report and to do something about insolvency law reform.

Prof. Collier—As I said, we are in constant communication with the government and Treasury in relation to insolvency law reform in the sense that we have made our own submissions. We are awaiting the delivery of law reform, which will come when it comes.

Ms BURKE—With regard to Telstra, most of the media reports have commented on the speed with which this investigation has gotten underway. Who or what triggered the investigation that ASIC is currently undertaking?

Mr Lucy—The commission decided to commence the investigation.

Ms BURKE—On what basis?

Mr Lucy—On two instances. The first was a statement that had been reported to Mr Burgess in the press about—and I think it is well known—the reference to his mother. The second was the announcement by Telstra with regard to an expectation of reduction of earnings. Both of those events caused us to form a view that we should look at continuous disclosure issues to do with Telstra.

Ms BURKE—So it was a view that you yourself arrived at?

Mr Lucy—Yes.

Ms BURKE—It was not on the basis of the document that is doing the rounds at the moment?

Mr Lucy—That is correct.

Ms BURKE—Given the nature of this investigation and the individuals involved, will you be seeking to make inquiries of the minister and the Prime Minister with regard to this matter?

Mr Lucy—At this stage, we have been conducting our investigation for about a week. Because it is an ongoing investigation, we are significantly constrained as to what we can discuss. We have sought legal advice with regard to several areas. Again, they are subject to legal professional privilege.

Ms BURKE—Are you yourself going to be leading this investigation?

Mr Lucy—I will be fundamentally involved, yes. It will be an activity that the commission will be heavily involved with. As the chairman of ASIC, I will be primarily engaged in it.

Ms BURKE—Have you formed a view at this point in time about issues of insider trading and whether you will be pursuing those issues?

Mr Lucy—No, we have not formed that view at this time.

Ms BURKE—But it will be something you will be considering?

Mr Lucy—Yes.

Ms BURKE—Could that insider trading investigation lead to individuals who had the said document—the digital, Compaq and national broadband plan?

Mr Lucy—That is hypothetical. I just do not know where it might lead us.

Senator WONG—Mr Lucy, when you said that the commission made the decision, I infer from that that it was your decision?

Mr Lucy—In particular, Jeremy Cooper and I were together. We collectively made the decision in consultation with Berna Collier.

Senator WONG—Isn't it the case that Ms Redfern's enforcement group—I do not know what the term is—is generally where investigation decisions are made?

Mr Lucy—Yes. The formal decision to commence the investigation in that sense was undertaken through the enforcement directorate. To precipitate the inquiry within ASIC was a matter that the commission commenced. There was then a reference to our regulation directorate to look at issues and provide advice back to the commission.

Senator WONG—Sorry, where was the reference to?

Mr Lucy—Our internal regulation directorate. That in turn resulted in a reference to the enforcement directorate, and the enforcement directorate formally decided to commence the investigation.

Senator WONG—What proportion of the number of investigations ASIC undertakes are the subject of a direct decision by you, Mr Lucy, in conjunction with Mr Cooper?

Mr Lucy—I would have to come back to you on that question. But it is fair to say that, of significant areas of enforcement activity, the commission is generally heavily engaged.

Senator WONG—Are you involved in the majority of decisions to investigate, or the minority?

Mr Lucy—The minority of decisions to investigate, full stop. But where the matters are of a significant interest to ASIC we would probably be involved in the majority.

Senator WONG—Before the decision was made did anyone from any ministerial office contact you to discuss this matter?

Mr Lucy—No.

Ms BURKE—In respect of those issues, why the speed, given your general cautionary nature—which is probably wise given the areas you investigate? The media reports have, I suppose, drawn an analogy with News Corp and how long it took to move on that, but why the speed in respect of this issue?

Mr Lucy—I do not think there is any point in making any comparison. The view we took was that this was a matter that involved a substantial public company in Australia. Any issue where there is potential for the market to be uninformed needs to be responded to very quickly, and that is the reason we undertook our interest at that time.

Ms BURKE—And is Telstra being fully cooperative in your discussions at this point in time?

Mr Lucy—Yes.

Senator WONG—After the decision to investigate, were there any discussions with any ministerial officer or minister?

Mr Lucy—I spoke to Treasury and advised them what we had determined. To the best of my recollection, I do not believe that I have had any—and any other officer can join me in answering this—discussion with any minister.

Senator WONG—Or ministerial office?

Mr Lucy—No. In the last 24 hours, for example, there have been discussions of a general nature, but at the time of making decisions, no.

Senator WONG—I see. Subsequent to the decision to investigate the Telstra matter that Ms Burke brought up, what discussions have there been with either ministers or ministerial officers and yourself, Mr Cooper, Professor Collier or, to your knowledge, other officers of ASIC?

Mr Lucy—I attended a dinner last evening with a number of people, including the Treasurer, his Assistant Treasurer, his parliamentary secretary and others, in front of a group of business persons, and there was an almost off-the-cuff comment in respect of Telstra, to which I did not respond.

Senator WONG—By whom?

Mr Lucy—I honestly cannot recall. It was a general discussion. I guess the real point is whether or not there has been any attempt to influence ASIC in any manner from any political point, and categorically that is not the case.

Senator WONG—Was the dinner being held in a private or official capacity?

Mr Lucy—I was there in my capacity as Chairman of ASIC. It was a meeting with a committee that meets from time to time with the Treasurer.

Senator WONG—Apart from that, have you had any other discussions with ministers or ministers' officers regarding this matter?

Mr Lucy—No, I have not.

Senator WONG—I am happy for you to take that on notice because obviously I have asked you about other officers of ASIC.

Mr Lucy—Thank you. We will take that on notice.

Senator SHERRY—You referred to the comments allegedly made by Mr Burgess. Did you attempt to verify whether he made those comments, as distinct from what was reported in the media?

Mr Lucy—That is part of our investigation. The point that you raise is a very fair point.

Senator SHERRY—I would not want anyone hanged because of what is allegedly said according to the media.

Mr Lucy—We can understand where you are coming from.

Senator SHERRY—And are you aware of the comments by the Prime Minister in parliamentary question time about talking up the share price?

Mr Lucy—I read them.

Senator BRANDIS—On a point of order, Mr Chairman, that is a false statement. The Prime Minister did not use the expression 'talking up the share price'.

Senator WONG—It was: 'talking up the interests of the company'.

Senator BRANDIS—He used the expression 'talking up the interests of the company', which is quite a different thing.

Senator SHERRY—Mr Lucy, have you checked to verify what the Prime Minister said in relation to this matter in question time?

Mr Lucy—All matters to do with this investigation are before us. We are looking at all areas, and at this stage we cannot comment any further.

Senator WONG—Do I infer from that that the answer given by the Prime Minister is a matter that is before you?

Mr Lucy—Any matter that has been mentioned publicly in respect of this Telstra issue we will consider.

Senator SHERRY—Including this matter?

Mr Lucy—Yes, including this matter.

CHAIRMAN—Are there any further questions?

Senator SHERRY—Mr Chairman, I have a lot of questions on other matters. Mr Lucy kindly has gone into a number of important issues in his opening statement, which I do not think we will be able to cover tonight. Is it possible to organise another hearing to cover those other matters?

CHAIRMAN—I am sure we can find a mutually convenient time.

Mr Lucy—Mr Chairman, as a general statement, any assistance that your members can provide by letting us know in advance the sorts of issues they have an interest in helps us enormously to be able to provide direct advice, if that is acceptable, or otherwise to be prepared for questions in this forum.

Senator SHERRY—I have provided a list of three matters, one of which has largely been dealt with and two others that remain.

Mr Lucy—I understand that; we are certainly aware of the other two.

Senator SHERRY—But there are some other matters as well.

CHAIRMAN—We can continue until at least 9.30 tonight. I have had several exchanges of correspondence over the last 12 months or thereabouts with two parliamentary secretaries to the Treasurer in relation to a company called Lamoore Yacht Sales, which I think is based in Sydney, and the termination by NRMA Insurance of a distribution disagreement between it and Lamoore. In a letter advising it was terminating the agreement, NRMA Insurance said that the decision was largely the result of the introduction of ongoing issues around the Financial Services Reform Act and compliance costs arising from the distribution through its network. I do not dispute the right of NRMA to terminate a contract if that is within the terms of the contract, but I do think it is a bit rich for them to be blaming FSR as the reason for that termination. In the final exchange of correspondence I had with the current parliamentary secretary, Mr Pearce, he suggested that this might be a matter Lamoore should take up directly with ASIC in terms of NRMA misrepresenting their reasons for terminating the contract. What would be ASIC's response?

Mr Lucy—We would look forward to hearing from Lamoore.

Mr Cooper—One of the refinement proposals we are looking at deals with the supply chain, if you like, of insurance products from the underwriter through to other hands and what level of licensing and training are required down that chain. Your story, while I have no familiarity with the details of it, is something that has been happening within the industry. In an endeavour to free up without giving up the benefits of the FSR reform program, we are looking at perhaps loosening some of the requirements in the supply chain. That may well ameliorate that sort of situation in the future.

Senator SHERRY—Mr Lucy, in your opening statement, on page 4 under the 'Super Choice' heading, you say:

> The fact is however, that some worrying patterns of misconduct were found that go beyond any fine judgment of the law as they involve cases of blatant mis-selling and flagrant disregard for the interests of the clients involved.

In the next paragraph you say:

> But there are also those who deliberately do a material disservice to the Australian community and the industry. ASIC will not bow to pressure from those who wish to misdirect our efforts.

I must say, that is pretty strong staff. Do you want to respond to my observation that it is pretty strong stuff?

Mr Lucy—I accept that it is strong stuff. With your permission, Jeremy will respond. As I said earlier in my opening statement, Jeremy Cooper has been heavily involved in the FSR area.

Mr Cooper—This reflects some of the issues that we did uncover in the surveillance. They fell into three categories. The first was the fairly consistent failure of advisers to look at what we call the 'from fund'—that is, the fund that the client has their existing superannuation with. There was systemic failure to look at that. The second was where the switch from one fund to another actually caused detriment, so that in the process the person lost the insurance they needed or were exposed to significant fees and exit costs and so on that were not properly articulated to them. In a way, I suppose, in the implementation of a new regime you might expect to see some of that kind of conduct, although perhaps not quite on the scale we saw.

Perhaps more worrying still was the fact that we uncovered what you would call good old fashioned mis-selling of life insurance. We found cases where people who did not need it or could not afford it or both were being fairly regularly advised that they needed life insurance. The obvious impact was that the adviser received quite substantial commissions, particularly in the case of life insurance. It is typical that they receive over 100 per cent of the first year's premium by way of commission, together with other trailing commissions on top of that.

We saw a disturbing pattern where this seemed to us to be happening too often. People whose only income was social security benefits were being recommended to acquire expensive life insurance that did not seem to match their means. There were other examples, such as that of a 25-year-old labourer with no encumbrances or dependants being told that he needed a whole new set of insurance and life insurance. In the process he lost the only thing he really needed, which was disablement insurance because he was a labourer. That is the kind of stuff we saw.

Senator SHERRY—I have read the release document. Of a couple of concerns that I did have, notwithstanding what I thought were strong observations, one is that the word 'commission' did not appear in the document, as I recollect, at all. Given your comments here and the comments in that document, it seems odd that the words 'trail commission' did not appear in the document as a possible source of a problem.

Mr Cooper—It really comes down to what we are trying to do in the financial services area and, in particular, with financial planners. We are on a journey. Clearly, we are not there yet. We have taken the decision that it is in the interests of the wider community that we work on these issues and that we work collectively on them. We are close to the Financial Planning Association and other industry bodies. As opposed to the all-out attack on the financial planning industry, where we are seen as being at one end of the spectrum, we are merely pointing to the problems in the system and taking enforcement action. That is all we are doing.

Senator SHERRY—I appreciate that but it just struck me that there was not one mention of the word 'commission'. You already referred in your evidence earlier to particular examples where it is a problem. Why do you not refer in any way at all to what is clearly, from the evidence you have just given, one of the sources of the problems?

Mr Cooper—I can explain that. We were not seeking to write a book about the financial planning industry—

Senator SHERRY—I am not suggesting you were or should.

Mr Cooper—Okay. The purpose of that report was to send some messages back to the industry, not necessarily to consumers at all. That report followed a surveillance we had done on the industry late last year and very early this year to test how ready the industry was in relation to switching. It was not a complete thesis on all the problems in the industry. We were really trying to get some key messages across: 'Hey, look at the from funds; look at the benefits you might lose in doing the switch.' We also made a comment that a very high proportion of the advices were, in effect, to an in-house product. There are many other things we could have gone on and said.

Senator SHERRY—Sorry, I cannot accept what you say. I did find it quite extraordinary that there was no mention at all of the word 'commission' in that document.

Mr Cooper—We will be talking about that—soon in the press we will be getting out some other messages specifically on that subject, but this is not the place for it.

Senator SHERRY—I appreciate that. The other thing that struck me about the document, and again you have made strong statements here tonight and the document itself makes strong statements, is that there is no statistical table—numbers of people surveyed, for example, and the level and type of problems identified. It is obviously a strong general statement, but it immediately struck me: 'Where are the stats?' And I am not suggesting a thesis, to use your words, just a table of the stats that give an overview of results.

Mr Cooper—Well, you see, we do not really have results. A number of those issues are turning into enforcement matters, so we have to be very careful—

Senator SHERRY—I am going to get to that.

Mr Cooper—We have to be very careful what we say are results. That is why we were necessarily generic.

Senator SHERRY—You can produce a table of results and say: 'Matters still under active investigation,' 'Matters concluded by agreement,' or whatever, but as I recall there was not even a figure of the total number of people investigated.

Mr Cooper—We told people that we had looked at 260 separate pieces of advice.

Senator SHERRY—Yes. So how many planners did that represent, for example?

Mr Cooper—There were 19 licensees in total.

Senator SHERRY—Yes, but how many planners?

Mr Cooper—I could not specifically answer how many individual people there were within that. But we have to go back to what the report was about. It was merely trying to get a message back to the industry that there were some issues. You see, the more we crank up a report like that and go into details about how many people have done the wrong things and so on, the more we confuse consumers, if you like, about whether they should be going to financial planners or not.

Senator SHERRY—I strongly disagree with that. We will have to agree to disagree. I would have thought it was important in a document like that, where you are making tough conclusions and comments about practices that should not occur. I congratulate you on that. I have made my point about statistical analysis being needed—at least to a much greater level than you provided, which was not much. Don’t you think the failure to provide that made it easier, for example, for the financial planners association to criticise the document, because you could say, ‘It’s not representative’?

Mr Cooper—Yes; I agree with that.

Senator SHERRY—Okay. Thanks. In your opening statement, Mr Lucy, I was a little intrigued by the comment I read out earlier:

> ... were found that go beyond any fine judgment of the law as they involve cases of blatant mis-selling and flagrant disregard for the interests of the clients involved.

I take it from that that ‘blatant mis-selling and flagrant disregard of the interests of the clients’ was identified.

Mr Lucy—Yes.

Senator SHERRY—However, your expression ‘found that go beyond any fine judgment of the law’ seems to indicate to me that unfortunately there cannot be a successful prosecution or any reasonable expectation of a successful prosecution in terms of the current law of at least some instances of blatant mis-selling.

Mr Cooper—Perhaps I can explain what we were getting at there. A lot of the debate we have had with the financial planners and the industry bodies has been about fine details within the super switching rules—about whether a particular provision might require X, Y or Z. We are basically saying, ‘You can just put all that to one side.’ We are talking about things here that are fundamentally blatant and obvious. They are not about fine interpretations that might end up in the High Court. This is just pure and simple—people on unemployment benefits being told they need expensive life insurance—so you do not need all the fine judgments and section this and section that. It is very simple. People without any legal training could see that this is not right. That is what that means.

Senator SHERRY—Okay.

Mr Cooper—It is not saying that we would never be able to succeed on enforcement.

Senator SHERRY—Have you reached the conclusion that you would not be able to succeed on enforcement in some areas that you have identified as mis-selling?

Mr Cooper—Not that I am aware of, no. In some cases we have already got court orders. One of the matters we picked up here was a Western Australian example where we have already got orders in the court.

Senator SHERRY—That leads in part to my next question. You referred earlier to an example about insurance et cetera. As a consequence of this exercise, are you able to provide the committee with a case-by-case list—but not going to names—of the mis-selling and the disregard for the interests of clients that you identified? Please take it on notice.

Mr Cooper—I can take it on notice, but without prejudicing enforcement cases that we have by not mentioning names.

Senator SHERRY—I understand that.

Mr Cooper—I will take it on notice. I appreciate what you are asking for.

Senator SHERRY—That would be appreciated. You just gave us an example of a case, and that is good, but that was not in the document itself. I will not re-churn that issue—if I can use that expression—but it would be appreciated, subject to the difficulty you indicate. I would also like you to take on notice how many identified cases of mis-selling or disregard of clients' interests you have 'settled'—cases that have reached a successful conclusion, cases where you believed you had to take action and a response has occurred. I would like the details, not necessarily names but the quantum of money and the type of case. Could you take that on notice?

Mr Cooper—Yes.

Senator SHERRY—How many matters are still ongoing? Can you give me an approximate figure where discussions are still going on and the matters have not been finalised or there is at least the possibility of some further action in the courts?

Mr Cooper—I could give you this statistic: we have issues with all 19 licensees. I do not mean that we are taking enforcement action against all of them.

Senator SHERRY—No, I understand that.

Mr Cooper—I will divide them into two camps: compliance actions that are required and enforcement matters. We have issues with all of the licensees that were actually giving switching advice.

Senator SHERRY—Perhaps you could present in a summary table form the information that I have requested to be taken on notice. Before I get to a specific matter, I have a question that relates to the statement of advice, the SOA. Obviously in the investigation that was carried out, SOAs were examined?

Mr Cooper—Yes, that is the principal methodology.

Senator SHERRY—I observed your press release of Wednesday, 31 August, for example, on the refinements—I love that word 'refinements'; roll back might be another way of expressing it—on the statement of advice. I will not have time to ask what I intended to ask tonight, but were the refinements to the statement of advice referred to in this press release and the original statements of advice that are now being revised as a consequence of this ever consumer tested? Was there a focus group type study done presenting these documents to consumers to actually see whether they could read them and understand them—both the original SOAs and the now to be refined SOAs?

Mr Cooper—When you say the original SOAs, I am not quite sure what you mean. But in relation to the model that we have produced—

Senator SHERRY—The original model.

Mr Cooper—With the model we have just issued, the answer is, yes and no. I will explain what that means.

Senator SHERRY—Okay.

Mr Cooper—We have had a group of people to help us with the initial scenario—in other words, what the facts were on which we were going to write the SOA. Then we got a much wider group—financial planners, industry bodies and, significantly, the Australian Consumers Association—to give us feedback on the document. We wanted to get it out quickly. We will test it. We will get feedback from all over. All sorts of people will give us feedback on it. We have had a lot of feedback from the industry group. We thought the main thing was to get this document out quickly. It is not supposed to be a masterpiece. It is not supposed to be the be-all and end-all: 'This is the only way to do a statement of advice.' There is a view that it is probably still too long, but, again, we are on a journey here. We are driving the industry down from 80 pages to 12.

Senator SHERRY—Sorry, but the industry blame you—and the lawyers, I might say—for the original 80-page document.

Mr Cooper—Yes, I think everyone has been—

Senator SHERRY—You were involved in the original 80-page document, or whatever size the documents were; you have referred to it. You were involved in the original development of that.

Mr Cooper—No, that is something that industry came up with. That was what the lawyers and the—

Senator SHERRY—But you had an opportunity to provide guidance to industry.

Mr Cooper—Yes, I think ASIC could well have jumped into the fray earlier. The view was: 'Look, FSR is principles based. Why should the regulator have to show everybody how this is done?' That was the view that was taken. That was obviously incorrect, because the industry

created a monster, if you like. Now we have come back and said: 'Well, we'll have to spend the taxpayers' money to do this. Here's the 12-pager.'

Senator SHERRY—The industry created a monster, but when did you become aware that these monsters were emerging? I certainly observed them a year ago. Everywhere I went, people were showing me these monstrous—I think your description is appropriate—draft documents they were developing. Why didn't you intervene earlier to provide some more precise guidance about these monstrous documents that have been around for the best part of a year?

Mr Cooper—FSR started in March last year. By October, I would think, or thereabouts it became obvious that this was happening. We tried to push the 'clear, concise and effective' message, which was really what they were supposed to be. That did not work, and that is why it ended up as a refinement proposal and we decided to do the guidance.

Mr BAKER—I do not mind doing it now or next time. First of all, I would hope that, as we move forward, these 80-page documents would reduce to a commonsense approach. In response to Senator Sherry's refinements of roll-back, I would say it is actually bringing some commonsense to the situation. It is important that planners out there do not have to do 80-page reports just to shift and bring some commonsense to the superannuation environment, where people have 10, 12 or 15 different funds. At times, I think that some of the planners—the majority out there who are doing the right thing—come under undue criticism. I would be interested in some detail of how you regulate the licence dealers in the companies under the new regime as far as your investigations are concerned and in percentages of investigations that occur and the abnormalities that you detect.

Mr Cooper—Is this outside superannuation?

Mr BAKER—No, basically within the current superannuation environment, but it would also be great to have those statistics and figures outside it.

Mr Cooper—All right, we will take that one on notice.

Mr BAKER—That would be good.

Senator SHERRY—When we are discussing another hearing date, it would be useful if perhaps—and I do not want to put you under undue pressure—we could get that data for my request and the request Mr Baker has made by then. I understand the pressures you are under. There was one case I indicated on notice about Financial Services Partners.

Mr Lucy—Yes, I will answer that one.

Senator SHERRY—That involves a Mr Brendan Moore.

Mr Lucy—I can answer that very promptly. That is before the court, and because it is before the court we are not in a position to respond any further.

Senator SHERRY—Let me raise one issue on this. I know it is before the court, but ASIC put out a press release on it. That is correct, isn't it?

Mr Lucy—I cannot answer that with any surety. I expect that we did.

Senator SHERRY—I want to go to the press release. ASIC put out a press release on 1 April on this matter. That is correct?

Mr Lucy—Yes.

Senator SHERRY—I have it here.

Mr Lucy—That is when it appeared before the Magistrates Court in Hobart.

Senator SHERRY—There is some detail in this press release that I will go into next time, but can I ask you to check something. The press release went out on 1 April. The *Financial Review* article on 2 April was obviously off the back of the press release. However, one of the issues that concerns me is that the *Financial Review* article of 2 April, which was based on your press release, contains detailed information of a monetary size—specifically, $140,000—that was not in the press release. The question is: are ASIC aware or have they investigated whether or not a leak occurred from the organisation that provided to the *AFR* that monetary detail, which was not in the press release that was released the day before?

Mr Lucy—I will have to take that on notice. For example, it might have been included in the court documents.

Senator SHERRY—I understand that it was not in the court documents; I have checked.

Mr Lucy—We will have a look at it and come back to you on that.

Senator SHERRY—We heard earlier about your principle of issuing a press release but not commenting further. I will take you on your word because it is seems to me that, whatever the merit or otherwise of this prosecution, it would be extremely unfair on an individual for background briefing to occur, if it occurred, from the regulator on further details that were not contained in the press release and that could prejudice the view that the court may take—not to mention the view that the community have taken towards this particular planner. I would like you to check just how that information got into the public domain when it was not in the original press release.

Mr Lucy—Will do.

CHAIRMAN—There being no further questions, I thank Mr Lucy and his colleagues for appearing before the committee. As has been requested, we will try to find another mutually convenient date to further our oversight role before the end of the year.

Committee adjourned at 9.32 pm