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JOINT COMMITTEE ON CORPORATIONS AND SECURITIES

Reference: Mandatory bid rule

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JOINT COMMITTEE ON CORPORATIONS AND SECURITIES

Thursday, 30 March 2000**Thursday, 30 March 2000**

Members: Senator Chapman *(Chair)*, Senators Conroy, Cooney, Gibson and Murray and Ms Bishop, Mr Cameron, Mr Rudd, Mr Sercombe and Dr Southcott

Senators and members in attendance: Senators Chapman, Conroy and Gibson and Mr Cameron and Mr Rudd

Terms of reference for the inquiry:

The Corporate Law Economic Reform Program Bill 1998 provided, among other things, for a mandatory bid rule, under which a bidder would be able to exceed the takeover threshold (more than 20 per cent of the total voting rights in a company) before being required to make a general takeover offer. The Committee inquired into and reported on the Bill in May 1999.

During Parliamentary consideration of the Bill in October 1999, the Senate removed the mandatory bid rule. However, the Government indicated at the time that, in view of what it considered to be an important reform, it would ask the Committee to reconsider the matter. The Minister for Financial Services and Regulation, the Hon. Joe Hockey MP, has now asked the Committee to inquire into whether it is appropriate to amend the Corporations Law to include a mandatory bid rule, similar in terms to that proposed in the Bill.

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COMMITTEE MET AT 9.38 A.M.

LUCAS, Mr Alistair, Executive Director, Corporate Finance Group, Macquarie Bank Ltd

CHAIR—I declare open this public hearing of the Parliamentary Joint Statutory Committee on Corporations and Securities. I welcome all witnesses who will be appearing before the committee at today's hearing. The hearing today will be in two parts. First we will be taking evidence on our inquiry into the mandatory bid rule. This will be the committee's second hearing on this particular issue. We have so far received 10 written submissions which the committee will consider along with the evidence received today in preparing our report. Later in the day, as part of the committee's statutory oversight of the Australian Securities and Investment Commission, the committee will speak with Mr Alan Cameron, chairman of ASIC, about ASIC's work.

THE COMMITTEE PREFERS TO CONDUCT ITS HEARING IN PUBLIC, BUT IF THERE ARE ANY CONFIDENTIAL MATTERS THAT WITNESSES WISH TO DISCUSS WITH THE COMMITTEE IN CAMERA, WE CAN MOVE INTO IN CAMERA AT THE WITNESS'S REQUEST. I THEREFORE NOW OPEN PROCEEDINGS BY WELCOMING MR ALISTAIR LUCAS FROM THE MACQUARIE BANK. MR LUCAS, DO YOU WISH TO MAKE AN OPENING PRESENTATION TO THE COMMITTEE? IF SO, WE WILL PROCEED TO THAT AND THEN FOLLOW THAT WITH QUESTIONS.

Mr Lucas—Thank you. I was proposing to make just a very brief introduction if that is appropriate and then I will be happy to answer questions. The issue, of course, at hand is the mandatory bid rule. I am in support of amendments to the Corporations Law to permit a mandatory bid rule into Australian takeovers regulation. There are a number of key reasons for that, the major one being that I believe that takeovers are advantageous for the Australian economy and that the current rules do result in an inhibition to corporations making takeovers, and a mandatory bid rule would facilitate such transactions. The rationale for that argument has been set out a number of times; I do not propose to repeat that. Macquarie Bank has made a submission to this inquiry.

BUT I JUST MAKE ONE COMMENT. I THINK IT IS IMPORTANT IN DISCUSSING THIS THAT ONE FOCUS ON THE FACT THAT THE MANDATORY BID RULE IS NOT THE CENTRAL ARGUMENT. THE NOTION OF A MANDATORY BID IS A SAFEGUARD ON WHAT IS THE CRUX ISSUE. THE CRUX ISSUE IS THAT UNDER AUSTRALIAN TAKEOVER LAW ONE IS NOT PERMITTED TO BUY A MAJOR INTEREST IN A PUBLIC COMPANY AND THEN FOLLOW ON WITH AN OFFER. ONCE ONE GETS THE 20 PER CENT, THE ONLY WAY—WITH A NUMBER OF EXCEPTIONS—TO GET BEYOND 20 PER CENT IS TO MAKE A TAKEOVER OFFER. THE ISSUE AT HAND HERE IS REALLY THE ABILITY TO GIVE THE VENDOR, A MAJOR VENDOR SHAREHOLDER, CERTAINTY THAT THE TRANSACTION WILL OCCUR BY BEING ABLE TO SELL TO THE OFFEROR, AND CERTAINTY TO THE ACQUIRER THAT THEY WILL MAKE PROGRESS IN THEIR TAKEOVER BEFORE THEY HAVE TO ANNOUNCE IT PUBLICLY. THE MANDATORY BID RULE IS THE SAFEGUARD WHICH IS ADDED ONTO THAT TRANSACTION TO MAKE THAT PROCESS FAIR TO SHAREHOLDERS. SO IT IS THE PRIMARY TRANSACTION WHICH WE THINK IS THE IMPORTANT ONE, AND WE BELIEVE THAT ADDITIONAL FREEDOM WOULD BE ADVANTAGEOUS FOR THE ECONOMY. THAT IS ALL I WANTED TO SAY IN INTRODUCTION.

CHAIR—Thank you. In evidence we took from Mr Peter Lee from the UK Takeovers and Mergers Panel a couple of weeks ago, it was indicated that in the United Kingdom the use of the mandatory bid rule is relatively low, with only between five and 15 per cent of takeover bids being in effect mandatory bids and with a majority of takeovers being of the traditional type. Given that experience in the United Kingdom, do you think that the arguments in support of mandatory bids have overstated its potential influence in the Australian context?

Mr Lucas—I think that is a good point. The reality is that a mandatory bid regime would only apply to a relatively small number of deals, but it would be advantageous to those deals. Where there are companies with open registers, essentially this process is not applicable. It is applicable to situations where there is already a major shareholder. Without having done a detailed study, I think it is fair to say that the Australian stock market is characterised, because it is a much smaller market, by more companies, on average, with big single shareholders than would be the case in a much broader, wider market like the UK. So it is possible that its application would be more relevant to Australia than it has been to the UK, but the central thesis of your question I think is reasonable. It will not be relevant in the majority of cases, but that is not to say that in the minority of cases where it is relevant that it is not significantly beneficial.

CHAIR—All right. Again, comparing our situation with the United Kingdom, given the lower threshold here of 20 per cent compared with the 30 per cent threshold in the UK, some have argued that you will not get the same premium for control because moving from 20 to 40 does not give you the same extent of control as moving from 30 to 50. If you cannot hear, I will repeat the question.

COMPARING AUSTRALIA WITH THE UNITED KINGDOM SITUATION, IN AUSTRALIA THE PROPOSAL IS THAT THE MANDATORY BID APPLIES MOVING FROM 20 PER CENT TO 40 PER CENT; IN THE UK THE MOVE IS FROM 30 TO 50. IT IS ARGUED THAT MOVING TO 40 PER CENT DOES NOT GUARANTEE CONTROL ON THE WAY THAT MOVING TO 50 DOES, AND THEREFORE THE MANDATORY BID RULE AS PROPOSED IN AUSTRALIA WOULD NOT PROVIDE THE PREMIUM PAID TO SHAREHOLDERS FOR CONTROL THAT APPLIES IN THE UK SITUATION. I WAS WONDERING WHAT YOUR REACTION IS TO THAT.

Mr Lucas—The correct comparison is the premium for control that would be available to shareholders under a takeover bid for that company in Australia between the two regimes rather than comparing a situation in the United Kingdom—it is what the Australian shareholders would receive in that company. We would say that a mandatory bid rule is more likely to give a better premium in that particular situation than what exists at the moment. Moving to the UK, it is problematic, almost imponderable. The reality is that in the UK situation, with the higher threshold at 30 per cent, one is closer to control in any event. A 30 per cent parcel in a company gives a much more significant degree of influence than 20 per cent which, generally speaking, is not sufficient in a widely owned company to give any kind of effective control. All things equal, I think it would be hard to argue that 20 to 40 is significantly different in terms of premium available from 30 to 50. The key question is to compare the two situations in the Australian scenario.

CHAIR—The other issue that has been raised is that shareholders are denied the benefit of public auction that applies in the existing situation under the mandatory bid rule and therefore of being assured of getting the highest possible price for their shares in a takeover.

Mr Lucas—This issue is one of the most important in relation to the question at hand. In my experience, getting an auction going—there have been a number of public auctions—in a public company situation is very difficult. Quite often when a takeover is being made, the offeror companies are making very major corporate change decisions. They are increasing their size, maybe 20 or 50 per cent, or even doubling their size by making a takeover offer. When a corporation makes a takeover offer it wants to be certain that success will occur, otherwise it has flagged to the whole market a major change in strategy and has then failed if it does not succeed. That can be a significant issue in relation to the confidence that investors have in that company. That company, by indicating that it wishes to make a takeover, may have made it clear that it is weak in a particular market. It may have made it clear that it believes its current level of operations is not sufficiently diversified. A whole range of strategic issues can be and are pretty clearly read by analysts into corporations by the process of making takeover offers. Companies do not make takeover offers lightly. It is much harder in my experience for a corporation to make a decision to make a takeover offer in a situation where they know someone has already made an offer and so it is already contested. I have heard countless times, 'We are not interested in bidding in a contested situation.' That is a common statement made by boards. It is an unattractive situation to be in a public auction process. The process that the mandatory bid rule would allow is a private auction. A private auction is a much more acceptable way for corporations to conduct an auction because they do not have to make their position public. They do not have to make their pricing public. They do not have to line up the finance in advance. It is a much easier process for the corporations to deal with.

OF COURSE, WHAT IT UNDERLINES IS THAT WE BELIEVE THAT MAJOR SHAREHOLDERS, WHEN THEY WANT TO SELL, ARE NOT STUPID. THEY JUST DO NOT GO AND SELL TO THE FIRST PERSON. IF SOMEONE HAS 50 PER CENT OF A COMPANY, FOR EXAMPLE, AND THEY WANT TO SELL IT, THEY WOULD WANT AN AUCTION. IT IS IN THEIR INTERESTS TO GET THE MAXIMUM PRICE. SO UNDER THE MANDATORY BID RULE, WHICH OF COURSE IS OPTIONAL—UNDER THE MANDATORY BID RULE IT WOULD NOT BE MANDATORY TO USE THAT PROCESS—IF A VENDOR SHAREHOLDER CHOSE TO SELL THEIR SHAREHOLDING THEY WOULD RUN A PRIVATE AUCTION. THEY WOULD WANT TO SEE THE MAXIMUM PRICE BEING PAID FOR THE SHAREHOLDERS. SO WE WOULD ARGUE THAT THAT PRIVATE AUCTION PROCESS IS MORE LIKELY TO RESULT IN AN OFFER BEING MADE TO ALL SHAREHOLDERS AT THE HIGHEST PRICE.

CHAIR—The Securities and Investments Commission has suggested, given the new takeover panel provisions which have just come into operation, that we should see how those new provisions operate for a 12-month period before making any further changes to the takeover law, and therefore the proposal for the introduction of the mandatory bid rule should be deferred for that period. Do you have a reaction to that suggestion?

Mr Lucas—I do not regard this change as being a particularly major or draconian change. This is not in any sense rewriting the takeover law. I think most people would regard the change to the compulsory acquisition provisions that came in in the recent changes as being more fundamental. We think this is a very sensible incremental improvement in takeover law. I could see the merit of that argument if the change were more major. In fact, the core takeover law, after 13 March, is really very much the same as what we had before 13 March. There is a different adjudication process with the panel, some significant changes in the area of

compulsory acquisition, but this change is an incremental change. Could the market cope with it quickly? Yes, I think the market could cope with it quickly.

CHAIR—Thank you.

Senator CONROY—In your submission, part 3, you state:

As the major shareholder has an interest in receiving the highest price for its shares, it would typically conduct a bargaining process prior to a sale being agreed to. In our experience, even a 'distressed' vendor should be able to conduct a value maximising auction process.

I am not sure if you have seen all the other submissions, but we have had a submission from Mr Rod Levy, a partner at Freehill Hollingdale and Page, and in his submission he says:

In my 15 years in practice in takeovers, I have been involved in transactions where the majority shareholder was prepared to sell at a price which was less than that achievable if an auction developed. This is particularly the case where the seller is in financial distress or is controlled by a liquidator, receiver or administrator.

They seem to be two totally diametrically opposed views from two people in the industry. Both people work in the same industry. Have you any comments on Mr Levy's—

Mr Lucas—It has always been my experience over many years that when people want to sell things that they are relatively assiduous in seeking the highest possible price. I can say that as a universal rule. In situations where I have come across distressed sellers, I must say my experience has been that distressed sellers are as keen as anyone to maximise price. Indeed, some distressed sellers have even greater rationale for wanting price to be maximised, that is, survival. It is a very rare situation where a distressed seller is in a position, such as in the case of change of corporate control, that it had to make a decision so quickly that it was impossible for other bidders to be involved.

IN A DISTRESS SITUATION, THERE ARE CREDITORS INVOLVED, ALMOST BY DEFINITION. THOSE CREDITORS ARE LOOKING TO HAVE THEIR DEBTS ASSOCIATED TO THE MAXIMUM POSSIBLE EXTENT. IT WOULD SEEM TO BE A SIGNIFICANTLY VALUE DESTROYING MOVE, WERE THOSE CREDITORS TO SAY TO THE DISTRESSED SELLERS, 'LOOK, WE DO NOT CARE WHAT PRICE YOU GET. YOU HAVE GOT TO SELL IT WITHIN TWO DAYS.' IT IS MUCH MORE LIKELY THAT CREDITORS IN THOSE SITUATIONS WOULD SAY, 'YOU HAVE GOT TO SELL THAT ASSET TO PAY THE DEBTS. YOU ARE DISTRESSED, THE DEBTS HAVE GOT TO BE PAID. WE WANT TO SEE A PROCESS BY WHICH WE GET THE MAXIMUM POSSIBLE PRICE.' OF COURSE, A CORPORATE AUCTION CAN BE RUN QUICKLY IN TERMS OF THE TIME IT TAKES FOR DISTRESSED ASSETS TO BE WORKED OUT.

IN THE CASE OF A LIQUIDATOR, MY EXPERIENCE IS THAT LIQUIDATORS ARE VERY, VERY ASSIDUOUS IN SEEKING OUT THE HIGHEST POSSIBLE PRICE, AND OF COURSE THEY HAVE A STATUTORY OBLIGATION SO TO DO. MY EXPERIENCE HAS BEEN THAT IT DOES NOT REALLY MATTER WHETHER A VENDOR IS FINANCIALLY SOUND OR DISTRESSED; IT IS A PRETTY GENERAL RULE THAT VENDORS WANT THE HIGHEST PRICE AND SEEK TO GET SUCH.

Senator CONROY—So you have never experienced what Mr Levy's 15 years of experience have encountered?

Mr Lucas—No, I have not experienced a single situation where I could say that because a seller was distressed they entered into a process more quickly than a non-distressed seller would have done and that resulted in a lower price being achieved for that particular asset. I think that in some cases—and this may be where I could agree with Rod—a buyer will take advantage of a distressed seller's situation to offer a lower price, but that would be true whether the mandatory bid rule was in place or not. That is just a dynamic of buying and selling. But that is quite different from a situation such as I think would be implied by what Rod has said, that a distressed seller would, because of this kind of rule, enter into a hampered or damaged auction process.

Senator CONROY—To use a colloquial term: you have never experienced a fire sale, then?

Mr Lucas—A fire sale occurs when someone has to sell something, and the price will be set by the market. We have seen many fire sales. One of the most famous fire sales was the sale of Fairfax, in which we were involved some years ago—a classic fire sale. Although the vendor was extremely distressed, we had a very vigorous bidding process for that asset. The creditors allowed that bidding process to take time; it took some months. The creditors obviously wanted that bidding process to happen, and maximum price at the time—although somewhat lower than it is today—was undoubtedly achieved in a fire sale situation. So, in regard to the implication that things get sold more cheaply in fire sales, no, I do not think I would agree with that. Are there fire sales? Clearly, there are many distressed vendors.

Senator CONROY—I take on board what you say about the market determining the price, but if everybody in the market knows something has to be sold quickly, then surely that will mean there is a lower general level of price offered. If supply is being foisted onto the market, you have got to take what price you can get. I am not suggesting that it is entirely a price taking situation, but the market would have the information that the goods have to be sold, cleared, quickly. The market would factor that into its bidding process, surely. It cannot have no effect.

Mr Lucas—I would agree with that. The reality is that if I were buying your house and I happened to know that you needed the money to pay off a creditor and if I knew there were no other buyers—I was the only person interested in your house—a smart buyer would take advantage of that situation. If a price achieved in a sale process by willing buyer and willing seller is X, if you have a very willing seller and a willing buyer, all things equal, the price achieved will be a lower one. Where that will not occur is where there is a bidding situation between a number of buyers. Then the price is set by the buyers working on each other, and the vendor's financial situation and motives actually become irrelevant—the Fairfax situation. It would not have mattered what the financial situation was in the Fairfax situation, the top price was going to be achieved.

MY POINT IS THAT IF THE PRICE IS GOING TO BE LOWER BECAUSE OF A DISTRESSED SELLER SITUATION, THAT WOULD BE SO UNDER A PUBLIC AUCTION SITUATION OR A MANDATORY BID PRIVATE AUCTION SITUATION—THAT DYNAMIC WOULD BE COMMON. AND IN OUR VIEW, EVEN WITH A DISTRESSED SELLER, IN FACT BECAUSE IT CAN PROBABLY HAPPEN MORE QUICKLY, THE MANDATORY BID OR PRIVATE AUCTION PROCESS IS GOING TO BE ADVANTAGEOUS COMPARED TO THE PUBLIC AUCTION PROCESS THAT IS THE ONLY AUCTION PROCESS THAT IS AVAILABLE UNDER THE PRESENT LAW. SO I WOULD AGREE THAT UNDER A VERY, VERY WILLING SELLER SITUATION

PRICES WILL BE LOWER, BUT THAT IS NOT THE ISSUE AS TO WHETHER PRICES WOULD BE LOWER UNDER PRIVATE AUCTION VERSUS PUBLIC AUCTION. I HOPE THAT IS CLEAR.

Senator CONROY—Yes. I want to take you to a different example to Fairfax. It is a one that has got a bit of publicity recently, so I am hoping you were not involved in this and therefore you can comment. Obviously, if you were involved in this you would not be in a position to comment. Take National Textiles, let us say, where there has been a fair bit of media comment that Mr Bart did particularly well in terms of buying some of the assets off Mr Howard. There has even been media comment that perhaps he had a conflict of interest, but I am not trying to go to that aspect. There has been substantial media comment that in the National Textiles case Bart got away with a very good deal out of the existing board. He was obviously associated with it and, as I said, I am trying to avoid that particular angle. But, in a situation where there was a fire sale on, he appears to have walked away with a very good textile company in Tasmania which is a going concern, and he seems to have got it for an awful lot less than other people were potentially prepared to pay, as part of a fire sale process. I am in no way trying to cast any aspersions. Maybe he was just lucky enough to be the right person in the right place at the right time. But that is the sort of situation, if you are in a mandatory bid process and it coincides with that and what is at stake is the control premium, when you potentially have the conflict, not in a situation where it does not impact on the control premium. It is that sort of conjunction of events where I have a concern.

Mr Lucas—One cannot deny the possibility that, say, at the end of the day, a stupid vendor—and I am not going back to that example, obviously, at all—chooses not to enter into—

Senator CONROY—And we are not talking National Textiles.

Mr Lucas—No, we are not talking National Textiles. A stupid vendor enters into a process where they do not seek to maximise their price by getting as many bidders as possible. I cannot say to the committee, ‘Vendors are, 100 per cent of the time, rational and never do silly things, and never sell anything without going to all the possible buyers.’ By definition, there must be situations where, if we have a mandatory bid rule, an inefficient vendor sells something in an inefficient way at a price lower than might have been achieved under a public auction, and therefore the follow-up bid is at a lower price than would otherwise have occurred. You cannot say that would never happen.

WHAT I WOULD SAY IS TWO THINGS. IT IS EXTREMELY RARE THAT PEOPLE JUST GO AND SELL. TO TAKE THE EXAMPLE THAT YOU GAVE OF A FIRE SALE SITUATION, MY GUESS IS THAT, IN MOST OF THOSE SITUATIONS WHERE IT LOOKS REALLY CHEAP, THE VENDOR ACTUALLY HAS BEEN AROUND, TRIED TO FIND BUYERS AND FORMED A VIEW THAT THERE IS ONLY ONE SENSIBLE BUYER. HAVING SAID THAT, YOU CANNOT RULE OUT THE POSSIBILITY THAT A STUPID VENDOR DOES NOT SEEK ALWAYS THE MAXIMUM PRICE. I HAVE BEEN IN THIS BUSINESS FOR 20 YEARS. I HAVE NOT COME ACROSS TOO MANY STUPID VENDORS. I HAVE FOUND THAT IT DOES NOT TAKE TOO MUCH FOR VENDORS TO REALISE THAT THE BEST PRICE THEY WILL ACHIEVE IS TO CANVASS AS MANY BUYERS AS POSSIBLE. COMPETITIVE TENSION IS STUFF WE INVESTMENT BANKERS TALK ABOUT ALL THE TIME AND WE ARE CONSTANTLY IN THE PROCESS OF MAXIMISING THE COMPETITIVE TENSION. THE OTHER POINT I WOULD SAY IS THAT YOU COULD HAVE AN INEFFICIENT SITUATION—WHICH IS, SENATOR, WHAT YOU SAID—WHERE THERE WAS

INEFFICIENCY IN THE SALE PROCESS AND THAT COULD DAMAGE SHAREHOLDERS. OFFSETTING THAT, MY EXPERIENCE IS THAT IF WE HAD A PRIVATE AUCTION SYSTEM ANY SUCH INEFFICIENCY AS THE ONE TO WHICH YOU REFER WILL BE OFFSET BY PRIVATE AUCTIONS WHERE THERE WOULD BE MORE BIDDERS THAN THERE WOULD BE UNDER THE PUBLIC AUCTION SYSTEM. I WOULD EXPECT THE OFFSETTING BENEFIT OF HAVING MORE BIDDERS ON AVERAGE WOULD RESULT IN A BETTER PRICE ON AVERAGE THAN THE OCCASIONAL SITUATION WHERE YOU HAVE AN INEFFICIENT VENDOR.

Senator CONROY—You have been lucky. I do not think Mr Levy is defining the people he has been involved with as inefficient or stupid vendors when he says that he has dealt with some majority shareholders who were prepared to sell at prices which were less than achievable in auction. I guess you have been lucky that you have never dealt with anyone like that. I am interested in this competitive issue you raised. ASIC have actually extrapolated into a pure argument that a greater supply of bids, which are possibly potential bids flowing from the mandatory bid rule being introduced, could actually lead to a lower price because there is more demand for the bidding. In other words, supply of bids is greater and therefore greater supply usually means lower price. Have you seen their submission?

Mr Lucas—I am not familiar with that argument.

Senator CONROY—I was just interested in your response to it. It was an argument I was intrigued by. I had not actually thought of that one myself.

Mr Lucas—Ordinarily with a supply and demand curve one would expect that if one increased the demand side that would run up, not down, the price curve.

Senator CONROY—I needed to think about it a couple of times myself. Their basic argument is that there is a greater supply of bidders or potential bidders and that would work with general levels being pushed because there are more people prepared to have a look around and make an assessment. Maybe I am not representing their position particularly well, which is entirely possible.

Mr Lucas—My experience is that in these situations we are talking about a given or fixed supply; there is one block of shares which we are referring to. It is axiomatic that more buyers contesting the acquisition of that block of shares will result in a higher price. I have also found that the ability to transact and make inquiries privately and not have to make those inquiries publicly—for example the opportunity to have due diligence, which is available potentially under a private sale—encourages more buyers into the process. So if ASIC are saying that it would encourage more buyers into the process, I would agree with them. In my view that would result in higher rather than lower prices.

Senator CONROY—I do not think I have necessarily done them justice in the way I have described it to you.

Mr Lucas—I have not read that.

Senator CONROY—No, that is okay. ASIC make the following point, in a footnote in their submission:

Data available to ASIC suggests that almost half of all takeover offers for Australian targets are made by foreign bidders or subsidiaries of foreign bidders.

That tends to fly in the face of some of the arguments that foreign bidders seem to be discouraged by not having access to this particular avenue for takeover. I wonder if you could comment on that at all.

Mr Lucas—Really, in my view, nothing can be drawn from that. Australia is always going to have a lot of foreign takeovers because we are a small economy and some of the obvious buyers of Australian economic production are offshore. Many of the bids to which they refer—for example, Rio acquiring CRA—

Senator CONROY—That was a partnership, I thought.

Mr Lucas—That was a partnership. As a buy-out, another example might be the acquisition of BTR Nylex. Of course, those bids are acquisitions of partly owned subsidiaries by the foreign holding company, and the mandatory bid which we are talking about this morning has no relevance to those transactions at all.

Senator CONROY—I have just one last point. I know Mr Rudd and Senator Gibson have got some questions. You mentioned that people do not engage in a takeover bid lightly—I think that was the word you used. They have done a lot of work, made a lot of preparation. Yet the implication that I draw from that is that people who would then, perhaps in a public auction process, get involved in the bid would be not doing so lightly. If a second company has joined or become an alternate bidder, then I presume it has also considered the position carefully in that process.

Mr Lucas—Very much so, yes.

Senator CONROY—So I am intrigued why we would want to see two potential bidders who had gone through all those processes not going for it.

Mr Lucas—I can explain that. Let us say there were three obvious buyers for a major stake in a company. It is very likely that one of those three is just not prepared to contest a public company takeover offer. As I said earlier, you hear that all the time from boards. It might be that one of the three companies makes an offer under the current rules and the second one comes in and tops it, and we could have the public auction to which you refer. That is good. Those two companies have been prepared to declare their strategic hand publicly. The third potential bidder, which was not prepared to make a public company offer, just sits on the sidelines and does not participate.

WHAT I WOULD SAY IS THAT, HAD THAT AUCTION BEEN RUN ON A PRIVATE BASIS, THE SECOND ONE THAT BID PUBLICLY WOULD ALMOST CERTAINLY HAVE BEEN IN THE PRIVATE PROCESS. BUT THE THIRD ONE—WHICH HELD OUT OF THE PUBLIC PROCESS—WOULD ALSO HAVE BEEN IN THE AUCTION PROCESS. UNDER A PRIVATE AUCTION PROCESS, WE ARE VERY, VERY UNLIKELY TO LOSE ANY OF THE PLAYERS WHO WOULD BID PUBLICLY. THEY WILL BE THERE IN THE PRIVATE AUCTION. MY POINT IS THAT, IN ADDITION,

THERE WILL BE OTHER PRIVATE BIDDERS WHO WOULD NOT BE PREPARED TO PLAY THE PUBLIC GAME.

Senator GIBSON—I have a question about private auction. What happens in reality in Australia now when a company is basically for sale but, because of our current law structure, private bids cannot be formally entered into?

Mr Lucas—That is right.

Senator GIBSON—But would it also be true to say that for expressions of interest people ring up and say, 'Are you interested?'

Mr Lucas—Yes.

Senator GIBSON—If you were acting for the vendor, would you ring up three or four potential buyers and say, 'Are you interested in company X?' without making any commitment? In other words, is that the reality of what is actually happening today?

Mr Lucas—Yes, that very much does happen.

Senator GIBSON—So this proposal is really declaring legal the expressions of interest which are, in fact, happening informally today?

Mr Lucas—Yes. It is an interesting point, because the application of the current rule gives rise to what one would describe as artifices to get as close to not breaching the rule as possible. A lot of advice has been obtained from the legal profession as to how far one can go in having those discussions without achieving a relevant interest, which is what gives rise to the breach of the law. Certainly, at the moment in an ordinary situation, if a major shareholder in a public company wishes to sell that stake, they would engage an investment bank and the investment bank would go round to bidders seeking expressions of interest. But what we cannot do in that situation is give any certainty. So the bidder will say, 'Yes, we are quite interested in that company but the only way we can play in the game is to make an offer. Is that correct?' We say yes, and they often say, 'We like the company but we don't like the process'.

Senator GIBSON—I can understand that. And I can understand quite a significant proportion of companies being very reluctant indeed to enter the public auction process but being willing to deal on a private basis. I can understand that very well. Thank you.

CHAIR—Further questions?

Mr RUDD—This may be regarded as the Rex Connor memorial question, but it is along these lines: just having flipped through your submission, it seems the prima-facie logic in it is that the more M&A activity we have in this economy the better. Why is that the case? Is it the more M&A activity in the economy the better it is for institutions like Macquarie Bank?

Mr Lucas—Taking that last point first, we are in the business of providing advice and financing takeover offers. I would never suggest for a moment that more takeover offers—an expansion of our market—would not be good for Macquarie Bank. We happen, I think, to be

expert in the area but would not suggest for a moment that we do not make a living from it—that is the situation on its face.

ARE TAKEOVER OFFERS GOOD FOR THE ECONOMY? THE MAJOR POINT, WE FEEL, IS THAT, BY AND LARGE, THE MARKET IS THE BEST DETERMINANT OF HOW ASSETS SHOULD BE OWNED AND CONTROLLED IN ORDER TO OPTIMISE EFFICIENCY. WE HAVE A VERY EFFECTIVE COMPETITION RULE IN THIS COUNTRY WHICH, OF COURSE, IS NO SUGGESTION THAT IN THIS MANDATORY BID DISCUSSION THE COMPETITION LAW SHOULD BE AMENDED IN ANY WAY. IF IT IS SUBJECT TO THE COMPETITION LAW WORKING, AND WE WOULD SAY IT DOES, THEN FACILITATING THE MARKET IN THE DETERMINATION OF THE BEST ECONOMIC OWNERSHIP OF ASSETS IS MORE LIKELY TO RESULT IN A MORE EFFICIENT ECONOMY THAN NOT. THAT IS THE FUNDAMENTAL ARGUMENT.

Mr RUDD—You are saying that there is a credible macroeconomic argument which you can advance that, the greater the level of M&A activity in a particular developed economy, the better the efficiency dividend within that economy, and that you can produce credible data to that effect.

Mr Lucas—It is very difficult to produce—

Mr RUDD—But you rest a lot of the argument here on the fact that, as a matter of some remorse and regret, the level of M&A activity here is considerably less than in other—

Mr Lucas—Yes. It is considerably less than in other developed economies, which may be suggestive that our rules do not permit as free a flow of capital as other economies. If that is the case, we would argue that it is likely that that is economically inefficient. At the end of the day it is not the absolute level of M&A; it is whether the assets in an economy are structured in the most efficient manner and that there are mechanisms available to allow any efficiencies to be addressed. The fact that the US has a high level of activity in M&A would suggest that, in a dynamic changing economy, the market sees it as being very desirable for there to be constant change in economic ownership in order to maximise economic efficiency. I would add that I have not done the detailed research but a number of commentators have said that a reason for some of the lower performing economies being in that position is the fact that their regulatory systems or the institutions they have do not allow the free flow of assets within the economy. That can be one of the reasons why those economies are not performing as well as the United States, for example.

Senator CONROY—I just want to come in on the general macroanalysis again. I am not sure if you have had a chance to flick through one of the other submissions we received from Professor Ian Ramsay—

Mr Lucas—No, I have not read the Ramsay one.

Senator CONROY—of the Centre for Corporate Law and Securities Regulation. He refers us to a study by the Stockholm School of Economics on the optimality of a mandatory bid rule. An analysis was undertaken following a directive from the commission of the EU about possibly making it mandatory to have the mandatory bid rule. Their analysis does not seem to

support the optimality of allocative economic efficiency. I am not by any means an expert in these things and it is a long time since I have seen some of the equations and macroeconomic analysis that they have done in this. I would be interested if anyone at Macquarie or at the institute of securities might want to have a look at it and give us a response.

Mr Lucas—I would be happy to do that.

Senator CONROY—It essentially seems to argue that they are not convinced. They say:

By demonstrating that it is only under quite restrictive conditions that the target shareowners actually gain ex post from implementation of the rule, the analysis exposes the unclear and insufficient motivation behind the MBR. In particular, the right to sell feature of the rule is not a free option and needs serious motivation from the regulators. The relative similarity of willingness to pay rule provides the answer to when enactment of the MBR is really in the interest of the shareholders.

As I said, he has actually done an extensive analysis of it. Probably the most notable quote I saw is:

In fact, unless the difference in private benefits is large, the target shareowners encounter a loss from implementation of a MBR.

I would be interested if anyone wanted to do an analysis, rebuttal or anything like that as it is a live issue in the EU because of the directive.

Mr Lucas—I would be happy for us to have a look at that. Sweden introduced a mandatory bid rule after that study was completed. It is a bit hard to comment. As I said earlier, the key issue here is providing certainty to vendors and buyers in a corporate situation, not the mandatory bid rule itself. That is the safeguard element that is overlaid at the top. But we would be happy to have a look at that and come back to the committee.

Mr RUDD—Presumably, a subset of that study—without having looked at it myself either—is when you have high levels of M&A activity. You can run an allocative efficiency argument at one level but it also unleashes a whole series of quite perverse price signals within an economy at the same time in terms of what constitutes a desirable form of activity. At a much cruder level you can simply advance the lay argument that, when you have got M&A activity with its own brokerage driven momentum behind it, simple questions like the ability of board and management to actually concentrate on running the business is constantly in a state of flux. So I think that is an observation to roll into that.

THE SECONDARY ONE, JUST TO UNPACK THE ASSUMPTIONS CONTAINED IN YOUR OPENING PARAGRAPHS, IS THAT A LOWER LEVEL OF M&A ACTIVITY, BY DEFINITION, IS A BAD THING. I THINK THAT IS OPEN TO QUESTION RATHER THAN IT BEING SEEN AS A PRIMA FACIE GIVEN TRUTH THAT IT IS SO. WHEN YOU ANSWERED THE QUESTION ON THIS BEFORE, YOU SAID, HOWEVER, THAT THE POSITION FROM WHICH THE BANK COMES IS THAT THE BEST DETERMINATIVE VALUE IS MARKETS AND THAT, IN EFFECT, THE FEWER CONSTRAINTS ON THE OPERATION OF MARKETS IN THAT AREA THE BETTER. BUT IS IT NOT THE CASE THAT WHAT WE ARE SEEKING TO CONSTRUCT WITH THIS PROPOSAL IS A MARKET THAT BECOMES LESS TRANSPARENT RATHER THAN MORE? THAT SEEMS TO BE THE BURDEN OF THE UP-FRONT

RESERVATIONS ARTICULATED BY ASIC IN THEIR SUBMISSION TO THE COMMITTEE.

THE ESSENCE OF PROPERLY FUNCTIONING FREE MARKETS IS A HIGH DEGREE OF TRANSPARENCY AND A HIGH DEGREE OF CONTESTABILITY—TWO DISCIPLINES WHICH HAVE BEEN EXTENSIVELY APPLIED TO THE PUBLIC SECTOR FOR SOME TIME IN THE DEBATE WHICH HAS RAGED IN THIS COUNTRY FOR THE LAST DECADE AND A HALF. YET WHAT WE SEEM TO HAVE WITH THIS PROPOSAL ON M&A WITH CORPORATE AUSTRALIA IS A PROPOSAL WHICH IN FACT TAKES US RADICALLY IN THE REVERSE DIRECTION, OR SIGNIFICANTLY, APPRECIABLY OR IMMEASURABLY IN THE REVERSE DIRECTION. ASIC'S SUBMISSION STATES:

> The current law has the advantage of encouraging a high degree of transparency in takeover transactions. Public transactions are easiest for the market to understand and to factor into their commercial decisions. Public transactions are also easier for the regulator to monitor and regulate. If a decisive change of control is permitted to take place in private, the level of information available to the market and the regulator is decreased. There will be more opportunity for the acquirer and the vendor to enter into undisclosed 'side deals' of a kind that violate the equal opportunity principle.

How do you respond to that against the overall logic of the argument which you advance, which is that properly functioning markets are the best determinants of asset value through an open M&A regime, when in fact what you are constructing is something considerably more constrained than that?

Mr Lucas—There are a couple of things there. Firstly, I will take that point of ASIC's, that under this proposal people are more likely to enter into side deals. My view is that the likelihood of people breaching the law is not necessarily a sound basis for determining whether a law is going to be a good law or not. But, if we were arguing on that ground, there is the current artificiality of the law. Really we have a law which says that you can only go at 60 kilometres an hour, whereas everyone knows it is safe to go at 80 kilometres an hour. That is the situation we have at the moment. The current law is artificial and if anything is a law that is driving people towards getting close to breaching the current provisions because they are widely recognised as being artificial. But I do not think that was the central part of your question. The central part of your question related to the transparency and the operations of the market.

SHARE MARKETS, OF COURSE, ARE PRIVATE MARKETS. ALL TRADES BY THE OPERATION OF A MARKET ARE REPORTED PUBLICLY, WHICH TYPICALLY MAKES THEM VERY EFFICIENT MARKETS AND THERE IS INSTANT INFORMATION AVAILABLE. BUT, IF THE AMP WANTS TO SELL $100 MILLION WORTH OF SHARES IN TELSTRA, IT WILL DO SO PRIVATELY. THE TRANSACTION WILL BE COMPLETED AND IMMEDIATELY REPORTED SUBSEQUENTLY, BUT THE TRANSACTION HAPPENS IN PRIVATE BEFORE IT IS PUBLICLY REPORTED. THE ENTIRE STOCK MARKET OPERATES ON THAT BASIS: THE ENTIRE STOCK MARKET IS A SERIES OF PRIVATE TRANSACTIONS. WHAT WE HAVE HERE IN FACT IS THE ANOMALY THAT, WHEN WE GET INTO BIG STAKES, ALL OF A SUDDEN THEY HAVE GOT TO BE HUNG OUT IN FRONT OF THE MARKET BEFORE THE TRANSACTION OCCURS.

Mr RUDD—Isn't control of a corporation in a market a public good in this sense? Isn't that where public policy and the law of the state enter in, in terms of a regulatory concern? You say it is an artificial construct, but doesn't a market have an interest in the control of a particular corporation particularly when it can lead to such things as market dominance? You seem to say that there is no legitimate regulatory interest in that.

Mr Lucas—I think we should, with respect, leave out the issue of competition law because no change obviously is proposed in relation to competition law and if some offer were to be affected through the mandatory bid rule that breached the competition law, it would be affected in exactly the same way.

DOES THE MARKET HAVE AN INTEREST IN SUCH TRANSACTIONS? YES, OF COURSE THEY DO. WHAT IS PROPOSED UNDER THE MANDATORY BID RULE IS THAT, AS SOON AS THE TRANSACTION HAS BEEN ENTERED INTO, IT BECOMES PUBLIC AND ALL THE MINORITY SHAREHOLDERS THEN SHARE IN THE BENEFITS OF THAT TRANSACTION ON EXACTLY THE SAME TERMS. THE ONLY PART OF IT THAT IS CARRIED OUT IN PRIVATE IS THE AUCTION PROCESS WHICH IS WHAT HAPPENS IN ALL STOCK MARKET TRANSACTIONS. WHEN THE DEAL IS CONSUMMATED IT INSTANTLY BECOMES PUBLIC AND HAS THE FULL SPOTLIGHT PUT ON IT. DO I THINK THAT IS AN APPROPRIATELY PUBLIC AND OPEN PROCESS? YES, I THINK IT IS BECAUSE IT IS REALLY HOW THE STOCK MARKET WORKS.

Mr RUDD—Except that currently if you are proposing to move to a position of dominant ownership, there is public transparency on that during the execution of the bid.

Mr Lucas—Yes, there is.

Mr RUDD—This radically changes that; otherwise we would not be having this discussion.

Mr Lucas—That is right, in those circumstances where the mandatory bid was applicable. Of course, the great majority of takeovers are widely owned companies and will proceed as they do now. The mandatory bid rule, for example, would not apply to Commonwealth Colonial. It is just not applicable to a deal like that.

Senator CONROY—Why not?

Mr Lucas—Because there is no majority shareholder. There is no one party that can give rise to any level of control.

Senator CONROY—But that is the function of the shareholding. It is not a function of why the mandatory bid rule could not apply. It could if there was a 10 per cent shareholder.

Mr Lucas—Sure, but as a matter of fact, most companies do not have those large blocks of shares. It could apply if there were one there, but as a matter of fact a typical situation is that they do not exist. Where there is a large shareholding, what would happen is that a private auction, with the bidders interested in that parcel of shares, would be carried out in private. That is by definition what happens in a private auction. But the transaction, as soon as it were effected, would become public, which to me is a very appropriate process for allowing the market to examine the transaction.

Mr RUDD—So in conclusion do you think that ASIC are gilding a lily in their argument in their submission?

Mr Lucas—They have a different view. I think ASIC's view comes about from having seen a number of public auctions and where they have occurred, they have occurred successfully. We have been involved in a number. They are very rare, but when they do occur they can be very successful. What ASIC does not have access to, and which we do have access to because we are in the business of advising them, are the motives of boards of directors in making offers. We often observe situations where corporations would be interested in entering into a takeover situation but will not because of the strictures of the current law. ASIC just do not have the access to that view; they are not in a position to experience that. That puts them in a position where they make a different argument.

Senator CONROY—I guess where I struggle with the argument is that I was not sure that the public policy debate should be directed towards guaranteeing a fixed price outcome for an individual. Your argument, which you keep coming back to, is certainty of outcome for the bidder. I have just never understood that the certainty of outcome for the buyer should be the sole determinant of public policy.

Mr Lucas—In my view, it is very much an issue of public policy as to whether the process results in maximum price for shareholders. The public policy issue here is: does the current law give rise to the highest possible price? In other words, does the current rule, by inserting an artificial restriction to the process, give rise to lower prices that by definition are deleterious to the financial interests of minority shareholders? That is the public policy issue. The issue of certainty is important because price is maximised when we have the strongest bidding. In my experience, strongest bidding comes about when the bidders can be offered certainty. There is a direct nexus between the certainty issue, the appetite of bidders and the resultant price issue which I think is the public policy one.

Senator CONROY—I appreciate your comments that, with the Commonwealth-Colonial, there are no blocks of votes to be really hunted. It was put to us—I think by one of your colleagues when he was here representing the institute a week or two ago—that possibly a set of circumstances had transpired. After receiving the bid, Colonial had shopped around to see if there was a better bid available before it said yes to Commonwealth. I cannot comment whether this is true or not, but it was put to us that this was a possible scenario that had happened. Do you think it would have made a difference to the answers if Colonial had been able to go to NAB and say, 'It's Commonwealth that is bidding for us,' rather than just going to NAB and saying, 'We've had a bid'? Do you think the value to NAB would have been greater if they had known that the rival was Commonwealth?

Mr Lucas—One would expect it in a private auction process. That is exactly what was being said.

Senator CONROY—Surely Colonial would not have been breaching all sorts of fiduciary duties by revealing who their bidder was.

Mr Lucas—Colonial's fiduciary duty is to maximise the share price for its shareholders.

Senator CONROY—Surely Commonwealth Bank are not hawking around on the basis that you can just go and tell everybody that they are hawking around.

Mr Lucas—Commonwealth were the buyer, not the hawker.

Senator CONROY—Surely there would be a confidentiality agreement involved.

Mr Lucas—There could be a confidentiality agreement. If we were advising the vendor company in that situation we would say, ‘We do not want a confidentiality restriction and we won’t deal if you want a confidentiality restriction.’ It would be the subject of a negotiation. I can tell you right now that, under a private situation, they would have been able to go round to the various potential bidders. If they had gone to a NAB, NAB would have said, ‘If we’re highest price, we’re going to win this. Are we interested in buying? Maybe we are interested in buying.’

IF NAB WERE LOOKING AT THIS NOW—AND I KNOW NOTHING ABOUT THIS; I AM NOT INVOLVED, SO I AM TALKING ONLY IN GENERALITIES—THEY FACE A PRETTY UNATTRACTIVE SITUATION, BECAUSE IF THEY WANTED TO BID, THEY HAVE GOT TO GO IN AND CONTEST THE BID AGAINST ANOTHER VERY BIG OFFEROR PUBLICLY. I WOULD BE CONFIDENT OF TWO THINGS: IF COLONIAL WERE AWARE—AND I DO NOT KNOW—OF A POTENTIAL PROCESS WITH COMMONWEALTH SOME TIME AGO, THEY WOULD HAVE GONE TO A NUMBER OF PLAYERS TO SEEK THE MAXIMUM PRICE. THEY WOULD HAVE DONE THAT TO MAXIMISE THE RESULT FOR THEIR SHAREHOLDERS. IF THEY HAD NOT, IN THE CURRENT SITUATION, IF THE NATIONAL BANK WERE CONSIDERING A BID FOR COLONIAL, ONE OF THE BIGGEST FACTORS THAT THAT BOARD WOULD CONSIDER IS THE FACT THAT THEY HAVE TO GO INTO A CONTESTED SITUATION AGAINST AN ESTABLISHED BIDDER THAT IS ALREADY OUT THERE IN THE MARKET. THAT WOULD BE A SIGNIFICANT NEGATIVE FOR ANY BOARD CONSIDERING A RIVAL BID AT THIS STAGE.

Senator GIBSON—A key public policy issue which has been raised is that the present law in effect excludes some bidders who do not want to go public.

Senator CONROY—The present law does not exclude anybody.

Senator GIBSON—The practical effect of it is that it excludes some boards who, quite rightly—and I can understand why—do not want to go into a public auction process. Therefore, the public interest would be enhanced by removing that restriction. Is that the essence of what you are saying?

Mr Lucas—Yes, that is the essence of what we are saying.

CHAIR—There being no further questions, thank you very much, Mr Lucas, for appearing before the committee and for the way in which you have answered quite an extensive range of questions.

Mr Lucas—Thank you very much. Thanks for the opportunity.

[10.43 A.M.]

LYNCH, Dr David, Director of Policy, International Banks and Securities Association of Australia

CHAIR—Welcome, Dr Lynch. Would you like to make an opening statement before we proceed to questions?

Dr Lynch—Yes. The International Banks and Securities Association is an industry representative body which represents investment banks. There is a large foreign bank element in the membership that reflects the nature of that industry. The association as an industry body in some senses stands between the government and the industry. That is one of its functions—as an intermediary in that respect. There are two elements of our interaction, with government regulation and taxation being the two key areas.

IN RELATION TO MERGERS, ACQUISITIONS AND TAKEOVERS, IN THE AREA OF TAX WE HAVE SEEN RELIEF FOR SCRIP-FOR-SCRIP BIDS AND OTHER INITIATIVES WHICH ARE WELCOME. IN THE AREA OF REGULATION WE HAVE SEEN INITIATIVES LIKE THE INVIGORATION OF THE TAKEOVERS PANEL, THE COMPANIES AND SECURITIES PANEL, AND ALSO THE ISSUE OF THE MANDATORY BID HAS BEEN DISCUSSED WITHIN THE ASSOCIATION. OUR COMMENTS TODAY ARE TO PROVIDE INFORMATION TO THE COMMITTEE ON THE NATURE OF THE DISCUSSIONS WHICH TOOK PLACE WITHIN THE ORGANISATION.

AS I MENTIONED, ONE FUNCTION OF THE ASSOCIATION IS TO REVIEW REGULATORY CHANGES THAT MIGHT AFFECT THE INDUSTRY, AND IN THAT CONTEXT WE DID, IN LATE 1997 AND EARLY 1998, SPEND SOME TIME REVIEWING THE MANDATORY BID RULE AS PROPOSED IN CLERP 4. A SUMMARY OF THE POSITION WAS THAT IT BECAME CLEAR THAT THE TRADITIONAL TRADE-OFF IN FINANCIAL MARKETS REGULATION, WHICH IS THE DESIRE FOR UNFETTERED CAPITAL MARKETS, COUNTERBALANCED WITH THE NEED TO PROVIDE ADEQUATE PROTECTION FOR INVESTORS AND SHORE UP CONFIDENCE IN MARKETS, WAS AN ISSUE IN RELATION TO THE BID RULE.

IN ESSENCE, THERE WERE TWO VIEWS. REALLY, WHERE THE BALANCE LIES IN RESPECT OF THOSE VIEWS DEPENDED ON INDIVIDUAL ASSESSMENTS. BUT WHAT WE HAVE WRITTEN IN OUR SUBMISSION HERE IS A BRIEF SUMMARY OF THE TWO POINTS OF VIEW WHICH WERE PUT TO US IN THAT CONTEXT. I WILL RUN THROUGH THOSE BRIEFLY BECAUSE I THINK MANY OF THE POINTS YOU WOULD HAVE HEARD BEFORE.

THE PROPONENTS FOR THE MANDATORY BID RULE SAW SIGNIFICANT VALUE, AND SEE SIGNIFICANT VALUE, TO A MORE COMPETITIVE AND ACTIVE TAKEOVERS MARKET, THE CONNECTION THERE BEING MORE EFFICIENT USE OF CAPITAL, BETTER ALLOCATION OF CAPITAL, WHICH WILL RESULT IN GREATER ECONOMIC POTENTIAL. THE CERTAINTY WHICH THE MANDATORY BID RULE WOULD PROVIDE WOULD IMPROVE PRICE TENSION IN THE MARKET—THAT IS, EXISTING COMPANIES WOULD BE UNDER GREATER THREAT FROM TAKEOVER AND THAT IN ITSELF WOULD INDUCE BETTER MANAGEMENT PERFORMANCE. IT WAS ALSO ARGUED THAT BID COSTS COULD BE REDUCED THROUGH THAT LOWER SHARE PRICE PREMIUM AND THAT THE

BID PROCESS WOULD BE SMOOTHER BY DEFERRING DEFENSIVE TACTICS, ALL OF WHICH WOULD ENCOURAGE TAKEOVERS ACTIVITY.

THE OPPONENTS OF THE MANDATORY BID RULE FOCUSED MORE ON THE LIKELIHOOD OF A DECREASE IN PRICE COMPETITION IN TAKEOVERS INITIATED UNDER THE RULE. THE CONCERN HERE WAS THAT THERE WOULD BE CONSTRAINTS ON THE OPTION PROCESS, OR THERE COULD BE A REDUCTION IN MARKET TRANSPARENCY. THEY WERE CONCERNED THAT THE RULE COULD PREVENT SHAREHOLDERS OF A TARGET COMPANY FROM HAVING ADVICE FROM COMPANY DIRECTORS BEFORE CONTROL HAD PASSED TO THE BIDDER, AND THAT SMALL SHAREHOLDERS IN PARTICULAR COULD BE EXCLUDED FROM THAT PROCESS. IN ADDITION, THE TAKEOVER PREMIUM COULD BE REDUCED UNDER THE RULE BECAUSE COUNTERBIDDERS FOR THE COMPANY COULD BE REMOVED FROM THE PROCESS. IN OTHER WORDS, THERE WOULD NOT BE A FULL AUCTION. INDEED, IT WAS DIFFICULT TO SEE HOW BID COSTS COULD BE REDUCED WHILE AT THE SAME TIME DECREASING PRICE COMPETITION IN THE ACTUAL BID PROCESS ITSELF.

THAT DEBATE OCCURRED WITHIN THE ASSOCIATION AND AS A CONSEQUENCE OF THAT, AS A MEANS TO TRY AND MOVE FORWARD FROM TWO DIFFERING VIEWS, THE ASSOCIATION AT THAT TIME PROPOSED AN ALTERNATIVE, WHICH WAS A PRE-BID AGREEMENT. UNDER THAT AGREEMENT, THE BIDDERS COULD THEN TARGET SHAREHOLDERS AND ENTER PRE-BID AGREEMENTS IN WHICH THERE WOULD BE AN IRREVOCABLE COMMITMENT TO SELL SHARES WITHIN A GIVEN TIME. THE CONTROL ON THAT WAS THAT, SHOULD AN ALTERNATIVE BID EMERGE, THE INITIAL AGREEMENT WOULD BE CONDITIONAL ON THE OPTION FOR THE TARGET SHAREHOLDERS TO SELL TO THE HIGHER BIDDER.

WE RECENTLY CANVASSED VIEWS AMONGST MEMBERS AGAIN WHEN THE COMMITTEE'S HEARINGS WERE BEGUN, AND THERE IS A SIMILAR DISPARITY OF VIEWS. IN ESSENCE, THERE IS A MIDDLE GROUND WHICH IS STILL BEING SOUGHT.

CHAIR—Thanks very much, Dr Lynch. You refer to the divergence of views within the banking industry. Is it possible to distil where the balance lies? I note in your conclusion you support the mandatory bid rule. Is that based on where the balance of opinion lies within your membership? Can you put any sort of percentage of where it would lie in favour and against?

Dr Lynch—There are three sets of views here. There is one set which is strongly opposed to the mandatory bid rule; there is a set of practitioners who are strongly in favour of it; and there is a middle ground which is saying that it is better for industry if we can have a position which we can all agree to, and that is where support for a pre-bid agreement mainly came from. From our point of view it is a relatively evenly balanced debate. It is certainly not predominantly one way or the other. If it were, as an association it would be easier for us to present our position on that.

CHAIR—Given the international experience of a number of your members, is it possible for you to comment on the international perception of Australia's takeover market—how it operates and the degree of fairness and transparency in it?

Dr Lynch—In international terms, I think the market's integrity is not questioned. There are aspects of the market in which efficiency could be improved. As mentioned, I think the takeover's panel will assist there. There were also taxation reforms which significantly

improved the market. So, from an international perspective, yes, there were improvements that could be made and I think they are being made. In respect specifically of the mandatory bid rule, the conclusions of members took account of the international perceptions which were there and the experience in other jurisdictions. The concern probably was that. if one of the benefits from the markets as they operate here is the high degree of transparency and there were a compromise to that, then that would be an aspect which had to be taken into the equation. But in this sense there is no fundamental flaw. If this rule were or were not to proceed, I do not think it would fundamentally alter the international view of the market here, based on comments made to me by members.

Senator CONROY—You mentioned the lively debate, and I was interested that you said that there was one body of view and then you used the words 'there are the participants who strongly support it'. Would it be fair to say that you were describing the participants as the companies that are actively involved in merger and acquisitions? Is that an unfair characterisation of them?

Dr Lynch—No. Perhaps I should give a little more detail. The principal interest from our members is as advisers in connection with mergers and acquisitions activity. So when I refer to participants it is more as advisers than actual companies that could be subject to mergers and acquisitions.

Senator CONROY—Sorry, I was meaning advisers rather than actual takeover targets or whatever. So when you used the word 'participants', it would be fair to say that they would be the proponents who would either benefit directly or potentially benefit directly from an increase in takeover activity, if that were the effect?

Dr Lynch—Yes, if there were greater activity, advisers would be involved in providing more advice. On the other hand, if you have a quite complex system, you could equally have fewer takeovers but rather more advice attached to that too. I do not see that as being the issue in the sense that, if you take the mandatory bid in the context of other reforms which are happening, from our association's point of view in the context of mergers acquisitions, things like scrip bid relief are more important from the point of view of lifting market activity. One of the roles of the association, too, in representing part of the industry, is to try to take a strategic view on the overall development of the industry rather than look at it purely from the point of view of an adviser in the market. Therefore, things like economic efficiency, where they are relevant to this debate, become important in the context of our decision making.

EARLIER THERE WAS A QUESTION RAISED AS TO WHETHER THERE WAS A DIRECT CONNECTION BETWEEN ECONOMIC PRODUCTIVITY AND MERGERS AND ACQUISITIONS. IT IS A VALID QUESTION, BUT THERE IS A CONNECTION WHICH IS MADE THERE IN SEVERAL AREAS, NOT LEAST OF WHICH IS THE TAX REFORM PROCESS. THAT TENDS TO BUILD OFF STUDIES WHICH SHOW THAT ONE OF THE MAIN DETERMINANTS OF ECONOMIC GROWTH IS THE EFFICIENCY WITH WHICH YOU USE CAPITAL. THAT IS QUITE A DIFFERENT ISSUE FROM THE AMOUNT OF CAPITAL YOU HAVE TO USE AND, TYPICALLY, FROM MY EXPERIENCE IN ACADEMIC STUDIES, IT IS THE LATTER WHICH COUNTS MOST. I THINK THE FEELING IS THAT, WHEN YOU LOOK AT MERGER AND ACQUISITION ACTIVITY, YOU ARE LOOKING AT ALLOCATING THE

ECONOMY'S CAPITAL, AND THEREFORE THE MORE EFFICIENT THAT PROCESS IS THE BETTER THE ECONOMIC EFFICIENCIES THAT SHOULD FLOW FROM IT.

IN TERMS OF DIRECT NUMBERS, WHERE PEOPLE CLASS MERGERS AND ACQUISITIONS ACTIVITY AS TESTERS OF ECONOMIC GROWTH, I AM NOT AWARE OF IT. I WOULD BE DOUBTFUL THAT THE RESULTS COULD SHOW UP AN AWFUL LOT ANYWAY BECAUSE IT IS A VERY LONG BOW TO DRAW IN TERMS OF MAKING THOSE CONNECTIONS. THE LOGIC STANDS UP AND WE HAVE ACCEPTED THAT IN TERMS OF OUR VIEWS.

Senator CONROY—I am not sure whether you had arrived when we were discussing a report from the Stockholm School of Economics that was produced in response to the EU's directive.

Dr Lynch—I heard something economics related.

Senator CONROY—That was an economic study. In their conclusions, ironically they say:

It is no coincidence that several U.S. corporate managers have proposed that the MBR be introduced into their articles of incorporation. The principle serves as a defence against hostile takeovers since it checks rather than stimulates acquisitions. Accordingly, these more practical arguments support the already critical stance against the MBR that was the result of the theoretical analysis.

THEY QUESTIONED THE WHOLE MACRO ARGUMENT. THEY THEN ALSO POINTED TO A COUPLE OF PRACTICAL EXAMPLES WHERE, NOTWITHSTANDING THAT THIS IS MEANT TO STIMULATE, COMPANIES ARE NOW USING IT AS A DEFENCE AND, THEREFORE, NOT ACHIEVING TAKEOVERS. I WAS WONDERING IF YOU HAD ANY RESPONSE. I APPRECIATE YOU PROBABLY HAVE NOT SEEN IT YET.

Dr Lynch—No, I have not. I reviewed the paper very briefly and I read its conclusions more than the technical analysis. Typically, those sorts of papers are written on assumptions and conditions that are reasonably restrictive.

Senator CONROY—Sure.

Dr Lynch—I tend to attach more weight to the anecdotal evidence from practitioners than I would to those studies. Having said that, they do serve as a benchmark. They provide benchmark questions at least. I cannot comment further than that.

CHAIR—Stephen, you were referring to this economic study. As I read it, they are referring to the EC proposal to make the mandatory bid rule mandatory, whereas our proposal is to make it an option.

Senator CONROY—They are saying that everyone has to have it in their laws. The option has to be there. It is mandatory to have the option.

Mr RUDD—They are mandating the option, are they?

Senator CONROY—Some countries in the EU do not have it, so they are saying you have to provide it.

Mr RUDD—The points just made by Senator Conroy and the earlier discussion with the representative from Macquarie Bank go to the heart of my question as well. You can do a whole range of macro-economic studies that try to unpack the variables. That is always logically very difficult in terms of whether X regulatory change results in Y addition to allocative efficiency and, as a consequence, economic activity and growth. You said that you put greater store by what practitioners had to say. You represent international banks. International jurisdictions that have changed rules in the last decade or so have gone from something approximating what we have here at the moment in this country to what is currently being envisaged for this country with this particular proposal. Are you aware of any studies which go to a before and after analysis in terms of taking the narrowest measure possible, which is simply the level of M&A activity? Suspend my broader agnosticism on the equation between M&A activity and levels of economic growth and public good—leave all that to one side for the moment—and just answer that narrow question.

Dr Lynch—The short answer is no. I am not familiar with studies. I should qualify the nature of the organisation here. We represent international banks. We represent them in terms of their operations in Australia, so access to that material is not as readily available as might seemingly be suggested by the name of the organisation. There is a general issue of whether M&A activity is better or not. Then there is a question as to whether the mandatory bid rule within that framework is helpful or not. It is really the latter where the discussion has taken place within the industry group here.

IT IS A QUESTION OF: IS THE CONSEQUENT REDUCTION OF TRANSPARENCY, OR THE ABSENCE OF NEW BIDDERS TO COME INTO THE EQUATION, TOO MUCH OF A NEGATIVE IN THE CONTEXT OF A MANDATORY BID RULE? THE DISCUSSIONS WHICH TOOK PLACE IN OUR ORGANISATION REFLECTED THE NATURE OF BIDS WHICH HAD TAKEN PLACE. SO WHERE YOU HAD AN OPENING BID OFFER AND SUBSEQUENTLY ADDITIONAL BIDDERS ENTERED THE PROCESS AND CONSEQUENTLY THE FINAL OFFER PRICE OF THE BID INCREASED BY 20 PER CENT OR 30 PER CENT, WHAT YOU ARE TRYING TO WEIGH UP BY THE END OF THE DAY IS WHETHER TAKING THAT PROCESS OUT, WHICH IS REMOVING SOME PRICE COMPETITION, IS BALANCED BY MOVING UP THE GENERAL LEVEL OF PRICE TENSION IN THE MARKET BY A GREATER LEVEL OF ACTIVITY. THAT IS THE AREA WHERE THE DEBATE TOOK PLACE.

Mr RUDD—Again you would think that if there were serious proponents of this by way of a change and they were seeking to take their analytical base as being share price value—that is, that which is ultimately delivered to the vendor—then there must be some analytical study somewhere of the quantitative impact of an MRB regime on share price value through M&A activity as opposed to share price value through a non-MRB regime and M&A activity under such a regime.

YOU KNOW WHAT PUBLIC POLICY IS LIKE. ESSENTIALLY, WE OPERATE ON THE BASIS OF INTEREST GROUPS THEORY. YOU HAVE A BUNCH OF PEOPLE HERE WHO ARE WAVING A FLAG AND SAYING, 'I AM HERE REPRESENTING THE INTERESTS OF THE PUNTERS,' WHICH IS THOSE WHO ARE SEEKING TO YIELD MAXIMUM RETURN TO THEMSELVES. MY SENSES WERE FLYING A BIT BLIND ON THIS. WE HAVE A SERIES OF A PRIORI ASSUMPTIONS AND ASSERTIONS WHICH SAY, 'IF YOU DO THIS YOU ARE BOUND TO, ON THE BALANCE OF PROBABILITIES, JACK UP THE SHARE PRICE VALUE FOR ALL THE PUNTERS OUT THERE.' SOMEONE INVOLVED IN THIS PROCESS WOULD SAY, 'WHERE IS

THE EVIDENCE?' IF YOU HAVE REGIMES AROUND THE WORLD WHICH HAVE CHANGE THEN SURELY YOU SHOULD BE ABLE TO QUANTIFY THAT.

Dr Lynch—I have not seen that evidence and it has not been provided to us in the context of the debate which we had. The obvious evidence which we have looked to is that where you have seen additional bidders come in a process and seen the consequent increase. That is easy to observe. The other is more difficult. I have not given consideration to the reasons why that material is not there. It could possibly be that when you are looking at mergers and acquisitions you are looking at a dynamic process. There may well be structural factors within an industry which underpin the changing organisation. Consequently, it may well be that when you do get to look at analysis of that nature you simply cannot abstract the pure effect from the mandatory rules.

Mr RUDD—The extractionary variables I fully understand, but life is an imprecise science and whatever science we have around the place we should clutch. Therefore, it could not head us in the direction of leaving us less informed to have such a quantitative study undertaken, at least on the part of the proponents of this.

I UNDERSTAND FULLY WHAT YOU HAVE SAID BEFORE IN TERMS OF WHERE YOUR OWN MEMBERS LIE ON THIS QUESTION, BECAUSE FLIPPING TO THE OTHER SIDE OF INTEREST GROUPS THEORY AND LISTENING CAREFULLY TO WHAT YOU SAID BEFORE, PLAINLY THE PARTICIPANTS IN THE BUSINESS ARE THE ADVISERS WHO PRESUMABLY HAVE FEES STRUCTURED AROUND A GIVEN TRANSACTION OCCURRING AND FINANCIAL CLOSURE BEING EFFECTED. THEY ARE GOING TO BE DRIVEN BY LEGITIMATE SELF-INTEREST IN ALL OF THIS. I THINK IT IS IMPORTANT THAT WE UNPACK THAT AND MAKE THAT QUITE TRANSPARENT AS WELL. THOSE PEOPLE ARE GOING TO BENEFIT FROM A GREATER LEVEL OF M&A ACTIVITY BECAUSE IT IS BETTER FOR THEM. IT MAKES THINGS SPIN AROUND MORE. THE MORE TRANSACTIONS THAT OCCUR, THE HAPPIER THOSE PEOPLE ARE. THAT IS AN OBSERVATION, NOT A QUESTION.

Dr Lynch—It is probably a fair observation. It is a matter of fact, I think, yes. From their perspective, and indeed generally from an organisation like ourselves, when you are looking at government policy or evaluating government policy, you obviously try and develop and align the arguments in favour or against a change with the public policy outcomes of that so that you have a better chance of having your case heard successfully. I think that is correct, but it does not necessarily defeat the integrity of the process either.

Mr RUDD—The final point I make is that when we go back to the overall elements of interest group theory as it applies to public administration, notwithstanding our respective imperfections on this side of the table, we are supposed to aggregate all these things and say that proper public policy consists of a regulatory regime which, firstly, maximises shareholder value for punters and small participants out there; secondly and relatedly, ensures that there is a fair and transparent open market process which does that, which is not loaded in one direction or another; and, thirdly, because we are responsible for national economic management, assumes that this whole regime does the national economy net good rather than the reverse or as opposed to being neutral. The more quantitative data we can get on some of those judgments, the better. My concern, having reviewed a lot of the submissions before us, is that we have a great pack of assertions. Some of them are clearly driven by interest. That is fine; this process is partly about hearing people's interests. But I do not see a whole lot of hard data.

Dr Lynch—What I can offer is to endeavour to locate such information as would exist and pass it on without delay, if it is obtainable.

Mr RUDD—I would appreciate that.

CHAIR—There being no further questions, thank you very much for appearing before the committee and for the answers you have given to the questions that have been put.

[11.11 A.M.]

WORNER, Mr Alexander Claude, Member, Business Law Committee, New South Wales Young Lawyers

CHAIR—Welcome, Mr Worner. Do you wish to make an opening statement before we proceed to questions?

Mr Worner—I am quite happy to proceed straight to questions if you want.

CHAIR—Can you tell me a bit about the New South Wales Young Lawyers Organisation and its Business Law Committee? Is it part of a national body or is it distinct to New South Wales? It is not an organisation I am aware of.

Mr Worner—It is a subgroup of the Law Society of New South Wales. Basically, our members are all lawyers in New South Wales under the age of 36 or in their first five years of practice. Our organisation runs a number of groups or committees which focus on development in different areas of law including, for example, environmental law, litigation, and one of those being, obviously, corporation and securities law or the Business Law Committee. Our focus is on, firstly, keeping our members up to date in developments in the area and, secondly, being a participant in legal developments and development of the law.

CHAIR—Do you, as an organisation, believe that the mandatory bid rule would lead to companies falling into the hands of persons who can manage the company better than incumbent directors and management? Do you see that as a likely outcome and, if so, an advantage?

Mr Worner—I think the view of our committee is that takeovers should be sufficiently encouraged to allow companies to be managed by the people who can most efficiently manage the company's resources. Takeovers should be a facilitator to allow the people who can most effectively manage a company to manage it so shareholder value is maximised and shareholders get the greatest return. Are we are saying that the mandatory bid rule is necessary for that? Our submission says, yes, a mandatory bid rule, properly structured, will help the takeovers code ensure that that aim is met. Our submission is somewhat confusing and I am happy to try and clarify it a little.

CHAIR—Yes. I would be glad if you would do that.

Mr Worner—The primary basis of the submission is the idea of having the mandatory bid rule based on an agreement, the agreement being conditional upon the fact that it tries to facilitate or allow a competing bid to be raised after someone has acquired over 20 per cent of a company. If you allow someone to go out and grab over 20 per cent of a company and then make a takeover bid, another competing bidder may say, 'No. I will not make a competing bid because someone else has acquired over 20 per cent already.' They will have obtained such a strategic stake in the company that no-one will make a competing bid.

WE BELIEVE THAT COMPETING BIDS CAN MAXIMISE VALUE FOR SHAREHOLDERS, FIRSTLY, BECAUSE IF A COMPETING BIDDER THINKS, 'YES, WE CAN MANAGE THE RESOURCES OF THE COMPANY BETTER,' THEY SHOULD BE ALLOWED TO MAKE A COMPETING BID. SECONDLY, THE COMPETING BID IS NORMALLY AT A HIGHER PRICE; THEREFORE, THE VALUE TO SHAREHOLDERS IS MAXIMISED BECAUSE THERE IS A PERSON OUT THERE WHO IS WILLING TO MAKE A HIGHER BID. SO THE STRUCTURE OF OUR ARGUMENT IS BASED ON AN AGREEMENT WHICH CAN BE VALIDATED OR FALL AWAY IF SOMEBODY WANTS TO MAKE A COMPETING BID AGAINST SOMEONE WHO HAS ACQUIRED OVER 20 PER CENT OF THE COMPANY THROUGH THE MANDATORY BID RULE. THERE ARE VARIOUS WAYS TO STRUCTURE THAT. I HAVE TRIED TO PUT TOGETHER FOUR PROPOSALS WHICH PROBABLY CLARIFY WHAT I HAVE SAID IN THE SUBMISSION. I APOLOGISE FOR THE TYPING MISTAKES IN THE SUBMISSION WHICH MEAN THAT IT MIGHT BE HARD TO READ. BUT I AM HAPPY TO HAND OVER FOUR PROPOSALS FOR YOU TO LOOK AT WHICH EXPLAIN THE SUBMISSION I HAVE PUT TOGETHER.

CHAIR—Yes, we will receive that. In essence, your proposal is to have, if you like, a conditional mandatory bid rule?

Mr Worner—Yes.

CHAIR—The condition being that no other bidder comes into the equation to offer a higher price. If they do, then the mandatory bid does not proceed; if they do not, the mandatory bid does proceed?

Mr Worner—Basically, yes, but obviously there are variations of how you structure that proposal.

CHAIR—Yes, but that is the essential principle?

Mr Worner—That is the essential principle, yes, but not necessarily having the mandatory bid automatically fall away. Basically it depends on how you set it up. Part of our submission is that the initial seller who has resulted in the triggering of the mandatory bid rule makes a decision as to whether to accept the higher offer and, if they do accept the competing bid, obviously the initial agreement falls away and that initial seller has the right to go off and sell his shares to the competing bidder rather than stick with the initial bidder as such.

CHAIR—Does each of these bids require an agreement? If your second bidder comes in and makes a bid, do you reach one of these conditional agreements with them, which is subject to whether or not a third bidder comes in?

Mr Worner—No. What we are proposing at the moment is one conditional agreement up front, being a written agreement which is immediately disclosed to the market. That initial agreement would have a right in it that the seller can terminate the agreement, acquire back his shares and have the right to sell those shares to another person if a third party, after disclosure of the agreement to the market, decides, 'Yes, we want to make a full takeover offer for that body corporate, including the shares which are the subject of the conditional agreement.' If that person enters the market, the initial seller can say, 'No, I want to terminate the initial agreement. I accept the offer of the competing bidder and sell my shares to the competing bidder.' Then you have two takeover offers in the market. You have got to work out whether you structure it to

allow the first bidder to pull out or not. Proposal 1 is based on a time period. The initial bidder can pull out after 30 days, but after 30 days he is stuck in. Proposals 2 and 3 are that the initial bidder can pull out if the agreement is terminated.

OUR PROPOSAL 4 IS A VARIATION ON THAT SAYING WE CAN HAVE A CONDITIONAL AGREEMENT BASED ON SHAREHOLDER APPROVAL. BUT THAT IS NOT OUR PRIMARY SUBMISSION BECAUSE WE NEED TO ENCOURAGE TAKEOVER BIDS. A LOT OF BIDDERS WOULD BE DISCOURAGED TO MAKE A MANDATORY BID RULE TAKEOVER IF THEY KNEW THEY HAD TO GO TO THE UNCERTAINTY AND THE COST OF SEEKING SHAREHOLDER APPROVAL.

CHAIR—Does the second bid become a public bid in your proposal?

Mr Worner—Yes, it would.

CHAIR—Were you here when Mr Lucas gave his evidence this morning?

Mr Worner—No. Only for the last five minutes.

CHAIR—One of the issues that he raised was the fact that one of the difficulties with the current situation is that a number of potential buyers in the takeover situation do not want to get involved in a public auction process. It is not because of the price effect of that; they do not want to get into hostilities with another potential takeover offeror. The advantage of the mandatory bid rule is that in effect you have a private auction. You still have the auction process going on because the vendor will still seek out more than one potential purchaser to maximise the price but because it is in effect a private auction you will get more potential bidders coming in through that process because they do not go through the public wrangling of bidding and counterbidding and so on. How would your proposal fit into that? Aren’t you really providing a public auction in another form?

Mr Worner—Our proposal is basically a public auction. Unless you make it public, you can seek out a few people you think may be interested in acquiring the shares if you are an initial seller, but unless you make it completely public you do not actually know who is a potential buyer out there in the market. You may have indications and you may be able to seek out sources, but if you make it completely public everyone knows and anyone who is a potential acquirer can say, ‘Yes, I am interested in making a full takeover bid for the company.’ They put their hands up and come forward. Obviously the public auction would still occur under my proposal, but it would occur at the initial stage when the person acquires the first triggering acquisition. After that it would become a public auction which is in line with the previous mandatory bid rule that is proposed.

Mr RUDD—Looking at proposal 1, under your 30-day proposed disclosure period, presumably multiple third parties can make multiple bids. Is that right?

Mr Worner—Yes, that is basically—

Mr RUDD—That is not like the first cab off the rank? It becomes a bit complicated.

Mr Worner—Throughout the period there can be multiple bids during the initial stage until the triggering acquisition. There can be a private auction with multiple bidders for the triggering acquisition and then after the acquisition has been made public there can be multiple bids after that. Anyone can enter the market and say, ‘I want to acquire and make a full takeover bid for securities of that company.’ Then the transferor gets the right to accept one of those offers. There is nothing stopping someone launching a takeover bid at any stage for the company. The only obligation is that the person who makes a triggering acquisition in some circumstances will be forced to go on and make a full takeover offer. But there is no limitation on people making bids for the securities of the company.

Mr RUDD—So the public auction part of the process becomes in effect analogous to what we have got at the moment?

Mr Worner—Yes, very similar.

Mr RUDD—With the exception that under proposal 1, you have a time line.

Mr Worner—Yes. It is very similar to what we have got at the moment and to the mandatory bid rule that was proposed except that under these submissions you have got the possibility that the triggering acquisition could be invalidated and it would fall back to normal. It would fall back to having a current situation, which arises where at the moment you can just have competing bidders in the market. Am I explaining myself?

Mr RUDD—I think so. What is your overall estimation of the impact of this proposal on the level of M&A activity. Do those in the business regard this as more onerous or less onerous?

Mr Worner—I cannot give you specific figures. We have not done any studies or looked at any particular figures, so unfortunately I cannot help on that basis. Personally, I would say it should hopefully stimulate M&A activity because it provides an opportunity to go above the 20 per cent threshold with some certainty that you have someone possibly locked in, provided a competing figure is not made.

CHAIR—Thank you very much, Mr Worner, for appearing before the committee, for putting your alternative proposal and for answering our questions in relation to that.

[11.25 A.M.]

ROFE, Mr Alfred Edward Fulton, Chairman, Australian Shareholders Association Ltd

CHAIR—Do you wish to make an opening statement to the committee before we proceed to questions?

Mr Rofe—Yes, if I may, Mr Chairman. Because we have not put in a written submission, I thought it might be useful to outline some of our views. However, just before I do, I guess most members of the committee are already pretty familiar with the role and the activities of the Australian Shareholders Association Ltd. As you know, our role is to represent the interests of individual, as opposed to institutional, investors in Australia. We have a pretty good working relationship with IBSA, which represents institutional investors, so I think between the two of us we have the field pretty well covered. We also have pretty good working relationships with other industry bodies like the AICD, SIA, the accounting bodies, the chartered secretaries, ASX and ASIC.

WE CURRENTLY HAVE BETWEEN 5,000 AND 6,000 MEMBERS IN ALL STATES OF AUSTRALIA, WITH SOME OVERSEAS MEMBERS IN NEW ZEALAND, NEW GUINEA AND SOUTH-EAST ASIA. OUR NATIONAL OFFICE IS IN SYDNEY, AND WE HAVE ACTIVE COUNCILS IN ALL AUSTRALIAN MAINLAND STATES. I HAVE PROVIDED MEMBERS WITH A COPY OF THE LATEST ISSUE OF OUR NEWSLETTER CALLED *EQUITY*, WHICH IS PUBLISHED EVERY TWO MONTHS AND WHICH CONTAINS DETAILS OF SOME OF OUR CURRENT ACTIVITIES. I WAS JUST GOING TO MENTION A COUPLE OF ARTICLES IN THERE WHICH MIGHT BE OF INTEREST. ON PAGE 5, WE HAVE OUR CURRENT LIST OF POOR PERFORMERS. CERTAINLY OUR FOCUS IN RECENT YEARS HAS BEEN ON COMPANIES WHICH DO NOT SEEM TO BE PERFORMING WELL IN RELATION TO OTHER COMPANIES IN SIMILAR INDUSTRIES. ON PAGES 6 AND 7, WE HAVE WHAT WE CALL CASE MATTERS. THIS IS VERY POPULAR WITH OUR MEMBERS. IT OUTLINES OUR DISCUSSIONS WITH COMPANIES AND, IN SOME CASES, WHAT WE HAVE SAID AT GENERAL MEETINGS AND SO FORTH. THE THIRD ARTICLE I WANTED TO MENTION IS ON PAGES 14 AND 15. IT IS AN ARTICLE BY HENRY BOSCH, THE FORMER CHAIRMAN OF THE NATIONAL COMPANIES AND SECURITIES COMMISSION, ON THE YANNON INVESTIGATION, WHICH MEMBERS MAY CONSIDER RELEVANT TO THIS AFTERNOON'S PROCEEDINGS.

LET ME THEN GO ON AND TALK ABOUT THE MANDATORY BID RULE. I THINK PROBABLY THE FIRST PREMISE IS WHAT I MIGHT CALL THE ECONOMIC EFFICIENCY ARGUMENT—THE IDEA THAT TAKEOVERS ARE GENERALLY TO BE ENCOURAGED AND SEEN TO BE A USEFUL MECHANISM FOR THE ALLOCATION OF RESOURCES AND A DISCIPLINE ON THE EXISTING MANAGEMENT OF COMPANIES. A NUMBER OF WITNESSES AND SUBMISSIONS HAVE REFERRED TO THIS PRINCIPLE, AND I THINK IT IS PRETTY WIDELY ACCEPTED. A NUMBER OF PEOPLE WOULD SUGGEST THAT THE AMERICAN ECONOMY IS A GOOD EXAMPLE OF ITS OPERATION IN PRACTICE.

THE SECOND PREMISE IS INVESTOR PROTECTION. I THINK IN AUSTRALIA WE CAN FIND THAT PARTICULARLY IN THE FOUR EGGLESTON PRINCIPLES. BUT AGAIN, IF WE LOOK, FOR EXAMPLE, AT THE PAPER BY ELAINE HUTSON WHICH REVIEWS THE TAKEOVER LEGISLATION IN A NUMBER OF OTHER COUNTRIES, I

THINK IT IS FAIR TO SAY THAT THEY ARE ALL MOVING TOWARDS SOME EQUIVALENT OF THE EGGLESTON PRINCIPLES.

I THINK THE KEY ISSUE FOR THE COMMITTEE IS: WILL THE INTRODUCTION OF A MANDATORY BID RULE IN AUSTRALIA INCREASE ECONOMIC EFFICIENCY WITHOUT ADVERSELY AFFECTING INVESTOR PROTECTION? I GUESS A STARTING POINT IS WHAT WE REALLY MEAN BY A MANDATORY BID RULE. A LOT OF THE SUBMISSIONS HAVE TALKED ABOUT A MANDATORY BID RULE. THEY HAVE SAID, 'LOTS OF OTHER COUNTRIES HAVE IT. WE SHOULD HAVE ONE TOO.' BUT IN FACT IF WE LOOK CAREFULLY AT THE SUBMISSIONS—AND IN PARTICULAR ELAINE HUTSON'S PAPER—WE WILL SEE THAT THE PHRASE 'MANDATORY BID RULE' IS USED IN DIFFERENT CONTEXTS TO MEAN DIFFERENT THINGS.

IF WE LOOK, FOR EXAMPLE, AT THE UNITED KINGDOM SITUATION, THE RULE THERE IN SUMMARY IS: IF A BIDDER GOES OVER THE RELEVANT THRESHOLD, WHICH IN THE UK IS 30 PER CENT, THEY MUST MAKE A FULL TAKEOVER OFFER FOR ALL THE OTHER SHARES. IN A SENSE, THAT IS REALLY A STATEMENT OF EGGLESTON PRINCIPLE NO. 4; THAT, SO FAR AS PRACTICABLE, EACH SHAREHOLDER SHOULD HAVE AN EQUAL OPPORTUNITY TO PARTICIPATE IN THE BENEFITS OFFERED BY A TAKEOVER.

IF WE LOOK AT THE CURRENT AUSTRALIAN SITUATION, THE BASIC RULE IS: A BIDDER MUST NOT GO OVER THE THRESHOLD—IN THIS CASE, 20 PER CENT—UNLESS THEY MAKE A TAKEOVER BID FOR ALL SHARES. WHAT I WOULD SUGGEST IS THAT THE PRESENT AUSTRALIAN RULE IS VERY SIMILAR TO THE SO-CALLED UK MANDATORY BID RULE, WITH THE EXCEPTION THAT IN AUSTRALIA YOU CANNOT CROSS THE THRESHOLD UNLESS YOU MAKE A TAKEOVER BID. IN THE UK YOU CAN CROSS THE THRESHOLD, TIE UP A COUPLE OF SHAREHOLDERS AND THEN GO ON AND MAKE YOUR GENERAL BID. WHAT WE ARE PROPOSING IN AUSTRALIA UNDER THE AUSTRALIAN MANDATORY BID RULE IS THAT A BIDDER CAN GO OVER THE THRESHOLD ONCE, PROVIDED HE THEN MAKES A TAKEOVER BID FOR ALL THE REMAINING SHARES. SO I THINK IT IS A LITTLE CONFUSING IN SOME OF THE SUBMISSIONS TO SAY, 'WE HAVEN'T GOT A MANDATORY BID RULE IN AUSTRALIA, LOTS OF OTHER PEOPLE DO; THEREFORE, WE NEED A MANDATORY BID RULE,' WITHOUT MAKING IT CLEAR THAT THERE IS A SUBTLE DIFFERENCE BETWEEN THE PROPOSED AUSTRALIAN MANDATORY BID RULE AND THE UK RULE.

THE NEXT THING I WOULD LIKE TO SAY SOMETHING ABOUT IS: HAS THE ABSENCE OF A MANDATORY BID RULE IMPEDED TAKEOVER ACTIVITY IN AUSTRALIA? IT HAS BEEN ALLEGED THAT IN RECENT YEARS THERE HAS BEEN LESS TAKEOVER ACTIVITY IN AUSTRALIA THAN IN THE UK OR IN THE US AND THAT A SIGNIFICANT REASON FOR THIS HAS BEEN THE ABSENCE OF A MANDATORY BID RULE IN AUSTRALIA. IN FACT, IF ONE EXAMINES THE VARIOUS SUBMISSIONS, I DO NOT BELIEVE THAT ANY COMPELLING EVIDENCE HAS BEEN PROVIDED TO SUPPORT THIS ARGUMENT.

I MUST SAY THAT, OF THE VARIOUS SUBMISSIONS—I HAVE HAD THE OPPORTUNITY TO READ THEM AND TO TALK TO PETER LEE LAST WEEK, AND I HAVE READ THE *HANSARD* AND THE PAPER BY ELAINE HUTSON—I FOUND THE ASIC SUBMISSION AND THE PAPER BY ELAINE HUTSON, INSOFAR AS IT SURVEYS OVERSEAS COUNTRIES, ALTHOUGH NOT INSOFAR AS THE CONCLUSIONS ARE CONCERNED, TO BE THE MOST HELPFUL. I GUESS ASIC HAS RAISED THIS POINT IN ITS SUBMISSION, BUT THERE ARE A NUMBER OF OTHER FACTORS WHICH MAY EXPLAIN THE REDUCED LEVEL OF TAKEOVER

ACTIVITY IN AUSTRALIA, INCLUDING, IN PARTICULAR, THE TENDENCIES OF OFFERORS AND TARGET COMPANIES IN AUSTRALIA TO RESORT TO TACTICAL LITIGATION AND THE ABSENCE UP UNTIL NOW OF CAPITAL GAINS TAX ROLLOVER RELIEF IN AUSTRALIA.

BOTH OF THOSE MATTERS HAVE RECENTLY BEEN ADDRESSED. WE HOPE THAT THE AMENDED PANEL PROVISIONS MIGHT HELP TO REDUCE TACTICAL LITIGATION. OF COURSE, WE DO NOW HAVE CAPITAL GAINS TAX ROLLOVER RELIEF. I THINK THAT IS A VALID POINT: HAS THE ABSENCE OF A MANDATORY BID RULE IN THE FORM PROPOSED IN AUSTRALIA REALLY BEEN A MAJOR FACTOR INHIBITING TAKEOVERS IN AUSTRALIA? AS I SAY, I DO NOT THINK THERE IS ANY COMPELLING EVIDENCE ONE WAY OR THE OTHER ON THAT.

THERE WERE A COUPLE OF OTHER POINTS I WANTED TO RAISE. I MIGHT RUN THROUGH SOME OF THE KEY PROVISIONS IN THE AUSTRALIAN PROPOSAL AND COMMENT ON THEM. I AM TAKING THEM FROM THE EXPLANATORY MEMORANDUM OF THE CORPORATE LAW ECONOMIC REFORM PROGRAM BILL 1998. WITH RESPECT TO THE MANDATORY BID CONDITIONS, THE MEMORANDUM STATES:

> the bidder must start from below the 20 per cent threshold with only one acquisition being allowed before the mandatory bid requirement is triggered...

The only comment I would make on that is that I would certainly support the limitation to only one acquisition, but I think it should be clear that that one acquisition might include an acquisition from a number of related parties. For example, a major shareholder may have its shareholding registered in the names of a number of subsidiaries, so I think it would be appropriate to consider those subsidiaries as a single acquisition. The memorandum continues:

> the bidder should not acquire a relevant interest in any other securities...

> the bidder must disclose to the selling shareholder that the mandatory bid requirement will be triggered...

> the bid must include an offer of a cash sum for the securities, thereby giving target shareholders the option of exiting from the company completely. Alternative consideration, such as securities or a combination of cash and securities, may also be offered...

I note that under the UK rule the bid can only be a cash bid. Mr Lee outlined the two main reasons for that. I do not think it is necessary provided that there is a cash alternative. Of course, from a shareholder’s point of view, particularly with the presence of capital gains tax rollover relief, in many cases a scrip bid will be more attractive than a cash bid, so it may be in the interests of both the bidder and the target company shareholders to have a scrip alternative available. The next point outlined in the memorandum is as follows:

> the bid must be for an amount at least equivalent to the highest price paid by the bidder in cash or non-cash transactions in the last four months.

I want to mention two points in that regard. First of all, the rule in the UK is 12 months rather than four months. I think Mr Lee suggested that 12 months gave better protection to shareholders. On the other hand, I think it is arguable that a longer period may inhibit a bid if circumstances have changed. For example, if we take the AMP-GIO situation—and putting aside the question that the clean-up offer was a scheme of arrangement rather than a takeover offer—I think it is arguable that AMP would probably not have been prepared to make a second bid at $5.35, but it was prepared to make a bid at a lower price. In other words, from a

shareholder's point of view, I think half a loaf is better than no bread, so I think that, having regard to the arguments about 12 months or four months, I am quite happy with the four-month provision there.

THE SECOND POINT THAT MIGHT BE RAISED IN RELATION TO THAT IS THE PROBLEM OF VALUING THE CONSIDERATION. I NOTICED THAT THE AUSTRALIAN PANEL RECENTLY ISSUED A DRAFT POLICY STATEMENT DEALING WITH THAT ISSUE, SO I DO NOT THINK THAT IS INSURMOUNTABLE. THE NEXT POINT IS:

> the bid must be unconditional ...

I would certainly support that approach and disagree with the AICD's submission on that point. The following point says:

> target shareholders must be provided with an independent expert's report by the target ...

That is probably a useful protection for shareholders. The following point says:

> the bidder must not exercise control of the target until the offer period starts ...

I think that is appropriate. The next point says:

> no securities will be able to be issued, nor dividends declared or distributions made, from the time of the pre-bid acquisition until the end of the bid period without shareholder approval ...

I think that is appropriate. In making comparisons with overseas requirements, it is important to look at the complete scheme and not just focus on one particular aspect of it. One particular matter which emerges from the Hutson paper is the difference in the role of the directors of the target company. In the UK, under the London City code, they normally play a key role. These duties are, in fact, specified in the code. I think Mr Lee pointed out that normally a bidder would approach the target company directors first and, even in a mandatory bid situation, the directors of the target company would normally become involved.

IN THE US—AND THIS IS DISCUSSED AT PAGES 24 AND 25 OF THE HUTSON PAPER—PARTICULARLY IN RELATION TO THE REVLON AND THE PARAMOUNT COMMUNICATIONS CASES THE PRINCIPLE APPEARS TO BE THAT, ALTHOUGH THE TARGET COMPANY DIRECTORS MIGHT INITIALLY RESIST THE BID, THERE MAY COME A STAGE WHERE IT IS THEIR DUTY TO CONDUCT AN OPTION. IN AUSTRALIA, THE POSITION IS LESS CLEAR. CAN TARGET COMPANY DIRECTORS SIMPLY SAY, 'THIS COMPANY IS NOT FOR SALE AT ANY PRICE,' AS ONE OR TWO CHAIRMEN SEEM TO BE SAYING LATELY? THIS POSITION MAY BE CLARIFIED BY THE GIO CLASS ACTION. ONE CANNOT JUST GO THROUGH A LIST AND SAY, 'OTHER COUNTRIES HAVE A MANDATORY BID RULE; THEREFORE, WE SHOULD HAVE ONE IN AUSTRALIA,' UNLESS WE UNDERSTAND EXACTLY WHAT WE MEAN BY THE MANDATORY BID RULE AND THE DIFFERENT ENVIRONMENT OPERATING.'

I MIGHT SUMMARISE OUR POSITION BEFORE YOU ASK ME QUESTIONS. THE ASA DOES NOT OPPOSE THE INTRODUCTION OF A MANDATORY BID RULE IN AUSTRALIA, SUBJECT TO THE INCLUSION OF THE CONDITIONS RECOMMENDED BY ASIC AND MY EARLIER COMMENTS. ON THE OTHER HAND,

WE HAVE STRONG SYMPATHY FOR THE POSITION ADVOCATED BY MR LEVY WHICH IS PAGES 33 AND 34 OF THE BOOKLET WITH SUBMISSIONS. THAT APPEARS TO CORRESPOND TO THE CONCEPT OF PRE-BID AGREEMENTS REFERRED TO IN THE ASIC SUBMISSION AT PAGES 26 AND 27 OF THE PRINTED BOOKLET. ONE MIGHT ALSO REFER TO PARAGRAPH 2 ON PAGE 2 OF SUBMISSION 7, WHICH IS ON PAGE 49 OF THE PRINTED BOOKLET. THE FIRST PARAGRAPH THERE REFERS TO THE FACT THAT:

... a bidder will be more likely to incur the cost of a takeover bid if it is confident that a positive outcome will be achieved. We believe that more bidders would be willing to make a takeover offer if they could establish that the controlling shareholder or shareholders are prepared to sell their shares, even if this willingness is qualified by the understanding that, should a higher offer emerge, the shares will be sold for the highest price available.

So that seems to me to support Mr Levy's position of an undertaking to sell but retaining the right to accept a higher offer and therefore not thwarting an auction.

I GUESS FROM AN OFFEROR'S POINT OF VIEW, THERE SEEM TO BE TWO BENEFITS OF A MANDATORY BID RULE. THE FIRST BENEFIT IS THAT THERE IS AN ASSURANCE THAT THE MAJOR SHAREHOLDER WILL SELL, AND I THINK THIS IS IN THE INTEREST OF ALL SHAREHOLDERS BECAUSE IT ENCOURAGES THE SALE PROCESS. THE SECOND BENEFIT IS THAT IT RAISES THE POTENTIAL FOR BLOCKING RIVAL BIDS AND, TO THAT EXTENT, IT MIGHT BE THOUGHT TO BE TO THE DISADVANTAGE OF THE INTERESTS OF OTHER SHAREHOLDERS IN THAT IT IMPEDES AN AUCTION. I THINK PERHAPS I SHOULD STOP THERE SO THAT YOU CAN ASK ME SOME QUESTIONS.

CHAIR—Thank you very much, Mr Rofe. I guess the crux of the argument for and against mandatory bids revolves around this issue of whether or not small shareholders are going to get a better premium out of the public auction process that currently exists.

Mr Rofe—I would not say small shareholders; I would say shareholders. One piece of evidence which no-one has produced in these submissions is an analysis of the shareholding structure of Australian companies. Many years ago Ted Wheelwright at Sydney University did something like this but no-one, so far as I can see, has done it recently. I think there is quite a range between some companies where there is a dominant shareholder, some companies where there is a high proportion of institutional shareholders and other companies where there is a wide spread of shareholdings.

I THINK THAT ARTICLE WHICH PROFESSOR RAMSAY SENT UP PERHAPS HIGHLIGHTS THIS ISSUE: A MANDATORY BID RULE MAY BE BENEFICIAL IN CERTAIN CIRCUMSTANCES AND IN OTHERS IT MAY NOT. ONE IMPORTANT FACTOR IS THE STRUCTURE OF THE SHAREHOLDINGS. I KNOW SOME OF JOHN GREEN'S ARGUMENTS ABOUT THE MAJOR SHAREHOLDER. I AM SURE THAT, IF A BIDDER NEGOTIATED WITH A KERRY PACKER WHO WAS A MAJOR SHAREHOLDER IN A PARTICULAR COMPANY, THE BIDDER WOULD GET THE MAXIMUM PRICE. BUT IN OTHER SITUATIONS, WHERE THERE IS PERHAPS NOT A DOMINANT SHAREHOLDER OR PERHAPS NOT A SHAREHOLDER WHO IS IN A PARTICULARLY STRONG POSITION, IT DOES NOT NECESSARILY FOLLOW THAT THE MANDATORY BID RULE WILL BE IN THE BEST INTERESTS OF ALL SHAREHOLDERS.

CHAIR—I was just going to query this dichotomy between the public auction process that occurs under the existing situation and the private auction capacity under a mandatory bid rule. Evidence has been given to us about the unwillingness of some potential bidders to get involved

in a public auction process because of the potential damage to their reputation if they lose out in the end or for whatever reason. Where do you think the balance of argument lies in those two issues in terms of maximising shareholder value?

Mr Rofe—I think one of the key elements here is transparency. There are two reasons for this. Firstly, it encourages confidence in the market; and, secondly it is an essential element of an efficient market which maximises prices. What I would be concerned about is a secret negotiation prior to the public offer. Perhaps a negotiation with one significant shareholder to, as it were, start the ball rolling is one thing, but I think there is a risk that, if a bidder negotiates secretly with a number of significant shareholders without necessarily telling one of them that it is talking to others and what price it is offering to others, it may not maximise the final price.

AGAIN THIS IS ONE OF JOHN GREEN'S ARGUMENTS. HE SAYS IF YOU SELL YOUR HOUSE YOU HAVE THE CHOICE OF SELLING IT BY PRIVATE TREATY OR BY PUBLIC AUCTION. BUT IN THAT SITUATION IT IS THE VENDOR'S CHOICE. WHAT WE ARE TALKING ABOUT IN A MANDATORY BID RULE IS THE PURCHASER'S CHOICE. AS I SAY, I WOULD BE CONCERNED WITH A SITUATION WHICH WOULD INVOLVE A BIDDER NEGOTIATING WITH A NUMBER OF MAJOR SHAREHOLDERS, NOT HAVING A TRANSPARENT AUCTION PROCESS, PERHAPS TYING ONE OR TWO UP AT A SUBOPTIMAL PRICE, AND MAKING A MANDATORY BID—AGAIN AT A SUBOPTIMAL PRICE—SO THAT THE TAKEOVER WAS ONLY PARTIALLY SUCCESSFUL. YOU WOULD HAVE A SITUATION WHERE THE THEN CONTROLLING SHAREHOLDER WAS GOING TO CREEP UP, USING THE THREE PER CENT IN SIX MONTHS RULE, UNTIL THEY GET TO THE 90 PER CENT. THEN THEY COULD USE THE NEW COMPULSORY ACQUISITION PROVISIONS TO CLEAN OUT THE REMAINDER AT WHAT AGAIN WAS LIKELY TO BE A SUBOPTIMAL PRICE. IT IS IMPORTANT TO HAVE, AS SOON AS POSSIBLE, A PUBLIC AUCTION WHERE THERE IS FULL DISCLOSURE OF PRICES AND INTERESTED PARTIES.

Senator GIBSON—You are not worried about the evidence we heard from Mr Lucas this morning, that in practice there is quite a significant number of companies whose boards do not want to expose themselves to the public auction process?

Mr Rofe—I do not know. I must say I was quite taken by Senator Conroy's comments about the 'shrinking violets'. I would not really have thought of Macquarie Bank and its clients as shrinking violets.

Senator GIBSON—It is not a matter of Macquarie Bank. It is the company which wants to make the bid.

Mr Rofe—I must say that, if a bidder can get something at a good price, they should be prepared to come out in the open about it—certainly, of course, if there are bidders who are looking for bargain deals. If they can do a deal on the quiet, get a good price and then make an offer for the rest of the shares, they are doing well, aren't they? Certainly, there is the situation going back to what I said earlier about tactical litigation, where in virtually every bid nowadays one party or the other rushes off to the court to get an injunction to claim that there is some inadequacy in the part A statement or what have you. I hope that the amendments in relation to the takeover panel might do something there. Putting that aside, I am rather sceptical about these shrinking violets who, if they see a good deal, are not prepared to compete with other potential purchasers in an auction process.

Senator GIBSON—In my past life I was a director of quite a few companies, and I can understand some boards not wanting to go into a public auction process.

Mr Rofe—I know there are quite a lot of boards who like the easy life, and that is why we have got our list of poor performers.

Senator GIBSON—I agree.

Mr Rofe—And that is why we want to encourage takeover activity, so that some of these directors who have been enjoying the easy life are going to have to get their act together a bit better.

Senator GIBSON—The suggestion, therefore, of allowing private bids to take place would, in fact, encourage takeover activity—which your association is in favour of.

Mr Rofe—The initial deal to kick off the sale process is fine, but I would be concerned about secret auctions in which the participants were not fully informed as to what prices are being offered and to whom.

Senator CONROY—Is the purchaser controlling that auction, not the proper seller?

Mr Rofe—Yes.

Senator CONROY—It is the total inverse of the normal auction process?

Mr Rofe—That is right.

Senator GIBSON—If you want to sell, you control the system, you control the selling.

Mr Rofe—Yes, but a lot of this argument has been based on the premise that there is a single controlling shareholder with whom the bidder is negotiating. In that Pasminco case which Mr Levy referred to in his submission, there were probably half a dozen major institutions which between them controlled well over 50 per cent of the shares. So if you have got a situation like that—

Senator CONROY—You take the lowest price.

Mr Rofe—That is right. You go to the institutions independently, you do not tell them what you are doing and you find the one that is prepared to accept the lowest price. If you put your foot on that shareholding then you have squeezed out effective competition. That is the thing that I am concerned about.

Senator GIBSON—That implies that Pasminco were less than diligent in the—

Mr Rofe—No, because Pasminco was not involved. Initially it was a negotiation between the purchaser and the individual institutional shareholders. As I said, this is one difference between

the Australian situation and the situation in the UK and the US: there is less formal involvement of the target company's board.

Mr RUDD—Going to your commentary on ASIC's submission, basically what you are saying is that in ASIC's stated reservations on pages 3 to 8 of their submission, in that argumentation, they all have rocks in their heads and that, after page 8, they basically concede the game and say, 'If we are going to get pregnant, this is how we should get pregnant'—that is essentially your view. None of the enjoinders about retaining some virginity on this question are well-founded, in your view, particularly their whole argument about transparency. You actually do not see that the regulators have a legitimate argument there?

Mr Rofe—You have lost me there.

Mr RUDD—On page 22 of the submission book the opening paragraph under the heading 'Regulatory concerns'—a point which I addressed earlier to the representative from Macquarie Bank—basically says that ASIC's overall concern is the diminution in the transparency of transactions.

Mr Rofe—As I said earlier, I think transparency is a key element in a market which operates efficiently and in which potential investors have confidence.

CHAIR—Is your concern that the proposed mandatory bid rule is inadequate with regard to transparency?

Mr Rofe—No. What I am saying is that if you limit it to one acquisition, it is not as great a concern. As I said, my preference leans towards the Levy model, but in view of the lack of strong evidence one way or another, particularly Mr Lee's evidence to the effect that he is not aware of significant problems in the operation of mandatory bids in the UK, that is of some comfort.

Mr RUDD—But the burden of the first part of ASIC's submission, if I read it correctly—and they are going to appear before us next—is that there should be no policy change on this question. That is where you part company with them?

Mr Rofe—I would express it slightly differently. I would say that there is not a compelling reason for a policy change at this stage for the introduction of a mandatory bid rule, particularly when we have regard to the fact that there have recently been a number of changes to the regulatory environment which may remove some of the previous impediments to the operation of mergers and acquisitions.

Mr RUDD—In your studies of the broader question of the interests, say, of your constituency and what price is going to be delivered to shareholders through, let us say, two phenomena occurring—assuming there is a causality between them—one being an increased level of M&A activity and the other being the introduction of the sort of regime which is being contemplated here, can you point to any empirical survey out there of before and after studies in other jurisdictions which provide some quantitative evidence to support the thesis that this will be all hunky-dory for small shareholders?

Mr Rofe—No, I cannot. I do not want to base it solely on the interests of small shareholders. There is evidence, and I think it is generally accepted—and this is a reason driving some of the changes in Europe and elsewhere—that an effective takeover market does improve economic efficiency. That, of course, is not only in the interests of the shareholders in the company concerned but in the national interest. So I think that is a factor which people would not disagree with.

Mr RUDD—Some do. Critique has emerged in the United States about M&A mania, to the extent that that becomes, in fact, a substitute for normal corporate development, as a large slice of company time is spent focusing on predatory behaviour in the market by people who do not know the business. You know the arguments as well as I do. You do not think that is worthy of consideration or in terms of any reflection on a regulatory environment? I do not necessarily argue that myself, but I am interested to test the thesis.

Mr Rofe—One argument that has come up in some of these submissions is that a more competitive takeover environment might encourage companies to take the defensive action before the bid rather than after; that it is not really in shareholders' or anyone's interest for directors to wait until they receive a bid or suspect that they are about to receive a bid, to say 'Look, we've got great plans; we're going to be profitable next year; we've got all these strategies in place,' which, at that stage, often sounds a bit unconvincing. Rather, if there were this environment of increased takeover activity, those boards of directors would be saying to themselves all the time, 'We want to develop the right strategies; we want to let our shareholders know that we are developing the right strategies.' I would suggest that, if that is the case, if they can convince shareholders and the market that they are doing the right thing, the share price will reflect the potential and they will be less susceptible to takeover activities.

Mr RUDD—Doesn't the reverse logic also conceivably apply? What you are arguing basically is that you tunnel back through this logic and you increase corporate performance. You seem to be saying that, therefore, that makes you a less desirable M&A target. Surely, the reverse logic could be applied.

Mr Rofe—If your share price properly reflects your performance, then you should not be susceptible to a takeover. This is the sort of philosophy underlining our free enterprise system, isn't it?

Mr RUDD—In part.

CHAIR—There being no further questions, thank you very much for your evidence to the committee and for your answers to our questions.

[12.04 P.M.]

CAMERON, Mr Alan, Chairman, Australian Securities and Investments Commission

CHAIR—Welcome. Do you wish to make an opening statement before we proceed to questions?

Mr Cameron—Yes, I would like to make a very brief statement. I simply wanted to draw attention to the nature of the commission's submission. In December 1997, the commission responded to what was then CLERP paper No. 4, and the material that we are presenting to you today is basically that submission again. Things have moved on in the intervening period—in particular, the legislation was published and has been debated and this committee has been asked to look now into the mandatory bid rule in the context where the rest of the changes envisaged by that piece of legislation have effectively occurred. Since 13 March, the takeover's panel has been in place. As far as I am aware, it has had no referrals since 13 March. So perhaps the issues that are arising with respect to takeovers have not required any dispute resolution, but that in itself is quite interesting because it was one of the issues that was underlying the industry's concern about the low level of takeovers—that it might have been tactical litigation that was one of the contributing factors. Since that has gone as a factor, it is interesting to see—

Senator CONROY—All that pent up takeover activity?

Mr Cameron—No, there has not been any pent up takeover activity, at least related to that. I am not quite sure how you interpret that, but it is just interesting after what is now 2½ weeks that there still has been no matter referred to the panel.

THE ONLY QUALIFICATION THAT WE INTRODUCED THIS YEAR IN THE SUBMISSION IS THE REFERENCE TO THE CASE FOR ALLOWING THE TAKEOVER'S REGIME TO STABILISE, AND THAT DOES LINK A BIT TO THE ISSUE ABOUT WHETHER THE PANEL IS GETTING ANY WORK. WE SIMPLY INVITE THE COMMITTEE TO CONSIDER WHETHER THE EXTENT OF CHANGE IS SUCH THAT IT MIGHT BE ONE OF THE FACTORS YOU MIGHT WISH TO CONSIDER AS TO WHETHER THE REGIME SHOULD BE ALLOWED TO SETTLE DOWN.

I HAVE HAD THE OPPORTUNITY OF READING MR LEE'S AND MR GREEN'S EVIDENCE WHEN YOU HAD A HEARING A COUPLE OF WEEKS AGO. WHEN I READ THAT, I WAS STRUCK BY MR GREEN'S REFERENCE TO HIM NOT EXPECTING A HIGH LEVEL OF MANDATORY BIDS IN ANY EVENT, IF THE RULE WERE TO BE INTRODUCED. IN A SENSE, I SUPPOSE I AM SIMPLY INVITING YOU TO CONSIDER WHAT THE EXPECTATIONS MIGHT NOW BE IF THIS RULE WERE TO BE INTRODUCED.

PERHAPS I SHOULD REITERATE WHAT WE SAID IN DECEMBER 1997, THAT THE COMMISSION DOES NOT SEEK TO TAKE A VIEW FUNDAMENTALLY ABOUT THE INTRODUCTION OF THE MANDATORY BID RULE. WE NEVER REGARDED OURSELVES AS HAVING ANY MONOPOLY OF WISDOM ON WHAT OUGHT TO BE DONE IN THIS AREA. IT IS FUNDAMENTALLY A MATTER FOR GOVERNMENT AND PARLIAMENT AS TO WHAT OUGHT TO BE DONE. WE SAW OUR ROLE AT THE TIME, AND WE STILL SEE OUR ROLE, AS DRAWING ATTENTION TO

REGULATORY ISSUES THAT MIGHT ARISE IF THAT POLICY WERE TO BE ADOPTED. A LOT OF THE ISSUES THAT WE RAISED—AS YOU CAN SEE FROM THE WAY THAT THE ORIGINAL SUBMISSION HAS BEEN ANNOTATED—HAVE BEEN ADDRESSED IN THE FORM OF THE DRAFT LEGISLATION THAT WAS BEFORE THE PARLIAMENT LAST YEAR.

SO WHILE I AM VERY HAPPY TO DEBATE THE MATTER WITH YOU AND HAVE A GENERAL DISCUSSION, I DO WANT TO MAKE IT CLEAR THAT THE COMMISSION HAS SOUGHT TO BE STUDIOUSLY CAREFUL ABOUT NOT ADOPTING SOME OVERRIDING OPINION ABOUT THE MERITS OR NOT OF INTRODUCING THIS. FOR EXAMPLE, I REMIND YOU THAT THERE ARE COMPANIES OR SHAREHOLDERS THAT HOLD MORE THAN 20 PER CENT OF COMPANIES THAT DO PERIODICALLY APPROACH THE COMMISSION FOR RELIEF TO ENABLE THEM TO ENTER INTO A TRANSACTION. THERE HAVE NOT BEEN AS MANY OF THEM AS YOU MIGHT IMAGINE, WHICH AGAIN LINKS TO MY COMMENT ABOUT JUST HOW NECESSARY THIS RULE IS. BUT THE COMMISSION HAS HAD POLICY PUBLISHED FOR SOME TIME ABOUT THE CIRCUMSTANCES IN WHICH A TENDER OPTION CAN BE CONDUCTED.

SO THERE IS AN ISSUE ABOUT SHAREHOLDERS WITH MORE THAN 20 PER CENT WISHING TO SELL THEIR SHARES. MR GREEN DESCRIBES IT AS A BIT LIKE SELLING YOUR HOUSE AND HAVING TO MAKE AN ISSUE. OF COURSE, IF A SHAREHOLDER HAS MORE THAN 20 PER CENT, IN THE PUBLIC INTEREST THE VIEW HAS ALWAYS BEEN TAKEN THAT THAT PERSON IS NOT BEHAVING AS AN ABSOLUTELY FREE AGENT, UNLIKE THE VENDOR OF A PIECE OF RESIDENTIAL REAL ESTATE. THE COMMISSION HAS TO DEAL WITH THAT ISSUE AT THE MOMENT AND DOES DO SO. THE MANDATORY BID RULE WOULD MEAN THAT THE COMMISSION WOULD NOT HAVE QUITE THE SAME NEED TO DEAL WITH THOSE ISSUES IN THE FUTURE.

I AM HAPPY TO HAVE A GENERAL DISCUSSION, BUT THE COMMISSION'S FUNDAMENTAL VIEW ALL ALONG HAS BEEN THAT IT IS PERFECTLY POSSIBLE TO INTRODUCE THIS RULE, AND THERE IS A SERIES OF SAFEGUARDS ALREADY IN THE DRAFT LEGISLATION INTENDED TO ADDRESS WHAT WAS SEEN AS THE POTENTIAL EXCESSES.

CHAIR—Thank you, Mr Cameron. Apart from the argument that the mandatory bid rule will encourage takeover activity, there is also the argument that it will be an incentive for the improvement of the performance of boards, of company management, by introducing a more competitive takeover regime. Your proposal is to allow the legislation that passed last year and came into operation on 13 March, with the mandatory bid rule excised from it, to operate for a period and then review it. What of the alternative, of actually putting the mandatory bid rule into place as was intended and then conducting a review to see how it had operated, in effect, and whether it had produced these benefits?

Mr Cameron—Clearly that is perfectly open to the committee and, in due course, to the government and the parliament. The important factor is the government's decision to allow scrip for scrip capital gains tax relief. If you were to ask my private view, I would say that that is the most significant factor likely to lead to more takeovers in the near future. It is almost mildly curious that it has not done so yet. Nevertheless, in the circumstances of our capital markets, that is probably a more fundamental factor. I would repeat that it simply is an issue for others to decide to what extent you might want to allow a little more time to go past the mandatory bid rule. In a sense, the rest of CLERP is surviving without the mandatory bid rule; the question is whether it is now time to put the mandatory bid rule in as well. Mr Green, after

all, has suggested that there will not be many takeovers that rely on it. One would wonder whether at some stage it is going to happen. And, if it is going to happen at some stage, it is a matter for judgment as to when that should be.

CHAIR—Among the regulatory concerns that you raise is the issue of level of disclosure of private deals or side deals in a mandatory bid situation. Is there a capacity for greater transparency to be brought into play in relation to those, in the context of a mandatory bid rule applying?

Mr Cameron—I am not sure how to address that. If the commission had grounds for concern that there was some side deal that was an unlawful deal, the benefits of which were not going to be shared with all other shareholders, then the commission could commence an investigation. But it would have to be satisfied that there were grounds to suspect a breach of the law before its formal powers of compelling people to answer questions and produce documents and so on would be triggered. So, in a sense, it is the risk or the possibility of a completely unknown side deal, or a side deal that is more along the lines of, 'Well, we will remember that you did this for us in the future.' It is that sort of nod and a wink type arrangement that it is not possible to legislate against.

AGAIN I WAS STRUCK BY THE FACT THAT MR LEE COULD NOT POINT TO ANY CONCERN ABOUT THAT SUBJECT IN THE UNITED KINGDOM. I CANNOT EXPLAIN THAT. THE REASON WE RAISED THE ISSUE WAS MORE TO ENLIVEN THE DEBATE ABOUT WHAT THE ISSUES WERE—WE CANNOT POINT TO THE EVIDENCE OF IT EITHER. BUT IT IS JUST INTERESTING THAT HE DOES NOT HAVE ANY IMPRESSION THAT IT IS AN ISSUE IN THE UNITED KINGDOM. I CANNOT TELL YOU WHY NOT. THE UNITED KINGDOM, AFTER ALL, WORKS IN A MUCH LESS LITIGIOUS, MUCH LESS FORMAL WAY IN THE TAKEOVERS AREA, IF NOT IN OTHER WAYS, AND PERHAPS THE UNOFFICIAL UNDERSTANDING SIMPLY WOULD NOT HAVE ANY SCOPE FOR EFFECT IN THE CITY OF LONDON BECAUSE IT IS A TIGHTER COMMUNITY OF PEOPLE. OTHERWISE I REALLY CANNOT EXPLAIN WHY THAT WOULD NOT BECOME AN ISSUE HERE IF IT IS NOT AN ISSUE THERE.

CHAIR—We heard from the New South Wales Young Lawyers a proposal to have, in effect, a conditional mandatory bid—in a sense, a termination clause as part of the mandatory bid—which would allow an alternative bidder to come into the market and allow the original offer then to be declined and the better offer to be taken up. Do you see that as a practical means of overcoming concerns about this private auction not maximising shareholder value?

Mr Cameron—I was not able to be here earlier and therefore did not hear that submission. I would like to think about it, but in principle I cannot see any reason why it could not be made workable. I query whether it would satisfy those who are calling for the mandatory bid rule in its present form, but in principle I cannot immediately see any reason why that would not work.

Senator GIBSON—Mr Cameron, have you had a chance to have a look at the international comparison paper that Elaine Hutson prepared for the securities institute?

Mr Cameron—No, I do not think I have seen that. Should I look at it now?

Senator GIBSON—It may be something you might care to look at. It is a very good international comparison of what is going on. It is quite obvious that mandatory bids are fairly widespread now through national and European regimes. It is not as if this proposal is out of kilter with what is available internationally.

Mr Cameron—No. The point I was trying to make, but perhaps not very well earlier, is that there is always a real problem wherever you set the takeover threshold level. There will always be an issue as to how you deal with a person who happens to hold more shares than that level at the point at which some transaction is triggered. We have all sorts of ways of doing that in the law at the moment, including the shareholder meeting to approve the change of control and so on. That all amounts to some version of a mandatory bid rule. It is not as though it is an issue that is entirely new. This is simply a way of casting the solution to a set of real commercial situations. The commission’s own policy is about how to deal with a tender process if you hold more than the 20 per cent.

Senator GIBSON—I agree.

Senator CONROY—You are an independent manipulator, are you not? You are allowed to have an independent view.

Mr Cameron—Indeed.

Senator CONROY—It can be independent of the government.

Mr Cameron—Yes, it can. The situation here is that the government has made a policy decision about the mandatory bid rule since we issued our original submission anyway. The government had decided that it wants to introduce a mandatory bid rule.

Senator CONROY—And the parliament has rejected it.

Mr Cameron—I am saying the government has made that decision. When we put the submission in before, we were aware of the fact that it was not likely to be uncontroversial. We, therefore, felt that we should share our views on the matter. But we believed then, and we believe now, that it is perfectly possible and open to introduce a mandatory bid rule. What the government has put forward, and what the committee is now debating, if it is to be put forward, is what the conditions are. The regulator has views about what those conditions could and should be. I do not think it is up to us to have a view—and if we did have a view it could never be a determinative one—about whether what you call a mandatory bid rule is or is not a good idea.

Senator CONROY—I guess I probably have a misunderstanding of what this committee is doing. I am not here to decide what the conditions are on a mandatory bid rule being introduced. I am here discussing whether or not it should be introduced. Just because the government has decided it should be introduced does not mean this committee, as a committee of the whole parliament, is looking at the conditions on its introduction.

Mr RUDD—You are accountable to both of us, the minister and this committee as a body, are you not?

Mr Cameron—I think strictly I am accountable to the minister. I report to the parliament through the committee.

Mr RUDD—So, as Senator Conroy said, the government has made a decision through the minister. Parliament, reflecting a different deliberative mechanism, has arrived at a different decision. You seem to have taken the decision that the battles have been lost because the government has made a determination, forgetting that the other side of your responsibility mechanism has reached a different conclusion.

Mr Cameron—I have not reached a conclusion one way or the other.

Mr RUDD—But you began by saying that the battle is lost, the thing is going to be introduced and, therefore, these should be the conditions attached.

Mr Cameron—I am not quite sure what I can say in answer to that. If the mandatory bid rule is introduced, it will be one of a series of exceptions to the 20 per cent takeover threshold rule and the ways in which you cross the 20 per cent takeover threshold. There is a whole series of conditions about that. As I have mentioned several times, the commission presently provides relief to enable people to do that by way of a tender process. The mandatory bid rule is an alternative to that.

I DO NOT IMAGINE THAT THE GOVERNMENT OR THE PARLIAMENT WOULD WISH A SITUATION TO OCCUR WHERE A COMPANY THAT HAPPENED TO HAVE AN EXISTING HOLDER WITH MORE THAN 20 PER CENT OF THE EXISTING SHARES THEREBY BECAME RENDERED TAKEOVER PROOF. IN A SENSE, YOU NEED TO HAVE SOME MECHANISM OR MECHANISMS FOR CROSSING IT. IT IS ENTIRELY A MATTER FOR THE COMMITTEE, PARLIAMENT AND GOVERNMENT IN DUE COURSE WHETHER ONE OF THEM IS WHAT WE LOOSELY CALL A MANDATORY BID RULE. BUT THERE WILL ALWAYS HAVE TO BE SOME WAY OF CROSSING THAT 20 PER CENT THRESHOLD OR EVERY COMPANY WITH A SINGLE SHAREHOLDER HOLDING MORE THAN 20 PER CENT WILL BE TAKEOVER PROOF, UNLESS THAT SHAREHOLDER CHOOSES TO GO INTO THE PUBLIC MARKET AND SELL OFF ITS HOLDING PIECEMEAL IN A WAY THAT DOES NOT EVER BRING THE PURCHASERS INTO SOME FORM OF ASSOCIATION. THAT IS VERY HARD TO DO.

I AM NOT SURE I AM ANSWERING YOUR QUESTIONS OR YOUR CONCERNS, BUT IT IS SIMPLY THAT THE COMMISSION, BACK IN DECEMBER 1997 AND TODAY, HAS ALWAYS SOUGHT TO SAY THAT IT IS ENTIRELY A MATTER FOR OTHERS WHETHER OR NOT THIS RULE SHOULD BE INTRODUCED AND, IF SO, ON WHAT CONDITIONS. WE HAVE SOUGHT TO HELP THE DEBATE BY GIVING YOU SOME THOUGHTS ABOUT WHAT MIGHT HELP YOUR DISCUSSIONS ON IT.

Mr RUDD—Your language in your original submission is quite forthright on that question. It basically says that the case as to why we need this has not been proven.

Mr Cameron—I was listening when Mr Lee gave evidence. I am not sure he was asked this, but I asked him privately and I think I can share with you that the number of mandatory bids made in the United Kingdom in the last 12 months is around 10 out of 300, which is a lower proportion than the proportion over the entire life of the London takeover panel. That is not a secret in the sense that it seems to confirm what Mr Green said as well. I say that really in

answer to your question, in a sense. We do not think, from what we can tell, that there will be many takeover mandatory bids, because there are all sorts of other reasons why you would not want to be subject to the condition that is inherent in the approach we are taking to a mandatory bid—namely, no minimum acceptance condition. We think that is quite a fundamental reason why there will not be many mandatory bids in Australia.

BUT IF I COULD SPELL THAT OUT: OUR IMPRESSION IS THAT VERY FEW PEOPLE LAUNCH A TAKEOVER OFFER THESE DAYS UNLESS THEY HAVE CONFIDENCE THAT THEY CAN ACQUIRE COMPLETE CONTROL. IF THE MANDATORY BID RULE, IN THE FORM THAT IS BEING PROPOSED IN THE PARLIAMENT, IS ADOPTED, ANYBODY WHO WANTS FULL CONTROL IS NOT LIKELY TO START OFF WITH A MANDATORY BID. BY STARTING OFF WITH A MANDATORY BID, THEY WILL NOT BE ABLE TO PUT THE 90 PER CENT ACCEPTANCE CONDITION ON IT, AND THAT MAKES A PRETTY FUNDAMENTAL CHANGE AS TO WHETHER THERE WILL BE MANY OF THEM. THAT IS PART OF WHAT WE MEANT WHEN WE SAID THAT WE DO NOT THINK THE CASE HAS BEEN MADE OUT. BY THE TIME YOU PUT THESE OTHER CONDITIONS ON IT, THERE WILL NOT BE MANY.

THAT PROBABLY ANSWERS YOUR EARLIER QUESTION AS WELL. THE WAY THE CONDITIONS ARE SPELT OUT IS A VERY IMPORTANT PART OF WHETHER YOU ANSWER YES OR NO TO THE FUNDAMENTAL QUESTION AS TO WHETHER THERE SHOULD BE A MANDATORY BID. BACK IN DECEMBER 1997 WE WERE DEALING WITH A QUITE DIFFERENT PROPOSITION, BECAUSE THE CONDITIONS WERE NOT SPELT OUT AS THEY NOW ARE IN THE DRAFT BILL. SO I THINK THE TENOR AND THE TONE, WHICH YOU HAVE OBVIOUSLY PICKED UP, OF OUR EARLIER SUBMISSION HAS TO BE SEEN IN THE LIGHT OF THE FACT THAT THE CONDITIONS WERE NOT THERE.

Mr RUDD—Yes, I understand that.

CHAIR—Does that then raise the issue that, from the UK experience, there are limited situations where the mandatory bid rule is relevant to a takeover? If you examined the actual occurrences in the UK, one assumes you could do some sort of analysis to determine the degree of benefit that was derived from the offeror and the vendor in each case. If that was reasonably satisfactory, particularly in terms of the vendors and the other shareholders who were then subject to the mandatory bid, given the relatively small number of takeovers that have occurred there and your prediction that it is only going to be used sparingly in Australia, that in fact may produce an argument in favour of it. There are particular circumstances where it is beneficial, but in terms of the broad sweep of shareholders it is not going to be particularly relevant—either detrimental or advantageous—so perhaps that is an argument for having it in there for those situations where it is beneficial.

Mr Cameron—Again, I would try to avoid it, because I think it is a bit difficult for the regulator who eventually has to administer the law—however you deliver it to us—to buy into too many of these fundamental debates. But I think you can argue, at least theoretically, that one of the things that will tend to drive the price up in the first purchase will be the fact that the bidder will then be at risk of being stuck with that holding themselves because the bid must be fully unconditional. If that rule is preserved, if that condition is maintained as part of the parliament’s approach, then it will be a very brave bidder who does not bid at reasonably full

price or who is not prepared to raise the price, because they will not be sure of control in that situation.

BUT YOU CAN READ IT EITHER WAY. YOU CAN SAY EITHER THAT IT MEANS THERE WILL BE FEWER BIDS, OR THAT IT MEANS THE BIDS WILL HAVE TO BE AT A LARGER PRICE THAN THE LACK OF AN AUCTION MIGHT OTHERWISE HAVE SUGGESTED. AGAIN I HAVE THE BENEFIT OF HAVING READ THE DEBATE YOU HAD WITH MR LEE AND MR GREEN, SO I AM AWARE THAT YOU HAVE BEEN HAVING THAT DEBATE ABOUT WHETHER THE PUBLIC AUCTION NECESSARILY PRODUCES THE HIGHEST PRICE. THE OTHER FACTOR I WOULD ADD IN IS THE NECESSITY TO ENSURE THAT YOU GET TO CONTROL, BECAUSE OUR EXPERIENCE IN THIS COUNTRY IS THAT FEW BIDDERS ARE REALLY CONTENT WITH A SITUATION WHERE THEY WILL NOT GET CONTROL.

Senator CONROY—Mr Lucas argued that the public auction process discourages bidders and, because there are fewer bidders, therefore there is a less optimal outcome for the shareholder. Do you have a view on that?

Mr Cameron—I have heard it before from his colleague Mr Green, also at Macquarie Bank. In private he has mentioned that there are some overseas participants—I do not think it is appropriate for me to name names—who find the Australian marketplace a bit aggressive for their taste. In effect, they just say they will not come into a public auction situation where they run the risk of losing face because they end up being outbid. I have my own view. That sounds as if they are a bit hypersensitive. After all, if these people were to be Americans, for example, they would be coming from a far more aggressive culture in most such respects, and a far more open and forthright culture. I am not sure that case is made out to my personal satisfaction but I am aware that the argument is there. It may be truer—

Senator CONROY—You would have thought that they were almost derelict in their duty if they were just afraid of having their names in the newspaper—that there would be good value to be got by getting in there and they were just saying, ‘Oh no, I do not want my name in the newspaper.’ If I were a shareholder and the director said to me, ‘Oh no, I really do not want to risk losing face by not winning this bid, but yes, there is good potential there for us,’ I would be an unhappy shareholder. I would probably want to change my management if they were that much of a shrinking violet.

Mr Cameron—It could be a question, though, if you were dealing with an overseas bidder, as to whether that overseas bidder might simply make a decision, if you like, against Australia as a place to go. It is a matter that you would have to decide. It is entirely a policy question—whether, in a sense, we would be better off as a country if people did have that view, however irrational some of us might think it to be, and do we really want to discourage them—that I think others will have to answer rather than me.

Mr RUDD—This is my final question. I do not wish to be a pedant but I will be. Maybe I just missed something in the earlier logic. I am just puzzled as to why you therefore resubmit the original submission. You say in your covering submission of February 2000, at paragraph 2:

Accordingly, ASIC’s submission to the Committee—

that refers to the earlier one—

which is attached, consists of an extract from ASIC's earlier submission to Treasury…

Having assiduously read that on the flight from Brisbane this morning, and presumably therefore wasted 44 minutes of my time as I read it and reread it, I think you are basically saying that the first half of that submission is no longer valid, that it was not any longer your substantial view, which is basically the whole bit which deals with the proposition not being proven. I am just puzzled as to why you would resubmit that to the committee for the purposes of this exercise and not actually draft something afresh.

Mr Cameron—This is a source of some internal debate as to how to deal with the fact that we were being asked to express a view to a committee on a subject where we had previously expressed a view to the committee.

Mr RUDD—If life, in your view, had changed and you advanced two sets of reasons why that was the case—one which I contested, which is your responsibilities to the executive and the legislature, being over there, and the second being that there have been subsequent changes legislatively anyway in a related area—that I could grasp. Presumably, on that basis then you would say, 'The external environment has changed; therefore we can advance a different set of arguments.' But you have before us a set of arguments which on the one hand you are saying is valid but on the other hand you are saying is now out of date. Pardon me for being confused.

Mr Cameron—Again I am not quite sure how to address that. What we have said all along is that it is entirely open to introduce such a rule. Also, bearing in mind that the debate that was occurring during 1997 was a different debate, we had reasons there which we put forward and which individually are still there for your consideration. They would always have been.

WHAT WE HAVE DONE IS TO EDIT THE REASONS AS YOU GO THROUGH IT, IN ORDER TO UPDATE IT FOR WHAT THE GOVERNMENT DID. PERHAPS I HAVE WASTED A BIT OF YOUR TIME IF YOU HAVE, IN EFFECT, READ THIS AND THEN LISTENED TO ME THIS MORNING AND THOUGHT, 'HE IS TAKING A DIFFERENT VIEW.' BUT I AM NOT SO MUCH TAKING A DIFFERENT VIEW ABOUT ANY OF THESE INDIVIDUALS REASONS; I AM SIMPLY SAYING THAT THESE ARE ALL REASONS, WE HAVE IDENTIFIED THEM AS DECEMBER 1997 MATERIAL AND WE HAVE INVITED YOU TO—

Mr RUDD—But by virtue of your covering submissions you implied, at least, that at February 2000 they are still valid. That is where my confusion lies. If you think life has moved on, just say, 'Junk it. That's it.' But if it has not and you are trying to sit on the fence somehow on this, then tell us that as well.

Mr Cameron—We were actually, in a real sense, trying to sit on the fence then, too. The debate had not really started. We were intending to help the debate. I suppose we could have gone through and edited the fine detail of those words for you, to try and change the attitude, but if we had done that, at least Senator Conroy would have sat down and compared it word for word. So in a sense we thought it was more honest and more direct to give you exactly what we said in December 1997, update it, come and talk to you about it and also add one further thing, which I still think is something that you might wish to consider. That is whether the other things having happened is a reason.

Mr RUDD—I understand that being a substantive one today. Thank you.

CHAIR—Thank you very much, Mr Cameron, for your evidence before the committee this morning.