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Official Committee Hansard

SENATE

STANDING COMMITTEE ON ECONOMICS

ESTIMATES

(Budget Estimates)

WEDNESDAY, 30 MAY 2007

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SENATE STANDING COMMITTEE ON

ECONOMICS

Wednesday, 30 May 2007

Members: Senator Ronaldson *(Chair)*, Senator Stephens *(Deputy Chair)*, Senators Bernardi, Chapman, Hurley, Joyce, Murray and Webber

Participating members: Senators Adams, Allison, Barnett, Bartlett, Boswell, Bob Brown, George Campbell, Carr, Conroy, Eggleston, Chris Evans, Faulkner, Ferguson, Fielding, Fifield, Forshaw, Hogg, Kemp, Kirk, Lightfoot, Ludwig, Marshall, Ian Macdonald, Sandy Macdonald, McGauran, Milne, Nettle, O'Brien, Parry, Payne, Robert Ray, Sherry, Siewert, Watson and Wong

Senators in attendance: Senators Bernardi, Boswell, Chapman, Conroy, Fielding, Joyce, Murray, O'Brien, Parry, Ronaldson, Sherry, Trood, Watson and Wong

Committee met at 9.05 am

TREASURY PORTFOLIO

Consideration resumed from 29 May 2007

In Attendance

Senator Coonan, Minister for Communications, Information Technology and the Arts

Senator Minchin, Minister for Finance and Administration

The Treasury
Outcome 1: Sound Macroeconomic Environment
Output Group 1.1: Macroeconomic Group
Mr David Parker, Executive Director
Dr David Gruen, Executive Director
Dr Steven Kennedy, General Manager, Domestic Economy Division
Mr Phil Garton, Manager, Domestic Economy Division
Ms Nghi Luu, Senior Adviser, Domestic Economy Division
Mr David Pearl, General Manager, International Economy Division
Mr Milo Lucich, International Economy Division
Mr Paul Gardiner, Manager, International Economy Division
Mr Roger Brake, General Manager, International Finance Division
Ms Bernadette Welch, Manager, G20 and Asia-Pacific Economic Cooperation Secretariat
Mr Luke Yeaman, Senior Advisor, G20 and Asia-Pacific Economic Cooperation Secretariat
Dr Paul O'Mara, General Manager, Macroeconomic Policy Division
Mr Graeme Davis, Principal Adviser, Macroeconomic Policy Division
Mr Tony McDonald, Senior Adviser, Macroeconomic Policy Division
Mr Greg Coombs, Manager, Macroeconomic Policy Division
Outcome 2: Effective Government Spending Arrangements
Output Group 2.1: Fiscal Group
Mr David Tune, Executive Director

Mr David Martine, General Manager, Budget Policy Division
Mr Jason McDonald, Manager, Budget Policy Division
Mr Rob Heferen, General Manager, Social Policy Division
Mr Peter Robinson, Principal Adviser, Social Policy Division
Ms Peta Furnell, Principal Advisor, Social Policy Division
Mr Michael Willcock, General Manager, Commonwealth-State Relations Division
Ms Maryanne Mrakovcic, General Manager, Industry, Environment and Defence Division
Mr Geoff Francis, Manager, Industry, Environment and Defence Division
Mr Michael Burton, Chief Financial Officer, Corporate Services Division

Outcome 3: Effective taxation and retirement income arrangements

Output Group 3.1: Revenue Group

Mr Mike Callaghan, Executive Director
Mr Blair Comley, General Manager, Business Tax Division
Mr Mark O'Connor, General Manager, Individuals and Exempt Tax Division
Mr Martin Jacobs, Manager, Individuals and Exempt Tax Division
Mr John Lonsdale, General Manager, Superannuation, Retirement and Savings Division
Ms Louise Seeber, Manager, Superannuation, Retirement and Savings Division
Mr Nigel Murray, Manager, Superannuation, Retirement and Savings Division
Mr Nigel Ray, General Manager, Tax Analysis Division
Mr Damien White, Manager, Tax Analysis Division
Mr Phil Gallagher, Manager, Tax Analysis Division
Mr Colin Brown, Manager, Tax Analysis Division
Mr Anthony King, Tax Analysis Division
Mr Paul McCullough, General Manager, Tax System Review Division
Ms Brenda Berkeley, General Manager, Tax Design Division
Mr Matthew Flavel, Business Tax Division

Outcome 4: Well Functioning Markets

Output Group 4.1: Markets Group

Mr Jim Murphy, Executive Director
Mr Patrick Colmer, General Manager, Foreign Investment and Trade Policy Division
Mr Chris Legg, General Manager, Financial System Division
Ms Vicki Wilkinson, Manager, Financial System Division
Mr Trevor King, Manager, Financial System Division
Ms Kerstin Wijeyewardene, Manager, Financial System Division
Mr David Love, Manager, Financial System Division
Mr Andre Moore, Manager, Financial System Division
Mr Geoff Miller, General Manager, Corporations and Financial Services Division
Ms Marian Kljakovic, Manager, Corporations and Financial Services Division
Mr Matt Brine, Manager, Corporations and Financial Services Division
Ms Ruth Smith, Manager, Corporations and Financial Services Division
Mr Bede Fraser, Manager, Corporations and Financial Services Division
Mr Jorge del Busto, Senior Adviser, Corporations and Financial Services Division
Mr Steve French, General Manager, Competition and Consumer Policy Division
Ms HK Holdaway, Manager, Competition and Consumer Policy Division

Mr Glen McCrea, Senior Adviser, Competition and Consumer Policy Division
Mr Aidan Storer, Senior Adviser, Competition and Consumer Policy Division
Mr Brad Archer, Manager, Competition and Consumer Policy Division
Mr John Karatsoreos, Senior Adviser, Competition and Consumer Policy Division
Mr Michael Johnston, Manager, Competition and Consumer Policy Division
Ms Jane Melanie, Senior Adviser, Competition and Consumer Policy Division
Mr James Chisholm, Senior Adviser, Competition and Consumer Policy Division
Ms Jacky Rowbothom, Senior Adviser, Competition and Consumer Policy Division
Mr Peter McCray, General Manager, Financial Literacy Foundation
Ms Linda Rosser, Manager, Financial Literacy Foundation
Mr Peter Martin, Australian Government Actuary

Australian Accounting Standards Board

Professor David Boymal, Chairman
Mr Angus Thomson, Technical Director

Australian Bureau of Statistics

Mr Brian Pink, Australian Statistician
Mr Peter Harper, Deputy Australian Statistician, Economics Statistics Group
Mr Denis Farrell, Acting Deputy Australian Statistician, Services Group
Ms Teresa Dickinson, Acting First Assistant Statistician, Corporate Services Division
Mr Mark Whybrow, ABS Chief Financial Officer

Australian Competition and Consumer Commission

Mr Graeme Samuel, Chairman
Mr Brian Cassidy, Chief Executive Officer
Mr Joe Dimasi, Executive General Manager, Regulatory Affairs Division
Mr Mark Pearson, Executive General Manager, Enforcement and Compliance Division
Mr Scott Gregson, General Manager, Adjudication Branch
Mr Nigel Ridgeway, General Manager, Compliance Strategies Branch
Ms Rose Webb, General Manager, Enforcement and Coordination
Ms Lee Hollis, General Manager, Cartels and Criminal Enforcement Branch
Mr Tim Grimwade, General Manager, Mergers and Assets Sales Branch
Ms Helen Lu, General Manager, Corporate
Mr Adrian Brocklehurst, Chief Financial Officer
Mr Michael Cosgrave, General Manager, Communications Group
Mr Michael Carnahan, General Manager, Information, Research and Analysis

Australian Office of Financial Management

Mr Neil Hyden, Chief Executive Officer
Mr Michael Bath, Director, Financial Risk
Mr Andrew Johnson, Head, Compliance and Reporting
Mr Pat Raccosta, Chief Financial Officer

Australian Prudential Regulation Authority

Dr John Laker, Chairman
Mr Ross Jones, Deputy Chairman
Mr Brandon Khoo, Executive General Manager, Specialised Institutions Division
Mr SG Venkatramani, General Manager, Central Region, Specialised Institutions Division

Dr Steve Davies, General Manager, Statistics

Australian Securities and Investments Commission

Mr Tony D'Aloisio, Chairman
Mr Jeremy Cooper, Deputy Chairman

Australian Taxation Office

Mr Michael D'Ascenzo, Commissioner of Taxation
Ms Jennie Granger, Second Commissioner of Taxation
Mr Bruce Quigley, Second Commissioner of Taxation
Ms Margaret Crawford, Chief Operating Officer
Ms Raelene Vivian, Deputy Commissioner
Ms Sally Druhan, Assistant Commissioner
Mr Greg Dark, First Assistant Commissioner

Corporations and Markets Advisory Committee

Mr Vincent Jewell, Acting Executive Director

Financial Reporting Council

Mr Charles Macek, Chairman
Mr Jorge del Busto, Secretary

Inspector-General of Taxation

Mr David Vos AM, Inspector-General of Taxation
Mr Rick Matthews, Inspector-General of Taxation

National Competition Council

Mr John Feil, Executive Director
Mr Ross Campbell, Director

Productivity Commission

Mr Bernard Wonder, Head of Office
Mr Garth Pitkethly, First Assistant Commissioner
Mr Michael Kirby, First Assistant Commissioner
Ms Su McCluskey, Executive Director, Office of Best Practice Regulation

Takeovers Panel

Mr Nigel Morris, Director

[9.05 am]

Australian Competition and Consumer Commission

CHAIR (Senator Ronaldson)—I call this meeting of the Senate Standing Committee on Economics to order. I welcome the officers of the Department of Treasury. We now turn to the first item on today's agenda, an examination of Australian Competition and Consumer Commission. We have a long day ahead and I suspect that everyone, both colleagues and witnesses, will facilitate the smooth running of today's hearings. Mr Samuel, do you have an opening statement?

Mr Samuel—No. I apologise for the confusion that arose over the timing of this particular meeting of the ACCC before the Senate committee. It had been intended originally that Mr Cassidy and I would be in Moscow this week for the meeting of the International Competition Network but some priorities at home, not the least of which was a court decision that was handed down yesterday and some work that we are doing in telecommunications, necessitated

our very last minute cancellation of our visit to Moscow. My apologies to the senators and to this committee for having caused some confusion and disruption to the meeting scheduling.

CHAIR—They are accepted.

Senator O'BRIEN—I am glad you touched on the issue reported in today's newspapers which appears to reflect upon the ACCC's capacities in relation to prosecuting powers under the act. I am not sure whether you consider that is a fair report. A report in *The Financial Review* under the headline 'ACCC bungle threatens cartel probes' states:

> The Federal Court has slammed the competition regulator for failing to understand laws against price-fixing and for lacking the critical evidence needed to support a landmark case involving an alleged cartel by petrol retailers in Victoria.

What comment has the ACCC to the reflection on the judgement in Matthew Drummond's article?

Mr Samuel—As I have said on many occasions, we do not take our instructions from the media. I am always very cautious about accepting some of the descriptions used in the media, even by journalists as skilled as Matthew Drummond, as to the processes that we undertake and as to the decisions of the courts.

Perhaps it is worth making some comments on yesterday's decision and the processes that led up to that court case being instituted. We have to go back some time in this but, as you will be aware, we had a successful prosecution against a number of respondents in relation to petrol price-fixing in the Ballarat region of Victoria, which secured in the ultimate around $20 million in fines. One of those respondents, APCO Ltd, did appeal the decision and was successful in that appeal before the Full Federal Court but as to the other respondents involved, over $20 million in fines or penalties were awarded by the court and were payable by the respondents.

During the course of that particular matter we received information that a similar price-fixing arrangement was taking place in the Geelong area and we pursued an intense investigation into that. During the course of that investigation and in the lead-up to the trial a number of participants in the alleged price-fixing arrangement, five in all, admitted to us that they were involved in an arrangement or understanding to notify others of prices with the expectation that there would be a price movement that would follow on from those notifications. I note yesterday that there has been some suggestion from the barrister representing one of the parties in this matter that the process of obtaining admissions from these parties was open to some criticism. I would have to say to you that at least one of those parties is very well resourced and made the admissions on the basis of very significant and senior legal counsel.

We then proceeded to undertake an intensive investigation. The investigation involved interviewing witnesses, in particular interviewing witnesses that were provided by the admitting parties and at the same time collating a vast database of telephone records and price movements in the Geelong area. We put all of this together and then we proceeded to court. The outcome of the court decision is one that causes us some concern. While we accept the decision—and I will not comment at the moment as to whether or not we will be appealing the decision because it is too early at this stage to form an opinion on that—but the concern

relates to the evidentiary burden that is placed upon the commission in dealing with these matters.

Here we have a case of 18 respondents, five of whom have admitted that they were engaged in an arrangement or an understanding. We have telephone records and a substantial amount of correlation between telephone calls and price movements in petrol. Then we have witnesses, but in many cases the witnesses are either unwilling to help, as you might expect, or in other cases are asked to remember specific events that took place many years before. I will give you some examples. They are asked to recall a specific phone conversation that occurred perhaps four or five years prior to the examination in the witness box, that is, the specific conversation, the time of the conversation, the nature of the conversation, the details of words uttered through the conversation, and details of responses by the other party to the conversation, and at the same time they are asked to recall what they did following the conversation in relation to prices.

You can imagine that where you have unwilling witnesses and witnesses that are subject to cross-examination, when they are asked to remember phone conversations and the exact details of what occurred through the conversation, that places a difficulty on us in terms of the evidentiary burden. As I was relating to a party this morning, you can envisage if you were cross-examining a witness of that nature and the witness is able to say, 'At 3.15pm on 29 March 2001 I recall making a phone call to party B and party B responded in the following manner and then as a result of that I did the following things with my prices on the board at my petrol station,' then the next question cross-examining counsel I guess would ask would be, 'What did you have for dinner that night?' When you say, 'I cannot recall,' then the witness is asked, 'How did you recall the phone conversation when you cannot recall a simple matter like what you had for dinner that night?' There are those sorts of evidentiary burdens that we have.

In this case the court held that it is insufficient to have admitting parties; it is insufficient to have vast records of telephone calls and in many cases correlation of price movements, but what the court requires in these cases is specific memory and specific evidence of conversations that have taken place and at the same time it requires not just an understanding or an expectation on the part of participating parties in an arrangement of this nature that price movements will take place following phone calls or following conversations, but that there is a specific commitment on the part of participating parties that they will move their prices. That places some very difficult evidentiary burdens in our path, particularly where you are dealing with what I call multiparty and multitransaction arrangements of this nature. This is not a single transaction; it is a series of multiple transactions, some hundreds in nature that we are dealing with. All I can say is that we are studying the case and we are studying the implications of it in terms of these multiparty, multitransaction cartel cases and we are going to have to deal with that evidentiary burden in the future.

Senator O'BRIEN—The same article states:

> The case underlines the ACCC's main tool in prosecuting cartels—the use of the immunity agreements for cartel members in return for their co-operation. The judge refused to accept written witness statements from five defendants who received leniency in return for testifying in support of the case.

Is that an accurate statement?

Mr Samuel—As I have said, with great respect to the author of that article, that he fundamentally fails to understand the workings of the immunity policy. In fact, I would have to say to you that the implications of this case are to place even greater weight and greater importance on the immunity policy. The proposition that has been put by one of the defence counsel when leaving the court last night—which I saw on interview—was that this immunity policy encourages witnesses to come out and provide to us dubious or false evidence in order to avoid the court costs of a trial. But frankly what it does do is it says to witnesses that if you want to have immunity from prosecution you have to provide us with accurate, credible and fully cooperative information as to what has occurred. In the absence of that you can imagine the position we have. Remember that I have described the evidentiary burden that we are dealing with, but if we do not have a witness who is prepared to provide full cooperation and full, credible information to us as to what has happened in a cartel, then we will be dealing at all times with hostile witnesses who at the very least will simply say, 'I do not recall.' If they do not recall then as far as the evidentiary burden that is now required to be satisfied by us is concerned, we do not satisfy that burden in any way or means at all.

Senator O'BRIEN—The article states:

> In the current case before Justice Gray the regulator relied on evidence showing the retailers would call each other before lifting their prices.
>
> But the judge, applying the new test, said direct evidence of a commitment to lift prices was needed to prove a prosecution, rather than merely communicating price rises with the hope they would be followed.
>
> An arrangement or understanding in which each party is free to do as it wishes is a creature unknown to S45(2) of the Trade Practices Act. This finding is fatal to the ACCC's case.

Is that a new view?

Mr Samuel—I have commented upon the requirement that there be a 'commitment'. Let me say that the case—which is precedent in this matter, that is the decision in the Full Federal Court in relation to APCO—places us in a very difficult position as to evidentiary burden but, if I might say so, it also indirectly provides something of a textbook for parties that want to engage in these multiparty, multitransactional cartel arrangements and their clever lawyers because what the textbook is essentially saying to them is, 'Do not enter into a commitment,' with the word 'commitment' underlined. It then says, 'Have a wink and a nod and high expectation, but do not commit yourselves because in the absence of a commitment then the court seems to be saying that we do not have an understanding. And secondly, in order to bolster the evidence or bolster the proposition that there is no commitment, what you ought to do is every now and then move your prices in a counterintuitive manner; move them in the opposite direction so that it can show that you did not have a commitment, you had an ability to opt out of or to exercise your discretion as you saw fit.'

I have to emphasise that this in no way a criticism of the court. The court has interpreted the law as it sees the law is required to be interpreted but what it does provide is a textbook as to how to construct a collusive arrangement, a price-fixing arrangement, in a way that will make it very difficult indeed for the commission to be able to successfully prosecute a case. So it is all the more important that we have the immunity policy in place which at least gives us the opportunity to bring before the court credible witnesses that will provide full cooperation.

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Senator O'BRIEN—What you seem to be saying, at least in the context of this type of prosecution, is that the way the law is constructed and interpreted will make it extremely difficult for the ACCC to prove conclusion in relation to petrol pricing in these sorts of communities.

Mr Samuel—In the very short time that we have had available to read the 333 page judgement and to think about the matter internally since—and obviously we have been doing some soul searching in relation to the conduct of this investigation and the conduct of this case since it occurred and since the decision of the Full Court in the APCO case—we have been trying to work through strategically as to what we might do to sharpen up the investigation or to sharpen up the processes. If you deal with the fundamental proposition that you are dealing for the most part with unwilling or unreliable witnesses, in many cases hostile witnesses who are not going to concede that they have a commitment because to do so obviously condemns them in terms of potential for prosecution and penalties, if you deal with parties who now know that, providing they do not acknowledge that they had a commitment; providing they conduct their affairs in a way that attempts to disguise the nature of the arrangement or understanding, that is by moving prices in a counterintuitive direction; if you deal with the circumstance that inferential evidence, that is evidence that might be drawn by way of inference from a correlation between telephone calls and price movements, that that evidence is unsatisfactory and is unacceptable to the court, then I would have to say to you that our strategy in dealing with these matters is now open to substantial review and I am not sure what the answer is at this point.

Mr Cassidy—The court decision means that we really have to think about the issue that you raised with the law as it currently stands, but also we need to think about our investigation techniques.

Senator O'BRIEN—Do you mean using phone tapping?

Mr Cassidy—That is getting to a third thing. I was going to suggest that we need to think about our investigatory powers and between those three. Having received the decision yesterday it is something that we are still thinking about.

Senator O'BRIEN—Would that require a change to the law?

Mr Cassidy—The first and the third potentially require a change to the law but, as I have said, 24 hours after the decision we have not got to a point of saying that the law needs changing because we are still absorbing exactly what the court said in the Geelong case.

Senator O'BRIEN—What the judge found was argument put by the defence in this case, was it?

Mr Cassidy—No. Basically the defence's argument was simply that there was no agreement. You could characterise what he found was somewhere between our case that there was an agreement to coordinate their price setting and the defence argument that there was not such an agreement. In a sense what the judge has said is that there was perhaps an agreement to the exchanging of information about prices between various parties but that there was not a commitment between the parties to be moving their prices in an agreed, coordinated fashion. I would have to say that if you stop and reflect on it, the proposition is that you had literally hundreds of phone calls occurring over a two-year period so that the participants in the petrol

industry could be exchanging information on petrol prices, when in a sense all they needed to do was probably look up and down the street at their competitor's pricing boards to see what was happening with those prices. It does lead you to a fairly odd conclusion.

Senator O'BRIEN—Were you surprised by this decision?

Mr Cassidy—With any case or matter we take we believe we have certainly an arguable and a reasonable case and we thought we had that on this occasion. We are surprised a bit by the decision.

Senator O'BRIEN—But the nature of the findings seems to have taken you by surprise in relation to how the judge would interpret the evidence that you presented as no evidence at all of a breach of 45(2), which is what that passage that I read to you indicates.

Mr Cassidy—It would have to be said that during the trial the judge was casting some doubt on what was referred to as inferential evidence, that is to say the matching of phone calls with subsequent price movements and our lack of witnesses who were able to appear in the witness box and testify to what had occurred in a particular phone call, at a particular time and a particular day three or four years ago. As a result of the trial we suspected the court was having some problems accepting what was referred to as inferential evidence, albeit that there was a heck of a lot of it. I do not think that the decision, in that respect, if you like, came as an enormous surprise. It was disappointing but we had some inkling during the trial that that was the court's position. Indeed, it was because of that that during the trial we actually ceased proceedings against a couple of the respondents since we did not have any evidence against them at all other than the inferential evidence. In other words, we did not have any other party saying, 'Yes, he was involved.' All we had was the so-called inferential evidence, so that disposition by the court was the reason why we ceased proceedings against a couple of the parties during the course of the trial.

Senator O'BRIEN—So during the trial the organisation came to a view that the type of evidence upon which you were relying was unlikely to obtain a conviction, that is, the inferential evidence? Did you come to a conclusion that the probability of getting any convictions was remote?

Mr Cassidy—I think that is putting it a bit strong because we had the background of the Ballarat case where, in a sense, we had adduced exactly the same type of evidence and the court had accepted it. So while during the hearing of the Geelong proceedings we realised that the court in that case seemed to have some issues, if you like, with the inferential evidence. Nonetheless we were still, I suppose, hopeful that that evidence would be accepted.

Mr Samuel—It is interesting, just by way of observation, I think in a subsequent article in this morning's *Financial Review* the same journalist recites some of the evidence that was given and indicates that evidence was given that in some of the phone calls codes were being used. Mr Cassidy has said that it would have been just as easy for them to walk up and down the street and see what the price is, but they are making phone calls using code language. I think that the commission could be forgiven for having a high degree of expectation that that was evidence of some sort of an arrangement that was in existence. But the court has said that the burden of proof is higher than that.

Senator JOYCE—How do we tighten that up?

CHAIR—Senator Joyce, perhaps we should let Senator O'Brien continue with his line and we will be more than happy to come back to you on that.

Senator O'BRIEN—So, in relation to the conduct of proceedings, what you seem to be saying is that the way that the judge has interpreted the law flies in the face of the way it was interpreted in relation to the Ballarat case that you referred to and is different in that respect from how a different judge has applied the law?

Mr Samuel—I do not think that I would want to go that far because I do not think it is appropriate to make comments upon the way that the judge has interpreted the law. I do not mean by that to in any way imply that we believe that the judge has erred. I want to stress that because that is not our implication. But we have had a similar set of circumstances; in this case the court has come to the conclusion that perhaps the information, the evidence that we adduced before the court, was insufficient and it may well be that the nature of the evidence before the court in this case was different to that that was adduced in the Ballarat case. Also I have to observe that amongst what I call the admitting parties, witnesses who had provided the commission witness statements which were not permitted to be brought before the court, but in fact the court insisted in this case on viva voce evidence, that is oral evidence being given, that in some cases those witnesses changed their position and changed the evidence that they gave to the commission in the witness statements. That does not make it easy. You believe that you have full cooperation coming from parties; you believe that the witness statements that have been provided to you are accurate and will reflect what the witness provides in court, but then the witness changes his evidence and that can substantially undermine your case to the extent that a cooperating witness becomes, in effect, a hostile witness.

Senator O'BRIEN—So you do not obtain a sworn declaration from those who are cooperating before the trial?

Mr Samuel—We obtain witness statements.

Mr Cassidy—We get statements under oath but the problem is that the court was not prepared to admit those and insisted on oral evidence.

Senator O'BRIEN—And the evidence was different from that which was obtained under oath, you say?

Mr Cassidy—In some cases it seemed that when people were actually in the witness box, and I suppose particularly being present and seeing the way the trial was proceeding, perhaps their recollection started to vary a bit from what it was when they gave us their sworn statements. I would have to say not to the point of saying, 'Well, we said black is black and now we are saying black is white.' But nonetheless what they could remember of times in giving us their witness statements they had trouble recalling, or recalling with precision, when they were actually in the witness box. That is another evidentiary difficulty, if you like, we have to think about. It is not by no means common practice in the Federal Court for judges to refuse to accept written statements as evidence, but certainly this is not the first case where that has occurred. So that is another issue we need to think about.

Senator O'BRIEN—So the practice of obtaining these statements has been rejected by the court in previous cases? Perhaps I should rephrase that; it is not your practice but the judge has refused to accept those statements and has required new evidence to be presented orally.

Mr Cassidy—I will be pressed off the top of my head to mention the other cases, but certainly we have had other cases where either the court has insisted on oral evidence alone, or alternatively they have accepted the sworn statements but have also wanted oral evidence in addition. I could not say that that is common practice, but certainly it is something that we have struck before.

Senator O'BRIEN—What does this say about the commission's ability to police the probably millions of price movements in the Australian petrol market. We have had discussion certainly during the petrol inquiry about how the ACCC would carry out its functions under the act. What you seem to be saying is that your expectation—and I think you touched upon the pending prosecutions and that evidence—is that the way that the courts are requiring the presentation of evidence and the state of the law and your rights in relation to obtaining evidence will, in all likelihood, lead to a less than satisfactory set of outcomes in policing competition law in this area.

Mr Samuel—Earlier I indicated that if I were providing legal advice in relation to this matter, that is legal advice to potential participants in a cartel, I would probably use this case as something of a textbook as to how to construct a price fixing arrangement or understanding in a way that could avoid the successful prosecution by the ACCC. That involves both the structure of the arrangement, the implementation of the arrangement and the provision of evidence before a court in the event that the ACCC took you to court. I think this does provide something of a textbook for these smart lawyers as to the advice to be given to clients in relation to these matters. That just makes our task all that much more difficult.

Senator O'BRIEN—So, really, what you are saying is that we need to look at the state of the law in relation to the enforcement of competition laws, certainly in this sector if not in others, but I see that the articles are suggesting that this case, as a precedent, will lead to difficulties in the Pratt prosecution.

Mr Samuel—It is not appropriate to comment on that other than to say that we do not believe that this particular case, that is the Geelong case, has any implications at all for our prosecution of the Visy case. That is proceeding to court in October and we are ready to proceed at this point of time. We do not think there are any implications at all in that matter.

Senator O'BRIEN—So this precedent will have no implications for that case; is that what you are telling us?

Mr Samuel—The only comment I am prepared to say in relation to that matter is that this case has no implications at all for the Visy case—at all.

Senator O'BRIEN—At all?

Mr Samuel—At all. But as to questions of the law itself, as I think I have indicated earlier, we are undertaking at the moment a very detailed and careful review of the whole process and strategy that we adopt in investigating these matters. That has not just started today. That has been undertaken over the past year or more, particularly in the context of the hearing of this

case, which took place in 2005, and since that time we have been examining our investigation processes. We have been working not only internally but also in conjunction with the Director of Public Prosecutions in anticipation of criminal penalties coming into place. That work in itself has been of significant assistance to us in working through our investigative processes as to whether or not changes in the law are required. I think that is a matter for another day.

Senator O'BRIEN—Do you accept the finding that those charged were not guilty?

Mr Samuel—We have to accept the decision of the court, subject to our consideration of whether or not there be any appeal. But at the present time that is the decision of the court.

Senator O'BRIEN—Is that an active consideration? I am not sure whether I can take that from your evidence that you are actively considering an appeal.

Mr Samuel—I think we are actively considering 333 pages of a decision at this stage. We only received it yesterday at about midday, so we are actively looking at that in addition to preparing for this Senate estimates hearing. So I think it is just a bit too early to provide an answer.

Senator O'BRIEN—Are you taking legal advice about that?

Mr Samuel—Absolutely, yes.

Senator O'BRIEN—So you are taking legal advice about the possibility of an appeal?

Mr Samuel—Yes, we are.

Senator CONROY—Do you consider that the people who gave evidence on your behalf pleaded guilty?

Mr Samuel—It is not a question of considering. What we have is unqualified admissions by certain parties that they were involved in an arrangement or an understanding. Those are referred to in the case itself by the judge. But the court said that in the end those admissions were not sufficient to lead him to the conclusion that there was an understanding as required under the act. Keep in mind that what the court has said is that, yes, there are parties who have admitted that they had an arrangement, had an understanding. I could give the exact quote from the case but I will not take you to it at the moment. But the difficulty the judge had was that there was not a 'commitment' from other parties that they would participate in that arrangement or understanding.

Senator CONROY—How many? So four or five people, was it? Five people?

Mr Samuel—Five.

Senator CONROY—Five people actually admitted they were involved in it.

Mr Cassidy—This is in a sense confidential so I cannot actually reveal the party, but I might add that in the case of one of those parties we had actually agreed proposed consent orders with the party that involved a significant penalty to be put to the court. But then the court indicated that they would not be hearing those individual matters until they had heard the contested case so we did not proceed to discuss consent orders with the other four parties. But with at least, as I say, one of those parties, we did actually get to a point of having proposed consent orders with an agreed penalty to be put to the court.

Senator CONROY—I apologise. I interrupted Senator O'Brien.

Senator O'BRIEN—Is the presentation of these statements at the discretion of the judge?

Mr Cassidy—The consent orders?

Senator O'BRIEN—No, not the consent orders, the sworn witness statements.

Mr Cassidy—Very much so. It is a question of what the court will admit as evidence.

Senator O'BRIEN—Are they the rules of the court or the state of the legislation?

Mr Samuel—Rules of court, I am instructed.

Mr Cassidy—They are rules of court. Whether it is in the Federal Court Act or whether it is just the rules of evidence of the court I am afraid I would have to consult our lawyers on, but it would be one or the other. I suspect rules of evidence, which means that it is not a legislative matter as such.

Senator O'BRIEN—I have other evidence about the ACCC's powers but, if there are other questions about that case, I am content that they be asked now, if it suits the Chair to do that.

CHAIR—I am grateful for your indication.

Senator O'BRIEN—I am happy to go on if you want to.

CHAIR—We have a lot of people who want to ask questions. You have had 40 minutes. Senator Bernardi and Senator Joyce have indicated to me but I am happy for you to continue, unless there are specific matters in relation to this case.

Senator JOYCE—I have questions about inferential evidence in regard to this cartel. You talk about the vagaries of the law you ran into in trying to prove your case. What would be the requirements of a change in the law to give you more teeth so that the inferential capacity becomes the actual capacity.

Mr Samuel—It is too early at this stage to provide advice on that. I do not think we have actually had time to consider those issues at this point in time. I think all we can do at this point is to comment upon the difficulties that we face. Then ultimately of course it is a matter of policy for government as to what changes in the law and whether they seek from us and obtain advice as to what changes in the law might be required.

Senator JOYCE—Was the problem that we could not prove that they were talking to one another?

Mr Samuel—No. In fact, it was acknowledged that they were talking to one another. They acknowledged that when they were talking to one another they were doing so using code. That was all clear. We could show not only that phone conversations were taking place, we could also show that there were certain price movements that correlated to the occurrence of phone conversations. What we could not do was produce witnesses who were able to say, or were prepared to say—I should put it perhaps in that form—that on a certain day at a certain time, perhaps three or four years earlier, they made a phone call, that the contents of the phone call were as follows, and that the consequences of the phone call were that certain movements took place in price. In addition, I should mention that they also denied that they had a

commitment. They were prepared to say that, yes, that this was information sharing. What was the purpose of the information sharing? Well, the purpose was to share information as to prices. But 'we had no commitment to move prices' was the evidence that they gave.

Senator JOYCE—So it was not that we did not ask the questions; we did ask the questions.

Mr Samuel—Yes.

Senator JOYCE—They were subpoenaed; they did turn up. So we must have knowledge of the people who were making the calls. You must have been able to work that out.

Mr Samuel—Yes.

Senator JOYCE—They could say they were making the calls; however, that claim was the calls had no influence on what was happening to prices.

Mr Samuel—There were two issues: the first was that they could not recall the exact nature of the calls that they made several years ago, and I suspect that that may be a problem that all of us would share in this room, being able to recall the exact nature of a phone call made several years ago. Then they indicated that whatever calls had been made were purely in the nature of information sharing, they were not part of a commitment between the parties that they would move prices in certain directions as a consequence of the sharing of that information about prices.

Senator JOYCE—Is the ACCC relying too much on circumstantial evidence? Isn't that the message the judge is sending?

Mr Samuel—It is clear that the court has said that circumstantial evidence on its own will not be sufficient, and we recognise that. The difficulty of course is that where you are dealing with a cartel, where you are dealing with a price-fixing arrangement where parties have an absolute incentive to be uncooperative, to be unwilling to provide information or evidence, and indeed to have great difficulty in remembering the nature of phone calls that they have undertaken, then it is very difficult to provide other than circumstantial or inferential evidence.

Senator JOYCE—Was not the problem for the ACCC that it had lots of evidence of the parties exchanging information on prices but no evidence that the parties had agreed to do anything in particular with that price information? Wasn't that what the judge said?

Mr Samuel—Yes. Although we did have some admitting parties who said that they believed that they had entered into an arrangement or understanding, that the arrangement or understanding was to notify prices to other parties with the expectation that it was highly likely that as a result of that notification the prices would move in a certain direction, but that was insufficient for there to be a successful outcome in terms of proving the existence of a cartel.

Mr Cassidy—Perhaps to understand the nature of the evidence, we had hundreds and hundreds of phone calls.

Senator JOYCE—Did you record those phone calls?

Mr Cassidy—No, we did not record them.

Senator JOYCE—Why not?

Mr Cassidy—Partly because, if you like, this was largely an ex-post investigation. Even if we wanted to record them, at the moment we do not have the powers to tap phones. We had all this information. We could show that quite a number of these phone calls were followed shortly after by, say, an increase in the price of petrol. But that was not always the case. In what we put to the court, we argued that this was not a tight cartel in a sense that as soon as someone said 'prices are to go up', prices went up. Because of perhaps the nature of the market it was in, we put to the court that what happened on occasion was that they would not reach agreement say to increase their price and one or two of them perhaps would not and then there would a further round of phone calls and, if you like, pressure brought to bear on the parties that had not agreed to increase their price to do so. But what that meant in terms of records is that you end up with a vast number of phone calls being made between the parties. Following quite a lot of those phone calls, petrol prices actually went up at the individual sites. But there were also phone calls where the prices did not go up. Our argument on that was that that was because they were having trouble getting the agreement of all the parties to increase their price at that particular time. But the way the court looked at that was that was an indication of a lack of commitment on the part of those involved and in fact what was really in existence was an arrangement to exchange information and, following that exchange of information, sometimes they might respond with their pricing and sometimes they might not, but there was no actual commitment in a sense that normally they would respond by increasing or changing their prices. So, if you like, that was the evidentiary issue that was before the court.

Mr Samuel—And what does that say? The textbook says then that if you want to set up an arrangement of this nature—

Senator JOYCE—You can.

Mr Samuel—but you want to demonstrate that there is no commitment, then you move your prices in a counterintuitive fashion—

Senator JOYCE—Yes, of course.

Mr Samuel—on several occasions to demonstrate there is no commitment. It is perhaps worth noting on paragraphs 874 and 875 of the judgement what was admitted. And in relation to three of the respondents, that is Leahy, Mr Carmichael and Mr Warner. The court says that they admitted that there existed an understanding between Mr Carmichael and Mr Warner on behalf of Leahy and Peter Anderson on behalf of APCO that said that:

… between them would advise or cause to be advised some or all of the Market Participants other than themselves of the amount and timing of the proposed increases (whether by means of the arrangements or understandings referred to …

and it goes on. I will paraphrase for a moment. It continues:

… each knowing and intending that such other Market Participants would in the ordinary course be likely, upon being so advised, to increase their prices at or about the advised time to prices the same or about the same as the advised prices.

Each of Leahy, Mr Carmichael and Mr Warner also admitted further provisions of the admitted understanding, namely:

• a provision to the effect that, in the ordinary course, Apco and Leahy would advise each other of the amount and timing of proposed increases in the retail price of ULP and Super to be charged at Leahy and Apco sites respectively, each knowing and intending that the other would in the ordinary course be likely, upon being so advised, to increase its prices at or about the advised time to prices the same or about the same as the advised prices.

CHAIR—Excuse me for a second. We have a very big day ahead of us. Senator Joyce, you are asking these questions. Quite frankly, I do not think we have time to hear the ACCC read the prosecution's case. That opportunity may or may not come up. Can we talk about the principles rather than getting down to very lengthy details about the evidence.

Senator CONROY—I am actually—

CHAIR—Senator Conroy, you will have your opportunity in a second to talk—

Senator CONROY—It is not for you to tell a witness what to answer.

CHAIR—Well, excuse me, I am speaking at the moment and when I am finished you will have the opportunity to make some comments. Thank you. Senator Joyce, while there may be some interest in the evidence, can we perhaps talk more about the principles rather than the intimate details of it, otherwise we will not get through the large number of questions we have.

Senator JOYCE—Isn't the judge saying that there is nothing wrong with sharing price information and that you need to prove an agreement to do something with that info. Isn't that what the judge said? Does the ACCC need phone-tapping powers?

Mr Samuel—I would not be prepared to comment on that at the moment.

Mr Cassidy—He certainly did not say that and that is really one of the issues we obviously need to reflect on in thinking about the judgement. The court is certainly right in that there is no law against sharing information.

Senator JOYCE—But that makes the whole thing a farce.

Mr Cassidy—But the real question here, if you like, is whether they were sharing information simply—

Senator JOYCE—Well, they obviously were.

Mr Cassidy—and as I said earlier, perhaps if you think on the likelihood of hundreds of phone calls being made to pass on information which the market participants could probably get by simply looking up and down the street—

Senator JOYCE—They obviously were. We all know they obviously were and they were affecting prices and we just cannot prove it. Basically that is what has happened. It comes down to that same position. To prove collusion we just about need a statutory declaration signed by all parties saying they colluded. I know you have to deal with the law that is given to you. You do not make the law; you deal with the law that is at your disposal. You will be no doubt providing advice in the future to the minister about relevant sections that need to be strengthened so that we do not have to deal with this fiasco again?

Mr Cassidy—That is something we really have to think about. We need three separate but related issues. One is whether we need to look at the way the actual offence of price-fixing is

defined. The second issue is whether the issue of our investigatory powers, which are also a question of legislation, need to be looked at or not. And the third is whether our investigations techniques, and in particular the sort of evidence we seek to bring before the court, needs to be looked at. They are not mutually exclusive but at this stage, 24 hours after receiving the judgement, we are not in a position to be able to say to you, 'Look, this is exactly what needs to happen as a result of this decision,' particularly when the first thing we have to think about, as Senator O'Brien referred to earlier, is the issue of appeal and get legal advice as to whether there are appealable issues here. So there is a certain sort of ordering of the thought processes we have to go through, and 24 hours after the decision we just have not gone through those.

Senator JOYCE—My final question is: is it not inherently that they all talk to one another anyhow because in most states, right from the inception of the process you may have one refinery—you may have a number of oil companies but only one refinery—and they are purchasing it from the refinery at agreed prices. So they are in communication right from the word go about what their prices are and what their margins are.

Mr Cassidy—There is element of truth in that, although I suppose another sort of perplexing issue, if I can put it that way, in all this is that our understanding is that service stations would not actually be talking to one another because a lot of that pricing information is actually shared electronically between service stations. In other words, they get information say from their oil company supplier which tells them electronically what are the prices being charged by their competitors in their region, and we talked about another occasion. That is one of the reasons why prices can move so quickly. Once one service station changes its price, the service stations immediately around will change their price within a matter of minutes because they are getting the information electronically. So the notion that service stations spend a lot of time on the phone talking to one another I do not think gels with our understanding of how it works.

Senator JOYCE—That would be how you catch the stupid ones. The smart ones have colluded right from the refinery gate because that is where the real deal is done.

Mr Cassidy—That is a whole separate issue I think you are raising now as to whether the oil companies themselves are involved in collusion. I think that is a whole separate issue and not one that relates to Geelong.

Senator JOYCE—Fair enough. Thank you very much.

Senator MURRAY—I have a question on the same topic. As you know, I was a member of the committee that had a look at the issue of petrol pricing and whether you had sufficient powers to deal with these issues. My general impression, from memory, was that the ACCC at that time was at pains to agree with the chair that no change to the law or regulation was required in this field. My question is: as a result of this case do you think you are likely to change that position now that you have had your limitations in law exposed somewhat?

Mr Samuel—If my recollection serves me correctly, I think at the time of that inquiry we actually forecast some difficulty in relation to the acceptability of inferential evidence and did indicate that we saw some difficulties arising in proving price-fixing arrangements where we were not able to bring forward any other reliable evidence than inferential evidence. I think in the context of—

Senator MURRAY—Was the phrase you used 'standard of proof' in that inquiry?

Mr Samuel—I just cannot recall that. I did make some comments about the potential attitude of the courts to inferential evidence. If I recall correctly, the reference to changing the law or to regulation was by reference to the regulation of petrol prices, and whether the regulation of petrol prices would be to the advantage or disadvantage of the consumer. If I recall correctly, we indicated that several inquiries and reports have been undertaken over recent years, including the most recent one, which was the report by the ACCC on the volatility of petrol prices, indicated that the regulation of petrol pricing would operate to the detriment rather than to the advantage of the consumer.

Senator JOYCE—Is he going to review other cartel practices after this?

CHAIR—Senator Joyce, there will be lots of time for these questions.

Senator MURRAY—Just to conclude, the question that exercised the mind of this committee, both in this inquiry and in previous ones, is whether your powers are sufficient in terms of investigation. You might recall that the main inquiry was whether you could get behind the veil, and at the time your answer, as I understood it, was that you felt you had sufficient powers, although you quite correctly recall the concerns you had. My thoughts are that you were referring to the standard of proof which, of course, goes to the issues of inferential evidence. If you were to reconsider your need for stronger investigative powers, how would you let the community know? Would you just go along and say it quietly to the Treasurer or would you be prepared to make an open statement on these matters?

Mr Cassidy—Perhaps I could return to what I said earlier: these are things that we still need to think about. But if in thinking about them we were to reach a position where we thought some legislative change was required, in the first instance we would raise that with the Treasurer and the Treasury, which is the appropriate course. Then, I suspect, as has been the case with other legislative proposals, subsequently it would come to light through processes such as this committee.

Senator BERNARDI—I have some questions on petrol pricing, if you do not mind. I understand that the ACCC monitors around half or thereabouts of retail sites.

Mr Cassidy—Four thousand six hundred out of six and a half thousand.

Senator BERNARDI—That is just over half—60 per cent or 55 per cent. How is the process of monitoring those prices taken? Can you just enlighten me?

Mr Cassidy—As to retail prices, we basically pay a commercial entity, Informed Sources, to collect that information for us. A lot of it is collected electronically, particularly for accessing electronic information from the oil companies on prices that have been charged on credit card and fuel card transactions. Also, Informed Sources does a certain amount of manual collection as well, particularly in country areas where perhaps the electronic information is either not available or is not as regular as it is in the higher volume/high turnover sites in the cities.

Senator BERNARDI—It is quite a rigorous process; it is based on factual transactions and so forth?

Mr Cassidy—Yes. This is something that came up during this committee's inquiry into petrol prices a little while ago. We do not just take the Informed Sources data at face value, because there are other data sources as well, We do cross-check to make sure that the data that we are getting from Informed Sources is reliable and accurate. In the course of doing those cross-checks, we have not had any reason to query the accuracy of the data we get.

Senator BERNARDI—There seem to be a number of people who say that the ACCC should have a formal prices monitoring process. What is the difference between what you are doing now and a formal price monitoring process?

Mr Cassidy—The difference between what we do now, which is sometimes, if you like, referred to as informal monitoring and formal monitoring, is that under formal monitoring we have compulsory information acquisition powers that we can use. For example, if we were having difficulty in getting the required information on whatever it was that we were monitoring through public sources, we would approach the companies involved and require them to provide us with that information. Compulsory information acquisition is really the only difference between informal and formal monitoring.

Senator BERNARDI—I do not want to stray into areas of policy; although the chair is not here to pull me up, I am sure the minister will. If you did have formal monitoring powers, would you think you would monitor more sites than you do currently?

Mr Cassidy—I do not know that we would monitor more sites. As you said, we are catching about 60 per cent of the sites at the moment, which we think is a reasonable coverage. If the decision was made ourselves that we wanted, say, 90 per cent or even 100 per cent coverage, we could do that. We could do that now. It means that we would have to pay more in order to have that information collected. I do not think it is an issue of being able to cover more or less sites as between informal and formal monitoring.

Mr Samuel—I think it goes to the nature of the information that we would be seeking. At present, as Mr Cassidy has indicated, we can monitor the retail prices at the bowsers through the electronic process. In addition, we monitor the international crude oil price, and we monitor the refined petrol prices, particularly those that are coming out of Singapore. We monitor the refiner margin, which is the difference between the crude oil and the refined petrol prices. We monitor the published terminal gate prices of the major oil companies and some independents and the city-country price differential. Formal price monitoring would also enable, through compulsory acquisition of information, the ability to monitor the costs of individual suppliers of petrol—it might be retailers; it might be the major oil companies—to monitor their costs, their revenue and their profit margins. They would be the sorts of issues that could be the result of a formal price monitoring. But in terms of information for the motorist, the information that we obtain at the present time is probably of much greater relevance to them.

Senator BERNARDI—Do you feel that you have the cooperation of the retail fuel outlets in supplying you with the information that you currently need?

Mr Cassidy—As I explained, the way the information is collected is not a question of cooperation. However, we do not just get the information and say, 'Oh, gee, this is interesting, having all this information.' If we see something happening with prices either in a particular

region or on a national basis, we make inquiries as to why that is. Indeed, we use this information, amongst other purposes, to point us in the direction of where perhaps there is collusive behaviour occurring. We certainly get fulsome cooperation from those involved in the industry when we go out asking about why it is that this particular price movement has occurred in a particular region, or nationally, or whatever it might be. I do not think we could say that we have not been getting the cooperation we need to undertake the task.

Senator BERNARDI—I guess that goes to the Trade Practices Act. Part VIIA of the act states that it is only when there is a lack of cooperation that there really is a need for formal prices monitoring. You have indicated that the cooperation is sufficient. Is my reading correct?

Mr Samuel—It is different information. Let me indicate the information and the use to which we put the information at the moment. Because of the monitoring of, say, the 60 per cent of sites at the moment, with respect to the five major capital cities we can provide a graph, which is on our website, showing the price movements and the volatility of those movements through the weekly price cycles. We are therefore able to advise Australian consumers what is generally the better day to be buying petrol at the lowest point of the cycle, which in most cities is on a Tuesday; and the highest point of the cycle, when it is less desirable to buy it, probably a Thursday. That varies according to each city. Those graphs are there.

We are also able to monitor the difference between the Singapore refined petrol price, which is the accepted international benchmark that regulates the prices at which petrol tends to move in Australia. We can monitor that relative to crude oil. We can see where there tends to be a movement of that Singapore refined price away from the crude oil price, and then we can ascertain from our international and Australian sources any reasons for those movements. As you are aware, the difference between that Singapore refined petrol price and the crude oil price is what is known as the refiner margin. We are also able to monitor on a rolling average basis the correlation between that international benchmark of the Singapore refined petrol price and the Australian average retail price. We take averages because the weekly volatile movements in price cycles need to be averaged out to get an indication of where petrol prices are moving. We look at that correlation between the Singapore and the Australian prices. Why do we do that?

The Australian oil companies have been at pains to say—and indeed to undertake to the Australian motorist—that the Australian prices will generally follow in direct correlation to the Singapore prices with about a seven- to 10-day lag. We run a rolling average graph and a statistical table. If we see that there is any movement away from that undertaking, that is, that undertaking to correlate the Australian price on average with the Singapore price, then we will note that and, more importantly, will say something about it publicly. We did so in January this year; we noted that there was a movement away. The moment that we made some comments it started to pull itself back into line with the correlation that ought to be occurring. We keep an eye on that, because in our view if the oil companies of Australia undertake to the Australian motorist that they are in a sense guided by the benchmark of that international Singapore price, they ought to stick with that benchmark. If they move away from it, then we want to know why.

Senator BERNARDI—Judging by the comments of both Mr Cassidy and you, Mr Samuel, you have a substantial amount of information—sufficient information—to monitor petrol prices appropriately. Where you suspect that there is some sort of anti-competitive conduct are your powers less efficient in allowing you to investigate this thoroughly?

Mr Samuel—That goes back to the questions that Senators Murray, O'Brien and Joyce put to us before. There are two different purposes. One is to provide advice to the Australian motorist as to what is happening with petrol pricing, the volatile price cycles and this correlation between Singapore unleaded petrol and the Australian average price. But then there is a separate issue, which is that if we detect or have information that there might be collusion occurring—and that would tend to be on a local basis amongst retailers in a particular area, such as occurred in Ballarat, and as we alleged occurred in Geelong, and as we successfully found had occurred in relation to some retailers in a locality in Queensland—we need to investigate it. Then we have to go back to our investigative powers under section 155 of the act, the ability to demand production of documents, the ability to call witnesses before us to give evidence under oath. That is what we are dealing with. We then go back to the normal process of investigation that any prosecuting authority has to undertake in particular in dealing with unreliable or unwilling witnesses.

Senator JOYCE—I would just like to ask one question under section 155. Will you be asking for an extension under section 155 for phone-tapping powers?

Mr Cassidy—That goes back to an answer I gave you earlier. That is something, along with a number of other issues, that we are still thinking about following the Geelong decision. It is too early to be able to comment on that one way or the other.

Mr Samuel—I might just observe, by the way, that if you were looking at the textbook of how to set up a cartel and not get detected, then you might avoid having telephone conversations and instead meet in the local coffee shop.

Senator JOYCE—Apparently the smaller the number of players the easier it is to collude, so if we get rid of independents, then it is going to become easier to collude, not harder.

Senator BERNARDI—Going back to section 155, you mentioned you had the power to request information and produce documents and to force witnesses to give testimony under oath. What other powers do you have under section 155?

Mr Cassidy—There is also a power to enter premises, a so-called raid.

Senator BERNARDI—Should you require a more stringent regime of compliance or you undertake a section of formal price monitoring of retail fuel outlets, would there be a risk of high prices to the consumer?

Mr Cassidy—Do you mean through formal monitoring?

Senator BERNARDI—If you increase compliance or monitoring costs for retail fuel outlets, there would be a cost to their doing that monitoring on your behalf and supplying the ACCC with the information. They would need to redress those costs, I guess, and so they might do that through higher fuel prices.

Mr Cassidy—I would have to say that, if we were directed to undertake some sort of formal monitoring, the sort of imposition it would involve for any individual service station

would probably not be such as to have an impact on petrol prices. Indeed, I suspect formal monitoring and the sorts of issues that the chairman has outlined that formal monitoring might go to, would probably be more an issue in relation to the oil companies and the distributors rather than the individual service stations.

Senator BERNARDI—If oil companies and distributors are required to expend more on compliance, is it likely that that would flow through into their cost of product at the wholesale level, which then will affect the retail prices?

Mr Cassidy—All of this is obviously hypothetical, but the sorts of demands that we might place on the oil companies as part of our formal monitoring arrangement and the cost of that to the oil companies would be miniscule in terms of the overall costs and what then gets passed on to motorists in the retail price of petrol. You would be talking about a very small fraction of a cent when you think about the amount of petrol that is sold in Australia. I really do not think there would be a retail price impact.

Senator BERNARDI—When you say 'a fraction of a cent', shoppers do drive from one service station to another to save that fraction of a cent—

Mr Cassidy—I am talking about a fraction that has a few noughts in front of it—that sort of fraction, rather than—

Senator BERNARDI—So the one-tenth of one percent that—

Mr Cassidy—As I say, it would probably have a few noughts in front of it, I suspect.

Senator BERNARDI—I am interested to learn a little more about part VIIA of the Trade Practices Act. As I understand it, if the ACCC were directed to conduct a price inquiry and as part of that direction they were looking at specific companies, the companies would not be able to increase their prices during the inquiry period without your approval; is that correct?

Mr Samuel—That is correct. It would be beyond a certain level as stipulated in section 95L of the act.

Senator BERNARDI—So 95L?

Mr Samuel—I think 95L(3) stipulates the maximum price that can be charged by relation back to the highest price charged in the previous 12 months. I think section 95N indicates that higher prices can be charged but only with the approval of the commission.

Senator BERNARDI—Given that the ACCC would have to grant approval for higher prices, is there an incentive then for petrol retailers to lock in higher prices up front so that consumers would not get the benefit of peaks as well as troughs during the time of that inquiry?

Mr Samuel—As I think I indicated before in response to another question, evidence that has been presented to numerous inquiries in relation to petrol prices over the years, most recently the Senate inquiry that Senator O'Brien and other senators were involved in, and indeed the inquiry that we undertook into the volatility of retail prices on petrol, has all come to the conclusion that, if you move towards regulating the price of petrol in what is otherwise a competitive market, there is a tendency for prices to move up. In fact, if a cap price is set, there will be a tendency for retailers and/or wholesalers to move their prices up towards the

cap and diminish the level of discounting that occurs. That is why every successive inquiry that has taken place, whether at state or federal level, has come to the conclusion that regulation of petrol pricing is unsatisfactory in its outcomes for consumers.

Senator MURRAY—Which is why the focus is on investigation rather than regulation

Mr Samuel—That is correct, Senator.

Senator BERNARDI—A price inquiry could theoretically lead to a fuel shortage, given the international markets that we compete in. If there is an inquiry that caps the price in this country for an extended period of time, people would sell their product internationally at a higher price, would they not?

Mr Samuel—That is the difficulty you get into when you cap prices. If you cap them at too low a level, you end up with a shortage—petrol is not imported, is exported or is not produced in this country and you end up with a fuel shortage. You place the commission in the invidious position of being between a rock and a hard place. It either keeps the price cap in place during the course of the inquiry, as a result of which you end up with a shortage, or it approves a price increase. Either way, they are not terribly popular results.

Senator BERNARDI—Would there be a risk that the outcome might be similar under a prices notification scheme?

Mr Dimasi—Yes, there would be a similar risk under a price notification scheme. A price notification scheme has applied in the past. That is a way of regulating price under part VIIA. Firms have to notify us before they can increase prices. That is at the wholesale level. One of the concerns the commission had, and indeed made a recommendation about in its 1996 report, was exactly that. That is why we recommended moving away from the notification arrangements.

Senator BERNARDI—Thank you for that clarification. I may come back with some further questions.

Senator JOYCE—Are you going to review other cartel cases following this case?

Mr Samuel—As I indicated, since this case came to court back in 2005 we have been looking at the strategy of our investigating process in anticipation of the sorts of difficulties that Mr Cassidy referred and that came to light during the course of the hearing of this particular case. We do not stand still. We have a specialised cartel detection and investigation unit within the commission. We have been working closely with the Director of Public Prosecutions, and that has been very instructive, particularly in the context of potential criminal prosecutions. That has its own flow through to our own civil investigations and civil prosecutions.

Senator JOYCE—Breaking down this whole section on collusion, wouldn't excess capacity, if it were in existence, increase competition? Would there not inherently be a drive to discount and move that excess capacity on?

Mr Cassidy—That is certainly right in theory. The more competitive a market is, the less it is prone to collusive activity. In saying that, the sort of collusion, particularly in relation to petrol, that we have been looking at and investigating is more regional in nature. I am not sure

whether more capacity in a national sense would be sufficient to deter some service station operators in a particular region from trying to take advantage of their geographic position.

Senator JOYCE—Two crucial things are the ability to engender excess capacity to get more product into the market—and things that might get more product onto the market would help—and having a multiplicity of players rather than a centralisation of players, which we currently have. It is hard to collude when there are a number of players in the market rather than a couple.

Mr Samuel—Mr Cassidy has referred to the more regional nature of some of these collusive arrangements. If you have six or seven players in a particular region, such as what we had in Ballarat, the capacity for those players to collude and reach an agreement between themselves, and to conduct the implementation of that agreement or arrangement through successive telephone calls becomes that much easier. If you are dealing with a large area such as the total metropolitan area of Sydney, then it becomes a lot more difficult for that collusion to take place because of the sheer number of sites.

Senator JOYCE—Or a lot more sophisticated?

Mr Samuel—Without wanting to give any more advice on how to set up a collusive arrangement—and the textbook has probably been written in the past few days—it would have to be an extraordinarily sophisticated arrangement to encompass some thousand or so retailers within a large metropolitan area.

Senator JOYCE—Just in Sydney's case they would all have to buy from two refiners. There are only two companies that refine petrol.

Mr Samuel—We need to remember that there is a retailing operation, which in itself is in its own way separate or divorced from what is happening at the wholesale level. There are some limitations there because of some of the rebates and price support schemes that are provided by the refineries or the wholesalers. Ultimately there is a retail operation, and that is where the collusion tends to occur and it has certainly been the focus of our attention over the past few years.

Senator JOYCE—That is where collusion occurs that you can get evidence of.

Senator O'BRIEN—In relation to the monitoring powers, you wrote to Mr Swan back in October 2005 and you said in part:

The ACCC monitors petrol prices throughout Australia. This monitoring activity has not been carried out under part VIIA of the TPA. The main difference between informal and formal price monitoring, that is between price monitoring not under part VIIA of the TPA and price monitoring under that Part, is that formal price monitoring allows the ACCC to use its compulsory information acquisition powers if necessary.

I understand that is still the case. Could you briefly describe the extra powers that you refer to?

Mr Cassidy—This is a potential source of confusion. We have two sets of information acquisition powers. One relates to where we are investigating a possible breach of the act, and that is what we were referring to earlier under section 155.

Senator O'BRIEN—In a very narrow circumstance.

Mr Cassidy—Yes, but that is an actual breach—price fixing or whatever. In relation to price monitoring, we have a separate set of powers that we can use where we are undertaking formal price monitoring. Those powers allow us to obtain documents. They allow us to obtain written information. They do not allow us to obtain testimony under oath. Really they are powers to obtain documentary information, be that existing documents or be that information given to us in written form.

Senator O'BRIEN—Mr Samuel, you also said in the letter:

> It is the case that the ACCC cannot initiate formal price surveillance activities under part VIIA of the TPA without a formal direction of the Treasurer, Assistant Treasurer, Parliamentary Secretary to the Treasurer or a Minister Acting for or on behalf of the Treasurer.

Has that changed?

Mr Samuel—No, that is the same.

Senator O'BRIEN—If the ACCC was of the view that there was information that might be uncovered with compulsory information acquisition powers, could it ask to be directed in that way?

Mr Samuel—It could always indicate to the minister that it might be necessary or appropriate to be given such a direction, but that is entirely a matter for the minister.

Senator O'BRIEN—Have you considered that course of action?

Mr Cassidy—With our petrol monitoring we have not needed to. As I said earlier, we have no problem in getting the pricing information that we need to undertake the task that we are currently undertaking.

Senator O'BRIEN—Without a formal direction you are not able to direct the provision of information by a refiner, a distributor or an oil company?

Mr Cassidy—That is right.

Senator O'BRIEN—You were just saying that the ACCC does not believe that it needs to have access to written information and that simply monitoring price movements is sufficient; is that right?

Mr Samuel—No.

Senator O'BRIEN—I thought that was what you just said, so I just want to be clear.

Mr Cassidy—What we are doing at present is monitoring prices and movements in various prices and we are providing that information in different forms on our website for the use of the average motorist.

Senator O'BRIEN—You have already said that.

Mr Cassidy—That is right. For that purpose we do not feel we require any formal monitoring powers. As the chairman said earlier, if the exercise is more about starting to look at profit margins, costs and so forth, I suspect that if we were given that sort of task or that was foreshadowed then we would need formal monitoring powers, because that is not information I suspect would be just volunteered to us.

Senator O'BRIEN—You have not received that direction in the last decade, have you?

Mr Cassidy—No.

CHAIR—There is no request before government at the moment to consider these matters because you do not believe that they are necessary?

Mr Cassidy—We have made no request and we have not received any direction either.

Senator O'BRIEN—The Treasurer often asks the ACCC to look at petrol prices. Did you receive a request from the Treasurer to look at petrol prices over the last Easter weekend?

Mr Samuel—It was the Prime Minister that asked us to look at that.

Senator O'BRIEN—Did you not receive a request from the Treasurer?

Mr Samuel—I do not recollect, but I think it was the Prime Minister. It would be unfortunate, but I could have the minister confused. I think it was the Prime Minister.

Senator O'BRIEN—The Prime Minister said last week:

> I'm going to ask the ACCC … to again, given the way in which the prices have gone up, to again advise me and the Government as to whether it is satisfied it is a faithful reflection of the current price and not an over-reflection … I'm going to talk to the chairman today.

That was reported on AAP on 25 May. What action did the ACCC take as a result of these comments or indeed discussions with the Prime Minister?

Mr Samuel—The Prime Minister did phone me and I explained the nature of the price monitoring processes that we undertake at the moment in much the same way as I have described them to Senator Bernardi before. I indicated that it was still our position that, if we saw a movement away from what I would call the almost direct correlation between the Singapore Mogas refined unleaded petrol price and the average Australian price across the five major capital cities, we would be making public comment to that effect. I also gave similar advice to the media, having been door-stopped last week at around the time of the Prime Minister's comments. At this point, the information we have before us indicates that the oil companies, as far as it is reflected in the retail price levels, are meeting and sticking to their commitment, which is to remain in correlation with the Singapore Mogas price. We need to clarify a couple of aspects here. The first is that we need to look at the refined unleaded petrol price of Singapore as the benchmark. It is not Tapas crude. We do not put crude oil into our petrol tanks but refined petrol. It is that particular price that we use and that the oil companies have used consistently for some years now as their benchmark. Our view has been that, if they stick with that undertaking that they have given and we understand why that is the benchmark in terms of the international trading in the petrol commodity, then they are meeting their commitment to the Australian motorist and they are reflecting what is happening in the marketplace. It is when they move away from that benchmark that we think that ought to be revealed publicly, and we have undertaken to the Australian community that we will do so if there is a movement away from that benchmark.

Senator JOYCE—They are not meeting their commitment, though.

CHAIR—Senator Joyce, please.

Senator O'BRIEN—They are meeting the benchmark arrangements. What can you tell us about the sort of refiner margin and wholesaler margin being achieved here? Do you have that information?

Mr Samuel—It is perhaps appropriate to clarify the refiner margin, which is the one that has been the source of some confusion in recent times. Three or four factors influence the price of petrol. The first is the price of crude oil, which moves in various directions. Some radio commentators see the price of crude oil go down and ask, 'Why is the Australian price of petrol not moving accordingly?' As I consistently point out, we do not put crude oil into our petrol tank; we use refined petrol.

Senator JOYCE—That is why I asked you about the refiner margin.

Mr Samuel—That is right. That is why we look at the Singapore refined price. It is called Singapore Mogas 95 Unleaded. It is the refined petrol price for 95 octane unleaded petrol. The refiner margin will move. It has generally on average sat around US$3 or US$4 a barrel. That is the difference between that crude oil price and the Singapore price. But it will move and the general reason for movement will be issues of supply and demand. In more recent times that refiner margin has moved out from US$3 or US$4 a barrel to upwards of US$15 a barrel. This is due to two or three factors. We have had some anticipated increase in demand in the US through the so-called driving season, which starts towards the end of May and runs through June/July. At the same time we have had some refineries go out of commission. In Singapore a major Exxon refinery went out of commission as a result of a fire, and something like 80 per cent of Exxon's capacity was taken out of commission. Refineries have gone out of commission in Indonesia through maintenance, and refineries in the US have gone out of commission for maintenance. They are starting to come back on stream. As they are coming back on stream, that refiner margin is starting to drop back. As at today the refiner margin is somewhere around US$11.30 a barrel, so it has pulled back. If the oil companies stick to that correlation between Singapore Mogas and the Australian price, it ought to start reflecting itself in the Australian price for petrol. If it does not, then we will be saying something. As I indicated, we did so back in January this year, and there was immediate reflection of that perhaps in the way that the Australian price started to move back to being in correlation with the Singapore price. If we can get a focus in the public's mind on that international refined petrol price as reflected in Singapore, that seems to be the most significant discipline that we can impose on the oil companies. That is, you undertook that you would stay with the international benchmark. There is a very good reason why that benchmark applies. Petrol is an internationally traded commodity. Stick with that benchmark and the Australian motorists ought to be able to say, 'You are being fair.'

Senator O'BRIEN—You are talking about their wholesale margin there; you are saying, 'Whatever the refiner margin is, we understand you take that and you pay that.'

Mr Samuel—You may well derive it in Australia as well, because they refine in Australia. But that is the nature of international petrol pricing.

Senator O'BRIEN—Where it is refined in Australia is the refiner margin is still moving through that range?

Mr Cassidy—Basically, because 55 per cent of the crude oil that we use in Australia is imported, so prices here reflect international prices.

Senator O'BRIEN—Yes.

Mr Samuel—The refiner margin in Australia will reflect the refiner margin on the international basis through Singapore. Now we get to the retail price.

Senator O'BRIEN—Even though capacity here has not changed?

Mr Samuel—No, but about 20 per cent of our petrol in this country is imported, and of course Australian refiners are operating in a world market; they will either choose to import more petrol and refine less petrol in Australia or, alternatively, they might export the petrol they refine in Australia if for any reason regulation was changed.

Senator O'BRIEN—That is very simplistic. In operating their refinery they have fixed costs to recover, and the more they put through their refinery the better they can share the fixed cost. Are you suggesting that they would deliberately run up their fixed cost per unit and import more?

Mr Samuel—No. What I am suggesting is that this is an international commodity and it is traded essentially through Singapore as far as the local region is concerned. They will set their wholesale prices according to that Singapore refined price that we have talked about.

Senator O'BRIEN—We understand that the refiner margin here will move in the same range as the South-East Asian refiner margin on the basis that, if they are charging it, it can be charged here?

Mr Samuel—That is correct.

Senator O'BRIEN—Is that irrespective of the issues of capacity here? In other words, the capacity to refine has not changed; it is just the price of refining has gone up.

Mr Samuel—That is correct.

Senator O'BRIEN—Is that acceptable behaviour?

Mr Samuel—As I have indicated, numerous inquiries have concluded that this is an internationally traded commodity and therefore in Australia you are largely governed by international prices that are set by traders in the international marketplace. But that relates to the wholesale price and then we have to move to the retail level, which is the one that affects most consumers, obviously.

Senator O'BRIEN—Essentially it is a system of what the market will bear?

Mr Samuel—That is correct.

Senator O'BRIEN—That is a significant part. You have the cost of crude and the cost of refining. If you take out the tax issue, they are the two most significant parts of the price?

Mr Samuel—Yes, that is right.

Mr Cassidy—You may recall the charts presented to this committee when it was undertaking its petrol price inquiry. The overwhelming explanation for the increase in the price of petrol in Australia in recent years has been the increase in the international crude oil price.

Senator O'BRIEN—That is not really the case at the moment, is it?

Mr Cassidy—At the moment the reason prices have gone up sharply is not an increase in the crude oil price; as the chairman was explaining, it is an increase in the margin between the international crude oil price and the international refined product price.

Senator O'BRIEN—The refiner margin?

Mr Cassidy—Yes.

Senator O'BRIEN—It is not the wholesaler margin, it is refiner margin; is that how we should understand it?

Mr Cassidy—No. I will just outline the margins. If you start from crude oil, you have a margin between the international crude oil price and the international refined product price, which is the so-called refiner margin. The next margin is the margin between the international refined product price and the price at the local refinery gate, which you might call the wholesale margin. The final margin is the margin between the terminal gate price and the retail price, which is the retail margin.

Senator O'BRIEN—You have the wholesaler margin, the retailer margin, the refiner margin and the cost of the crude?

Mr Cassidy—Yes, that is right.

Mr Samuel—That is the reason why we ultimately take the average retail price benchmarked against the refined petrol price in Singapore as the guide or benchmark that we are dealing with, because that then reflects itself through the refiner margin, the wholesale margin and the retail margin.

Mr Cassidy—Again, this goes back to material that we provided to the committee in the price inquiry. Neither the wholesale margin nor the retail margin have changed much in Australia in recent years. The wholesale margin has gone up a bit. That can be explained by the increased cost of the fuel standards that have been introduced in Australia. They were estimated to have a cost of about 2c or 3c a litre. That is the margin by which the wholesale margin has gone up. The retail margin has stayed fairly constant at around 3c or so a litre over the last so many years. Those two margins have not moved all that much. The margin that moves a lot is the so-called refiner's margin, but it goes up and comes down and sometimes it is negative. Over time, the actual driver of the retail petrol price in Australia is where you start from, which is the international crude oil price. That is what has increased and remained high over a sustained period of time.

Senator O'BRIEN—Should we understand it that the current level of prices, which seem high in the context of the currency and the crude price, are a reflection of a high refiner margin?

Mr Samuel—That is exactly right.

Mr Cassidy—That is right. It is the international refiner margin.

Senator O'BRIEN—Did you say that 80 per cent of our petrol is refined here; 20 per cent is imported and 80 per cent is refined here?

Mr Cassidy—Eleven per cent of our refined petroleum is imported. That is petrol coming in as petrol. And 55 per cent of the crude oil that we have in Australia is imported.

Senator O'BRIEN—Let us forget the crude oil. I am looking for where the refiner margin has been generated, whether it has been generated here or overseas. I think you said that 20 per cent of the refined petrol that we use is imported and 80 per cent therefore is refined here. Is that right?

Mr Cassidy—I do not think it is that high.

Senator O'BRIEN—I thought you said that. I do not want to put words in your mouth.

Mr Cassidy—The answer to your question is that the refiner margin is driven internationally. It is an internationally determined margin, and it is reflected in Australian prices. So it is determined offshore and it is reflected in the domestic prices.

Senator O'BRIEN—Or an opportunity to increase the margin is determined by what is happening somewhere else. You can put it in a different number of ways. You are choosing to express it as simply following a margin that has been achieved somewhere else. It is effectively generating the profitability of the refiner.

Mr Cassidy—It is the price that is determined in the international marketplace.

Senator JOYCE—If their refining margin in America dropped below our costs of refining in Australia, would our costs for refining therefore go below the costs of refining in Australia? Obviously it would not, so why does it go up?

Mr Dimasi—The refiner margin has been negative in the past.

Mr Cassidy—Yes, it has. It is not always positive.

Mr Dimasi—It has been negative.

Mr Cassidy—It was negative through December and the early part of January and I think again in April. It does go negative.

CHAIR—We will have a short break now, as was indicated on the program.

Proceedings suspended from 10.44 am to 10.59 am

CHAIR—I just have a couple of quick questions. Some states have called for federal intervention in relation to petrol prices. As I understand it, the states and territories themselves have the power to intervene if they thought it necessary, both in terms of conducting price inquiries and in capping petrol prices. Can you confirm that my understanding of their powers is correct?

Mr Cassidy—I think that is probably right. But if you want a definitive answer, you will probably need to take it on notice. The states have a number of pieces of legislation that relate to petrol retailing, so I would suspect that they—

CHAIR—Your initial view is they can but you will take the rest of that on notice, will you?

Mr Cassidy—Yes.

CHAIR—Mr Samuel, I just want to confirm your evidence before so that we are quite clear about it. Was it your evidence that any cap on prices, including refinery prices, on which there was some discussion earlier on, could lead to fuel shortages and/or higher prices for consumers?

Mr Samuel—Yes. If prices are capped at too low a level, inevitably there will be shortages. If prices are capped at a high enough level to avoid shortages, then there is a tendency for prices to move up too close to the cap and for there to be reduced volatility—'reduced volatility' is another way of saying reduced discounting—and this has been revealed in a number of inquiries that have been conducted into petrol pricing in Australia.

CHAIR—Senator O'Brien, do you have any questions?

Senator O'BRIEN—The Australian Automobile Association in the petrol inquiry we have been talking about said on page 2 of its submission:

> In the interests of ensuring efficient market operation, the ACCC should regularly report on the movements of fuel industry prices, costs and profits in all capital cities and regional areas.
>
> The government should ensure that the ACCC has adequate power under the Trade Practices Act to get to the bottom of limited wholesale competition—through investigation of, for example, potential barriers to entry that limit competition in the market as well as competition for the market (contestability)—and rectify its adverse price effects.

Does the ACCC have a view about that proposal?

Mr Samuel—There are two elements of the proposal. One is the provision of more information for Australian motorists. We are currently reviewing our ability to do that in connection with our website and would hope to have that review completed in the not-too-distant future. For example, it may assist Australian motorists to see quite visibly the relationship between the Singapore refined price and the Australian average retail price in addition to what they can see at the present time, which is the volatility of price cycles. As to the other items you have mentioned, they are matters of policy for government.

Senator O'BRIEN—Does the ACCC have adequate power to get to the bottom of limited wholesale competition and rectify its adverse price effects?

Mr Samuel—As I think we have indicated before, the issue of the various margins which, of course, are reflective of competition—and let us leave out crude oil, because I think that becomes less relevant in the context of what we are dealing with at the retail level in Australia—is one where we have to look at three price points. One is what I will call the international refined petrol price. We have then got the wholesale margin leading to the wholesale or terminal gate price. Then we have the retail margin leading to the price at the bowser. The wholesale and the retail margins, as Mr Cassidy has mentioned, have tended to remain consistent over more recent years subject to some increases in the wholesale margin flowing from the improved environmental standards relating to fuel in this country, which I think started in 2006. The figures that Mr Cassidy mentioned, which are average wholesale margins of around 3c a litre and average retail margins, again, of about 3c a litre, are reflective of averages as distinct from the volatility that will occur with those margins, particularly at the wholesale level with price support schemes and rebates and at the retail level with the retail prices that we see at the bowser. If you are asking me: is there

competition at both the wholesale and the retail level subject to the international refined petrol price being the benchmark, the competition—

Senator O'BRIEN—I was not actually asking that.

Mr Samuel—I am sorry.

Senator O'BRIEN—I was asking whether you have adequate power to get to the bottom of limited wholesale competition.

Mr Samuel—Yes, but I think it was the limited wholesale competition that you were referring to that I was perhaps getting to. What we are dealing with is competitive elements for pricing that tend to be regulated by international pricing factors, and then other elements, for example, wholesale margins and retail margins, which will be affected by competition. The question you are asking is: do we need any more power to be able to get to the bottom of that? The first question I would perhaps throw back is: do we agree that there is a limited level of wholesale competition? I am not sure that we would necessarily agree with that at this point, but if you take the combination of wholesale margins and retail margins and the volatility that is occurring in the price through the weekly price cycle, then I think that we would say that, subject to spot issues of regional collusion that may exist—and we talked about that earlier this morning—there is a fairly high level of competition as those in the market are chasing market share.

Senator O'BRIEN—That is a big subject and I am not going to open it up here for debate in relation to the evidence that we had before us in the inquiry. I am going to move to another matter if there are no further questions about petrol and the ACCC.

Senator JOYCE—I have just a couple. Has any investigation ever been carried out on how the major companies deal with each other and the relationships they have at the refinery base knowing that, for instance, in Queensland there is, I think, only one company that has a refinery capacity there? That is in Brisbane, anyhow. Obviously the others have to have some sort of relationship with them. Is there any transparency in how that relationship works and how those deals work?

Mr Cassidy—I do not know what you mean exactly by 'inquiry'. Over time we have looked at what used to be the so-called refinery exchange agreements where there was like a swapping of product from one refinery to another. We looked at those in terms of understanding how they worked. From time to time some questions were raised about whether they were the basis for any sort of anti-competitive arrangements. Those refinery swap agreements no longer operate. In recent times we have not carried out any what you would normally call investigations into the dealings between individual refineries.

Senator JOYCE—Regionally there is, for want of a better word, a virtual monopoly on the refinery capacity. In Queensland there is one company. In Sydney there is a duopoly. How do we exert further competitive pressures on that arrangement?

Mr Cassidy—That is not an easy question to answer. We have indicated previously our concern about the effect on imports of the fuel standards that we have and the fact that those fuel standards—

Senator JOYCE—Just for the record, that is basically the ring-roading of Australia from imports by our higher fuel standards than our—

Mr Cassidy—Yes, before we had those fuel standards—

Senator JOYCE—You could float in fuel?

Mr Cassidy—Float fuel imports were actually the main source of competition in our market—

Senator JOYCE—And now we cannot?

Mr Cassidy—People were able to pick up loads of refined product in Asia and then bring them in and sell them at competitive prices—

Senator JOYCE—We cannot do that now?

Mr Cassidy—We cannot do that now. Given the sort of capital investment that is involved in new refineries, you could not hold out that the establishing of new refineries in Australia is going to be a source of increased competition at the wholesale level—not in the foreseeable future. If there is going to be increased competition, it needs to come from imports.

Senator JOYCE—So there is no more new refining capacity coming onboard in Australia; we are quarantined from being able to import it from overseas, unless we import it from Scandinavia—

CHAIR—Senator Joyce, I must have spent too much time around machinery. Would you mind just speaking into the microphone; I cannot hear, I am afraid.

Senator JOYCE—Australia is ring-roaded from imports from Asia because of our sulphur content laws. In so many areas there is only one refinery and so there is an inherent monopoly in regional areas. The only other alternative refining capacity has to come from like fuel sources, such as ethanol. How are we getting that out into the market?

Mr Cassidy—As I recall it, each of the major oil companies has indicated that they will be rolling out E10 petrol—

Senator JOYCE—They have been indicating that for a few years now, but they are not doing too well.

Mr Cassidy—We are monitoring E10 petrol. Our monitoring report for the March quarter, which is up on our website, shows that we had 500 service stations around Australia selling E10, and that has increased quite considerably from the number we had in the December quarter. It is being rolled out.

Senator JOYCE—That is the only real sort of competition you are going to get regionally against, for instance, a monopoly on refining capacity in south-east Queensland; it would be through alternative fuel such as ethanol getting onto the market—

Mr Samuel—We should point out that E10 in terms of retail pricing has a price differential of about 2.5c to 3c a litre.

Mr Cassidy—The more fundamental point is one that we have discussed before: E10 is effectively regular petrol with 10 per cent ethanol added. The additional volume, or competition if you like, is the 10 per cent ethanol.

Senator JOYCE—I understand that.

Mr Cassidy—They are still adding it to the existing supply of regular petrol.

Senator JOYCE—That inherently should give us 10 per cent excess capacity. With the refining capacity so finely tuned, that gives you 10 per cent excess capacity, which implicitly creates downward pressure. You have excess capacity looking for a home so, therefore, as long as the independents are still in the market you should get discounting.

Mr Cassidy—As I said earlier, I think your basic proposition is right; to the extent that there is excess supply, you will have more competition and more price discounting. I suppose the issue I am raising is whether the sort of increment you are talking about with ethanol, particularly given it is ethanol going into existing petrol supply, is going to give you that sort of boost in overall supply.

Senator JOYCE—We were talking about the Tapas crude prices and Singapore prices.

CHAIR—I think Senator O'Brien might have been here. We had some evidence from the energy people on Monday night regarding some undertakings in relation to the number of sites that would be opened over the next 12 months by the majors which was actually quite interesting; there was a dramatic increase in those sites.

Senator JOYCE—I have no doubt that he was just trying to keep them honest. Who actually sells the oil to the refineries? Who are the major sellers of fuel to the refineries?

Mr Cassidy—Of crude oil to the refineries?

Senator JOYCE—Yes.

Mr Cassidy—The major producing areas are Bass Strait, North-West Shelf—

Senator JOYCE—Who owns those?

Mr Cassidy—They are normally owned by what you might call international oil companies.

Senator JOYCE—The same ones who own the refineries?

Mr Cassidy—Normally, yes. I suppose the one significant disconnect is that BHP has a significant role in Bass Strait. But apart from that you are talking about companies like Esso and Shell—

Senator JOYCE—Exxon selling to Caltex, which is basically selling to themselves.

Mr Cassidy—Esso International.

Senator JOYCE—Are there inherent competition strengths there or is it pretty much an oligopoly-type market where there are unlikely to be any new entrants? Is it a market that it is extremely hard to gain entry to?

Mr Cassidy—Yes, petroleum refining is a difficult market to enter simply because of the capital costs involved in establishing a new refinery.

Senator JOYCE—If they deliver to the refineries, if they own the refineries, and soon they own all the retailing outlets, or they are heading towards ownership co-jointly, with

strong marketing relationships, with Woolworths and Coles, where is the alternative marketing pressure going to come from?

Mr Cassidy—The pressure comes from the fact that they are competing with one another for market share. As I said to you earlier, we do not have any evidence to suggest that the oil companies themselves are in any sense colluding; they are all interested in making as much profit as they can. The competition comes between them for market share and resulting profits.

Senator JOYCE—I turn to the section 155 test for investigative purposes. In the US they have phone-tapping powers, do they not?

Mr Cassidy—Cartels are criminalised in the US; it is a criminal offence. The investigations in the US are undertaken by the FBI, which has quite a range of powers, including phone taps, electronic wires and so forth. But the investigation is done by the FBI.

Senator JOYCE—What are the like powers between our section 155 and the US? Are they similar in nature or vastly different?

Mr Cassidy—The US powers would be more extensive, because basically you are talking about the powers that are available to the FBI.

Senator JOYCE—And are they more effective?

Mr Cassidy—More extensive.

Senator JOYCE—But more effective? There is not much point in having power for the sake of power. On investigation are they more effective in dealing with cartel-type arrangements?

Mr Cassidy—That is a difficult question to answer in the sense that I think what really drives cartel investigations in the US is the fact that they have criminal sanctions. They have had for quite a while.

Senator JOYCE—We do not have them here, do we?

Mr Cassidy—No, the government has announced its intention to introduce them but we do not have them at present. As we have said before, if someone is facing the possibility of going to jail, that really concentrates their mind on (a) whether to be involved in a cartel in the first place—

Senator JOYCE—Do those cartel-type arrangements include such things as predatory pricing? Are you using that as a mechanism for knocking out—

Mr Cassidy—No, let us be clear. Cartels are where what should be competitors get together and agree on price.

Senator JOYCE—Yes, I understand. I understand exactly, but when they use that mechanism between them to knock out other competition that are not in the cartel?

Mr Cassidy—Predatory pricing is quite different. It is not criminal in the US. Elements of it are criminal in Canada, but there are not too many jurisdictions where predatory pricing as such is a criminal offence.

Senator JOYCE—Thank you for that.

CHAIR—In light of matters that we have been discussing since about 9 o'clock this morning, is ownership of oil production facilities or refineries, et cetera, at all relevant to prices? We were talking about international pricing for refineries this morning. Does ownership of any of these facilities have any relevance at all on pricing?

Mr Samuel—It is not something that we have studied in detail, but I would have to say that in light of the international benchmark pricing that is used to establish the refined price, and the fact that the competition can really occur at the wholesale and the retail margin level, the actual ownership of the refinery as such is not that relevant because it is guided and benchmarked very much against the international price. Where the true competition occurs is at the wholesale and retail margin level, keeping in mind that there will be some merging of those because the retail margin will be impacted by whatever price support mechanisms might be in place with wholesalers and their retailers.

CHAIR—Senator O'Brien.

Senator O'BRIEN—I will move to another topic. There has been an enormous debate over fibre to the node in the press over the past few weeks. For the record, can I just ask: is it the ACCC's view that the existing telecommunications regulatory regime is sufficiently robust to accommodate an investment in fibre to the node without regulatory reform?

Mr Samuel—You have asked me to comment on policy matters there, which is not our practice. The existing regulatory process involves parties that wish to undertake an investment and that recognise that access to the infrastructure they may invest in needs to be made available to their rivals. That is part of the nature of our competition policy in this country. There is a process to be pursued there which is a very public and transparent process. It relates to the process of lodging special access undertakings with the commission. Those special access undertakings are then subject to examination via the commission in a publicly transparent process involving public consultation, the receipt of submissions, the preparation by the commission of a draft position/view in terms of a draft decision on the undertaking, and then the preparation of a final determination, which follows publication of the draft. The consideration of those special access undertakings is undertaken in a public and transparent process, but we are required under the act to have regard to a number of criteria of reasonableness relating to those access provisions. 'Reasonableness' is defined in section 150AH of the act to cover a number of criteria, which take account of the legitimate business interests of the investor and the infrastructure. It takes account of the interests of those who are seeking access to that infrastructure, that is, their rivals, and it also takes account of the long-term interests of end-users, that is, ultimately the consumers. We deal with those as part of considering whether a special access undertaking is reasonable. That covers the process of access to the investment in infrastructure.

The actual investment itself, though, is undertaken by investors who may themselves require other regulatory interventions or legislative interventions to enable the investments to take place. They are not within the context of the issues of special access undertakings that I have talked about. For example, in the context of a fibre to the node investment, it has become clear in the discussions that we had last year with Telstra and that we have had more recently with the G9 group that there are some fundamental commercial or economic imperatives, the first of which is that it could be reasonably expected that there would only be the capacity for

20 million Australians to be able to service one infrastructure investment only, and that is one network; that the rolling out of duplicate networks such as occurred in the initial stages with the Optus and Telstra/Foxtel/HFC back in the early 1990s, which proved to be economically inefficient, limited the ultimate roll-out of that cable network to far fewer points of users, that is, homes and places of business, than would have otherwise been desirable. The question of having a single network becomes a relevant factor, but that is something that would be outside the remit of the ACCC. It would be a matter for government.

Senator O'BRIEN—I am not asking you to comment on whether you should or should not have those powers; it follows that the powers you have are not broad enough in consideration of the competition issues?

Mr Samuel—We need to separate two separate issues. The first issue is a policy determination of whether there ought to be duplicate networks or a single network. If a policy determination were made that there ought to be a single network only, that would be a matter of legislation. It would be a matter of government policy and that would be outside the application of the Trade Practices Act as it currently applies. The act as we have it deals with the terms and conditions of access by rivals to a single network, or to a natural monopoly network, and the powers are there for the ACCC to deal with that under the special access undertaking provisions of the Trade Practices Act. They deal with that essentially in the context of determining whether or not the access terms and conditions are reasonable.

Senator O'BRIEN—I understand what you are saying. That is a judgement that the ACCC has to make and it is not a matter for government, I take it?

Mr Samuel—The issue of whether or not access terms and conditions are reasonable are judgements that under the Trade Practices Act are required to be made by the ACCC in the context of special access undertaking processes.

Senator O'BRIEN—Are you describing in this context an application for a regulatory exemption under the act to facilitate this major investment?

Mr Samuel—No, there are two separate issues. There is a policy issue as to whether it is economically efficient and viable to have more than one network. That is a policy determination by government, which would be the subject of legislative enabling or legislative direction by government as to whether or not there is one network. Let us hypothetically assume the government determined that there should and could be economically one fibre to the node network: the process of providing access to that single network by competitors to enable a competitive environment is a matter that can be dealt with by the ACCC under the special access undertaking provisions of the Trade Practices Act as currently drafted.

Senator O'BRIEN—Following a determination by government?

Mr Samuel—The government needs to determine whether there will be one network or two or three. For example, if there were a determination that there could be two, three or four networks, then government would not need to intervene at all. That could be a matter of individual players deciding whether or not they would build duplicate networks. If there were a determination that there would be a single network only, then that would potentially require legislative intervention.

Mr Dimasi—A slightly different way of saying all of that is that there may be issues that some potential players in the industry may want to raise that are not within the scope of what the ACCC does, which is to establish the terms and conditions for access to a network. Where that network is judged to be regulated, there is a provision in the act that allows us to take into account all those issues of pricing, terms and conditions and so on. But some of the players might have issues that go beyond that. It is a question of how those issues might be dealt with and they may well be questions of policy.

Senator O'BRIEN—Let us go back to the Foxtel exercise, because it is that aspect of the law that I wanted to examine, where the ACCC granted an exemption to certain competition requirements only for the exemption to be overturned on review after construction had started. There seems to be a lot of disquiet in industry about issues of regulatory certainty that the exemption process provides. Are you aware of that disquiet?

Mr Cosgrave—There are two provisions that people who are contemplating investing can use. One relates to an exemption from regulation and one relates to the terms and conditions on which they will provide access to other access seekers. You correctly indicate that in Foxtel one of those provisions was used in the exemption application. That was ultimately overturned by the Australian Competition Tribunal, in part because of a view that the infrastructure was likely to be invested in in any case. What is being contemplated by parties here is the lodging of access undertakings whereby they will indicate terms and conditions in advance on which they will provide access. That is quite an important distinction, because in one instance you are seeking that total exemption from access obligation; in the other, you are in fact accepting that you will need to provide access and specifying that up front for the purposes of getting certainty in the terms and conditions on which you will provide that.

Senator O'BRIEN—Given all of that, is it the case that, by virtue of section 33(3) of the Acts Interpretation Act, even if an exemption is granted by the ACCC the commission may unilaterally vary or revoke that exemption so long as it follows the same process that it was obliged to follow when granting the exemption?

Mr Cosgrave—That is a legal question as to the application of the act. I will take that part of the question on notice, although I think the answer is, yes, as a matter of law you could. It would be quite a different matter as a matter of regulatory practice, having gone through an extensive public process, the purpose of which is to provide certainty to parties as to whether you would as a matter of practice vary your ruling. It seemed to be counterintuitive with the objective of these provisions, which is to provide certainty to investors.

Senator O'BRIEN—The legislative framework permits it, but you are saying that it is not a matter of policy?

Mr Cosgrave—What I am saying is that it may be. I have taken on notice to be absolutely certain for your benefit. But maybe it is a matter of power; as with a number of other instruments, you could vary it. But these are provisions put in place to provide certainty for investors. You would clearly hesitate long and hard if, having given certainty to investors, you were entertaining an application to vary that. You would hesitate long and hard before you went in that direction, if indeed you would at all.

Senator O'BRIEN—The other issue is the right of appeal by other parties to those exemption decisions, and of course that happened with Foxtel.

Mr Cosgrave—In relation to both of the provisions that I have mentioned there is a right of appeal. There is a merits right of appeal to the competition tribunal.

Senator O'BRIEN—Is it fair to say that an infrastructure investor would be wise to wait until any appeal process is finished before commencing the actual implementation of their investment?

Senator Coonan—That calls for a value judgement. I do not think the witness can be asked that.

Senator O'BRIEN—It sounds like commonsense.

Mr Cosgrave—It is a matter for any investor.

Senator O'BRIEN—How long do appeals under the act usually take?

Mr Cosgrave—The competition tribunal, as with the commission, has a statutory period of six months to consider an appeal.

Senator O'BRIEN—Can that period be extended?

Mr Cosgrave—Yes, it can.

Senator O'BRIEN—Is there a maximum period or is the extension potentially indefinite?

Mr Cosgrave—No. Generally the extension is up to three months, with some provisions in place if further information is required from the parties.

Senator O'BRIEN—Is that a stop-the-clock?

Mr Cosgrave—Stop the clock-type provisions apply, although, given that the tribunal is limited to the material before the commission, I am not aware of the tribunal ever having to use those.

Senator O'BRIEN—Is the commission satisfied that it has the powers available in this area to give effect to the general aims of the legislation?

Mr Samuel—Yes, in terms of dealing with access undertakings. The criteria set out there are very clear. They have operated well to date and we have not made any request of government or suggestions to government as to changes that might be made to those criteria or to the processes for dealing with special access undertakings.

Senator O'BRIEN—You have not made any request for change?

Mr Cosgrave—That is correct.

Senator O'BRIEN—It appears the government decided there is a need for regulatory reform. We were discussing the progress of various fibre to the node proposals with the Department of Communications last week and that department had indicated that it had met with Telstra to discuss its fibre to the node proposal eight to 10 times since February this year. Do any of those meetings involve ACCC representatives?

Senator Coonan—The DCITA estimates did not involve the ACCC.

Mr Samuel—The answer is, no, they are not involved.

Senator O'BRIEN—Mr Samuel, you recently said that the minister's discussions with Telstra are something we are not party to; that the ACCC had not been privy to what had been discussed. I take it that not only are you not at the meetings but the ACCC is not being kept advised as to matters that have been discussed?

Mr Samuel—It needs to be made clear that we have not been party to those discussions, and so it is not possible for us to express an opinion as to whether we have been kept advised as to the full content of the discussions.

Senator O'BRIEN—Are you saying that you do not know what they are about?

Mr Samuel—I was going on to say that there have been some communications between the department and members of the ACCC team, and there have been some communications between the minister and members of the ACCC team in relation to these discussions, but I could not say to you that we were privy to the full details of the discussions that have taken place, because we have not been party to those discussions.

Senator O'BRIEN—I use the term 'kept in the loop'. Is that a fair way of describing the department/ACCC team and ministerial/ACCC team discussions?

Mr Samuel—Are you asking have we been kept in the loop or out of the loop?

Senator O'BRIEN—Kept in the loop.

Mr Samuel—It is a bit hard to provide an answer on that. I would have to say that the information that has been passing between the minister's office, the department and the ACCC has been somewhat sporadic and ad hoc, so whether that amounts to 'being kept in the loop' or not I could not comment; I do not know.

Senator O'BRIEN—Minister, do you know whether they have been apprised of the matters in discussion between the other department and Telstra?

Senator Coonan—I can say unequivocally that they are apprised of matters that are the bailiwick of the ACCC that deal with the regulatory framework. There are some broader issues that relate to policy discussions that are not necessarily the subject of detailed discussion with the ACCC.

Senator O'BRIEN—So they are kept apprised of those matters in discussion that are relevant to the ACCC legislative framework?

Senator Coonan—Yes.

Senator O'BRIEN—That is the state of the law as it applies to this fibre to the node proposal discussion?

Senator Coonan—Yes. In fairness to the ACCC, it is not their role to develop policy. Their role is to implement the regulatory framework. It is my job to ensure that the regulatory framework is responsive and that it works and, if there are perceived barriers to investment, industry are perfectly entitled to raise those matters with me.

Senator O'BRIEN—Is it not appropriate for the ACCC to be in these discussions or negotiations?

Senator Coonan—The ACCC is not involved in policy. The ACCC is involved in implementation of enacted regulatory framework. Of course, the ACCC has a role in being involved where the regulatory framework is impacted.

Senator O'BRIEN—Mr Samuel, you have said recently that the ACCC is the 'guardian of the consumers' and, further, that for the government to sideline the ACCC as demanded by Telstra would be a very strange thing indeed for the government to do; and that, of course, the government is entitled to do it but 'I would have thought that Telstra would have made it extremely difficult to sideline us'. Can I take it from this statement that you do not think that the government would be a good guardian of consumers without the ACCC?

Senator Coonan—Really and truly!

Senator O'BRIEN—I am trying to interpret the statement. That is the statement that is on the record.

Senator Coonan—For the purposes of this particular hearing, the witnesses can explain policy and they can comment on policy positions that they are responsible for. They are not required to opine on policy.

Senator O'BRIEN—Mr Samuel, do you stand by the statement you made?

Senator Coonan—Is that your last question or is that Mr Samuel's comment?

Senator O'BRIEN—The comment which I read out.

Mr Samuel—The comment was made in an interview and I do not resile from the comment.

Senator O'BRIEN—While we are on the topic of secret negotiations about fibre to the node, can I get a definitive statement about—

Senator Coonan—There have been no secret negotiations about fibre to the node. There have been some discussions and I have said publicly that there is a point at which it is important that there is transparency in the process. I do not differ one iota from the ACCC's attitude to there being a necessary public and transparent process. But in terms of policy, clearly one has to inform yourself as to what is being proposed. Surely you are not suggesting that we should conduct that in Martin Place?

Senator O'BRIEN—So they are being conducted in secret?

Senator Coonan—No, they are not being conducted in secret.

Senator O'BRIEN—So they are closed; they are not out in the open?

Senator Coonan—That suggests there are clandestine discussions. That is not the case. I have said publicly that I am actively engaged in discussions. Calling them secret is a very pejorative term. They are not secret. They are discussions that have been well and truly flagged in the public arena that are necessary so that the government can have appropriate policy responses.

Senator O'BRIEN—You are entitled to your opinion. In relation to those negotiations can I get a definitive statement from Mr Samuel about who requested that the Telstra-ACCC talks about fibre to the node last year take place behind closed doors?

Mr Samuel—That was a specific insistence on the part of Telstra. It was made at several levels as well, but it was at their insistence. I should point out that at the early stage of discussing a proposed special access undertaking it is not unusual for the proposed lodger of an SAU to sit down with the ACCC to go through their proposals to try to get to a stage of a reasonable level of acceptability. It has always been made clear that there is a point in time in which that process must become transparent. If I recall correctly, on 12 April 2006 in a public statement I made it clear that these were only initial discussions with Telstra. They were taking place privately. It was insisted by Telstra that that be the case, and indeed any material provided to us by Telstra was done so under the strict condition that it remained confidential and not be used for any other purpose.

CHAIR—I would assume that is a request made by many organisations in relation to a variety of matters. That would not be unusual.

Mr Samuel—That is correct. It is not unusual for that to occur, but there is a point in time at which it has to break out of the private discussion and move into a lodgement in a public transparent process.

Senator O'BRIEN—You told Geraldine Doogue on ABC Radio that 'Telstra suspended its discussions then when we asked that they put their proposals in the public arena'. Then Henry Ergas wrote to the *Financial Review* saying that it was the ACCC that wanted the discussions on fibre to the node to remain confidential. The ACCC then wrote to the *Financial Review* stating that it was Telstra that had requested confidentiality for the access proposal. And then most recently Mr Phil Burgess appeared on the ABC and stated 'Graeme Samuel is the person who asked us to keep the negotiations secret'. I just thought it was an opportunity to set the record straight.

Mr Samuel—I will set the record straight. It is very clear on the papers and on all the discussions that took place that it was Telstra who insisted, not only to us but to others, that all these discussions remain confidential, and we acceded to that request. I might say that there was some concern within the commission at the extent and the time that those discussions might remain private and not be disclosed publicly. We have a firm belief in a transparency of process. That is why on 12 August I released a media release to indicate that this was only at the initial stages and that it was anticipated at a very early point in time that these issues would become public. As to the timetable that had been proposed, I think the discussions started to take place on 3 March 2006. It had been intended originally that they would go into the public marketplace on or about 8 or 11 May. It was then Telstra's request and insistence that it be deferred until June. In June Telstra indicated it would be putting something to the public marketplace by 30 June. That again was deferred, and it was not until some time in July or August that ultimately I went public in a speech given to a conference in Sydney and said that this has to become public. Within three days of that statement the talks were suspended. As to the reasons for the suspension of the talks, that will remain constantly the subject of speculation. It is speculation like this that always arises through lack of transparency. It allows spin-doctoring, rumour, innuendo and speculation to overwhelm what might in reality be an informed discussion.

Senator O'BRIEN—Is there any particular misinformation out there at the moment that you can correct here today, given that you have made that similar statement earlier this week

about spin-doctoring, rumour, innuendo, half-information and sometimes even misinformation?

Mr Samuel—I am afraid that the chairman would limit me, because I know that he is anxious that the proceedings close off at 11 pm tonight.

Senator O'BRIEN—Is there that much?

Mr Samuel—I doubt that I could satisfactorily deal with the misinformation and spin-doctoring before the 11 pm closure tonight. I say that with some degree of seriousness. An enormous amount of spin-doctoring has been going on, and an enormous amount of half-information and misinformation that you could not correct in a short period of time. We are under some constraint as well in that information that has been provided to us from time to time has been done so on the basis that it is commercial-in-confidence. Of course, what that means is that the parties providing that information to us on the basis of commercial-in-confidence are saying, 'You, the ACCC, are to be constrained in what you can say publicly. We, of course, having imposed the commercial-in-confidence constraint, will be able to spin-doctor and provide information as we see fit. But you, the ACCC, are bound by confidentiality.' We are severely constrained. As I said, I doubt that I could correct the misinformation even if I was permitted to before 11 pm tonight.

Senator O'BRIEN—I am happy for you to take it on notice.

CHAIR—What was that?

Senator O'BRIEN—I asked for the details of any particular misinformation out there at the moment that could be corrected here today. Rather than take the time of the committee till 11 pm—

Mr Samuel—I do not think it will be possible to deal with it satisfactorily. Given that there is so much that is the subject of an imposed constraint on us in terms of being subject to commercial-in-confidence, I do not think that I could make a valuable contribution to the current discussion.

Senator O'BRIEN—There are two answers that you have given me. So that I can clearly understand it, you are saying that, firstly, it would take a lot of time and, secondly, that in every case it is the subject of commercial-in-confidence undertakings.

Mr Samuel—Yes. The difficulty is that if I was to attempt to correct some of the misinformation I would run the risk of breaching the commercial-in-confidence constraints that are imposed upon us in relation to information given to us. Even if all those constraints were removed, then it would a long time to be able to correct the misinformation. But I am afraid that the commercial-in-confidence constraints make it virtually impossible to make any valuable correction or contribution to the debate as it currently stands, which is the reason why, I guess in a sense of increasing frustration, I have been urging the parties in this case, Telstra and G9, to be putting their proposals on the table for public examination because that might help correct a wealth of misinformation and spin-doctoring that is out there in the public arena at the current time.

Senator O'BRIEN—Mr Burgess, in the quote I referred you to, says that you are the person who asked Telstra to keep the negotiations secret.

Mr Samuel—I have to say that is just patently not true.

Senator O'BRIEN—He also said:

The style of the ACCC is very much behind the scenes and secrecy. There is a lack of transparency because that's the way the ACCC does business.

Mr Samuel—That is part of the problem of misinformation and spin-doctoring that is occurring. The ACCC not only in practice but is bound by law to be transparent. I think I have indicated both publicly and I am prepared to indicate now, that if for example a special access undertaking proposal was lodged with us it would immediately go onto our website—you cannot be any more transparent than going onto a website—and would be available for then public consultation. In dealing with a special access undertaking it is put out there for public examination and for submissions to be received by the ACCC in respect of that undertaking.

The determination of the ACCC takes a two-stage procedure. The first is a draft determination, which again is placed in the public arena for comment by all interested stakeholders, and then the final determination is placed in the public arena. Not only is it our practice, but we are bound by law to be especially transparent. There is no desire and there is no reason, frankly, for the ACCC to operate in secret. We are operating in a public environment with matters of serious public interest and of serious public impact, and therefore we take the view that these matters ought to be there in the transparency that is required under law, and that law has worked very effectively for many years. Our message to Telstra from the beginning has been: when you feel that you are in a position that you have sufficiently refined your proposal to put it in the public arena, do so. Their view put to us initially was that by the first or second week, 8 May or 11 May 2006, they would be in a position to put their proposal into the public arena.

As I have indicated to you, that date kept on being deferred and deferred. As I recall, at the very end of May 2006 Dr Burgess indicated that they were about 98 per cent of the way there. If it was 98 per cent of the way there, you would have thought that that would have been the point of time at which you could go into public arena, recognising that there was 2 per cent that had to be dealt with, according to Dr Burgess. As it turned out, we never got to see what the 98 per cent was or the 2 per cent in the public arena.

Senator O'BRIEN—Is it appropriate then for the ACCC to refuse to meet in private with any fibre-to-the-node proponent until they publicly reveal the detail of their proposal?

Mr Samuel—No, it is appropriate that we meet with proponents privately in what I will call the initial review phase, and that ought to be a short-term phase, in order to be able to indicate to parties whether on an initial first glance there are some fundamental deficiencies in their proposal. Having done that, it is entirely then appropriate, indeed incumbent upon those putting proposals to us, to put those proposals out into the public area by lodging them with us formally. We have talked about Telstra; the same issue applies to the G9 group. I think something like two or three weeks ago they proposed to a draft, a special access undertaking, and I said to them privately and publicly, very loudly, that they need to put that into the public arena. I have to say it remains a source of constant frustration to us that the parties have to date insisted on conducting their discussions privately, in-confidence, behind closed doors and

we are saying that it has just got beyond the point at which transparency is now a necessary part of the process.

Senator O'BRIEN—The best way to put an end to this rumour and innuendo would be to require that public exposure of proposals, would it not?

Mr Samuel—We have done just that to the extent that we are able to do so, that is by demanding it publicly and privately of the parties. In the context of Telstra, they indicated to us in August last year that they were no longer going to continue in any discussions with us at all and, although there have been, shall I say, very sporadic discussions of a very, very high level nature—that is of a helicopter nature if you like—during the remaining part of calendar year 2006, they would have numbered no more than two or three discussions in total. Discussions between the ACCC and Telstra have ceased and have not taken place in this year.

With G9, there have been discussions that have been taking place since, I guess, the second half of last year. They have reached a point where we have a draft undertaking before us, but we have said to G9, 'You must now make this public and lodge it with us for public scrutiny and examination,' and we are still awaiting that public lodgement to occur.

Senator O'BRIEN—That is the difficulty that the debate continues and, whilst the nature of the discussions remain effectively behind closed doors, that enables the generation of the rumour and innuendo, does it not?

Mr Samuel—I think that is right. There is a point at which we just cease to see any point in continuing behind-closed-doors discussion, and we do not continue it. I think it is fair to say that that point was reached with Telstra last July or August. That point has been reached with G9 and therefore we do not see any value in continuing behind-closed-door discussions. They then have a choice: they either put their proposals out into the public arena for scrutiny and examination by the ACCC in the context of the reasonableness criteria I described before or they do not continue. Our position is that behind-closed-door discussions must now terminate. They have terminated. We are now waiting for public scrutiny, public exposure and public examination.

Senator O'BRIEN—Clearly the most contentious thing around fibre to the node is price. In the past you have said that Telstra has been talking about an $80 to $85 average price of fibre to the node. Dr Burgess has recently described this $80 to $85 price as a furphy and says they do not exist in reality. What is your response to that?

Mr Samuel—This is part of the difficulty of correcting information and misinformation when we are bound by commercial-in-confidence. Let me perhaps point out, though, that when I quoted 'average prices', $80, $85 or whatever it might be, I was quoting actually Dr Burgess. He was quoted in I think one of the daily newspapers as indicating that the average price proposed by Telstra for access was in the mid-80s and I think that he has used that figure on a number of occasions.

These average figures are, I think as we all recognise, absolutely meaningless because they relate to a range of pricing points for access, depending upon the speed of access that we are talking about, the speed of service. For example, you might have a speed of service at 512 kilobits ranging up to 24 or 50 megabits; you might have half a dozen pricing points and then you strike an average of those pricing points. Even those that have engaged in year 10 or year

11 mathematics know that it is so easy to manipulate the average simply by weighting the pricing points. If you want your average to come down you heavily overweight the low-level pricing points and you underweight the high-level pricing points. Indeed, your average number could change in a matter of a nanosecond by a reweighting without actually changing the pricing points. The use of average numbers—whether it is by Telstra in the mid-80s or by G9, which I think have quoted figures of 21 to 24—is in my view absolutely meaningless and it is part of this process of misinformation that is out there in the public arena. I do not think the public really understand how averages can be manipulated by the under and over weighting process that I have described.

If we are talking prices we have got to see pricing points and understand what they relate to. Let us also understand that, while price has been the more public issue of discussion, there are so many other elements of the terms and conditions of access that are absolutely vital to a discussion of this issue. Using a pricing point is a bit like saying to a builder, 'How much will you charge me to build a house?', and he says, 'Well, how many bedrooms? Two storey or one storey? Tiled roof or steel decking roof? How many bathrooms? What quality of finish?' You cannot dictate a price without knowing all the other factors that are relevant to the terms and conditions of access.

CHAIR—Senator O'Brien, have you got much left on this point? I do have a number of other senators I want to accommodate, including Senate Boswell, who has been waiting patiently, and Senator Joyce. If you have not got much left on this then I am happy for you to finish, but if you have then I think we will come back to you.

Senator O'BRIEN—If I could just ask a couple of more questions and then I would be happy to be interrupted, but I do have other things.

CHAIR—Yes.

Senator O'BRIEN—When Dr Burgess said again to Geraldine Doogue that the fibre-to-the-node price of $60 for an average householder would 'be exactly in the ballpark of the prices that we are now talking about to the minister', you are saying that would be a completely misleading figure from Dr Burgess as to the impact on consumers?

Mr Samuel—Again, I am bound by commercial-in-confidence constraints in dealing with this. All I have indicated to you before is that there has been so much misinformation put out on this that I doubt that there is anyone other than those that have been apprised of commercial-in-confidence information that could make any informed comment on what has been put forward.

Senator O'BRIEN—What I am really trying to get at is: you are suggesting these comments about average prices are so capable of being manipulated that they are as good as meaningless for the public to understand what the price for the service might actually mean to them?

Mr Samuel—Yes, and I think part of the difficulty we have in this, if you read carefully Dr Burgess's comments to Geraldine Doogue, he made two comments in relation to prices which were in fact totally unrelated. The first was, if I recall correctly, that the suggested average price of $80 to $85 was 'a furphy', and I have indicated my view on average prices, which is to say that they are absolutely irrelevant and meaningless. The second was that he talked

about an entry point, I think, of around $60 and, again, I do not think that he defined what the entry point was and what would be the speed of broadband service that would be provided at that entry point. Again, without knowing those sorts of issues you do not know what the entry point is that we are dealing with. Are we talking about an entry point of 256 kilobits, or 512 kilobits, or one and a half megabits, or 10 megabits? I am not sure whether the figure was a wholesale access price or a retail price, but I suspect that if we were to say to consumers, 'You have got an entry point of $60 for 512 kilobits,' they would ask what we are even talking about. 'We get that at the moment. That's not broadband, that's snail band.'

Senator O'BRIEN—When comparing Telstra's proposal with G9's you have also said as recently as 21 May, 'You have got to ask yourself what is it that is causing Telstra to be over double that of an Investec proposal.' Is this one of the points in the debate where you have to say that the ACCC is not able to assist the public to understand in any way the answer to the question you posed then, when you said you have got to ask yourself what it is that is causing Telstra to be over double that of an Investec proposal? You are not able to assist the public in any way on that?

Mr Samuel—I think that needs to be context, too. That is, I made that comment in relation to 'double' by reference to comments that have been made by Mr Paul O'Sullivan, who was leading through Optus the G9 proposal. I think he was suggesting in a public advertisement that they were about half, or less than half that, of the Telstra proposal. The difficulty is that we do not know what each proposal is. As I say, I do not know whether it is a four bedroom home or a two bedroom home or whether it is five bathrooms or one bathroom. It is impossible to compare proposals when we do not have the full terms and conditions and details of what the proposals are. Can the public be informed? I would have thought that all but a very few people that have been very close to the discussions at the moment would be well justified in saying that they are at a complete loss to understand what all this is all about because there is no accurate information out there to enable them to make an accurate analysis and determination.

Senator O'BRIEN—Are you saying that, other than for your commercial-in-confidence promises, you would be able to explain that to this committee?

Mr Samuel—No, even if the commercial-in-confidence constraints were removed, the information that we have at the present time is not all embracing. It does not cover the totality of the terms and conditions. We have some commercial-in-confidence information but, if I can use my house analogy, it will identify that the roof is steel decking or tiling. It will not identify how many bedrooms or whether it is brick veneer or solid brick. It will not give any of that because, as I understand it, I do not think we have sufficient information to identify the totality of the proposals.

Senator O'BRIEN—Not even the ACCC can give us that answer, if it were able to?

Mr Samuel—I am just turning to my colleagues because—

Mr Dimasi—We are hopeful that we will get that information once we have the special access undertaking in front of us, at least from one of the parties. We will need them from both parties to make the comparisons you are suggesting.

CHAIR—Senator O'Brien, you have had nearly 50 minutes so I do want to give other committee members some opportunities, so we can come back to that afterwards. Senator Boswell?

Senator BOSWELL—I will be about five minutes. I would like to ask some questions on the code of conduct. Do I address my questions to you, Mr Samuel?

Mr Samuel—Yes, and I will probably pass them over to Mr Ridgeway, who will deal with them.

Senator BOSWELL—The other day in a press release you issued a caution to the merchants. I understand this was a second warning. Is that so?

Mr Samuel—Yes, we have issued two warnings. One was relating to the backdating of contracts that was occurring prior to 14 December 2006, which was the commencement date, if you like, in respect of the application of the code to new contracts. The second one related to some terms and conditions of contracts that were being entered into, and that is the one I think you have just referred to.

Senator BOSWELL—Were you responding to complaints?

Mr Samuel—Yes. The nature and the extent of the complaints I will refer to Nigel Ridgeway but, yes, we have been responding to complaints which were not one or two in nature but tended to be somewhat more widespread across the nation. Mr Ridgeway might want to add to that.

Mr Ridgeway—Just to add to that, the commission has received a number of individual complaints in relation to some forms of contract in a horticultural produce agreement, but also conduct associated with that. Some have been from individual growers, others from industry associations. We have also received some concerns raised by chambers of fruit and vegetable in relation to conduct by others.

Senator BOSWELL—What potential breaches of the code has the ACCC been investigating and can you give us some more details on that?

Mr Ridgeway—Perhaps we can just comment on the broad nature of concern and, of course, putting the code into its context within the Trade Practices Act and provisions of the act that are also considered. Conduct such as the allegations of backdating horticultural produce agreements by way of attempting to avoid obligations under the code—that is the allegation—risk contravening the misleading and deceptive conduct provisions of the act more broadly, for example. That is on the basis that there is a purporting to enable traders to comply with the code when in actual fact they are unlikely to do so, depending on the nature of the contract, of course. In relation to some of the provisions of the broader template contracts that have been circulated, there are some provisions which appear to be quite contrary to the provisions of the code; that is, for example, the capacity to deem a transaction and a transfer of ownership never to have taken place when indeed it has.

Senator BOSWELL—What are you going to do about it? You have issued two warnings. What follow-up action are you going to take?

Mr Ridgeway—The commission has a number of processes under way, partly involving working with the various chambers and grower organisations to encourage all such contracts

to be compliant with the code and conduct to comply with the relevant Trade Practices Act. We have some cooperative responses from a number of the organisations involved, but we are also looking at specific examples of contracts and associated conduct with a view to determining whether specific breaches have occurred and then determining what further action is appropriate.

Senator BOSWELL—You have been speaking to merchants and growers, in all states or what states?

Mr Ridgeway—Throughout the country.

Senator BOSWELL—In every state, or is it is just in Queensland?

Mr Ridgeway—No, in every state. We have had a number of meetings with key chambers and grower groups representing all states and national organisations, and we also have engaged with a number of produce-specific grower organisations that represent a national perspective.

Senator BOSWELL—Is this worse in Queensland, are you getting more complaints in Queensland, or is it general?

Mr Ridgeway—I think it would be fair to say it is general. There is conduct and some of the issues that we have outlined are pertinent certainly to Queensland but also to a number of other states.

Senator BOSWELL—I am concerned that you have a bit of pressure on at the moment, but how are you going to stop backsliding when the pressure comes off? Are you going to have a watching brief on this?

Mr Ridgeway—Indeed. We have a specific codes team that is addressing particularly the introduction of the Horticultural Code of Conduct as well as the recently introduced oil code. But we also have a specific framework across our enforcement division looking at the code-related concerns and issues. That is an ongoing commitment.

Senator BOSWELL—That will continue to stay there past the term of the introduction of this, which happened a couple of weeks ago?

Mr Ridgeway—That is correct.

Senator BOSWELL—If all else fails, where do you go? I know you are trying to work with them and I commend that, but if you cannot get some agreement or some recognition of the fact that this is a code of conduct endorsed or put up by the federal parliament, what is your next step?

Mr Samuel—We will prosecute them.

Senator BOSWELL—Thank you very much.

Senator JOYCE—You said the mandatory code covered all contracts, but it does not cover Coles and Woolworths, does it?

Mr Ridgeway—I mentioned all contracts that are subject to the Horticultural Produce Agreement, which really deals with those contracts where traders engage with growers of

produce for the resale of that produce. The code does not address a specific nature of trade. It really addresses the nature of the transaction.

Senator JOYCE—In the application of the mandatory code of conduct, have you seen any examples of traders, the people purchasing the product, trying to exacerbate any red tape, so to speak, by placing onto the growers a whole range of conditions and outcomes that really are not part of the mandatory code, they are just a means of raising the ire of the grower to think that the mandatory code of conduct is far more than what it actually is?

Mr Ridgeway—We have seen quite a range of different responses by the trading community to the code obligations, some of them resulting in what appear to be fairly, if I use the terms, 'legalistic' or 'complex' contract proposals. Others are fairly straightforward, one-page agreements that cover all the requirements of the code. There is an approach by a number of traders to manage the risk associated with the clarity that the code brings with certain mechanisms that other traders have not pursued. So, to the degree that it answers your question, there is quite of range. Some appear to be quite simple and workable. Others, while they may argue that they are workable, appear to be fairly complex and extensive.

Senator JOYCE—It seems to be that they are doing that for the purpose of trying to white-ant the code by making it unworkable for the grower who is sending them in the produce so that they once more put political pressure back on us to get rid of the code.

Mr Ridgeway—There are a number of responses that we have identified in the sector since the code has been introduced with respect to what we might characterise as the noise factor issues that go to the workability, or perceptions of the workability, of the code. They are arguably issues of policy. We, for our part, focus on the practical enforceability aspects of the code. We have not found that to be a challenge and we redirect the noise factor to those who would properly deal with it.

Senator JOYCE—I want to go back to Telstra. It appears that the trick with Telstra is that they really have us over a barrel because they have a virtual monopoly in the market and we are trying to impose a regulatory framework on them, and if they do not want to play ball it becomes hard for us. That being the case, at the end of the day really the only way you are ever going to really deal with them is if there was an alternative player in the market that brought in some competition in that back-haul capacity. What sort of alternatives do we have up our sleeve with Telstra?

Mr Samuel—It is perhaps not appropriate to comment upon what alternatives we have with Telstra, because there are issues that are currently in play in relation to that. But generally when you are dealing with a monopolist you only have two choices. One is to introduce competition, if you can; the other is to accede to the wishes and the will of the monopolist. I would say the first one is generally the preferable one as far as Australian consumers are concerned.

Senator JOYCE—So bring in competition if you can. To compete with Telstra you would have to have a fibre type of setup. You would have to have like products to compete with like products. Is that how you see the analysis of it?

Mr Samuel—I think it is perhaps an oversimplification.

Senator JOYCE—Because they are talking about snail band, and I agree with you that you have to come up with the capacity speed that they have.

Mr Samuel—But I think that we need to recognise that the fibre network proposal covers a part of Australia only, and is intended to cover a part of Australia only, as we currently have seen proposals that have been outlined. But there are other elements of broadband in terms of more rural and remote areas that would be covered by other issues and by other technology, and that is part of the Broadband Connect issues that have been dealt with by government and by the minister.

Senator JOYCE—This is what I am thinking of. I am not presupposing that it is going to happen, but if it became apparent to Telstra that someone else was going to put in a fibre-optic system in parallel with them, wherever they are, then they would be much more likely to come to the negotiation table, wouldn't they?

Mr Samuel—As I say, competition is the most effective way of dealing with a monopolist. Failing that, then you either accede to their will and wishes or you regulate. The problem with regulating when you are dealing with a monopolist without any competitive tension is that you cannot regulate to force them to invest.

Senator JOYCE—Yes. They have all the cards, basically. Would you say that in your knowledge, and I imagine that it has become extensive of late, that if we are trying to break down a monopoly position of a person who has a fibre network, you could compete with them on a wireless basis? On the information that you have, do you think that it is technologically possible to bring in like competition with a different product; that is, 'You have fibre; we have wireless and we are going to compete with you'?

Mr Samuel—It is getting into an area that is beyond, I think, our remit to start analysing which technologies are better and best in certain areas. Suffice to say that overseas experience would suggest that fixed line networks are more appropriate in economic terms to more densely populated areas whereas wireless networks are perhaps more appropriate to less densely populated areas. That becomes ultimately an economic decision, an economic analysis, as distinct from a technical one.

Senator JOYCE—And that is why we have the broadband package, to deal with the less economic areas and hopefully give a better parity into those areas. Does the ACCC acknowledge that the fibre technology is the future-proof technology for aggregated traffic?

Mr Samuel—I think you are asking us to express and opinion on something that is really outside our remit. It is not for us to be picking winners or to define that fibre technology is the technology as distinct from any other. I think that is ultimately a matter for the private sector. I guess if you had asked that question of me five years ago, there might be some eyebrows raised as to what people were talking about with FTTN and fibre technology. So I think that these are matters that really we need to leave to the private sector to determine. What we have to try and do is ensure that the basis upon which this technology, or whatever technology is made available to Australian consumers, is done so on fair and reasonable prices, and the best way of ensuring that is to have some form of competitive tension.

Senator JOYCE—Therefore you would agree that, because fibre infrastructure for the small markets or end users is not practical, therefore the fibre infrastructure is inherently a monopoly in those markets?

Mr Samuel—I do not want to start trying to express an opinion as to which technology is the winner and which is the loser and which is the most likely into the future, but I think all I have indicated is that fixed line is generally accepted to be more economically viable and appropriate to more densely populated areas. What 'more densely' means is a relative term, of course, whereas wireless tends to be now accepted as the more appropriate technology for less densely populated areas such as might occur in rural and remote Australia. It is one of the dangers or the risks that we have when we see somewhat superficial—

Senator JOYCE—That is important. When you are talking about rural and remote Australia, what is your definition of 'rural and remote Australia'?

Mr Samuel—I was just going to go on and say and perhaps just describe that in this context. So often we see comparisons made between Australia and, for example, South Korea or Singapore or Hong Kong. But when those comparisons are made as to what might have been done in those jurisdictions in terms of fibre networks and the like, I do not think there is a ready understanding that Australia is one of the largest and perhaps most sparsely populated continents on the earth. For Singapore, Taiwan, Korea or places like that which are much smaller areas and with much more densely populated areas, fixed line may well be a more appropriate technology to use than, for example, can occur in the vast land masses of Australia.

Senator JOYCE—Let us talk about your definition of 'rural and regional'. Would you determine that Toowoomba is 'rural and regional'?

Mr Samuel—It is probably regional but whether it is rural is another thing. We have different definitions. We have urban, we actually have densely populated urban and less densely populated urban, we have regional—and that can be densely and less densely populated regional areas—and then we have rural Australia and then we have remote Australia. There is no scientific definition of those but they just indicate the vast geographical spaces that we are covering and the reduced density of population.

Senator JOYCE—But when you talk about relevance for wireless being for rural and regional, how about Tamworth? Would that be 'rural and regional' and therefore relevant for wireless or would it be more somewhere that should have fibre? We obviously believe that fibre to the node is the way you are going to go in urban. So I am just trying to work out, in your deliberations, where these areas are.

Mr Samuel—So far you have chosen two locations that I can sort of identify with because I have been to them. I am just getting a bit nervous that you might move me out into locations about which I have no knowledge at all and that would be embarrassing.

Senator JOYCE—Wobigah.

Mr Samuel—Yes, that is right. Let me say it is not appropriate for us to identify certain areas as being appropriate for fixed line and certain areas to be appropriate for wireless. That is a matter for ultimately the private sector to determine and they will determine that in the

context of whether they will obtain an appropriate return on investment. Appropriate returns on investment will also take account of what consumers can pay and what they are prepared to pay.

Senator JOYCE—For the record, that is Wobigah with 'g'. What percentage of the population do you think lives in 'rural and regional'?

Mr Samuel—I would have to take that question on notice.

Senator JOYCE—I am just trying to work out how big this place is.

Mr Samuel—I would have to take that on notice, but equally I think if I took it on notice I still could not give you an answer because, you see, 'rural and regional' are subject to a judgement decision as to what we encompass within 'rural and regional'. Let me perhaps make it a bit easier for you, if I can, in this context. Do not hang me on then numbers, but Telstra claims for the moment that its next G network covers—I think the figure quoted is—98 per cent of the population.

Senator JOYCE—Good. Where is that?

Senator CONROY—It is a Telstra figure.

Mr Samuel—I am just saying to you it is 98 per cent population, which means that two per cent of the population is not covered, and two per cent on my rough calculations is about 400,000 people.

Senator JOYCE—And probably about 90 per cent of the land mass.

Mr Samuel—It could well be, but I cannot give you those numbers.

Senator JOYCE—I have the sinking feeling that I live in that two per cent.

Mr Samuel—I would not want to ask you where you live, because I might not be able to identify the—

Senator JOYCE—St George. Am I in part of—

Mr Samuel—I know exactly where St George is.

Senator CONROY—It has a DSLAM, though.

Senator JOYCE—I think I am living in that two per cent, which is a bit of a worry to me, because 98 per cent of the population lives in a very small part of the country.

Mr Samuel—Does St George have a DSLAM?

Senator CONROY—Yes. They ADSL enabled Senator Joyce's exchange just because he lives there.

Senator JOYCE—I have been canonised by Senator Conroy. I thank you for that.

Senator CONROY—St Barnaby.

CHAIR—Let us move on. We have had about two and half minutes from *I've Been Everywhere, Man*.

Senator JOYCE—What about a country such as Canada? They are similar type of land mass to us. How do they deal with it?

Mr Samuel—I have to say to you I have had a lot of trouble trying to get to grips with Australia without trying to work out Canada, so I cannot give you the answer.

Senator Coonan—A lot of it is very competitive.

Senator JOYCE—What is their regulatory mechanism? I mean, they cannot be running duplicate fibre all round Canada. I know they do in the United States, but that is because they have 300 million people.

Mr Samuel—Yes, but let us keep in mind, for example, that in the United States we have a substantial cable rollout well beyond anything that we have in Australia that covers 90 per cent of the population.

Senator JOYCE—I know they have that in the United States.

Senator Coonan—It is the same in Canada.

Senator JOYCE—It is the same in Canada; they have duplications of—

Senator Coonan—They do have some duplication.

Mr Cosgrave—There are some provincial initiatives that involve some fibre and some WiMAX. There is not a national response to the issue in Canada.

Senator JOYCE—Do they have a regulatory mechanism that we could lift to use in Australia?

Mr Cosgrave—To the best of my knowledge, no.

Senator Coonan—We have a light touch and even Mr Ergas, who is a very well-respected expert in this area and is retained by Telstra, has given evidence I think in an inquiry into the Canadian regulatory regime where they were looking at adopting our model.

Senator JOYCE—Did we advise them that was not a very good idea?

Senator Coonan—We have not, I do not think, but no doubt experience will have informed us in a way that we may now go back if they ever have another inquiry.

Senator JOYCE—Are there any papers that have been suggested by the ACCC that will in time be handed to the minister in regard to possible legislative changes to make our soft touch a bit harder?

Mr Samuel—I cannot give you an answer to that but they are matters of policy that I do not think we would discuss here.

CHAIR—On that note we are going to break for—

Senator MURRAY—It is a policy to go to lunch.

CHAIR—It is a very good policy. Just before we officially close, just for the benefit of the committee, I have Senators Perry, Fielding and Murray who are looking to ask some questions, not for a long period, I gather, and I intend dealing with those senators after lunch. Then we will return to the Senator Conroy and then we can come back to Senator Joyce after that. We will now break for lunch.

Proceedings suspended from 12.30 pm to 1.35 pm

CHAIR—We will resume these hearings.

Mr Samuel—Could I just correct one statement I made this morning, because it has since been clarified by my colleagues in relation to our dealings with Telstra. I think I indicated that information provided to us last year in the discussion with Telstra about fibre to the node was all provided to us on a commercial-in-confidence basis, but then I added the words 'and under a constraint, they were not to be used for any other purpose'. The addition of those words is incorrect. They were all provided on a commercial-in-confidence basis but we have not accepted and would never accept a commitment not to use the information for any other purpose, so I need to have that corrected if I can for the person. I apologise if I have caused any confusion. Thank you.

Senator CONROY—I just want to talk about another of the major issues of controversy surrounding FTTN and that is the existence or relevance of the so-called called 'rural deficit'. Telstra has long insisted that the cost of cross-subsidies for rural and regional Australia was the primary reason for the collapse of its FTTN negotiations. At the time of the collapse of your first round of discussions with Telstra over FTTN on 7 August 2006 you stated:

Telstra also claimed that it could not reach agreement with the ACCC on the extent of cross-subsidies to be provided by urban consumers to finance the cost of its services to rural and remote Australia.

"But at no stage in the discussions has Telstra ever proposed that its FTTN network would be rolled out to rural and remote Australia."

Is it still the ACCC's view that the cost of services in rural and regional Australia is not relevant to the FTTN debate?

Mr Samuel—The difficulty that we are under is that we have not been a party to discussions that have taken place over the past five months or six months. Therefore I cannot be sure as to the issues that may be causing some difficulties in discussions that have not involved us. What I am aware of though is that there has been, as a part of the discussion on fibre to the node access pricing—whether it is an integral part I am not sure—a discussion concerning ULL access pricing and the extent of any what I will call 'high-cost' surcharge payable in respect of, if I can loosely call it, the band 2 area in relation to bands 3 and 4. The exact nature of those discussions I am afraid I cannot give you any current information on.

Senator CONROY—Thanks for that. I will now ask you the question and, hopefully, get the answer to the question I ask you this time. I was quoting a comment that you made and I am asking you about the rural deficit and the FTTN network and I said, 'Is it still the ACCC's view that the cost of services in rural and regional Australia is not relevant to the FTTN debate,' which is exactly what you said back in August last year. I am just asking you whether that is still the ACCC's view.

Mr Samuel—I am sorry, I tried to provide the answer by saying that, as we are not privy to the current discussions it is not possible for me to give an answer to that, but perhaps Mr Dimasi can—

Senator CONROY—Sorry, what has discussions that you are not privy to got to do with your view?

Mr Samuel—When you say the FTTN debate, the most I can tell you about it is how relevant that may or may not be to the G9 proposal, because we have a draft proposal in front

of us. But I do not have a Telstra proposal in front of us so I am not aware of how relevant that might be to a Telstra proposal, but perhaps Mr Dimasi can help.

Mr Dimasi—The issue of a rural deficit is something that we have expressed views on in the past and was one of the core issues, I think, as it related to pricing of ULL that was dealt with in the recent tribunal decision. Our view always has been, of course, that it is entirely appropriate for Telstra to recover all of its legitimate costs. However, the issue of the higher costs areas are matters that are dealt with through the USO obligations, and that is not something that the ACCC assesses. The USO payments are there to deal with the higher costs that Telstra faces in—

Senator CONROY—Thank you for a description of the legal obligations of Telstra to meet its USO. What I am asking and I will keep asking until one of you actually gives an answer, is: is it still the ACCC's view? I am after your view.

Mr Dimasi—No, our view has not changed.

Senator CONROY—And your view is that:

... at no stage in the discussions has Telstra ever proposed that its FTTN network would be rolled out to rural and remote Australia.

And Telstra also claimed:

... it could not reach agreement with the ACCC on the extent of cross-subsidies to be provided by urban consumers to finance the cost of its services to rural and remote Australia.

That was Mr Samuel's quote?

Mr Dimasi—I have not got the paper in front of me but I will accept that was a quote.

Senator CONROY—I actually read it in a different order, as in I changed the sentences around then.

Mr Dimasi—Yes.

Senator CONROY—You still have the same view as you had back then?

Mr Dimasi—Some of those are factual matters about rolling out. I have no idea where Telstra plans to roll out or not roll out at the current moment. I just do not know.

Senator CONROY—You reiterated your view about the relevance of the cost of rural and regional services in December last year—

Mr Dimasi—Yes.

Senator CONROY—when you told this committee:

The issue of cross-subsidies for high-cost areas was really a separate issue from the fibre proposal because it was never part of Telstra's proposals ... that rural and remote Australia would be afforded high-speed broadband via a fibre to the node proposal.

Do you stand by that statement?

Mr Dimasi—We absolutely do, yes.

Senator CONROY—I asked last week whether it was still the minister's position that Telstra's argument about the cost of providing a service to rural, regional and remote Australia

is not relevant to FTTN, a previous statement that she had made, in light of the planned geographic reach of Telstra's network and she responded:

Well, I think there are some issues that I understand better now, complex matters to do with actual costs, efficient costs, sunk investment and a number of other issues. There may be an argument about what costs used in a network are appropriate to be taken into account.

You are standing by your position?

Mr Dimasi—We certainly stand by our position, but I am not sure how that relates to the comments you have just quoted from the minister.

Senator CONROY—The minister is now indicating that she better understands these complex issues. I am not going to try and paraphrase what the minister said. Her words are perfectly clear. To someone with your deep understanding of the issue I am sure you understand exactly what the minister meant. What would be the ACCC's position if the minister made it clear that the ACCC was to ensure that rural and regional costs were taken into account in FTTN pricing? Stop mumbling to Mr Dimasi, Senator Coonan.

Senator Coonan—I am quite entitled to mumble to whom I like.

Mr Dimasi—I am perfectly happy to answer the question. We would of course abide by any legal direction that we would get from the minister.

Senator CONROY—Would it require a ministerial pricing direction for the ACCC to take that approach?

Mr Dimasi—Yes.

Senator CONROY—It would?

Mr Dimasi—I just do not know of any other way that it would happen.

Senator CONROY—No, that is the answer I expected. That would be consistent with the law. Has G9 released its proposal yet? I understood it was going to be released this morning, last week—9 o'clock, 12 o'clock, 2 o'clock?

Mr Cosgrave—It has not been lodged to my understanding.

Senator CONROY—Has it actually been lodged, do you know?

Mr Cosgrave—It has not been lodged.

Senator CONROY—I know you are here but I just thought you might have heard over lunch or something.

Mr Samuel—No, I have not heard over lunch. Look, we are labouring under some difficulty because the chief executive of Optus is currently overseas and we need to communicate there and find out. I just do not have any updated information.

Senator CONROY—Just going back to the previous question I asked: why would you need a ministerial direction to go down the path that we were talking about before?

Mr Dimasi—I think the question that I was answering was: would we—

Senator CONROY—Would it require a ministerial pricing direction for the ACCC to take this approach, that is, to ensure that rural and regional costs were taken into account? Why would you need that? Why couldn't you just do it yourself?

Mr Dimasi—We would take all relevant costs into account in any decision that we make regarding Telstra. The question of the higher cost areas are dealt with through the USO obligations, which are not part of the remit of the ACCC. I guess if Telstra put up an argument that persuaded us—they did not in the ULL case and the tribunal backed us in that—of course we would take it into account.

Senator CONROY—You mean you might get a better understanding of its complex issues soon?

Mr Dimasi—I think we understand the issues.

Senator CONROY—The minister said she has now got a better understanding. Are you soon to get a better understanding?

Mr Dimasi—I think we understand the issue as it is.

Mr Samuel—Perhaps I can help. I do not think we can get into relative understandings of the issues because that is a judgement we cannot make. What I can indicate is that we will consider any proposal that is put forward by Telstra or G9 consistent with the law. If as a consequence of that discussion, in that analysis and hearing all the relevant arguments from Telstra, we do not consider it is appropriate to take account of the so-called rural deficit or high cost surcharges, or that it is not appropriate to take account of it to the extent that is proposed by Telstra, then we would have to act in accordance with the law as it stands and the only way that that law can be varied by ministerial fiat, if you like, would be by a specific ministerial determination. I think that is the proposition that Mr Dimasi is putting.

Senator CONROY—That is a little more flexible than previously indicated. 'Not appropriate' is a new concept. What is the legal concept of 'not appropriate'?

Mr Samuel—I am sorry, you are going to hang me on some words I am using in answer to a question.

Senator CONROY—No, it is an important area and I am giving you the opportunity to clarify what you mean. I am not trying to hang you. I am actually asking you to clarify.

Mr Samuel—'Not appropriate' goes back to some of the issues that I described earlier today relating to what is a definition of reasonable and reasonableness—section 150AH, the criteria that are set out in those provisions. So they are the criteria as set out in terms of our dealing with a special access undertaking, but if we formed a view in relation to those criteria that was not in accordance with that of Telstra or of the minister's view as to what we should deal with then, subject to some limitations, the minister has the capacity to make ministerial determinations or ministerial directions which would cover some issues in principle and that would be the flexibility available to the minister under the current law.

Senator CONROY—Are you saying you would make the same finding again, unless you received a ministerial pricing determination?

Mr Samuel—This is where it is a bit hard because we are operating in a bit of a vacuum of information at the moment. We do not know what we are dealing with. We have not had these discussions with Telstra for some months—as I say, for the whole of this calendar year and part of last year. I just do not know what we are dealing with and therefore it is not possible for us to say yes, we would come to exactly the same conclusion again as we came to last July or August—I think that was the date you referred to—without knowing what we are dealing with.

Senator CONROY—I might come back to you on that.

Mr Cosgrave—It is not a question of a finding. It is a question around, as Mr Dimasi said, the recovery of all appropriate costs. The argument is fundamentally around whether the Universal Service Fund adequately compensates Telstra—

Senator CONROY—That is not an argument for you, as you correctly identified.

Mr Cosgrave—What we have indicated and what Mr Dimasi has indicated, and what the Competition Tribunal were also satisfied about, was that no material had been put by Telstra sufficient to satisfy either ourselves or the tribunal in the averaging debate, which is the related debate, as to the adequacy or otherwise of the Universal Service Fund.

Senator CONROY—You are not suggesting that, because you felt that they had a legitimate argument that the USO was underfunded for them at the moment, that they could be compensated for it via a higher price than otherwise, are you? You are not suggesting that at all, I am sure?

Mr Cosgrave—What I am suggesting is that would be a factor for consideration, as the tribunal also indicated would be at least a factor for consideration in determining their legitimate business interests, whether they were adequately funded under the USF. As Mr Samuel has pointed out, there are a number of other factors that relate to the reasonableness criteria, including the rights of those who use the network et cetera.

Senator CONROY—If the government made a decision that it believed that the USO was the USO and that they were adequately compensated in a government decision—because that is what it is, the USO—the ACCC has the power then to say, 'Well look, we actually don't think the government are right; we'll let you have more money on your pricing.'

Mr Cosgrave—It is a question of considering the statutory criteria and, as you rightly say, the government made a decision and we reached the view in the consideration of the ULS undertaking that no material had been put to us that justified—

Senator CONROY—I just want to be clear about this. I just want to understand whether or not, if the government makes a decision about how much the USO is, which is what they do—they set the price; they set how much is contributed; they set out how much Telstra gets—

Mr Cosgrave—Clearly, that would be done—

Senator CONROY—and you do not agree with it; you think there is actually a calculation that is wrong—

Mr Cosgrave—No, that is not what I was putting to you.

Senator CONROY—That is what I am trying to say; it is a factor. What is a factor? The government have determined this. You do not get to second-guess the government; at least that is what I am trying to establish. You cannot say, 'Okay, we can let them have a bit more because the government really have been a too bit too hard on them over there.'

Mr Cosgrave—No, what was being put to us was that we should effectively second-guess the government in the sense of an argument being put that the Universal Service Fund did not compensate Telstra adequately, which is quite a different concept.

Senator CONROY—That is what I thought you meant, which is why I was a bit worried initially. You note in the media earlier this week:

At this point in time we are having no discussions at all with Telstra and have not been doing so at any time this year.

How many meetings have you had with the G9 since the start of the year? It can just be a ballpark. It does not have to be exact. Is it two, five, 10, 20; what are we talking?

Mr Samuel—Half a dozen.

Senator CONROY—G9 and their representatives. It does not have to be all of them in the room together.

Mr Samuel—Half a dozen or so.

Senator CONROY—Has any member of the ACCC or officer provided any advice to G9 about the contents of its application?

Mr Cosgrave—I think we have said publicly we have had a draft undertaking for some weeks. Clearly, we have provided some views in the context of considering that draft undertaking.

Senator CONROY—Has any member of the ACCC or officer provided any advice to G9 about an appropriate approach for G9 to take on pricing?

Mr Cosgrave—Consistent with our position in relation to the Telstra discussions last year, the details of those discussions are something we believe are in-confidence.

Senator CONROY—I know Mr Samuel, like myself, and even Senator Coonan at times, have all been calling for this information to be made public. Have you been urging G9, or have any of your officers been urging G9, about the timing of their application, other than the public urge of as soon as you can?

Mr Samuel—That is the urging: as soon as you can, and sooner if possible.

CHAIR—We have had some discussions about that this morning.

Senator CONROY—No, I was talking about G9 rather than Telstra.

CHAIR—Yes.

Senator CONROY—Has any member of the ACCC passed on any information disclosed to the ACCC from Telstra in the discussions between the ACCC and Telstra on FTTN last year? Have you been able to compare the $85 with the $25, $30? How have you managed that issue? I know the $85 has appeared in print. At times I cannot quite work out whether or not

that is an endorsed Phil Burgess figure or a not-endorsed Phil Burgess Telstra figure. How have you managed that aspect of it?

Mr Dimasi—Sorry, can I clarify the question? Your question was: have we 'passed on'? I did not quite understand that.

Senator CONROY—I am basically trying to find out if you have been in a situation where you are saying, 'Well, $85 is the Telstra figure,' and talking about that with G9?

Mr Samuel—The short is answer is no.

Senator CONROY—It is probably just sort of half out there and half not. Have you conducted that discussion?

Mr Samuel—The short answer is no, for two reasons. One, because it would be totally inappropriate to do so if we were privy to that information, but of course, as I indicated while you were out of the room this morning, the use of these averaging numbers is really somewhat meaningless because of the weighting process. We gave evidence about that this morning. I think that G9 are operating in perhaps a similar vacuum to us, as best we can establish in the discussions that have been held with G9. The most that they would know would be what would be on the public record as indicated by Dr Burgess.

Senator CONROY—At the November 2006 round of estimates you made quite a lot out of how involved the ACCC was in the drafting of the representations regarding the telecommunications regulatory regime in the T3 prospectus. From the understanding you got from your involvement in this process, is the ACCC constrained in any way from acting contrary to these representations? What is the legal position? I do not think Mr Samuel needs your help, Senator Coonan. He is an independent statutory officer.

Senator Coonan—Rather than me having to state that for the record—

Senator CONROY—If you want to say something—

Senator Coonan—it is easy enough for Mr Samuel to state it for the record. I would be astounded if he would deal with a question where he was being asked to provide a legal opinion as to a prospectus. It is the answer that you got a week ago. It will not be any different today.

Senator CONROY—I accept that you would not have a clue about the prospectus or the legal obligations.

CHAIR—Senator Conroy—

Senator CONROY—I am asking—

CHAIR—Senator Conroy, I am talking. That sort of intervention is not helpful to the progress of the committee's deliberations this afternoon. The minister is quite entitled to engage the way she did and it is inappropriate for that matter to be raised as it was.

Senator CONROY—It is not inappropriate.

CHAIR—I am saying it is inappropriate.

Senator CONROY—You can have your opinion.

CHAIR—You are not entitled to that. We have been going through the proceedings today where a lot of people have asked a lot of questions, including your colleague, Senator O'Brien.

Senator CONROY—What questions did they ask?

CHAIR—Let us get on with it. We have been going since nine o'clock this morning. These hearings have been conducted without that sort of intervention. Let us get on with it.

Senator CONROY—You do not know what question I have asked. You ruled the question out of order and you do not even know what it was.

CHAIR—I did not even rule on the question. If you had been listening to me you would know that I said that the intervention was not necessary, so let us get on with it.

Senator CONROY—From your understanding of your involvement in the process around the T3 prospectus, is the ACCC constrained in any way from acting contrary to these representations?

Mr Samuel—Frankly I cannot give an answer to that, because I just do not know.

Senator CONROY—I am happy for you to take it on notice.

Mr Samuel—Thank you.

Senator CONROY—That is the answer that I expected. As I said, you did not need the minister's help. Given that you were involved with the drafting of the Commonwealth representations in the prospectus, you would be aware that the document states at 5.3:

> Overall the regulatory legislation is settled. However, the Commonwealth has announced that it will review the telecommunications competition regulatory regime in 2009.

That is what is says. In the ACCC's view does this statement create the impression that the government will not be undertaking any major regulatory reforms in the telco sector before 2009?

Senator Coonan—He cannot be expected to form an opinion.

Senator CONROY—It is a legal document.

Senator Coonan—Excuse me, the opening statement read out by the chairman at the commencement of these hearings said that witnesses are not expected to provide an opinion. They can be asked to give an explanation of policy and of facts, but they need not form an opinion. They are the rules of the committee.

Senator CONROY—That applies to departments, and I accept that. But in terms of the ACCC, it is an independent statutory authority.

Senator Coonan—It also applies to agencies. They do not have to provide opinions.

Senator CONROY—I anticipate Mr Samuel will take it on notice.

CHAIR—The ACCC are Commonwealth officers and the same rules apply as they do to departmental officers.

Mr Samuel—I do not think I would take the question on notice because frankly I could not express a view using your words 'about what impression that statement might make'.

Senator CONROY—Is the ACCC aware that the Minister for Finance's letter on page 4 of the prospectus provides:

… the Australian government is committed to promoting a competitive telecommunications industry for the benefit of all consumers and has in place an appropriate telecommunications regime to facilitate this outcome.

Are you aware of that statement?

Mr Samuel—I have not read the whole prospectus, but I will take your word that it is included in the prospectus.

Senator CONROY—And I again ask, does the ACCC believe that these representations in any way constrain the ACCC's regulatory discretion? That is about your regulatory discretion, not the government's, but yours?

Mr Samuel—Again, I do not think I should provide an answer to a legal position on that.

Senator CONROY—I am happy for you to take it on notice.

Mr Samuel—I will take it on notice.

Senator CONROY—In the ACCC's view do any of the statements made in the Telstra prospectus limit the ACCC's options for facilitating the G9 proposal?

Mr Samuel—I will have to take that on notice.

Senator CONROY—The G9 are seeking subloop unbundling from the ACCC to facilitate its proposal. Does the ACCC consider subloop unbundling to be a major regulatory reform? That is a question that you do not need to take on notice.

Mr Cosgrave—The ACCC has commenced an inquiry into whether it varies its ULS declaration to effectively permit subloop unbundling. Whilst a request for that was initiated by the G9, it would be apposite to any fibre-to-the-node proposal. Indeed, as I understand it, the service description for the relevant service in a number of other jurisdictions allows for that. So that is the reason.

Senator CONROY—Is it a major regulatory reform?

Mr Cosgrave—No. It is a point of potential clarification around an existing service description, so I would not describe it as a major regulatory reform.

Senator CONROY—I appreciate your time and thank you to Senator Fielding for his indulgence. I shall return.

Senator FIELDING—I just wanted to follow up on an issue from last estimates hearings regarding Woolworths and ensuring that it is no longer acting in an anticompetitive manner. I have some follow-ups to questions on notice and I am trying to check where that is at now.

Mr Samuel—Does this relate to the liquor case?

Senator FIELDING—That is right.

Mr Samuel—I will turn to one of my colleagues for any update on that. I have just been informed that we are still awaiting the finalised audit report that was part of the conclusion of that particular matter. I have just been told that it is due tomorrow.

Senator FIELDING—Have there been any other representations made to you about anything else in the area of anticompetitive behaviour in regard to liquor?

Ms Webb—Following the outcome of that judgement we have had some other matters brought to our attention that are still being looked at.

Senator FIELDING—Are they going to proceed to further audits?

Ms Webb—They are still in the nature of initial investigations so we have not even determined yet whether they amount to a breach of the Trade Practices Act. We are still examining the facts.

Senator FIELDING—Given the Woolworth's case and obviously waiting for the audit report to come out, and the issues that were raised with Coles Liquorland division, do you feel from an anticompetitive point of view that you are on top of the issue, or is there more work to be done on this area? It seems like there are a few cases coming up.

Ms Webb—The publicity that surrounded this decision probably means that people in that industry are aware of the issue and aware of the action that the ACCC has taken and, as a result, are bringing matters to our attention that they think may cause major competitive concerns.

Senator FIELDING—Obviously until the audit report is out we will not know where to go with that one. I just wanted to make sure we were following that one through. Has the commission had any representations made to it regarding tenants of predominantly larger shopping centres and the claim that they are being forced to show their books or accounts?

Mr Samuel—That has come across my desk on several occasions, including in some speeches and public presentations that I have been involved in, and it has also come into our office at other levels of the commission. The position that we have explained to those who have put these issues to us is as follows. The contractual arrangements between a landlord and a tenant, in the absence of unconscionable conduct, are really a matter of contractual negotiation. The requirement for disclosure of books, revenue, turnover and the like is essentially related to the landlord assessing the performance of the tenant in the shopping centre and, at the same time, being able to calculate what is often the average turnover rent beyond the base rent that will apply in the shopping centre. They are matters of negotiation between the landlord and tenant, but we have been cognisant of the relatively unequal bargaining power between a landlord and tenant in those circumstances. The advice that I have given on many occasions, and as recently as last week to a group of the Australian Retailers Association, is that they ought to contemplate and pursue the process of collective negotiations with landlords. On almost every occasion that I have suggested that, there is a momentary period of euphoria at the prospect that they could conduct collective negotiations. It evaporates very quickly when one of the tenants concerned says, 'Yes, but I can do a better deal on my own.' And that is the end of the collective negotiations. But we have emphasised how collective negotiations are something that we will deal with very speedily, either through an authorisation process or through the new notification process that came into place as at the beginning of this year as a result of the so-called Dawson amendments. To the best of my knowledge we have had no notification or application for authorisation from any group of shopping centre tenants anywhere in Australia.

Senator FIELDING—As you have rightly pointed out, the unequal bargaining power and collective bargaining provisions of the Trade Practices Act will obviously assist in that area, but that relies on them getting together. But the issue at hand is whether it is reasonable for someone to have to show their books to a shopping centre. If there have been a number of complaints, would the ACCC be interested in at least doing some sort of small inquiry to start with to get a feel for how big the issue is and to allow people to come forward? A lot of people come to me with that concern, but they are reluctant to raise their heads too high because of potential repercussions.

Mr Samuel—They have raised it with us and we have had a number of representations made to us individually and collectively by the Australian Retailers Association and other groups in this context. Our response has been to say that under the Trade Practices Act the only way in which we could intervene in those sorts of negotiations and those sorts of arrangements between a landlord and a tenant would be in the presence of unconscionable conduct. It is the clear view of the commission and of its legal advisers that those arrangements between landlord and tenant do not amount to unconscionable conduct as it is defined in the law under the Trade Practices Act as presently drafted. Therefore, we have advised tenants that the way to deal with what is otherwise a contractual arrangement between a landlord and tenant is for the tenants collectively to obtain a more equal bargaining position. The way they do that is to collectively get together with the authorisation of the ACCC to negotiate with their landlords but to date no group of tenants has been able to get to the point of even contemplating collectively negotiating, let alone approaching the ACCC for an authorisation to do so.

Senator FIELDING—Is there any way of looking at the issue further by direction from the minister? I am concerned that these smaller businesses are being asked to produce their books and basically to reveal all their costs and revenue. Their thoughts are that basically the landlord can see exactly what they can pay in rent and can put that up. It is unfair and outrageous to think that they can get people to feel as if they are forced to show their books. Can anything else be done?

Mr Samuel—It is not within the power of the ACCC to deal with those issues under the Trade Practices Act. The relationship with the landlord and tenant, particularly in shopping centres, has traditionally been handled on a state-by-state basis by state governments under legislation, and there have been in place retail tenancy codes and retail tenancy legislation where these issues have been dealt with. But as I have explained, the Trade Practices Act does not cover the status of negotiations between parties in contractual arrangements such as landlord and tenant, unless what can be demonstrated is unconscionable conduct—that is, conduct that is so harsh and oppressive as to be without conscience.

Senator MURRAY—I have been campaigning on this practice, as you know, for well over a decade and a couple of committees have taken it up. I have written to you on this matter and sent you a publication of mine, which is also in the library upstairs. I have held to the view consistently that the practices that have been outlined again in the discussion between you and Senator Fielding are profoundly anticompetitive and are unconscionable. I have taken the view that a secret market, which is what a shopping centre is, without a price list that is available to all, is an anticompetitive device and results in price gouging. And I have taken the

view that requiring as a condition of a lease that you will take a benefit from a tenant's own efforts to improve their business, rather than just being a retailer of space, is profoundly unconscionable. Now, you have rejected my application as you have rejected others on the grounds that it is not within your powers under the law and it is complicated by the state-federal relationships. However, it is not outside of your powers to make a request of the government for a formal inquiry as to how the law can be examined to see whether it is adequate to address what I would regard and many regard as profound injustices and anticompetitive behaviour. So my question is: would you consider further the suggestion from Senator Fielding, which I will back and I would expect many others in this place to back, to consider requesting from the Treasurer a direction or a brief to examine this area again?

Mr Samuel—I know that we have had this discussion over many years—you are right; it is probably over a decade—about Senator Fielding's concerns and deliberations in this area. I do not want to in any way appear unsympathetic. Indeed so often our position in this area gets terribly misrepresented. I know it has been badly misrepresented at the moment by a certain radio commentator in Sydney that makes it very difficult for us. I think that senators do understand, and one would hope that the radio commentator would equally understand, that we operate within the law that is passed by parliament that gives us certain powers, and limits our powers as well. The powers do not permit us to deal with the sorts of issues that either Senator Fielding or you have raised. I know you have talked, for example, about issues of transparency of rentals payable in shopping centres and in the context in which the issue that Senator Fielding has raised with me; equally, the issue of transparency of rentals payable by other tenants has been raised. Again, we have indicated that collective bargaining there would facilitate tenants in knowing what other tenants are paying as part of their rental arrangements. Except there are some tenants who say they do not want anyone else to know what rentals they are paying because they can do a better deal on their own without having to become involved in a collective negotiation. Whether the Treasurer asks us to conduct an inquiry under section 29 of the act is entirely a matter for the Treasurer. Whether we requested that or not, I suspect that the Treasurer and/or government would be well aware of the issues that you have raised, if only because you have raised them on very many occasions. They would have the ability to request that if that was what they wanted to do. But that is a matter of policy. It is not appropriate for me to comment on those matters.

Senator MURRAY—Without being rude, but just to use a colloquialism, that is buck passing. It is my view that you, as an organisation, are better informed on these matters than is the Treasurer or the Treasury, because the complaints come to you and you have had submissions from all sorts of people and so on. The Treasurer, like you, is a very busy man but he would need to be appropriately briefed and advised. My sense of things is that this remains a burr under the saddle in small business retailers and it remains profoundly unfair. I would have thought that it was within your independence and within your ambit, if you like, to be able to construct a brief to the Treasurer saying this is a problem. You have been formally asked both outside this room and in this room to consider the matter, and a possible way it could be considered would be through the Treasurer. Here is the case for and against. That is what I am asking you to consider doing. I am not asking you to give a commitment here because you need to think about it. But you have clearly said to us all that you do not have the powers under the law to deal with the issues we are raising and we clearly say to you

that there is a problem that is related to us as politicians and you are also receiving material. So my request to you again is: would you consider this matter further in relaying this from your perspective to the Treasurer?

Mr Samuel—Senator, I did not want to give the impression that I was buck-passing, to use the expression used by you, other than to say that we remain in constant communication with both Treasury and the Treasurer on a whole range of issues that we deal with which may not necessarily fall within our remit under the law as it stands at the moment. It is not appropriate for me to discuss at this hearing the level of those communications, particularly where they relate to policy matters, other than simply to point out that any decisions as to inquiries of this nature that you have discussed would be entirely a matter for government. All I was indicating to you was that it was not appropriate for us to discuss this at this particular moment.

Senator MURRAY—Are you refusing to consider it?

Mr Samuel—Sorry, I do not think you are hearing me.

Senator MURRAY—I asked you a specific question. I recognise you cannot make a commitment now. Are you prepared to consider further whether you should approach the Treasurer formally on this matter? That was my specific question.

Mr Samuel—And I think the response I gave was to say—I do not know how much clearer I can make this—that we are in constant communication with Treasury and the Treasurer on a range of issues relating to areas that are within our remit and areas that are the subject of complaints and/or discussions that are lodged with us. All I have indicated to you is that ultimately it is a matter for the Treasurer as to whether or not we are asked to conduct an inquiry. If you want me to answer the question: will we consider it? Yes, we will consider it.

Senator MURRAY—That is what I wanted. Thank you.

Senator FIELDING—Has the minister for small business asked you to look into the issue at all?

CHAIR—If this is forming advice to government in relation to policy, we have got to be very careful about how the question is asked and indeed answered.

Mr Samuel—I have to say this is the really great difficulty associated with these questions, because they are asking us to deal with matters of policy, and it is an accepted principle of committee of inquiry of this nature that we cannot and should not discuss issues of policy. I am afraid I am subject to those limitations.

Senator FIELDING—To move away from policy, has the small business minister spoken to you with regard to retail tenants being concerned in this area? That is not policy.

Senator MURRAY—By the way—if I may say, through the chair, as a point of order—that instruction on policy is neither constitutional nor a Senate order; it is a convention. So do not ever accept it as law that we cannot ask questions on policy. We just observe the convention.

Mr Cassidy—Senator Fielding, the answer to your question is no, as best as we are aware.

Mr Samuel—We should take that on notice, though.

Mr Cassidy—We will check it for you. I am just relying on the recollection at the table.

Senator FIELDING—I do not have the annual report here but has this issue come up in there at all?

Mr Cassidy—Do you mean our annual report?

Senator FIELDING—Yes.

Mr Cassidy—Again, I would have to take that on notice. I could not say that it does not appear in some of the tables we have relating to complaints inquiries we receive. But that would be the only place that I think it would appear. If you like I can take that on notice and check whether there is any reference in those tables to the issue.

Senator FIELDING—Have you got the number of complaints in the last couple of years?

Mr Cassidy—I would have to take that on notice. We do not have that data with us.

Senator FIELDING—I will follow this up again and see what information comes back. Direction from the minister to the ACCC, or any of these bodies, is really important but it is also important to know what is going on, feeding that back and then saying that this is a real issue of some concern. It affects a lot of the small businesses. This is an issue, as Senator Murray has said for years, and I know I have got people coming to me. I think more needs to be done than potentially saying it is not us, it is them. People feel that they cannot do much. I know you probably sit there and say, 'Well, if they knew what we know they could do a lot more than they are doing.' But the trouble is that people do not have that expertise.

Mr Samuel—This is a source of some concern to us in terms of what is expected of us and what people believe we can and cannot do. In terms of retail tenancies, we receive a range of concerns and complaints raised by tenants. One is the issue of transparency of other rentals payable by other tenants. The second is the issue of provision of accounts and turnover in order to enable landlords to assess the performance of a tenant and the average rental. The third one which is sometimes raised with us is the discrimination, as it is described, of rentals payable by smaller tenants relative to larger tenants and the suggested cross-subsidy that occurs. There will be issues of what happens on the termination of a tenancy; that is, a five- or 10-year tenancy and then substantial increases of rental are imposed or alternatively the property is to be vacated. There will be issues about complaints that are lodged about relocation of tenants to different parts of a shopping centre which often relates to issues of rental payable and/or of traffic that passes a particular store.

We are in constant communication with groups like the Australian Retailers Association, other retailer groups of which there are many, as you know, as well as the Shopping Centre Council to deal with these issues. We can deal with them to a limited extent consistent with the law, which says at the present time that we can take action for unconscionable conduct, but we cannot take action for what is a circumstance of simple, tough bargaining. I do not want to leave any impression that we are trying to pass the buck, but we operate within a law that is given to us by parliament. If parliament wants to change the law to get us to do other things, then parliament has to deal with that. Parliament has proactively dealt with a whole range of things in the past that change our power and/or the areas that we have to deal with. All I have indicated to you is that in the past in this area state governments have tended to intervene with retail tenancy laws and/or the development of codes of conduct that apply to shopping centre landlords in a range of areas. Where we can assist, and I am sorry I am

repeating myself, is to suggest to retail tenants that they get together to collectively bargain, but they do not want to do it, according to all of the evidence that we have to date.

Senator JOYCE—I would like to follow up on this point.

CHAIR—Just quickly because Senator Fielding has been very patient.

Senator JOYCE—Is it section 51AB of the Trade Practices Act? Section 51AB(1) goes to conditions that are unconscionable but is it 51ABC that talks about that?

Mr Cassidy—It is probably 51AC, you are talking about.

Mr Samuel—It is 51AC.

Senator JOYCE—51AB talks about the relative strengths of bargaining positions of the corporation and the consumer. Wouldn't you suggest that if Westfield or Stockland turns up and they have got myriad shopping centres and then you have got Mrs MacGillicuddy's Country Meats with only one store and she is paying 10 times or sometimes 30 times the premium for the same article in the same place at the same time—that is, per square metre of retail space—then she intrinsically does not have the same bargaining strength and therefore, because she does not, that is how they get some person paying $150 a square metre and another person paying $3,000 a square metre. That is happening because they are being unconscionably exploited because of their lack of bargaining strength.

Mr Samuel—The issue of disproportionate bargaining power is the easiest one of all to identify in terms of small business under 51AC, or AB in terms of consumers. As I say, the issue of disproportionate bargaining power is the easiest criterion of all to identify. We have no difficulty in identifying that at all. What becomes relevant flowing on from that is that, once you have established the disproportionate bargaining power, we then have to determine in accordance with the guidance criteria set out in 51AC whether particular conduct between the stronger bargaining party and the weaker bargaining party is unconscionable, because that is the concept that is used in section 51AC.

Just a little while ago a Senate committee of inquiry examined the issue of the application of the Trade Practices Act to small business. My recollection is that the committee resolved that certain changes would be made with respect to unconscionable conduct. Some of those were more technical or process changes relating to the turnover thresholds for the application of the section. But my recollection also is that that committee—joint parties—recommended that the unconscionable conduct provisions be amended by the addition of one guidance criteria related to unilateral variation clauses. I may stand corrected, but I think that was the limit of the committee's recommendation in respect of that provision. Forgive me but, as Senator Murray has said, these issues have been around for a decade and I suspect longer.

Senator MURRAY—That is right.

Mr Samuel—You and I have been talking about this since 1995—

Senator JOYCE—But so has polio; that does not make it right.

Mr Samuel—All I am saying to you is that the ACCC operates within the law that is set for it to operate under by parliament. The Senate committee that examined the issue of small business and the Trade Practices Act delivered its report in—

Senator JOYCE—It was 2004—before I turned up.

Mr Samuel—So 2004. All I am suggesting to you is that it is within the remit of parliament, Senate committee, and so on, to change the law under which we operate. But you cannot expect us to operate outside the law.

Senator JOYCE—Section 51AB, part 2A, deals with the relative strength and bargaining position of a corporation. It states that, once you can charge people 10 times and in excess of 10 times what you are charging for the same product in the same place at the same time, then you have unreasonable bargaining power.

Mr Samuel—I have already indicated to you that determining whether there is disproportionate bargaining power—

Senator JOYCE—It is not disproportionate, it is unreasonable—

Mr Samuel—Just a minute. If there is disproportionate bargaining power, that is the easiest criterion for us to be able to assess. What flows from that, though, is the application of the unconscionable conduct provisions. There are a number of guides set out in section 51AC. We need to do 51AC, by the way. In respect of 51AC, a number of guidance criteria are set by parliament, and we operate within those criteria because they are the criteria set for the courts. If we go to the court and say, 'We have a whole new set of criteria we want to deal with', the court would say, 'But you are operating outside the law that is set for you by the parliament.'

Senator JOYCE—I will make the question simple. Is section 51AC unable to deal with the predicament of someone being charged 10 times for the same quantity in the same area and the same product?

Mr Samuel—Yes. I think I have indicated before that the process of negotiations between a landlord and tenant in relation to rental payments, for example, are on the best legal advice that we have been able to obtain outside the ambit of section 51AC.

Senator JOYCE—So, section 51AC is inadequate to deal with that? That is what we have to get on the record. That would be right; section 51AC is inadequate in being able to deal with that issue?

Mr Samuel—As I said, section 51AC will not deal with the negotiations at arm's length between a landlord and tenant in relation, for example, to rental payments.

Senator JOYCE—It is up to us, not you, to try and strengthen section 51AC. Thank you.

Senator MURRAY—I have called for the report in question because my memory is that the committee did want the broad area examined, but I think your remarks particularly about the unconscionable provisions are right. But the issue is broader than that and that is what I would like to refer to later. Just on the area of unconscionability, I was one of those who supported its introduction into the Trade Practices Act. I think it is a very good principle. Mr Cassidy will probably find it easiest to recall the detail, but my impression is that unconscionable conduct is dealt with in two ways. One is where you take it up and you deal with it essentially on its merits and people go away and sort things out as they should, and that is a fast process. The other way is where the hard cases end up in the courts. Perhaps you could indicate to me how many unconscionable conduct complaints you have received, how many you have been able to deal with on their merits and have resolved and then how many

have gone to court? Perhaps we should say in the last financial year or calendar year: which is easiest for you?

Mr Cassidy—Between, say, July last year and April, which I suppose is what you might call the financial year to date, we have recorded 145 contacts relating to unconscionable conduct in business. Of those, 126 were complaints and 19 were just straight inquiries. You are after the figure for complaints. We have had about 126, which represents only about half a per cent of the total number of matters that we have recorded in our database during that same period. This is probably going to be beyond me a bit right here and now. Translating that into what happened to those 126 is something I perhaps need to take on notice. If I do that, obviously, without going into details of particular ones I will be able to say how many of them went into our initial detailed investigation and how many of them are still there. I think I am reasonably right in saying that none of those would have actually found their way into court. At this stage, that is, if nothing else, a product of the time involved from when you get a complaint to when you end up getting into court.

Senator MURRAY—I would be happy to take those three items I asked you on notice. That is good. In answering that, could you add one more?

Mr Cassidy—Yes.

Senator MURRAY—If there is any particular area or category of business which dominates in that 126, I would be interested to know that.

Mr Cassidy—Yes. We will give you some idea what areas the 126 fall into.

Senator MURRAY—Thank you very much. I have another statistical question about franchising complaints. I have seen a lift in media reports on franchising. Are you getting more or fewer complaints? How many franchising complaints have you had in the same time period we have just discussed?

Mr Cassidy—I cannot for quite the same time period, so I suspect I will end up taking some of this on notice. But so far in this calendar year we have recorded 283 contacts in relation to franchising, of which 179 were complaints.

Senator MURRAY—You would not have courts in there—

Mr Cassidy—I do not have the figures in front of me, but I think I would be fairly safe in saying that we have probably had an increase in the number of complaints we are getting in relation to franchising—I have a chart in front of me that tells me we have—over the last 12 months or so. But, again, let me say that is an increase. I am talking about numbers of 179 out of 50,000-odd complaints that we receive a year. Let me take that on notice and we will be able to give you more detail on those figures.

Senator MURRAY—Forgive me if I did not pick this up earlier; I do not think it was asked. How many leasing or rental related complaints were there?

Mr Cassidy—Let me take that on notice as well, because we might need just to unpick that. At the moment, some rental/leasing complaints might have been recorded under unconscionable conduct. Some might be recorded under other areas of conduct under the act. We will need to manipulate our database a bit to pull that figure together for you.

Senator MURRAY—Those three areas, I think, are signals as to where small businesses are feeling irritated about their contractual relationships.

Mr Cassidy—But, again, without wanting to harp on it, I make the point that I am talking about figures of a couple of hundred out of 50,000. I think I can safely say that none of those areas are areas that are big in an absolute sense in terms of the complaints we get.

CHAIR—Let us get Senator Fielding as quickly as we can and then we can come back.

Senator MURRAY—You are going back to Senator Fielding?

CHAIR—He just wants to finish off and then we will come back to you in relation to that.

Senator MURRAY—I just want to conclude with one thing to assist you, Mr Chairman, because we had an earlier discussion about this. This will assist the Chairman of the Trade Practices Commission. The Senate Economics References Committee examined the effectiveness of the Trade Practices Act 1974 in protecting small businesses, and raised the issue of unconscionable conduct in retail tenancy arrangements in the executive summary to its main report. The best reference is at pages xvi to xvii and from E31 through to recommendation 10. I will not read all of those. Recommendation 10 states:

> The Committee recommends that the Commonwealth Government negotiate with State and Territory governments, with a view to introducing measures which would prohibit retail lease provisions compelling tenants to keep their tenancy terms and conditions secret.

This was the transparency issue we were discussing. The committee quite clearly took a view that the present conduct of the market was unsatisfactory and needed addressing. That is where we are with that.

Senator FIELDING—When monetary penalties are put in place, would 100 per cent of those penalties be collected and directed somewhere? Where someone has done something wrong and a penalty is applied, is that money always collected?

Mr Samuel—I can give you two answers. The first is that to the extent that it is collected it goes into consolidated revenue. Unfortunately, we do not have a slush fund to deal with that, so it goes into consolidated revenue. Is it always collected? Yes, we exercise every endeavour we can. For example, we talked earlier today about the Ballarat petrol price fixing case. There were circumstances there, indeed acknowledged by, as he then was, Justice Ron Merkel in the Federal Court, where parties have either by dent of circumstance or, as Justice Merkel suggested, by deliberately taking steps to denude themselves of assets, avoided the payment of penalties. We have been working on that to see whether there are ways and means of chasing those down. You would be aware that penalties of this nature are not provable in a liquidation of a company and, therefore, it can be difficult for us to recover the penalty where a company has taken steps to denude itself of assets or by dent of circumstances has become insolvent and goes into liquidation. The net result of that is that penalties become somewhat of a phantom or a Clayton imposition on the parties concerned; they just do not pay.

Senator FIELDING—What about the situation where a business may need to provide 10c back to lots of people, for example. Because of the cost of getting that back to them, applying the penalty would just not make sense. Does that happen very often at all?

Mr Samuel—What you are contemplating there is what payments might be made by a liquidator on a liquidation. Of course, our penalty does not rank. It does not feature in the liquidation because it is not provable. There will be circumstances, however, where a company or an individual goes into a scheme of arrangement with its creditors to pay debts. Unless and until it goes into liquidation, our penalty is a debt that can rank amongst the other creditors for the purposes of forming part of the payout. Keep in mind that you can have circumstances where a scheme administrator and/or a group of creditors say, 'If the ACCC is around seeking to collect a penalty of half a million dollars, then it might be better for us to put this company into liquidation, because then you will not be around; you cannot prove.'

Senator FIELDING—I am just thinking of one other situation where perhaps there has been an overcharge of something, and to try to get that money back to the individuals is nearly impossible. Will you go through that for me, if you can?

Mr Cassidy—We have discussed on previous occasions that there are some difficulties with the law at the moment in this regard, but we do have settlements or court outcomes where, as part of the outcome, say, a firm might be required to refund money to certain parties. Normally we would not seek that where the sort of amount you are talking about could be easily outweighed by the transaction costs, if I can put it that way. Where we might be seeking a refund would be in respect of those who purchase a particular good that is found not to be effective or of merchantable quality, or whatever. We would seek the refund of the full amount of the purchase price. We do not seek refunds of 10c and so forth. That is not the sort of refund or recompense that we get involved in.

Senator FIELDING—For instance, if there were hundreds of thousands of customers and the amount was 5c; trying to get that back to those people would just be impossible.

Mr Cassidy—The closest we came to that sort of situation, I suppose, was during the introduction of the GST, where some traders had ended up in a sense collecting what was a reasonable amount of money but that, on the other hand, was the sum of a whole lot of very small amounts. The approach we took there in settlements was not to try to get those very small amounts of money back to each and every individual but rather to ensure that the trader did not get to keep the money. There were some settlements we did where it was agreed that the money would be divested by the trader and invested in some agreed worthy cause, I suppose, would be the best way of putting it. Again, that was in recognition of the fact that the transaction costs involved in getting those small amounts of money back to a large number of people meant that it was not worth it.

Senator FIELDING—So it is still collected but maybe put somewhere else depending on what would make sense?

Mr Cassidy—Yes. I may stand corrected, but I do not know that we have had any of those. We might have had the odd one. We certainly had a few during the early days of the GST, back in 2000-01. We have not had many since.

Senator FIELDING—Thank you.

Senator MURRAY—I am not sure whether the ACCC has had an interest in private equity from a competition point of view. I know you took an interest in Qantas. Did you take an interest in the matter referred to in the literature as lockups, or lockup deals?

Mr Samuel—Yes. Just to make it clear what we are discussing, there have been circumstances that have occurred in the United States—and it has been suggested in the few private equity bids that we have had in Australia—where the private equity operators, the investors, tended to get together in an endeavour to lock up, for example, all the relevant bankers that might be involved in an acquisition, so as to lock out any competing takeover bid. We have indicated that we view that with concern. It has not been a matter that has raised its head in this country to date, although you will be aware that in relation to the Coles group where you have potential bids, the advisers to the Coles company had attempted to take some pre-emptive steps to avoid those lockups occurring. This became quite public so I can say that the advisers were in some consultation with us on that particular issue.

Senator MURRAY—Have you been discussing this matter with the overseas agencies you have links with, such as the United States and the United Kingdom?

Mr Samuel—We could have been discussing it this very week over in Moscow at the International Competition Network, but we are well aware that, particularly in the United States, both the FTC and the Department of Justice have expressed some views about this. We have expressed similar views privately. I think I have done so once on one public occasion. I have expressed similar views about our concern over potential lockups occurring, or lockouts as they are.

Senator MURRAY—There have been concerns over what I may loosely describe as the rules of engagement emerging in private equity, conflicts of interest, the way in which managers' and directors' interests intersect with those of bidders—Alinta and Qantas were both picked out in that regard. Various agencies are taking an interest in this from a different direction—for instance, the Takeovers Panel, or ASIC, and you. In that context, does the ACCC propose to release or produce any guidelines on this issue of lockups or any other issue in relation to private equity deals?

Mr Samuel—Not at the present time. It is like a number of matters that we deal; we do enter into discussions with parties that might be involved in these sorts of transactions. They are aware of our views. They are aware of them through some public comments I have made both in the media and at a number of addresses to business groups as to our attitude. I think it is fair to say that those who are involved in private equity bids would be very sensitive to the views of the commission as to lockups. In the event that it becomes an issue, they would be consulting with us. We need to keep it in the back of our mind that private equity bids in a serious sense have not been a major factor in the Australian scene to date. We have had a couple of very high profile ones—Qantas, Coles and a couple of the TV networks—but they have not been major issues to this point.

Senator MURRAY—As you rightly say, though, they are getting into the big ticket area, and moving well up into the $30 billion mark.

Mr Samuel—Yes, although with some mixed results in terms of success at this point.

Senator MURRAY—Yes. That is a good sign; the market is working effectively. Does the ACCC have any proposal to make any submission or to convey any thoughts on the Takeovers Panel issues paper, which picks up the issue of lockups in private equity deals and

the anticompetitive aspect of that, and which is dealt with in paragraphs 36 to 41 of their issues paper? Were you aware of that paper?

Mr Grimwade—I am not aware.

Mr Samuel—No, I am not aware of it and it is not a matter that we are dealing with at the moment.

Senator MURRAY—Could I through this forum advise you of it and ask you if you would not mind taking note of it. I do not need a response, but I think it does need consideration by the ACCC.

Mr Samuel—We will certainly do that.

Senator JOYCE—I would like to return to section 51AC and go through a couple of the issues there. I am just trying to flesh this out. I understand your position; you can only deal with the legislation you have, and you do not have legislation that is strong enough to deal with the unconscionable conduct in the manner that we are talking about here, especially in retail. I want to go through a couple of other things for the purpose of this. Can you draw a line between what you think is the differentiation between tough bargaining and unconscionable bargaining?

Mr Samuel—It is virtually impossible to do that in any broad generic sense, because it has become clear that unconscionable conduct issues and unconscionable conduct cases very much depend upon the facts and circumstance of each individual case. I cannot give you a specific definition. I can use expressions such as 'harsh' and 'oppressive' as unconscionable, but you would say, 'Well, what's the difference between harsh and oppressive and tough bargaining?' Each and every case will depend upon the facts and circumstances. The case law on the matter also is not really helpful, because the courts tend to use general descriptive terms, but each one would depend upon the facts and circumstances.

Senator JOYCE—That is my next question. Do you believe that the court's interpretation of it is too narrow or that your interpretation of it is too narrow to deal with such things as the 30 times premium that certain retail space is now being offered at?

Mr Samuel—I would like to be able to say to you that I think that our interpretation of it is not too narrow. We have openly said recently—in the past year or so—that we are endeavouring to take a more aggressive, perhaps edge-of-the-envelope, attitude towards testing unconscionable conduct issues. Likewise, I would be the first to acknowledge that there is an expectation, particularly in some sections of the small business community, that the unconscionable conduct provisions will apply in a far greater range of cases than on any illegal analysis, having regard to court interpretation of the provisions. There is an expectation gap there that we have to deal with. As to whether or not the court takes too narrow a view, far be it for me ever to suggest that a court takes an incorrect view of the interpretation of law—that is, after all, the role of the courts. If parliament is not happy with that interpretation of the law, then it is up to parliament to alter the law.

Senator JOYCE—That is a good answer.

Mr Samuel—I would like to get a similar sort of response from Senator Conroy every now and again.

Senator JOYCE—We are all getting along splendidly. You have been missing it. We have had a love-in since you have been away, Senator Conroy.

Senator CONROY—What have you been presiding over?

CHAIR—Let us keep it that way.

Senator JOYCE—As to places of activity—in Victoria we have a problem such that certain areas are designated as places of commercial activity, and then they are purchased holus-bolus by Stockland, Westfield or whoever. Now we have a significant lessening of competition test. There is only one place you can trade, and that is in their shopping centre. Does that, on your interpretation, verge on having an unconscionable position, or an extreme position, in the market; you can basically extract any premium you want if they want to do business, because they have nowhere else to go?

Mr Samuel—No, I think it is starting to verge on seeking my comments on matters of government policy as to town planning and the like, which of course I am not able to do and—

Senator JOYCE—It is state Labor government; you do not have to worry about it.

Mr Samuel—What you are perhaps illustrating is that, where you have a limited number of shopping centres, there will be created a disproportionate bargaining power between a landlord and a tenant, which brings us into section 51AC, But then you have to go to the criteria set out in section 51AC to determine whether the result of all of that disproportionate bargaining power and of the negotiations that then take place are such as to lead to a result of unconscionable conduct.

Senator JOYCE—When was the last section 51AC case that you pursued? Or have you already given the reason why you do not pursue more, that is, the gamut of the law is not sufficient enough for you to do it? When was the last time you pursued a section 51AC case and why do you not pursue more? Section 51AC, for those who have just tuned in, is unconscionable conduct—for the viewers at home.

Mr Cassidy—We have one case in court at the moment on appeal, the Dataline case. Prior to that the Cleanaway is probably the next most recent. I am sorry, I cannot give you dates.

Senator JOYCE—How long ago was the Cleanaway case, for the purpose of the *Hansard*?

Mr Cassidy—That is what I am saying; I do not know that I can give you a date. Can I take that on notice?

Mr Samuel—We have actually dealt with unconscionable cases outside the court for 87B undertakings, which will not be reflected in the narrowness of the question that you asked. There is a well-known one, of course, in relation to a shopping centre landlord, Westfield, and a coffee shop proprietor. I forget the name of the proprietor that we dealt with out of court through undertakings, and that would be about 18 months to two years ago.

Senator JOYCE—Eighteen months to two years ago?

Mr Samuel—Yes.

Senator JOYCE—Do you think in a trillion-dollar economy 18 months to two years ago is—

Mr Samuel—Sorry, the moment I said that I knew that you were going to then say that that was the last one. No, that is not the last one. We are dealing with unconscionable conduct matters on a regular basis.

Mr Cassidy—We have 10 under detailed investigation at the moment, so I do not think it is two years since we turned our minds to unconscionable conduct.

Mr Samuel—It is worth noting that many unconscionable conduct cases, or potential unconscionable conduct cases, involve misleading and deceptive conduct, and it is very much easier to prove misleading and deceptive conduct.

Senator JOYCE—Yes, absolutely.

Mr Samuel—No, but I need to point this out. If we want to get a speedy result to stop something occurring that is on the one hand misleading and deceptive but may also be unconscionable, it may well be that what we do is proceed down the misleading and deceptive conduct route because it is quicker and easier to get the same result as might otherwise be the case if we were to pursue an unconscionable conduct case.

Senator JOYCE—I will drill down on that issue. What if, in relation to a contract, a person in a superior bargaining position—and until the legislation changes, this would be unconscionable conduct—changed the terms of the contract such that it disadvantaged the smaller business? Would that concern the ACCC as being a process of unconscionable conduct?

Mr Samuel—In the submission that we put to the Senate Economics References Committee relating to small business we indicated that we took a view that unilateral variation clauses in contracts were at least prima facie evidence of unconscionable conduct. We do not like unilateral variation clauses, particularly where they do not provide for appropriate compensation for those who might be affected by a unilateral variation. My recollection is—Senator Murray, I am sure, will correct me—that the committee actually recommended that that be added as a criterion to the unconscionable conduct provisions, and we have to of course see what the legislation might say on that when it is produced. We would take a view that the use of and the implementation of a unilateral variation clause would, in our view, be a prima facie case of unconscionable conduct that we would potentially pursue.

Senator JOYCE—When was the last time we succeeded in a section 51AC case, which for the purpose of the record is unconscionable conduct?

Mr Cassidy—Let me give you an answer but take it notice just to make sure we—

Senator JOYCE—It was the Cleanaway case.

Mr Cassidy—It was Cleanaway and we think that was late last year, late 2006.

CHAIR—Ms Webb, do you have something you wish to add?

Ms Webb—That is correct. We have had a consumer unconscionable case since then, but not a small business case.

Senator JOYCE—I want to move now to significant lessening of competition and the impending purchase or sale of Coles, which has obviously been widely reported in the market and on television—everyone knows about it—and also the intentions that have widely been reported, namely, that portions thereof would be sold possibly to Woolworths. Is there ever a time we are going to cross the Rubicon of a significant lessening of competition in the retail market; is that ever possible? Does it concern you when you see that? It is 42 per cent and heading up. We must be getting to that point. We are way in excess of any other nation on this planet. When is the time we think, 'No, that is definitely a significant lessening'?

CHAIR—I do not think Mr Samuel can comment on those potentials that you have referred to, because they really are hypothetical until something definitive is put forward. But I suppose in relation to general principles—

Mr Samuel—I can give you the same answer that I gave on *Sunday Business* on Sky News, which is that it is not appropriate for us to comment on issues that either might be hypothetical or may or may not be the subject of discussions between ourselves and potential acquirers at this point in time—although I did say that I was prepared to go out on a limb and indicate that if Woolworths were to seek to acquire the Coles supermarket operations it was highly unlikely that they would get a clearance from the ACCC to that. I do not think that revealed too much to too many people. As to the other non-supermarket operations, that is the general merchandise operations and Officeworks, I did indicate and would maintain here that it would not be appropriate for us to comment on that. There are two reasons for that. The first is that any comment that I make is likely to be highly market sensitive in terms of Coles or Woolworths themselves. Equally, we do not form views on these issues based on superficial information. The views are formed after a very careful market analysis and market inquiries, and we are not at that point in time in respect of any proposed acquisitions by Woolworths of any elements of the Coles business.

Senator JOYCE—I had a range of other questions: how much of fuel, how much of liquor and how much of groceries could anybody own before it would be deemed to be a significant lessening of market competition? But I suppose your answer in each case would be the same.

Mr Samuel—It would be the same answer in each case, yes.

Senator JOYCE—We will not go through that. Here is a different tack. Could the involvement of people on a board of a company that is subject to a private equity buyout potentially give rise to anticompetitive behaviour because I would discourage other people from pursuing the purchase intentions? Let us say I had a company—an airline company—

Mr Samuel—Hypothetically.

Senator JOYCE—hypothetically—and I could structure a big premium in it for me if the deal went through, couldn't that suggest anticompetitive behaviour because it would be more than likely that I would not be encouraging other people to chip me? And then it might come to pass—and just hypothetically—that the deal fails and the strike price of the bid is quickly surpassed in the marketplace in any case.

Mr Samuel—I will give you a short answer to that strictly hypothetical question, which is that that is probably more a matter for ASIC than us because it raises issues of potential conflict of interest and the like. I would refer that to ASIC. Where we would become

involved, though—just to help you; I am sure it is probably going to be the next question—is if a director or a participant in a private equity bid had interests in another related business. Let us assume, for example, that a participant in a private equity bid for an airline, as you have described—

Senator JOYCE—Might have been also involved in an airport?

Mr Samuel—That is right, yes.

Senator JOYCE—Possibly.

Mr Samuel—Yes, very hypothetically. Then of course we have an interest. As you would be aware, in a very real example we did have an interest in that and expressed an opinion on that when the private equity bid was made for Qantas.

Senator JOYCE—I am going to go to another section. How many 87B undertakings has the ACCC secured during the last year relating to section 51AC?

Mr Cassidy—I do not think I have that precise figure. Can I take that on notice?

Senator JOYCE—Yes. When would a unilateral variation of a contract be unconscionable?

Mr Samuel—We would take a prima facie view that it was unconscionable if it did not contain appropriate compensation for any party damaged as a result of the exercise of the unilateral variation. To put that in context, just some time ago now—I will be corrected as to the date, but I think two or three years ago—we were concerned about the use of unilateral variation clauses in telecommunications contracts, that is, contracts between telecommunications providers and consumers, and we took a view that the use of those clauses without appropriate compensation being payable was at the least unconscionable and secured changes in the contracts concerned by the major telecommunications providers such that they now provide, where they have that ability to vary a contract, for compensation to be payable to any party that might have suffered loss as a result of the variation.

Senator JOYCE—Unilateral contracts also exist between horticultural producers and the supermarkets; mid-term they get varied by the supermarket. I think that might do me for a little while. I will hand across to somebody else.

Senator CONROY—We were talking earlier about subloop unbundling, and whether it was a major regulatory reform. Telstra executive Phil Burgess has said that we now know, three days ago, the Treasurer said he favoured the G9 plan; two days ago the ACCC announced that it was beginning the process of implementing the G9 plan, and they are going to explore subloop unbundling, and that is the first step in implementing the G9 plan. Does the ACCC agree that subloop unbundling is the first step in implementing the G9 plan?

Mr Cosgrave—No.

Senator CONROY—Has the G9 requested any other regulatory reforms from the ACCC to facilitate their proposal? I understand G9 have now lodged their undertaking with you?

Mr Cosgrave—That is my understanding, too, and I think the answer to the first part of your question is, no, they have not asked us for anything other than approval of their undertaking, self-evidently.

Senator CONROY—Are there any other regulatory reforms in their undertaking? I do not have a copy and I do not know what is in it.

Mr Dimasi—I think we had better have a look at the undertaking before we answer that question.

Senator CONROY—I am guessing you have a reasonable knowledge of it. I am not being cute.

Mr Dimasi—We have not seen the final undertaking that they have lodged.

Mr Cosgrave—I do not think we are being cute there, either. Clearly we have seen a draft copy and, clearly, we have had discussions over that, but to answer that comprehensively we would have to see what they have actually lodged, and we have not.

Senator CONROY—Did you not have to cull your entire speech this morning because it was not lodged by 9 o'clock?

Mr Samuel—I think you sent the note, did you not, to tell me that it had been lodged, so I appreciate that advice.

Senator CONROY—No, I would never send you a note like that because, as you know, I run a betting pool on how long you are going to speak for, Mr Samuels. So I was very disappointed by that note.

Mr Samuel—I was endeavouring through some drastic action to reduce the average time of my opening presentation in Senates estimates hearings—

Senator CONROY—Does the ACCC have a preference for either the G9 proposal or the Telstra proposal at this point?

Mr Samuel—No.

Mr Cosgrave—No.

Senator CONROY—Have you had a good opportunity to examine both proposals?

Mr Samuel—No.

Senator CONROY—So when, Mr Samuel, you talked about the G9 proposal on ABC Radio as something 'we're proposing', that was just a slip of the tongue?

Mr Samuel—That was a slip of the tongue.

Senator CONROY—Not a Freudian slip?

Mr Samuel—No, not a Freudian slip. It was a slip of the tongue. I wish we could all run through our whole life without having a slip of the tongue.

Senator CONROY—I notice the ABC Radio transcript of your appearance on this program has been edited to remove the slip.

Mr Samuel—That is not at my request, I have to say.

Senator CONROY—I was going to say: was that at your, or your office's, request?

Mr Samuel—No.

Senator CONROY—Any of your officers?

Mr Samuel—No. It was a slip of the tongue that was corrected immediately after it was said. Although I notice that the Telstra website seemed to make a large point of the slip of the tongue.

Senator CONROY—Moving on, is the ACCC aware that Telstra has expressed 'serious concerns' about the accuracy of the Commonwealth's regulatory representations in light of the G9 proposal? This is going back to the T3 prospectus.

Mr Samuel—Yes, I think I have read that somewhere.

Senator CONROY—Is the ACCC aware that Telstra has stated, 'Telstra would like to know exactly when the ACCC became aware of that'—referring to Mr Samuel's statements that the G9 was a serious proposal—'Was it during the T3 process and, if so, why wasn't it disclosed?' That was 2 March 2007.

Mr Samuel—I am happy to provide an answer to you. I will not provide answers to Telstra on that because most of their communication tends to go through the media, and I do not think that is the appropriate way to conduct a—

Senator CONROY—What is your response to that?

Mr Samuel—My response to that is that I think we became aware only much more recently of the potential serious nature of the G9 proposal and are dealing with it accordingly.

Senator CONROY—When did the ACCC become aware that the G9 proposal was a serious proposal?

Mr Samuel—It became very clear to us when a draft SAU was lodged with us three weeks ago.

Mr Cosgrave—Yes, some weeks ago.

Mr Samuel—Yes, some weeks ago. But it has become increasingly apparent over the past two or three months, of that order, that the proposal was a serious proposal and would need to be dealt with accordingly.

Senator CONROY—Were you aware that the G9 proposal was serious before the Telstra prospectus was finalised?

Mr Samuel—No.

Senator CONROY—Obviously not on that description. I wanted to talk about the ACT's recent affirmation of the ACCC's decision to reject Telstra's proposal for a $30 averaged ULL price. The ACCC warmly welcomed the ACT's decision as a comprehensive rejection of Telstra's proposed price for ULL? Is that correct?

Mr Samuel—Yes, we did.

Senator CONROY—Your press release on the day of the decision stated that 'Telstra should immediately acknowledge and accept the implications of this ruling for its ongoing campaign against the regulatory regime and the ACCC'. What are the implications of this decision for Telstra's public relations campaign against the ACCC?

Mr Samuel—To put it in brief form, the campaign can be best summarised with the use of the description of the ACCC as a 'rogue regulator', whatever that rhetoric might mean. We

have not responded to that rhetoric in any way at all. I think what this perhaps indicated is that in relation to this tribunal's decision, and I think three others in the past 12 months, the Australian Competition Tribunal has not considered our position to be that of a rogue but rather as being reasonable.

Senator CONROY—On a slightly different point, what are the implications of this decision for Telstra's campaign against the regulatory regime, as opposed to what I asked about before, its PR campaign?

Mr Samuel—Again, I could not comment on that because the campaign, although on its face appears to be directed towards the ACCC, as I think I have made clear on many occasions, is like water off a duck's back as far as the ACCC is concerned. We have our remit under the Trade Practices Act. We will conduct our responsibilities under that act independently, rigorously and transparently and fully accountable to the Australian community. I have suggested without having any knowledge of Telstra's strategy that the campaign is rather more directed towards government and parliament in general, and of course I cannot comment upon the impact of that on those parties.

Senator CONROY—Senator Minchin, how does the government feel about Telstra's campaign against the regulatory regime and that ACCC is a rogue regulator?

Senator Minchin—I am not sure that I wish to respond to an invitation just to make ad hoc remarks in a forum of this sort.

Senator CONROY—Following the decision of the ACT.

Senator Minchin—I have said in the past that—if you want a restatement of the position—the government believes the ACCC is an outstanding regulatory body, properly and capably implementing the tasks it is required to perform under law. On the other hand, corporations and individuals in this country, which is a great democracy, have a right to freedom of speech, consistent with the defamation laws of this country, to engage in public policy debate and express opinions. Whether it is Telstra or Fred Bloggs down the road they have a right to express opinions. The government, however, while watching this campaign by Telstra with interest, is not inclined to accept their arguments about alleged deficiencies with respect to the ACCC. I think as Mr Samuels properly says, this is a campaign seeking to have the government intervene to effect a particular outcome that Telstra seeks. So we observe that with interest.

Senator CONROY—The ACCC's press release on the day of the ACT's decision also states that this is the fourth decision made by the tribunal in less than 12 months affirming the ACCC's approach to assessing access prices. Has the ACCC ever lost an ACT appeal on a decision on a telco undertaking?

Mr Cosgrave—Not on an access undertaking.

Senator CONROY—The three other ACT decisions affirming the ACCC all related to the rejection of undertakings by the ACCC. Is that correct?

Mr Cosgrave—That is correct.

Senator CONROY—Did the ACCC apply similar pricing models in each of these decisions?

Mr Cosgrave—It certainly applied the same statutory test of reasonableness that applies to all access undertakings. One of them related to Telstra's line-sharing service and the other two to undertakings lodged respectively by Optus and Vodafone in relation to mobile termination services.

Senator CONROY—But I asked about the pricing model, not about the reasonableness test. It is not the same pricing model used in each of those because they are different areas. For ULL mobile transmission and LSS there is a different pricing model.

Mr Dimasi—The pricing principles that were applied are, I guess, not really comparable when you are talking about mobile termination, which was dealt with in some of the cases on ULL and LSS. I think it is fair to say that there was some commonality of principles in ULL and LSS, but they each dealt with their own set of circumstances.

Senator CONROY—Perhaps Telstra should get those lawyers from the Geelong petrol station instead of the ones they are currently using. You might want to give them the names! This looks like a pretty good strike rate for the ACCC, wouldn't you say?

Mr Dimasi—Yes. We are happy with those outcomes.

Senator CONROY—Four ACCC decisions in response to appeals from three different companies affirming three different approaches to access pricing?

Mr Dimasi—Yes.

Senator CONROY—You must be doing a pretty good job if the ACT is continually reaffirming across a wide range of areas?

Mr Samuel—I am happy to adopt the minister for finance's description of the role the ACCC is playing; if you would like that read into the transcript again, I am happy to have it done.

Senator CONROY—I suppose, though, an alternative explanation for the ACCC's success rate at the ACT is that the regulatory regime makes it next to impossible for any appeal to succeed. Basically, if the ACCC rejects an undertaking it seems almost impossible for it to get accepted, but the ACCC does not believe that this is the case, I guess.

Mr Dimasi—No, we do not believe it is the case.

Mr Samuel—It is perhaps worth studying the analysis undertaken by the ACT in dealing with these reviews. If they took the view that you just expressed, I suspect that their 273-page opinions could be reduced to one paragraph: 'It is impossible to overturn a rejection by the ACCC.' That is not what they do.

Mr Dimasi—We do not understand the logic of that conclusion, how one would reach that conclusion.

Senator CONROY—Just moving on to a related topic, I would like to talk about what an infrastructure owner needs to establish to have an undertaking accepted and, by extension, what they would need to show to win an ACT appeal. The ACCC has rejected 18 out of the 22 undertakings lodged under the telco access regime since 1997; is that correct? Does that sound right?

Mr Cosgrave—Those figures sound broadly right.

Senator CONROY—If there is no undertaking in place for an access product, the only regulatory avenue for access terms for these products to be determined is via arbitrations, which are not appealable on merit?

Mr Cosgrave—Bilateral arbitration between the parties, which is not appealable on the merits, correct.

Senator CONROY—The number of arbitrations that have been performed by the ACCC is currently at record levels; is that correct?

Mr Cosgrave—There are currently 41 arbitrations.

Senator CONROY—That would be a record level?

Mr Cosgrave—I believe that is the largest we have had. The history over the regime has been a little cyclical. We have had high levels before and in some years none whatsoever.

Senator CONROY—The 22 undertakings I mentioned before have been lodged by a range of companies; is that correct?

Mr Cosgrave—That is correct.

Senator CONROY—All 22 undertakings have been lodged by one of Telstra, Optus, Vodafone or Foxtel?

Mr Cosgrave—That is correct.

Senator CONROY—Why do you think there have been so many undertakings lodged that have failed to be accepted?

Mr Samuel—Because they have been unreasonable.

Senator CONROY—It is an expensive and drawn-out process to lodge an undertaking application; is that fair comment?

Mr Samuel—The expense is probably at our end in terms of the time that is taken to assess these, because they must be assessed rigorously and transparently in preparing reasons for our determinations. We try to limit the time taken, but ultimately it is a very time-consuming process and it does stretch out the deliberation on these issues. On any particular matter you could lodge successive undertakings, have them rejected and just lodge another one. I do not want to suggest any bad faith on the part of those that lodge them, but it would be well possible for those lodging undertakings to game the system by continually lodging undertakings which they confidently expect will be regarded as unreasonable.

Senator CONROY—I am interested in that because I am just working on the basis that someone who wants to put themselves through that process would only do it if they felt they had a reasonable chance of success, but you are suggesting that there may be other reasons?

Mr Samuel—I think any reasonable observer might conclude that some of the undertakings that have been lodged have not been lodged on the basis of a reasonable prospect of success. In fact, a reasonable observer might well come to the conclusion that the person lodging the undertaking had no belief that this undertaking would satisfy the reasonableness criteria of section 152AH.

Senator CONROY—So what does an infrastructure owner have to demonstrate to get their undertaking accepted?

Mr Samuel—I can take you to the various sections, but the fundamental provision is section 152AH(1). I will not recite that.

Senator CONROY—It just has to be reasonable.

Mr Samuel—Yes, it has to be reasonable, and there is a test of reasonableness set out in paragraphs (a) to (f), plus any other matters that we may want to have regard to.

Senator CONROY—'Reasonable' is a broad concept.

Mr Samuel—It is.

Senator CONROY—What is reasonable to you may not be reasonable to me and may not be reasonable to Senator Minchin.

Mr Samuel—That is why we undertake this process in a very transparent and rigorous manner and take account of the views of all stakeholders. I have endeavoured more recently, just for the sake of the public debate which, as I think we have said this morning, has been overladen with misinformation, to indicate to the public at large what are the three criteria of reasonableness. We are not limited to three criteria, but it is convenient just to summarise them in very brief form, which is: what is reasonable to the investor in terms of dealing with the investors' legitimate business interests; what is reasonable to access seekers in order to bring about a competitive environment; and ultimately what is reasonable to end users, that is, in terms of ensuring—as I have put it in the more colloquial sense—they do not get ripped off by monopoly prices.

Senator CONROY—The ACCC does not think these criteria are excessively broad?

Mr Dimasi—No. There is some further guidance in the legislation that guides us in our approach to reasonableness. Basically, there are things like efficient use of infrastructure and efficient investment. We are guided by those principles of economic efficiency that are built into the legislation. They are concepts that are understood and they are concepts that we apply and that we saw the tribunal apply in its decision as well.

Senator CONROY—There is no presumption of reasonableness, is there, at the beginning? They have to prove it; rather than they start off with 'This a reasonable offer,' and you have to disprove it? There is no presumption?

Mr Cosgrave—You are correct. Both ourselves and the tribunal have made clear that there is an onus on the applicant to satisfy us or, on appeal, the tribunal that the undertaking is reasonable. Equally, however, both ourselves and the tribunal have made clear that there is more than one path to reasonableness. You talked earlier about different economic modelling approaches. Again, both ourselves and the tribunal have made clear that you can adopt a number of approaches to reach a reasonable approach to an undertaking.

Senator CONROY—So they have to prove that to you and/or the tribunal?

Mr Cosgrave—The word used is generally 'satisfy'.

Senator CONROY—I am just looking at an exchange in the hearings of the ACT appeal of the Optus mobile termination undertaking, wherein Tribunal Member Davey states, 'We

have got to be affirmatively satisfied on everything, don't we, I hate to say it.' And Bannon QC said, 'Yes, Justice Goldberg, that is what the statute provides.'

Mr Cosgrave—They have to be satisfied that the undertaking is reasonable, yes.

Senator CONROY—In the ACCC experience, how difficult is it to positively prove the reasonableness of an economic model?

Mr Dimasi—I would not put it that way. It is not a question of proving that an economic model is reasonable but, rather, showing that the terms and conditions that you are offering are reasonable and that they are consistent with sound economic principles. I would put it that way rather than proving that a particular model is reasonable.

Senator CONROY—I am just interested, because I note that whenever the burden of proof is on the ACCC to prove the reasonableness of its model—for example, when it comes to go to court to enforce a competition notice—you have been very reticent yourselves.

Mr Samuel—Do you want to talk about competition notices or do you want to talk about—

Senator CONROY—When you have to actually prove the reasonableness of your own models, an example being when you have to justify a competition notice, it is something that you have not been excited about running into court to try and prove either.

Mr Samuel—Yes, but if we want to get into competition notices I think there will be some different issues there that we need to discuss that will be outside the issue of proving reasonableness of a model. I think any economist and any regulator will say to you that it is not difficult to prove that a particular set of terms and conditions are reasonable providing you have regard to the criteria and can demonstrate that to the commission. I would have to say to you—

Senator CONROY—So these people are wasting their time doing all of this economic modelling; you are wasting your time with all your economic modelling?

Mr Samuel—No. What I would say to you is that the material that has been put before us has not—as has been demonstrated by four reviews to the Australian Competition Tribunal—been reasonable in respect of any of the criteria that have been outlined. It is not an impossibility to satisfy the test of reasonableness.

Senator CONROY—I am just trying to understand how you do it. I just do not know many airtight economic models, that is all, and I have some experience in this area. I am just pondering how you actually prove an economic model to be reasonable.

Mr Dimasi—Again, I do not think it is a question of proving that an economic model is reasonable. I think it is a question of showing that the terms and conditions that you are offering are reasonable and that could be reasonably consistent with economic principles and the approach required in the legislation. I think the point is that, in looking at the criteria of reasonableness, we—and if you read the tribunal—could reach no conclusion other than that those terms and conditions were unreasonable. The point that I would make is if the terms and conditions offered are reasonable, they will get through. And when we say 'reasonable' we do not mean in some sort of vague way. The economic principles that are applied, which the tribunal, for example, looked at and discussed in its decision, are I think commonly

understood. I do not think the challenge is as high as you seem to suggest that it might be, if people intend to put in reasonable terms and conditions.

Senator CONROY—Can I draw your attention to an extract from the ACT hearing regarding the Vodafone appeal of the ACCC's decision to reject its mobile termination undertaking, to show how these requirements are actually playing out in practice in the ACT. This extract occurs in the context of a discussion about the ACCC's economic consultant Analysis's criticism of Vodafone's cost modelling'. Hutley QC says:

Now, I mean, one can see the variables that is going to be brought into that sort of exercise, and it is exactly the sort of series of variables about which minds are not just likely to differ but are guaranteed to differ and differ perhaps violently, because one has to make assumptions about 3G. One has to make assumptions about inflation. One has to make assumptions about wages. One has to make assumptions about traffic volumes. One has to make assumptions about data, the expansion of data service, and on it goes.

Tribunal Member Davey: This is not very constructive criticism. It is—

Hutley QC: No.

Tribunal Member Davey: That Analysis prove … so that they leave issues up in the air that really the applicant cannot address.

Hutley QC: Quite.

Tribunal Member Davey: So that it makes it a little more difficult for us to reach a conclusion on reasonableness.

What is your response to that extract? That is actually how it is happening on the ground, so speak.

Mr Dimasi—It is a little bit difficult to deal specifically with the extract, but let me deal with it in general. At the end of the day it is always open to the player to come and show us, 'These are our actual costs.' They can choose to come with models and an exercise of modelled costs or they can come to us and say: 'These are reasonable costs. These are our actual costs.' There are a number of ways they can do it. Certainly when you get into the exercise of modelling you can have minds that differ, and you can have arguments about modelling exercises; that is correct. But at the end of the day it is not a question of our having a preferred model or having, if you like, established out there that this is the only way that it can be done. All we ask is that people come to us with proposals that are reasonable and that are consistent with the criteria that we have in the legislation. I do not think that there is only one way and it is the ACCC's way; there are many ways that people can show that. I think so far—

Senator CONROY—From my reading of it, and I am not a lawyer, as I have always proudly said, this illustrates how difficult it is to prove reasonableness in the context of economic modelling in practice.

Mr Cosgrave—Rather than go into the quote, the two proceedings you have quoted from were the Optus and the Vodafone undertaking processes, both involving undertakings in relation to mobile termination. In relation to both of those services the commission has a principle of closer approximating charges to cost, generally by use of bottom-up modelling. In both of those cases the applicant chose to use a top-down model and in both cases the commission said that that is entirely open to the applicant. Reasonableness has a flexibility.

As to why they were considered to be unreasonable, in the case of Optus it sought to introduce two approaches to mark-ups to its efficient cost that the tribunal was not satisfied with; in the Vodafone case there were significant empirical issues with their modelling and with the way they had done it. So it was not a problem about the methodology; it was a problem about the application of the methodology.

Senator CONROY—Thank you.

CHAIR—We will break now.

Proceedings suspended from 3.36 pm to 4.00 pm

Senator CONROY—Looking over past ACCC decisions on undertakings and past ACT appeals decisions, there seem to be a few things that have to be satisfied to meet this reasonableness test. I would like to get the ACCC's views on these requirements. Firstly, it seems that the burden of rebutting any criticisms of the undertaking from any party that makes a submission on the undertaking rests with the infrastructure owner lodging the undertaking. Is that the ACCC view?

Mr Cosgrave—No. The ACCC view is that the access provider has to satisfy the reasonableness test under the act. It is not a question of rebutting propositions put by others; it is simply satisfying us as to the requisite test.

Senator CONROY—There cannot be any doubts raised by parties making submissions on the undertaking or else the ACCC cannot accept the undertaking. Is that a fact?

Mr Cosgrave—People raise doubts all the time. People raise points with you all the time in the assessment of these processes, some of which you accept if they have validity. If they have no validity, they are not accepted. It is part of the normal process of submission by parties in any regulatory process.

Senator CONROY—In the event of an appeal, the material that the party submitting the undertaking has to put on prior to the ACCC decision must be capable of dealing with any issue that may arise in the appeal, even if it was not previously raised by the ACCC. Is that a fair summary?

Mr Cosgrave—In my view, no.

Senator CONROY—Why not?

Mr Cosgrave—I do not have the act in front of me, and I notice the chair does. It provides that the tribunal is limited to the material before the commission, and there is a limited or virtually no ability for either party to put new material before the tribunal. That was put in for obvious reasons; the merit appeal people were raising wholly new arguments with the appellate tribunal and stringing out decision-making processes.

Senator CONROY—What is the ACCC's basic rationale for de-averaging ULL pricing in the way that it has done to date?

Mr Dimasi—Let me start, firstly, with the proposition of the ACCC's de-averaging. The bands that we have are not the ACCC's constructions. They are indeed Telstra's constructions. But, having said that, our view is that prices should reflect costs, and the structure of the de-

averaged approach can potentially give you a better reflection of costs incurred, which is consistent with the objects that we have to assess it against.

Senator CONROY—Putting to one side the quantum of any average price, what is the ACCC's position on the principle of averaged ULL pricing? Is it inherently unreasonable? Is it inherently inconsistent with the ACCC's approach to access pricing?

Mr Dimasi—Averaged over what? I guess it is not a question of accepting averaging or not accepting averaging. It is a question of saying: do these prices have a cost basis to them? That is the approach that we take. There is not necessarily anything sacrosanct about the various bands that currently exist and the averaging according to those bands. If a better argument can be made that prices can be made to reflect costs more efficiently with some other construct, we would be happy to have a look at that other construct.

Senator CONROY—It is not inherently inconsistent?

Mr Cosgrave—I do not want to be difficult, but what is—

Senator CONROY—What I said is: putting to one side the quantum, what is the ACCC's position on the principle of averaged ULL pricing? Is it inherently unreasonable? Are you saying that it is not inherently unreasonable if there is another construct?

Mr Cosgrave—What I am saying is that the information that has been provided to us indicates that you have significant variation in the costs incurred, and Telstra has attempted in the past to capture those differences in cost with the bands that it has constructed. I do not think anyone is saying that that was or is a perfect solution; that is one way of dealing with it. Forgetting about the quantum, if you asked, 'Would an average price across those bands be okay in principle?' we would have to say, 'Probably not,' given the arguments that have been made that the costs vary so significantly across different areas.

Senator CONROY—Let me be more pointed. In the ACCC's view, did the ACT's recent rejection of Telstra's appeal of the ACCC's rejection of its $30 averaged ULL proposal reject the reasonableness of an averaging approach to access pricing?

Mr Cosgrave—Yes.

Mr Dimasi—Yes.

Senator CONROY—Or did the tribunal simply reject Telstra's calculation of the appropriate averaged price?

Mr Dimasi—It did both.

Mr Cosgrave—The tribunal clearly found that averaging is not likely to promote competition, not likely to encourage an efficient use of infrastructure and not likely to encourage economically efficient investment by access seekers. The tribunal clearly found that overall averaging was not in accordance with the reasonableness test.

Senator CONROY—How are you going to see that people in rural and regional Australia will not have access to ADSL broadband?

Mr Dimasi—I do not see the connection.

Senator CONROY—It is not your problem?

Mr Dimasi—I do not see the connection between averaging and the provision of ULL that has been made.

Senator CONROY—If people have to pay $100 a month for that service do you think it will be taken up? I am just picking a figure there. Everyone is arguing that it is going to be a lot more, putting aside whether $100 or anybody else's figure is close.

CHAIR—It is probably very difficult for Mr Dimasi to answer that question.

Senator CONROY—It is actually not. He is very smart. He does not need your help.

CHAIR—Getting a figure like that and asking for comments is very difficult.

Senator CONROY—No, he is doing fine. He knows exactly what the question means.

Mr Dimasi—To answer that question, at the end of the day you have to look at all the policy responses that are available. For example, if the cost differs in providing broadband, the government has options to do other things.

Senator CONROY—So it is the government's job and you have no responsibility?

Mr Dimasi—We have a responsibility to make sure that the proposal in front of us is reasonable. If it is reasonable then we accept it.

Senator CONROY—If it is a reasonable average cost then you can accept it?

Mr Dimasi—If a reasonable argument can be made that averaging does not contravene the reasonableness criteria then of course would have a look at it. But so far the argument has not been made.

Mr Samuel—It is worth noting that the discussion that has taken place on this matter within Australia and elsewhere in the OECD has indicated that averaging is one way of dealing with the issue of retail parity pricing, which ultimately is a government policy determination. There are other ways of dealing with it, including appropriate structuring of USOs and, where necessary, cross-subsidies or high-cost surcharges—which are much more efficient ways of dealing with the issue of retail parity pricing and at the same time ensuring that you deal with the other criteria that Mr Cosgrove has listed that were regarded by the ACT as being criteria of unreasonableness in respect of averaging.

Senator CONROY—Thank you for that, Mr Samuel, and thank you for turning up today. I know you always give this a high priority. I am sure you will agree that it is far more enjoyable than sunning yourself in Moscow, and at least it is not your birthday!

Mr Samuel—Are you leaving us?

Senator CONROY—I am finished and I think that could possibly mean that you are finished, too.

CHAIR—I would not be quite so sure.

Mr Samuel—Senator Conroy has probably taken my seat on the plane!

CHAIR—Are there any further questions for Mr Samuel? I can probably think of some but, Mr Samuel, you are excused. I thank you and the other officers from the ACCC for their assistance today. I would suspect that is probably about as easy as you are ever going to get it.

Proceedings suspended from 4.12 pm to 4.34 pm

Australian Securities and Investments Commission

CHAIR—We welcome Mr D'Aloisio and other officers from ASIC. You have all been through this before so I will not go through my opening statement. I will pass straight away to Senator Joyce.

Mr D'Aloisio—ASIC may wish to say something.

CHAIR—My apologies.

Mr D'Aloisio—Thank you. Today ASIC will be represented by me and Jeremy Cooper, deputy chairman. Commissioner Jeffrey Lucy has asked me to apologise on his behalf. With my approval he is overseas on ASIC business. He is in Europe attending two regulatory workshops and a number of other meetings. He is, for example, chairing a two-day workshop hosted by the International Forum of Independent Audit Regulators, of which Australia is a member and Mr Lucy is the inaugural chairman. I apologise on Mr Lucy's behalf. I would like to make an opening statement. I have it in printed form and I would like to hand it up if that is convenient.

CHAIR—You have leave to table that.

Mr D'Aloisio—I would like to go through that. I add that I have also got statements on Fincorp, Westpoint and ACR, Australian Capital Reserve. I suspect they will be the subject of discussion; hence, I will be in your hands as to when you would like me to go into those statements. I will do my opening statement first and then I will be guided by you on how you would like me to do the other statements.

CHAIR—If you have those statements, you may as well table them now and they can be distributed.

Mr D'Aloisio—Turning to the opening statement, I am of course honoured to have been appointed as Chairman of ASIC for the next four years and I am really gratified by the support that I have received for my appointment. Clearly I will do the utmost to uphold the values of such an important position for Australia's corporate and capital markets and work constructively with our broad range of shareholders, including business and consumer associations, government and other agencies. I really do hope that over the next four years ASIC's actions will further improve business integrity in Australia. Our vision is that through our efforts and the efforts of a broader range of stakeholders we will not only maintain but improve business integrity in Australia and that, when benchmarked against global best practice, Australia's position will be at the top.

I would like to first congratulate the commission under my predecessor, Jeffrey Lucy, and deputy chairman Jeremy Cooper—and, earlier, Berna Collier—the executive directors and all in the ASIC team for their work and dedication to continuing to build a very successful organisation over the last three years. To me coming into ASIC three achievements do stand out in that period. Firstly, there has been the diligence in pursuing those companies and individuals who have breached the law, and that is demonstrated by tangible results, including a significant record of success of cases launched—a clear example of that is HIH. Secondly, the foundation has been laid for an ASIC that is much more proactive in working with

participants to list standards of corporate behaviour and thus market integrity. One clear example is the focus on compliance and surveillance in the superannuation industry; another is the introduction of the audit regulation team. Thirdly, the framework has been established for much greater international cooperation. An example of that is the participation in a number of key initiatives with the International Organisation of Securities Commissions, IOSCO.

These were achievements that were really over and above the business as usual and internal improvements aimed at sustaining the organisation. Jeffrey Lucy, I believe, can be proud that his legacy as chairman will be that he left ASIC in all respects a much better organisation than it was when he became chairman some three and a half years ago. His continuation as a commissioner will provide a rich source of corporate history and wise counsel, which will be important to me and to deputy chairman Jeremy Cooper. We intend to make full use of his skills and experience as a continuing and contributing commissioner.

Let me now turn to my term as chairman, which commenced on 13 May, some two and a half weeks ago. It is early days and my views are still forming. Nevertheless, what I have seen so far has led me with the commission and the senior team at ASIC to identify six things or priorities that we will address in the next 12 months. The six priorities which we will focus on in the next 12 months are as follows. Firstly, we will continue with business as usual for ASIC but with the key objective of lifting the operational effectiveness and service levels of ASIC for all stakeholders. Put simply, this will be to do everything we do better, with clearer outcomes measured against stakeholder feedback. This specific focus should translate into outcomes of improved and more cost-effective services for all those customers and stakeholders—for example, small and medium companies who deal with ASIC.

Secondly, and importantly for retail investors, particularly the baby boomer retirees and the generation following them, we will develop initiatives to assist them to better manage and protect their investments and wealth. The growth of direct retail investment—that is what I class as households and small super funds—has increased significantly. If you direct your attention to a chart that is attached to the notes that have been handed up, you will see that the overall retail market is $2.1 trillion, up from $1.2 trillion some five years ago. This increase can be seen in such things as the small super funds, the retail volume of trade on ASX and the retail investment in the unlisted sector.

We are seeing more sophisticated products aimed at retail investors such as derivatives, warrants, contracts for differences, CFDs, margin loans and hybrids. These developments have led us to reassess how we can work better to assist this retail sector. We are adding to the initiatives we have in this sector. We are setting up a special team to be led by a senior person to examine the risks for the retail sector and respond with specific projects to help address these risks. Examples of responses to be assessed and implemented are: quality advice in investor education on such things as the importance of diversifying risk through asset allocation and understanding risk and reward premiums for particular asset claims, for example, debt securities, which I will talk more about later; better, simpler and more targeted disclosure; blitzes on advertising of complex products targeted at the retail investor; and early detection and elimination of illegal operators. We expect that initiatives such as these will

over time translate into a more investment wise retail sector with better access to quality advice and one that is better equipped to manage investments and protect wealth.

Thirdly, for all investors to maintain and improve confidence in the integrity of Australia's capital markets, we will introduce new investigative and other techniques in the area of insider trading and market manipulation. Australia's stock of financial assets is now heading towards $3 trillion. The ASX exchange traded equity markets account for a significant proportion of this financial stock. We also have significant derivatives markets and OTC markets. ASIC monitors and enforces laws relating to insider trading, continuous disclosure and market manipulation and, while we have had some successes in deterring this behaviour, we feel we need to improve. A special team to be led by a senior person has been established to determine what additional actions ASIC in cooperation with ASX can take in the areas of continuous disclosure, market manipulation and insider trading. Part of the work of the team will be to assess new investigation techniques, building on best practice overseas. The team's remit will be broad. It will cover both exchange traded products and over-the-counter markets for equities, derivatives and other financial products.

The fourth priority focuses on small to medium business. As you know, ASIC is responsible for the legal infrastructure of the real economy, which is that part of the economy that produces goods and services, and the financial economy, which is the financial markets relied on by the real economy. Examples of that are in registration of companies, registration of charges, issuing of licences, relief orders and so on. These are all important administrative functions, many of which are conducted in ASIC's processing centre in regional Victoria, at Traralgon. Another special team to be led by a senior person will assess how we can use technology to improve existing services, add new services and reduce costs—that is, reduce red tape in providing this infrastructure. We believe that there are important benefits here to unlock for small and medium business.

Our fifth priority for all investors is to see what we can do to facilitate inward and outward investment in our capital markets. As an importer of capital and with more of our investments now going overseas, it is important to ensure that there are only the necessary minimum roadblocks to investment flows commensurate with adequate protection. This should facilitate both more liquid Australian markets and better access to offshore investment opportunities for Australia's investment pool, generating more competition, diversification and better overall returns for Australian investors.

The sixth priority—and also very important is that over the next nine to 12 months, while the ones that I have mentioned are going on—is that there will be an overall review of ASIC strategies, its priorities and initiatives. With a new chairman, a fresh set of eyes can look at the organisation. At the same time, our markets have changed significantly and are continuing to evolve at a rapid rate. A review will be conducted within the existing legislative framework of ASIC's roles and functions. It will be much asking the question: where does ASIC need to be in three to five years? We see this as an important initiative if we are continue to build on our success to date. And a key feature of that strategic review will be an extensive survey or external stakeholders to assist us to assess our priorities, what we do well and where we need to improve.

My approach with these six priorities may not entirely surprise you. It is similar to the approach I have adopted in my previous roles, particularly my last role as CEO of the ASX; that is, to identify immediate priorities and get on with those and, while doing that, to conduct a review of the organisation using a fresh set of eyes and to develop scorecards to measure and report on outcomes. I hope what I have said gives the committee an indication of the approach and priorities we will take in the next 12 months. In essence, it builds on ASIC's success to date but signifies a new set of priorities on operational effectiveness, improving results in the area of market manipulation and insider trading, assisting the important retail investor, facilitating capital flows and reducing red tape.

We will also review with external stakeholder input ASIC's priorities and initiatives for the next three to five years both in the context of ASIC's existing legislative framework and, importantly, in the context of continuing the evolution of Australia's corporate and capital markets. Thank you for allowing me to make an opening statement. I would be very happy to take committee's questions on ASIC, its future directions and so on.

CHAIR—Thank you. In relation to the statement Fincorp, Australian Capital Reserve and Westpoint, rather than getting you to read those out at some stage, the committee members have been distributed with those statements and they may well use them to form part of their questioning. So we will take through the course of your evidence, unless you have a very specific request to do otherwise.

Mr D'Aloisio—There will be some very specific things I would like to say about those three matters, so I would like an opportunity at least when we get to those subjects to talk to my notes as distinct from perhaps reading them out. I understand the difficulty in terms of time. There are some points I would like to make because I think they are extremely important issues for ASIC and for the retail sector.

CHAIR—I understand.

Mr D'Aloisio—I would like an opportunity to at least make the key points.

CHAIR—What we will do is, when we get questions in relation to those matters, which you undoubtedly will, you can make a statement as an introduction to answering the specific questions.

Mr D'Aloisio—Thank you.

CHAIR—Senator Joyce.

Senator JOYCE—If I could follow up on a question that I posed to the ACCC which was then referred on to you. If on a private equity buyout, as we saw with Qantas, there is an enticement of a $300 million incentive package for success of a deal, how can we deem that they would effectively countenance other bids when that sort of money is on the table? Do you believe that it should be the case that once these sorts of incentives are known publicly that they can no longer be impartial, therefore they have a conflict of interest in continuing in their position? We have seen now that the price of Qantas has gone beyond what the price of the purchase was and they were suggesting the purchase. The share owners would obviously have been worse off.

Mr D'Aloisio—In terms of the conflict issue, perhaps looking at the question in relation to Qantas more generally, certainly the role of the independent directors in setting up proper protocols for the handling of competitive bids in a takeover situation, including how incentives are disclosed to the market and how the independent directors deal with that, really that is a matter for the boards of those companies. I do not see that the size of the incentive would affect the principles involved in the way a board should handle the protocols of the potential conflict of interest and certainly it would not take away the independent director's obligation to ensure that they are doing the best deal for shareholders and must always be looking for the best result.

Senator JOYCE—Do you think there are no question marks over the duty of stewardship in finding the best outcome for all shareholders even though that there is, on one outcome, $300 million for them and on the other outcome there is nothing?

Mr D'Aloisio—That is where the decision the independent board members who make the decision should not be affected by whether executives get from one bid a higher bid or a lower bid. The central issue is what is in the best interests of the shareholders and you would be expecting the independent directors to be making that judgement.

Senator JOYCE—The answer is that you do not feel that there is any?

Mr D'Aloisio—I do not see it, from what you have said. I could think about it further, but I do not see the issue. The real issue with these things is to make sure that you have protocols to deal with coming to independent decisions through the independent board and clearly going with that is the disclosure to the market of everything so that the market can make up its own mind.

Senator JOYCE—You are responsible for foreign ownership guidelines, if they are part of the memos and articles of the organisation?

Mr D'Aloisio—My understanding is that we are not responsible for that. That is a matter for the relevant minister and the board, so we are not directly responsible for enforcing those. As I understand the way they work, the constitution of Qantas governs it. The board has got certain obligations. If the board does not achieve the outcomes of the 51 to 49 ratio, the minister can make an application to the court to get injunctions and so on. In terms of ASIC's own direct role, unless we see some Corporations Act issue, we would not be involved in that process, as I understand it at this point.

Senator JOYCE—Finally, do you have any opinions in regard to when a debt instrument becomes an instrument of control as opposed to an instrument of debt when the power of the debt instrument starts to become on a par, if not exceed, the power of the nominal shareholding?

Mr D'Aloisio—That is a difficult question. If I understand it correctly, you are looking at the economic power versus the actual voting power?

Senator JOYCE—What I am saying is, when the debt instrument becomes prescriptive to the extent that it determines the management structure and style of the company, therefore by proxy it has a greater presence in the day-to-day management of the company than a nominal shareholding, all the shareholding becomes is a licence to operate the debt and the debt

actually determines the operation of the company. Do you have an opinion on that? The reason I pose this question is that, on the same deal as do all private equity buyouts—because we have large debt holdings and looking at the balancing act between debt and equity—these debt instruments are debt in name only; by fact and by operation they operate as equity.

Mr D'Aloisio—It is a hard question to answer in the generality without looking at specific things, because in the Qantas deal in actual fact the debt was 'covenant lite', which I take it means there were very few actual covenants of the type I think you are referring to. One can envisage a situation where through a debt instrument you seek to impose conditions in relation to the way companies are managed, the way that ratios are kept in certain ways and cash flows are managed, so you could see through debt instruments imposing management-type covenants on the company. Again, it really has to be for the directors and management to figure out whether they would be prepared to recommend a deal that would, in effect—if we take your hypothesis, taking away in some respects the final rights of a board or of shareholders—be a big call for a board to make and would certainly be the subject of a lot of market pressure and speculation.

Senator JOYCE—Do you get the examination of the debt instruments in these private equity buyouts?

Mr D'Aloisio—They are referred to, they are in material and they are described, and from the description of them you get a feel for what all the essential conditions are.

Senator JOYCE—You do not actually sight the actual debt?

Mr D'Aloisio—Generally not. We would not actually sight them, no.

Senator JOYCE—Thank you very much.

CHAIR—Senator Sherry.

Senator SHERRY—Firstly, congratulations on your appointment.

Mr D'Aloisio—Thank you.

Senator SHERRY—Could you pass on my best to Mr Lucy? Thank you for your opening statement and also for your three statements. I think you rightly anticipated some questions in respect of Westpoint, Fincorp and Australian Capital Reserve—

CHAIR—I have conveyed those sentiments.

Senator SHERRY—Thank you. Perhaps if I pose a general question in those three areas and you have asked for the opportunity to respond. I have many detailed questions but I have a general question first of all. We have now had the apparent collapse of Australian Capital Reserve, which is up to $330 million for up to 7,000 investors. We have now had the collapse of Fincorp, with 8,000 investors up to $270 million. And we have had the collapse of Westpoint, and that is up to 4,000 investors, $300 million. That is three major collapses in the last two years and for a total of almost one billion dollars with up to 19,000 individual investors all around various property instruments. I note in your Fincorp document that you make the point that these types of Fincorp activities contain $34 billion in retail assets. We have not had a property collapse but we have had three major property instruments collapse in the last two years. I put it to you there is a pattern emerging. We have had three collapses in

two years of significance. There is a pattern emerging and there needs to be some urgent attention given to this sector, and we will explore that in detail. But do we not also run the risk now of a total collapse in public confidence in this sector which, in turn, may well lead effectively to a run on these types of constructs as people lose confidence and seek to withdraw their investment. As if we do not have a serious enough problem as it is, it may well contribute to further ongoing problems that may occur. There is a range of individual questions, so could you address the overview of what is happening in this area and how it can be effectively dealt with to minimise these sorts of collapses going forward?

CHAIR—I think it is appropriate for you to make the statement you want in relation to these matters and then answer specific questions.

Mr D'Aloisio—If I can do that this way and perhaps if I can ask you to have the Fincorp paper with you? If I can turn to the second slide in the Fincorp paper which has the debt securities held by retail investors, what we sought to bring out of that in those circles is the debenture area, the $34 billion that you have just referred to. That $34 billion, if you go into the body of my paper, is made up of listed and rated securities of $4 billion; listed and unrated, $8 billion; unlisted and rated, $14 billion; but unlisted and unrated, $8 billion. It is that $8 billion sector that the Fincorp type investments fall into. To just step back looking at that chart, the total market of debt securities for Australian household and small super funds we estimate at something in the order of $523 billion, of which $8 billion is in this category, or about 1.4 per cent. I think that is an important point in relation to the confidence issue that you have raised in terms of the impact on the overall market. It is important for the investors that are in that market, I accept that. Losing money is not what we want to see. But it is $8 billion of $523 billion, about 1.4 per cent.

Senator SHERRY—I understand that context but in the context of the individuals concerned, the thousands lost to them is catastrophic.

Mr D'Aloisio—Absolutely. I was not—

Senator SHERRY—There is a ripple effect.

Mr D'Aloisio—But I made the point as soon as I said it that I was not taking away from the impact. The point goes to the confidence issue and the flow-on in terms of the overall market. But for the individuals involved, it is extremely important, and I am not being insensitive to their concerns at all. In looking at it and approaching that sector and looking at this area, what we did and what this Fincorp paper says is that the first thing has been to look at what we have done in the past and what we need to do.

We feel that the first action plan out of it is to look at bringing in additional expertise in property and valuations to enable us to assess prospectuses, but we felt that we needed to go further and make this whole area a focus for ASIC, a clear priority, and hence I have outlined what I have called there the three point action plan. What we have said is what we want to do over the next six to 12 months is three things. We have appointed a team to treat this as a priority and to lead it. In relation to the existing debentures and other issues involved in the retail sector, we want to work with the trustees to really assess with the external property experts, the underlying business models and stress test those models to see what we learn from them and where the risk areas are and how we communicate those risks. And that

includes issues of valuations. We also in relation to new issues want to look at what changes we can make. I will not go through all my points of my three point action plan. But, thirdly, we want to do a lot more around the retail investor education area.

We have identified that three-stage plan going forward in this sector as urgent work based on, I guess, an assessment of what has gone on and where the problem areas have been. When you look at where the problems have occurred, they have occurred for a number of reasons. You have got debentures that have been issued in a market that does not list and does not rate them, so you do not have a secondary market in relation to these sorts of investments. You have also got money being raised and used in the property development area where the equity at risk, the actual debt equity ratio, if you like, or the share capital that has been put in by the promoters is very, very low. Built in with these things and what they seem to strive at doing is they have to actually raise more money from the public, and as the projects get towards the end of a cycle, issues around valuation emerge and if you have a slight movement in the property market you have got issues about whether you can then raise more borrowings to fund them.

It seemed to us that we can assist the industry by really focusing with the trustees, with the issuers and with the advertisers to, at the heart of it, really bring out much more clearly the risks for investors so that they can actually make more informed decisions about the risks in these products. We will come back to this three-point plan with your further questions.

Let me also make just one other point and then stop. When you look at the 19,000 or 20,000 investors that you have referred to, you see that the spread—and in the Fincorp case there were about 8,000—150 of those 8,000 had $200,000 or more, or 23 per cent of the value; the remainder had an average of about $17,000 to $20,000 in it. At an individual level what you are probably seeing there is some evidence that investors are spreading their risk; they are taking a bit of this but they are not putting in the whole of their savings. Although, again, you have made the point that some of the investors have in actual fact put in very substantial amounts of money.

Senator SHERRY—If I may just say very quickly, some have actually spread their risk across Fincorp, Westpoint and Australian Capital Reserve?

Mr D'Aloisio—But in fairness, they might have also spread it on listed securities and other forms of retail investment because, as I said earlier, the total retail investment sector is about $2.1 trillion of which debt securities are about $500 million. There is a lot of other investment that is going on. And I might add, in the priority that I outlined at the start in terms of the six priorities, when I talk about the retail investor in that sense, we are talking about the whole of the retail sector, the whole $2.1 trillion as being the focus, but much more specifically now the $8 billion of the $500 billion is the immediate focus that ASIC has. But we feel that we really need to focus on the whole sector and all of its investments. At the heart of it really is the ability for the retail investor to have a much greater understanding of asset allocation and risk management and the spreading of risk through asset allocation and really understanding risk-reward premiums and understanding, at the heart of these sorts of ventures with property investments, just what the risks are where people try to develop property using, in effect, 80 or 90 per cent debt and very little equity, and what can come undone.

Senator SHERRY—Thank you for that. In terms of the response to date, compared to the response we have had in the past, I have to say that this is a significant advance on where I think we have been on previous occasions, albeit that was before the collapse of Australian Capital Reserve. If we deal with Australian Capital Reserve first, at what point, if any, has ASIC been able to examine the issues surrounding the collapse of Australian Capital Reserve?

Mr D'Aloisio—If I take you to the attachment to that paper, there is a paper there also and I have produced a similar chart for Fincorp, typically what you are looking at with Australian Capital Reserve is it raised money over a six- or eight-year period, going back to 2000, and it issued some nine prospectuses. What we have tried to encapsulate in that time line in that chart above the line is where ASIC in relation to each of those prospectuses had had concerns and how it sought to resolve them through disclosure with the particular operators.

When we review those prospectuses we review them in terms of the disclosure and the valuations and numbers that are put in them. And where we have concerns we get those rectified. This went right through to March of this year when the last stop order was issued. There was a stop order put in relation to that ninth prospectus, because ASIC was not satisfied in relation to valuations and cash flows to let the prospectus continue so it issues a stop order. That stop order was appealed. And in that last two-month period the trustee also became involved with ACR in terms of seeing what the position was and what was going on. ASIC was kept informed of that, and that ultimately led to the directors themselves coming to the view that there was an issue that warranted them going into voluntary administration, in effect to protect the position where they were at, with a view to seeing now with an administrator what can be done to maximise returns.

Our role with ACR and Fincorp in the initial stages is very much about working with the administrator to see what can be recovered. But clearly in the case of Fincorp that has now moved to investigation phase then to seeing what happened and what third-party claims might be open. Whether or not ACR goes in that direction, I do not know at this stage because it is very early—this only happened on Monday and we need a bit of time to assess all that and to allow the administrators to do their job.

But coming back to the point, ASIC in relation to ACR and in relation to Fincorp, through the monitoring of prospectuses, which you know need to be filed but not registered with us under the old system, has sought to ensure that disclosures were made so that investors could make decisions. But the issue that we have been grappling with since that is that we say to ourselves, as you would say: given that we did all that, why did it still happen? Clearly, that is what the three-point plan that I have outlined to you is about. We really feel that we have got to bring in additional expertise to help us assess these underlying business models, how they work and whether they have got inherent flaws in them, and then work with the trustees, the issuers, to see what we can do in relation to the existing ones and, just as importantly, in relation to any new issues.

Senator SHERRY—Who was the trustee in the case of ACR?

Mr D'Aloisio—Permanent.

Senator SHERRY—Were they the trustee for the whole period?

Mr D'Aloisio—I cannot answer that. I can take that on notice. I am not sure.

Senator SHERRY—That is fine. Because in examining Westpoint and Fincorp at previous hearings, both here and at the joint committee, the trustee role has not attracted any attention, I recall. Lots of other issues have attracted attention but this one has not. I just want to take the opportunity to start with the trustee entity. You mentioned you had contact with the trustee entity in the case of ACR. What did that involve? What were you attempting to identify with the trustee? What were the issues that the trustee—

Mr D'Aloisio—Because we had issued a stop order on the prospectus because we were concerned about valuations and cash flow, you would naturally be concerned, and you would assume the trustee was also, and the trustee was. So what you were looking at were discussions between the trustee, the company and us to see what the situation is and how significant is it? Is the group in difficulty? If so, what can be done, or do the directors think that it is okay? Ultimately it is a judgement for the directors because really they have got the information. They are looking at it. The trustee plays a role in working with the directors, and we play a role. As you know, to put something into liquidation, or to make premature orders, can actually cost investors a lot of money as well. You really have to get the judgement right about whether everything is being done to keep the organisation going, and if the directors get to the view that it cannot, it has to be a call by the directors, and if the directors do not make that call then it is an issue for ASIC or for the trustee.

Senator SHERRY—Let us go to the role of the trustee, and I do note with interest that in respect to Westpoint and Fincorp the trustee was an entity called Sandhurst. They had the same trustee, but that was not the case with ACR. What is ASIC's understanding of the role of this trustee entity? What is your understanding of their role and do you have any observations to make about their role? If we start specifically with ACR, were they doing their job effectively and properly?

Mr D'Aloisio—At this stage, in terms of my involvement, I have not seen any evidence that would indicate that the trustee was not doing its job or that the directors were not or that we were not. We need to bear in mind that you will get corporate failures. I accept that getting three in this area is much more significant than that. But, speaking more generally, the trustee's obligations are about exercising due diligence to see whether the borrowing can be repaid, guarantees can be met and so on. Really, you would expect that a trustee would be keeping an eye on what is happening with prospectuses, what has been filed and whether the cash is there. You would be expecting they would be keeping an eye on the underlying valuations to see that the valuations accord with what has been said, that audit reports have been filed and that they are unqualified. You would be expecting the trustee to be doing that and I have no reason to think that the trustee in ACR has not done that in this case. I do not have any information otherwise.

Senator SHERRY—Sure. But my understanding is you do not have a direct regulatory role in terms of the trustee entities, do you? They are state regulated?

Mr D'Aloisio—The trustee's obligations are under, I think, 283DA of the Corporations Act. The trustee then has a number of powers under that act to act. We then also have a number of powers to act, to compel the trustee and to act ourselves. It would not be correct for me to say that this is a state issue and we at ASIC do not have any role over the trustee—

Senator SHERRY—No, I am not suggesting you do not have any role.

Mr D'Aloisio—I think the powers over the trustee, when you look at 283DA and so on of the Corporations Act, are quite extensive. We ourselves worked with the trustee. In fact, Deputy Chairman Jeremy Cooper may explain it better. In Bridgecorp we in fact went to court instead of the trustee.

Mr Cooper—Yes, we have a power under the Corporations Act to apply to the court for directions or orders where we think the trustee may not have lived up to its duties under section 283DA, and in fact we did this last year in relation to an entity called Bridgecorp, which is also in pretty much the same business. It is a debenture issuer of property related investments and so on. That was a case where it came to our attention that there were some issues and we used that remedy, by taking the trustee to court in effect and getting orders to remedy the situation.

Senator SHERRY—I am pleased that you have acknowledged that there is an extensive role for ASIC in respect to trustees and their duties and obligations, but it is not a total role, is it?

Mr D'Aloisio—It would be a secondary one.

Senator SHERRY—My understanding is that there is a role in terms of state entities in this area?

Mr D'Aloisio—I would have to take that on notice. From memory I think there is but I would not be able to help you very much with the details.

Senator SHERRY—I have tried to do some research as to which state entities are responsible for their aspects of these trustee entities. You have accepted and acknowledged a role and power in respect to these trustee entities. My understanding is that ASIC did write to three trustee entities. I have been looking for the dates but I could not find them. Can you confirm that ASIC had written to at least three trustees?

Mr Cooper—That is right and in fact that relates to the Bridgecorp matter. Having had it come to our attention that there were some issues in relation to the Bridgecorp entity, we thought it was prudent on our part to remind trustees in the area. Do not forget the trustee landscape is much narrower than it used to be because all of the other schemes have migrated to the managed investment scheme regime, so the trustee landscape really only relates to debentures. As you rightly point out it was only three entities. All we really did was remind them of their duties and, from memory, we pointed out in very broad terms the issues and actions that we were taking with Bridgecorp. We were really bringing the matter to their attention and that we would take action in this area.

Mr D'Aloisio—In relation to the three-point plan that we talk about with Fincorp, one of the central features of that will be much more intensive discussions with trustees about the existing debentures and also in relation to future issues. If there is a concern with these they are about the business models, and it is also about the unrated and unlisted nature of the securities that are issued and the advertising that is associated with it. We feel we have to look at all of those issues with the trustees and with the issuers and not to segment those issues out because they are all interrelated. If you have a good business model and business plan and if

you have got the right level of equity, the right deed between the trustee and the debenture issuer and the advertising is monitored, then these can still be instruments that can be used to raise capital in an efficient capital market and develop properties and so on. You need to look at that whole picture.

Senator SHERRY—I am in screaming agreement with you about that new approach. It seems to me that it is a new approach that you are outlining going forward. It does beg the question, however: why was this approach or something more proactive not carried out after Westpoint or, if not in the case of Westpoint, then Fincorp? Why is it that this more proactive role of ASIC is now being implemented after three such collapses?

Mr D'Aloisio—These questions are always hard to answer because we are evolving and building on what we do. Certainly there is no question that ASIC, from what I have seen in coming in, in trying to deal with these issues through the prospectus, through the disclosures, through the work that is being done, has been alive to the issues and working to resolve them—

Senator SHERRY—If ASIC had been alive to the issues, what you have outlined in terms of proactive action going forward would have commenced earlier in the piece. It may have commenced last year. You are leading a proactive push; you have outlined what that is. But I go back to the question: after Westpoint occurred approximately two years ago, or even after Fincorp, why wasn't this proactive program that you are outlining or something like it commenced then? We have now got a third collapse and your action has now commenced.

Mr D'Aloisio—A simple answer is I was not there, but I think it is a case of things evolving. With the benefit of hindsight, when you re-examine things you ask the team what else can we now do in light of this and what were we doing? The team at ASIC feels that we have got to do more in these areas and accept that we have not done enough in the past. I do not think that it is more complex than that.

Senator SHERRY—It is a very complex area. The exploration of the Westpoint issues, particularly in their complexity, is very significant. I accept you were not here when we have explored those issues.

Mr D'Aloisio—I am sorry, I was not meaning to use that as an excuse.

Senator SHERRY—No. I accept there are limits in terms of what you could do.

CHAIR—Mr Cooper, did you wish to say something?

Mr Cooper—It is just a very minor point. Sadly, for an existing scheme where some of these issues come up, typically the outcome is often a shutting down or putting into insolvent administration. We need to remind ourselves that, because some of these issues are inbuilt in the business model that is being run and the gearing levels and so on, often, even with the best will in the world, the outcome is one where the scheme halts and the losses are crystallised and so on. Not all of the chairman's ideas head in that direction, but often where you have got an existing scheme that has got its investments, borrowings and so on, regrettably that is the outcome.

Senator SHERRY—I asked earlier about the correspondence where you wrote to three trustees. Can you refresh my memory on the three trustee entities you wrote to and when, approximately?

Mr Cooper—The remaining players in the industry are: Sandhurst, as you have mentioned; the chairman mentioned Permanent, which is in fact the merged trust company and Permanent; and the third one—I had better be careful; I am not exactly sure who is left. There were many companies that acted as trustees, but I would not like to name one that is now not in the business, so could we take that last one on notice?

Mr D'Aloisio—We will take that on notice.

Senator SHERRY—Why did you select those three trustees to write to?

Mr Cooper—Given what I explained before, the landscape is narrow and I have a feeling that was the whole field.

Senator MURRAY—The Managed Investments Act had that effect.

Mr Cooper—Correct.

Senator SHERRY—I may be incorrect but my understanding is that there were more players in the field. I am interested as to why you have written to these three in particular. Was Permanent one of those three that you wrote to?

Mr D'Aloisio—Yes.

Senator SHERRY—When did you write to the three trustee entities?

Mr Cooper—It would have been in the second half of 2006.

Senator SHERRY—You said you wrote to them to remind them of their duties. What about going a step further in light of Westpoint and obviously what was occurring with Fincorp? What about a bit more intensive investigation and discussion as to whether in fact they were carrying out their duties at that point in time?

Mr Cooper—As the statements on both ACR and Fincorp show, they were at least two debenture schemes where a number of activities were going on. We had the court action in Bridgecorp so there is a third, and we felt it was timely to remind the trustees of other debenture schemes about their obligations.

Senator SHERRY—We get to this issue of timeliness. We can explore some of the warning signs as we have in respect to Fincorp and Westpoint, but was it timely? Did ASIC leave it too late to write to those trustee entities? Given. in the case of Fincorp and Westpoint, ASIC's own actions over a number of years and public warnings from a variety of sources, which we can go to and have on previous occasions, did ASIC leave it too late to go to those trustee entities?

Mr Cooper—No. It is very much a chain of events. Let us go back to 2004, and you will see that this pops up in the context of the ACR chart, that in fact in 2004 ASIC did a surveillance of the whole industry. It looked at all debenture issuers and that led to the report in early 2005, mainly aimed at warning consumers but it was a very widely covered report. We issued media releases and we were very specific. We were specific about naming some of the entities involved. We were specific about the issues, being valuations and some of the

things that the chairman has talked about. That was 2004, and you will be well aware of the amount of media coverage and commentary that has been going on since that time. So to say that we only wrote to trustees late in 2006 ignores the fact that we have been banging on about these issues both to consumers and the market generally and to trustees now for some years.

Senator SHERRY—Sure. But it begs the question, frankly: how many retail investors actually understand that activity that you carried out? And it still comes back to a fundamental question that really does worry me. With the publicity, the reports, the reminders and the actual level of intensity of examination, were these trustee entities doing their job or not? That is what seems to have been missing, at least to this point in time.

Mr D'Aloisio—I do not believe that we can give you a view on that. We have not done enough investigation to be able to look at whether or not this is an issue to do with the trustees. Intuitively this is a whole-of-industry issue in terms of what I said earlier about looking at the business plan, the unrated and unlisted nature of the securities and the level of investor education. The fact is that you have to accept that investors themselves need to carry some responsibility in relation to these investments. When you look at that you feel that certainly asset allocation and risk and understanding what a risk-reward premium is—if someone says, 'Put it with me and you'll get 10 per cent,' what does that actually mean and how do investors read that? It is that whole approach that is new in our thinking in going forward to deal with these issues. When we analyse it back it will not be one entity or one group that has not done something. It is a combination of factors. It is a sector that is about $8 billion and, as I come back to, it is unrated, unlisted, not subject to a lot of rating by investment advisers and financial planners and tends to rely on media advertising to get those with the average age of 60, the baby boomers, that seem to be investing in them. You have got to look at that total system, tackle all of it and not really try to apportion it to anything.

Senator SHERRY—I am in screaming agreement with you. You obviously would not be aware, but in the context of Westpoint we thoroughly examined it. One of the issues we had not looked at was the role of the trustee entity, but we thoroughly examined at previous committees the role of the adviser and the commission based selling that occurred in that context. We looked at the role of self-managed superannuation funds, where significant investment went through, and frankly my critique was of the ATO's lack of attention, at least until recently, in that area. There is an important set of issues around the role of research houses. There is an important set of issues around the auditors. I have described it as the perfect storm of a combination of issues and I have made some critique of ASIC's role in respect to Westpoint. I accept there is a range of issues, but it seems to me what is important is actually achieving a set of solutions to the range of issues so far identified to minimise the ongoing problems.

Mr D'Aloisio—That is why the three-point plan is there. It is very much working with the trustees, with the issuers and with the advertisers to tackle this whole problem, rather than as a first run of blaming a particular group. In the first instance, as industry and ASIC, we need to work together. I am suggesting the focus team work at these issues in the next six to 12 months. In that period, with the benefit of the further investigation of Fincorp and analysis of ACR, I feel that we will get a clearer picture of whether these things are fundamentally

flawed in the sense that there are problems or whether they are still a very efficient form of raising higher risk capital for higher risk ventures, which in our system, when you look at other areas where there is risk, should not be seen as unusual.

Senator SHERRY—I would like to highlight two further issues. I want to be fair to you because you have not been at previous hearings when these matters have been raised. At least in the context of Westpoint—and I am not sure to what extent in the context of Fincorp or Australian Capital—there are still outstanding issues about PI insurance for planners who are in the advice space. Primarily it is a Westpoint issue. That has not been concluded yet. There is still the issue of FICS—and FICS has a role in respect to Westpoint—and the ability of FICS because of the limit. These issues have not been finalised and I am not getting a sense of urgency from ASIC that these are the issues and ASIC is doing its best. I accept there are limitations on ASIC. There are whole-of-government issues here.

Mr D'Aloisio—I have indicated very clearly, in the priorities that I outlined at the start, the retail sector is a key focus. What I have said in relation to Fincorp, ACR and Westpoint is that it is absolutely the key priority for ASIC going forward, but around the plan that I have outlined and not around a plan of legislative change or anything of that nature. It is really working with the industry to deal with these issues. Debt securities unlisted and unrated, first. Debt securities more generally, second. Then you get more into some of the equity side. Do not forget that there are risks also around CFDs and margin loans. You mentioned earlier that we are in reasonably good times and there are not issues there, but you can expect that if markets tighten there could be issues in those sectors. That is an example where we have been more proactive in trying to position to see what the issues could be down the track, rather than just responding or waiting for an issue to emerge. This is a very proactive priority.

Senator SHERRY—It is proactive now. You have gone into proaction mode, at least on what has been outlined to the committee now, and I accept that. But there are limitations to the extent to which ASIC can be proactive. Some of the issues I have touched on are not ASIC responsibilities.

Mr D'Aloisio—I am just talking about ASIC's responsibilities.

Senator SHERRY—Yes, but I would put to you that there are areas that are clearly not your responsibility, like the promissory note issue that you have touched on. That has been debated for some time. I can recall Mr Lucy suggesting publicly to add two noughts to the $50,000, bringing it to $5 million. No action from government on that yet. You do have a role in identifying causes and issues where there may be required legislative action and/or regulation. You do have a role in giving advice to government in a whole range of areas.

Mr D'Aloisio—I accept that. I certainly am aware of that. Again, on the promissory note issue we have in fact written to Treasury, as the Westpoint note says, to see if that threshold could be lifted.

Senator SHERRY—Just on that point, and this is not a critique of you because you have only been in the position a few weeks, but what date was that written?

Mr D'Aloisio—It is on the last page.

Senator SHERRY—You wrote to the Treasurer on 24 May. I can recall Mr Lucy's comments publicly were some time in the latter part of last year—add two noughts to it. It begs the question, why on earth has it taken six months from the time of Mr Lucy's public comments about the promissory note 'loophole' to formally write to the Treasurer on that matter?

Mr D'Aloisio—I suspect there would have been a lot of discussions with Treasury in the meantime and then that culminated in this letter. I do not know, but that would be my thinking.

Senator SHERRY—Was that letter of 24 May from yourself or Mr Lucy? I am trying to identify the author.

Mr D'Aloisio—That would have been a letter from one of our executive directors.

Senator SHERRY—I do not want to be unfair to Mr Lucy, because he is not here. He raised the issue publicly, and in my view rightly, last year and then it takes six months to formally write to the Treasurer on what is an important gap in regulation that he himself had identified.

Senator MURRAY—And the courts have identified.

Senator SHERRY—And the courts have identified. The issue of the promissory notes went back long before Mr Lucy's public utterances on that matter and in fact was the subject of much discussion here with Mr Cooper and Mr Lucy about the difficulties of regulation given the promissory notes loophole.

Mr D'Aloisio—I am just looking at the chain of correspondence in the letter. Discussions have gone on from August 2006, March and then culminating in the letter.

Senator SHERRY—The overall context that I am trying to get to is that I am certainly very worried. We have had three major collapses, without a property collapse. Confidence in the retail market is going to be seriously impacted. It is getting worse as a result of the last collapse. The ongoing impact of collapsing consumer confidence in this sector in itself may create more problems further down the track if those investors seek to withdraw their moneys. That is going to compound whatever problems are there at the moment.

Mr D'Aloisio—I do not want to take this three-point plan to be an action point to worry investors. I believe as we do the work within that $8 billion sector there will be a lot of investments which are sound, well run, and well managed; which have good values and good properties; and which will make good profits for the investor. We need to be careful that we bear that in mind as well. I am not disagreeing with you in the sense of the thrust of the issue. Clearly, as the new chairman coming in, having three of these at the one time concerns me and says, in talking to the team at ASIC and the commission: 'Let's learn from what we have done to date. We have to make this a real focus. Let's give it a real priority shot over the next six to 12 months but take it as an overall approach.' Quite clearly I am aware of my responsibilities and, if at the end of that period we feel there is a need for legislative assistance, I will write to Treasury. I do not see that at the moment.

Senator MURRAY—I would just like some clarification. Earlier you indicated that the sector that we are talking about, unlisted and unrated securities, is $8 billion.

Mr D'Aloisio—Unlisted and unrated, yes. There is a chart there.

Senator MURRAY—Yes. Unlisted and unrated is $8 billion. Did I hear someone say that these three together are $1 billion?

Mr D'Aloisio—Yes, it is $1 billion.

Senator MURRAY—So it is one-eighth of the subsector. I want to make a clarification. Whilst the sector's problems do not reflect a problem with the total $523 billion sector, in the particular subsector $1 billion out of $8 billion is a very high figure, and I would assume that there is more risk apparent in the remaining $7 billion because of the height of that figure. Do you agree with that analysis?

Mr D'Aloisio—I would make two comments. The first is that it should not be assumed that the $1 billion is lost. That would be unfair to the investors. There is recovery and you will recall that in Fincorp there is a minimum of 30c in the dollar.

Senator MURRAY—I did not use the word 'lost'. I said that is the amount that is at risk.

Mr D'Aloisio—Yes, so it is not actually lost. In terms of it being 12½ per cent of that $8 billion, I agree with you; that is what is behind the thinking of really making this a priority area. Does it mean that there will be a lot more? I do not know.

Senator MURRAY—My question is whether those remaining constituents of the $8 billion, their external auditors and their trustees, need to be directly contacted.

Mr D'Aloisio—The three-point plan does that.

Senator MURRAY—It does that?

Mr D'Aloisio—That is the objective. The first part of the plan is to look at the existing ones. The second is to look at the ones that might be proposed. The third is to look at investor education. In other words, the third is to put more effort into helping investors on three things: understanding diversifying risk through asset allocation, understanding risk-reward premiums in terms of products and understanding, where products are unlisted and unrated, the underlying business models so that they can better assess whether a business model will deliver the sort of returns that the promoters are talking about. We feel that, if investors do that analysis, what you are likely to see is that they will spread their risks. They might want to have a punt or speculate. For example—as happens on the listed market—investors might want to invest in junior miners in Perth. They might speculate on that.

Senator MURRAY—I am sorry to interrupt you. I understood that. Really what I was trying to get clarification on whether it is your view that the $7 billion remaining out of the $8 billion is also at risk.

Mr D'Aloisio—No, that is not my view. I do not have enough information to form that view. You will find in that group there will be very good investments that are doing well.

Senator SHERRY—We are going to go to some other senators, and after we do I am going to come back on some quite detailed questions. Do we know approximately how many entities are involved in that $8 billion?

Mr D'Aloisio—I direct you to the notes on the chart.

Senator SHERRY—Which paper?

Mr D'Aloisio—It is the pie chart on the Fincorp paper. I direct you to note 3. You will see that there are 135 issuers of debentures with total assets of $95 billion. If you keep reading down you will get to the highlighted unlisted and unrated, with total assets of $17.8 billion, with debentures on issue of $8 billion. I think that should be 83 issuers.

Senator SHERRY—Yes, 83 are unlisted and unrated.

Mr D'Aloisio—Out of 135 unlisted and unrated.

Senator SHERRY—Those 83 are effectively a priority now?

Mr D'Aloisio—Yes, not because I have any information about them but because of what the nature of the issue has highlighted. If there is not an issue, that is great; investors need to know that. If there is an issue, investors need to know that. It is really saying: let us look at it.

Senator SHERRY—That approach now is fine. What you have outlined is proactive and seems to be targeted. Would you accept that not just in this sector are there consequences for consumers but it does impact a bit more broadly in the other sectors of the financial sector indirectly? For example, in respect of Westpoint the role of planners and commissions was highlighted. Whether it is correct or not, some consumers would wonder more generally about the role of planners and commissions. With the issue of self-managed superannuation funds, some individuals would worry more generally about self-managed superannuation funds. There is a spillover beyond the immediate impact of that particular sector.

Mr D'Aloisio—I believe that when you look at investments you will look at different sectors and form views. It is hard to see that there would be a spillover from here to Australia's equity markets. The retail investment in Australia's equity markets is between 20 and 25 per cent of the value of trades on that exchange, which must be $500 billion or $600 billion on that market—very significant amounts. What is happening in this unlisted and unrated area is not really going to spill over into that form of investment.

Senator SHERRY—I agree with you.

Mr D'Aloisio—Looking at the knock-on effects, the difficulty with this sector is very much that the advisers do not put it in their models because they are unrated and somehow it is the advertising that seems to cause the issue. I am not clear yet, but, to we deal with it reasonably quickly, as I have outlined, it seems to me that there should be no risk of a confidence spill to other sectors. That might not have been as clear as I intended.

Senator SHERRY—I will give you an example in the sector that you have highlighted. I have met with financial planners regularly about a whole range of issues, some of whom have said to me that they had absolutely nothing to do with Westpoint. However, a correct observation would be that they are being unfairly criticised as planners, be it about the role of commissions and the role of planners, in that particular collapse. So there is a spillover impact. It is similar with some aspects of superannuation and self-managed funds; there is a spillover consequence. I am attempting to highlight that because I am a little concerned that there is perhaps not enough recognition of the spillover impact in other areas which does hurt confidence and does hurt the general view or perception of planners or self-managed super funds much more generally.

Mr D'Aloisio—I do not see that risk at this point from this sector. This is unfortunate and it needs to be dealt with, but there is a lot of confidence in the Australian markets. There are a lot of assets available to the retail investors. There is some very good advice out there for retail investors in terms of how they should approach things. I would like to see this as a way for us to work with financial planners and trustees in the industry to really make sure that the very thing that you are concerned about does not occur and that there is no follow-on effect.

Senator SHERRY—I would like to clarify the 83 before I pass over to my colleagues. Are the 83 unlisted and unrated entities clearly separate, independent entities or are any of them interrelated? I am trying to get a sense of whether they are actually separate, individual entities.

Mr D'Aloisio—We will check and confirm that, but I am fairly sure these would be 83 different entity groups. Within each of them there might be a group as you have with an ACR or a Westpoint. In fact, the number would be far too small if that were the case, because Westpoint had 38 entities and Fincorp had 23.

Senator SHERRY—Yes, I just wanted to be clear about that.

Mr D'Aloisio—We will check that.

Senator MURRAY—If that is true, there is an interesting phenomenon here. If you have three comprising $1 billion and 83 comprising $7 billion then the others must be much smaller.

Mr D'Aloisio—Yes.

Senator MURRAY—It seems to be the biggest, then, that have fallen over. Is that the right conclusion to make?

Mr D'Aloisio—I can accept the first part of the statement—that there are a lot of smaller ones. That is right. But I do not have the data on whether the three were the biggest or not. We could get that and have a look for you. I just do not have that at the moment.

Mr Cooper—I have the information on the trustee. As you are closing off now, I thought you might like to hear that.

Senator SHERRY—Yes, thank you.

Mr Cooper—We did send a letter to all trustees in the industry, of which there were about 12, so we were quite a way off with three. That letter went out on 4 September 2006. Effectively the substance of it was pointing out to them what the judge in our Bridgecorp proceedings had said about the duties of the trustees.

Senator SHERRY—You sent correspondence to 12 on the basis of the Bridgecorp clarification. The other letter I asked about that you acknowledged was the letter to three.

Mr Cooper—That is confusing as well.

Senator SHERRY—Was that a separate piece of correspondence?

Mr Cooper—There was some media on it. It may well have been three trustees having something to say about having received a letter from ASIC, but I have just been told the

number is 20. I am sorry for changing it all the time. We need to go back. We sent out a letter to 20 different trustees.

Senator SHERRY—This is not terribly impressive. We have gone from three to 12 to 20 in the space of a minute.

Mr Cooper—The three was always wrong. I think that comes from the three trustee companies having something to say about having received a letter from ASIC. That is where the three has come from. The number is 20.

Senator SHERRY—Could we be provided with a list of those entities? Obviously you cannot do that now.

Mr Cooper—I am sure we can do that for you.

Senator SHERRY—Perhaps we could have a little bit of basic information on where their headquarters are and who at a state level is responsible for their regulatory oversight, to the extent that state governments are responsible in this area. I must say there has been a lot of research from our point of view to try to identify which particular government departments, statutory authorities and entities at a state level are overseeing these trustee entities. There is an added on issue that they are operating interstate, which begs a fundamental question for another time.

CHAIR—Senator Watson has a bouquet and I am not sure if Senator Bernardi has a brickbat, but we will take it on notice in that order.

Senator WATSON—Thank you for your opening statement. Your six priority items too have impressed me to such an extent that I will not ask questions on some past problems because you appear to be on the right track for avoiding similar occurrences in the future. I congratulate you on that proactive approach, particularly the blitzes on advertising of complex products, which I think are part of the problem. You have identified the nub of the three areas in your priorities and I wish you well in the execution of those goals. I do not have any further questions on this issue, but I do have one in relation to some possible insider trading and possible conflicts of interest in relation to a Tasmanian company later on.

Senator BERNARDI—I have brief questions covering a number of different areas. Firstly I will give you a bouquet as well on preparing these documents for your opening statement and the information about Westpoint, Fincorp and so forth. Following up from what Senator Sherry said about the disclosure regime, in your response you suggested that it was about helping people to understand the level of risks that were being taken. In regard to debt securities, wouldn't it be a very simple matter of disclosing whether they were secured as a primary debtor, a mezzanine debtor or an unsecured debtor by a simple system of stars or colours of PDSs or big, fat printing on the front?

Mr D'Aloisio—Yes. The disclosure around whether it is secured or unsecured, what it is secured over, how it works and whether other securities can be issued by other companies in the group that take precedence over the securities that you have does help. The other issue that we have in a number of these cases, as in ACR, is that they were actually marketed as totally unsecured. They were unsecured notes and they said they were unsecured notes. There would still be investors who would want to invest in unsecured notes, but, again, to follow on your

thinking, in the disclosure regime you would be insisting on getting a clearer explanation of what unsecured meant in that sort of situation.

Senator BERNARDI—I guess it is. If I recall the advertising for ACR, it gave the impression that it was a very solid company. Whilst it was called an unsecured note, it very much gave the impression that your money was safe. The same could be said about Fincorp and Westpoint. I was just interested in your opinion about the following. This is secured over a first mortgage on a property, or this is a mezzanine finance, which means you rate after someone else.

Mr D'Aloisio—We need to consider the thinking you would like the investor to make, or the intuitive response. If they see the advertisement to buy unsecured notes that will get a 10 per cent return, the thoughts you want the investor to have are: firstly, whether they want unsecured notes; secondly, whether they understand what unsecured notes are; and, thirdly, if they are going to take a bit of a punt on them, how much they should put in. What we are seeking to do in our job as part of the disclosure is to get that sort of intuitive thinking. As I said earlier to Senator Sherry, looking at the average amount that was in Fincorp and so on, quite a large number of people who have gone into these have understood the risk profile of these things. They are inherently riskier because they have less capital involved and they are very large projects of property investment, which just by its nature has risks.

We need to push our disclosure and advertising summaries so that the investors or the advisers that are advising the investors have some sort of intuitive rules when they see a product like this that they can use to quickly make a decision as to whether they want an exposure, why, and what the underlying business case or model is. Then they could assess that there may be a one in 10, a one in 15 or a one in three chance that they may never get their money back yet still be prepared to take the chance. That is what you are seeking to do because in the end people will still want to take risks in terms of the way they manage their portfolios. They will always want to take risks. It is really about their appetite for risk and where they no longer want to invest in a product.

Senator BERNARDI—I would like to just follow up on another point that Senator Sherry made. These are three property investment companies that have failed even though there has not been a property collapse. One of your documents—forgive me; I do not know which one it was—says that the reason for the collapse was that the valuations did not support further borrowing or further issue of notes against that. Whilst property markets have not collapsed, they were not appreciating at the rate expected to sustain the model.

Mr D'Aloisio—Moving away from these three, so I am not talking specifically about them, as you know, when you invest in property you have to plan for contingencies. There are risks around completion and construction, and there are risks around location and resale in terms of the sort of price you think you might get. Normally, in other forms of investment, you would expect to see a fairly significant capital amount in their equity at risk, if you like, or shareholder equity risk. In these the gearing of them is so high that you do not see that. A slight movement in the property market or a risk in construction can actually throw the numbers out. As soon as the valuations do not support further raising of debentures, it tends to be very difficult for the group to continue to operate, because a source of funds from the public is cut off.

Senator BERNARDI—Following on again from the risk and disclosure regime, every year we see the pie in the sky cases, where you offer land rights in space and on the moon and all sorts of things. Every year you get people who want to buy into completely unreasonable and ridiculous propositions. There is an old saying that you cannot protect everyone from themselves. No matter how much the proposal is to increase regulation, disclosure or anything else, we are still going to have people putting money into very silly investment schemes, legitimate or not. We cannot do everything to stop people from making mistakes.

Mr D'Aloisio—I think so. It is not our role to mandate what investments a retail investor can go into. The thing about the free enterprise system we operate under is that there are risks in relation to intellectual property rights over, say, some sort of technology, and it is blue sky. But you can make some significant advances for humankind by things coming off and people putting in seed capital and other capital. Then there are a whole lot of those that just do not come off and people lose their money. We certainly do not see our job as trying to pick what is going to be a winner and what is not. As ASIC, we need to push for disclosures and information so that investors can make informed decisions as they wish and, if they do not and they want to just go in, that is a matter for them. That is really our role as I see it.

Senator BERNARDI—In an offer to the retail public, there are really two types of regimes, I guess, for disclosure. One is the prospectus offer and one is the PDS.

Senator MURRAY—There are three—

Senator BERNARDI—There are three.

Mr D'Aloisio—They look over the annual financial statement as well, and that is why that is important.

Senator BERNARDI—If you are seeking to raise money from the retail public, there are two, really, including the PDS, which is what I am specifically referring to. What is the difference in the requirements of compliance between a PDS and a prospectus, in simple terms?

Mr Cooper—Broadly, they are intended to be very similar. It is just that, because of the breadth of the financial services landscape, the PDS regime is slightly more prescriptive. If we think about prospectuses, really there is very little prescription. You just have to put in what a reasonable investor and their professional advisor would expect to see in the documents. There is a sort of a market test. Really it is a test that has worked very well since the early nineties, when it was put in. The PDS regime, because it has to float over insurance products on the one hand and managed investment schemes on the other and so on—and indeed a very broad range of products—has more prescription and also goes more into being comprehensible to a retail investor. So there are—

Senator BERNARDI—One is designed for a retail investor in the PDS, without—

Mr Cooper—They are more focused on retail investors.

Senator BERNARDI—You made a point about the differentiation. A prospectus is designed for an investor and their professional advisor to make a decision on, rather than a retail member of the public; is that fair?

Mr Cooper—That is oversimplifying it. Typically because prospectuses relate principally to debentures and shares those products are relatively well understood, whereas the differences and complexities of the sorts of products covered by the PDS regime mean that it is slightly different. A lot of people have called for the two to be joined together, but there are some fairly good reasons for leaving them separate.

Senator BERNARDI—I have a history in the financial markets. In my experience, a prospectus is regarded as the fat bit at the front of the application form as you are on your way to buying the next hot property. Sometimes people do not assess the risk accurately. You can incorporate information by reference into a prospectus; am I right?

Mr Cooper—Currently with a prospectus, and there is a proposal to introduce that regime with the PDS as well.

Senator BERNARDI—I have a belief that there would be an opportunity for people to get into these documents more fulsomely if they did not have to wade through 60 pages of compliance in order to get to the nub of the risks and the opportunity as it is presented. It is just one of those—

Mr Cooper—That is certainly our view. Generally speaking, shorter documents are more comprehensible and therefore would be more used by consumers.

Mr D'Aloisio—Whether you actually then need to mandate that or we can get there with better understanding of how these products work, using financial advisors, planners and others in the industry to explain them, you should be able to come up with quite simple rules and documents that might be targeted to the retail investor that you provide advice to that distil the essence of the proposal. I think that is what you are saying—that it is within our ability as advisors and as people involved in the industry, whether they are trustees, issuers or advisors, to distil the essence of the particular business plan. And in the case of these companies, it is to distil, say in an ACR or Fincorp, the essence of that investment, how it works and why, and where the risks are. You should be able to reduce that to a page or two without having to tackle a broader issue as to whether you make legislative changes.

Senator BERNARDI—Would ASIC then still, as it does now, fulfil the role of approving that as a document that is—

Mr D'Aloisio—My preference would be that we did not have to approve that short form. It should be self-executing in the market. There should be sufficient incentive for advisors and people who operate in the market to produce those documents, because they get fees and remuneration by having investors invest in these products. Their reputation should really drive short-form advice and so on to the retail sector. ASIC can certainly review them from a point of view of whether they are misleading or deceptive and so on, but to approve them before they go out then raises the issue of ASIC needing to have the ability to assess investment schemes and proposals. I do not think we would ever have the ability to do that. That is not taking anything away from our organisation; it is a great organisation.

Senator BERNARDI—That is actually not the suggestion.

Mr D'Aloisio—No.

Senator BERNARDI—I do not think it is your role to approve an investment scheme or something; it is to ensure that there is compliance and that things are represented accurately, and I accept that.

Mr D'Aloisio—Often you get, 'The documents are too complex,' and this and that. I guess all I am saying is that I would like to push back a little bit on those issues and talk to the market and say: 'Is the problem really that the prospectus is thick or is it that you haven't sat down and distilled the essence of that proposal for your clients? Let's see how we can distil the essence of the proposal for the client as part of the marketing or as part of the work that is done to attract business effectively.'

Senator MURRAY—Is there a requirement for a clear enough statement of risk? That is essentially what Senator Bernardi is asking. The documents do not have up front a clear statement of risk. I have never yet seen a prospectus that has said, 'This is a high-risk venture.'

Senator BERNARDI—They do somewhere in the middle!

Mr D'Aloisio—They also say it is not ASIC approved!

Senator BERNARDI—It is. We have to recognise that there is a broad range of investors. Some take professional advice and some do not take professional advice. We want to equip people to make the most appropriate decision irrespective of their financial literacy. We want to try and build it but make it easy for them to understand exactly what they are getting into. When people talk about dead investments and they see a property, the only thing, no matter what it says in a prospectus or in the offer document, they think is 'Mortgage—safe as houses.' The reality is that it is not, because they could be mezzanine debtors or they could be unsecured creditors, and they might not know this. So you want to try to harmonise the PDS and the prospectus. What happens in the case of recall of prospectuses? This is in one of your charts—you suspended Fincorp for illegal advertising of a prospectus. What are the penalties? You called them back and said, 'There are some defects.' Then they were in trouble for illegal advertising. You have stopped from that. Are there financial penalties attached to that?

Mr D'Aloisio—I think in the case of Fincorp, from memory, we took a Supreme Court action which required them to repay the moneys to those who had invested. We can get the exact details for you, but certainly we required moneys to be returned. Clearly, where there is misleading and deceptive conduct and so on in relation to prospectuses, there are penalties associated with that and ASIC could take action. But in the Fincorp case you will see that we used stop orders, which they then remedied in relation to disclosure, and on one case we took them, as you see, to the New South Wales Supreme Court. Because there were inadequacies, the court orders were that the moneys be returned. The moneys were returned and then they continued with their next prospectus and went through the process of getting ASIC approval—getting ASIC to look at it and make sure that it complied with disclosure requirements.

Senator BERNARDI—Following on with compliance but in another realm, self-managed super funds are becoming very popular. There is a lot of money going into them and they invest in a number of different areas. There are requirements for them to have investment strategies and there are requirements for them to be audited every year. Am I right that

currently there are different requirements or qualifications for the auditors of, say, large superannuation entities versus self-managed super funds? Do you have to be a registered auditor for a self-managed super fund?

Mr D'Aloisio—No. But of course the audit and prudential management of self-managed super funds is really not with us; it is with the ATO, which administers that regime.

Senator PARRY—I turn to the six-year summary on page 51 of the annual report. There is a discrepancy. It may have been answered in previous estimates, but I am still curious to know this. Some 71 per cent of litigation in 2000-01 was successful, and the rest has been consistent; I think it works out to be 93 per cent—it is 94 per cent, 93 per cent and 92 per cent. Is there a particular reason? I notice the staffing is pretty well in line, if you look at increments, and funding is pretty well in line with increments over that time. Is there a particular reason why successful litigation was down a reasonable percentage difference, or is there a reason why it has been so high in the last few years?

Mr Cooper—It is useful when you split those figures out, because that figure is a blended one. It blends criminal prosecutions and civil prosecutions. We can get you the figures but if you break them apart you will see that the civil rate, of which there are more cases, is right up there; it is in the high nineties. I think you will find that the criminal rate is more akin to the 2001 or 2000 figure that you gave us. It is more in line with that. It is 70 per cent or so. Breaking them apart gives you a better feel for it.

Senator PARRY—There is a footnote which reads '2000-2001 may understate success rate'. I thought that might lead to an explanation as to why that is understated.

Mr D'Aloisio—I do not know. We can have a look at it for you. We will take it on notice.

Senator PARRY—If there is anything worth reporting back, if you would provide that on notice that would be great.

Mr D'Aloisio—We will take it on notice.

Senator PARRY—Likewise, on the six-year summary, in 2005-06, the year reported on, the staff average full-time equivalent, FTE, was 1,471, a decrease of 99 from the previous financial year. I have read through the staff and the personnel aspects, and there is no explanation as to why they were 99 down. That is a six per cent reduction. It is acknowledged that there was a six per cent reduction. Coincidentally, there is a six per cent reduction in workplace accidents as well, but that obviously is not related. Is there a reason why there was a 99 deficit this year compared with last year?

Mr Cooper—I think you will find that those figures have increased. We have received substantially more funding in the interim period. We can get you the detail on this. It may well have been that we were managing staff levels against our working capital. Certainly the current state of affairs would see—just guessing roughly—another 100 on top of the 1,471 figure that you have given us and, correspondingly, substantially increased funding in this financial year as well. We can get you the figures.

Mr D'Aloisio—We will take that on notice.

Senator PARRY—So nothing jumps out as to the six per cent?

Mr Cooper—No.

Senator PARRY—I thought it could have been a reporting anomaly, because sometimes you can have a depletion and a recruitment program during that time, but there was no footnote concerning that. Finally, I want to talk about the internal control measures for corruption. Do you have a unit that looks after corruption? Again, I notice that on page 44 you deal with complaints about staff. There are a fairly bland couple of paragraphs indicating that there are internal disciplinary procedures and so on. Do you have a unit particularly targeting corruption, especially in relation to investigation work?

Mr D'Aloisio—In terms of looking at the organisation coming in, I am comfortable with the checks and balances that exist in the way that work is allocated, reviewed and assessed, the way decisions are made on administrative matters, and the way decisions are made on investigations at the start and during a process. This has been one of the areas that I, as the new chairman, am certainly comfortable with. There are checks and balances within the organisation and the culture that would deal with that issue, I would say, unreservedly. There are risk and audit committees that look at the operations and review, and these are overlaid on all of that.

Senator PARRY—Is that peer review?

Mr D'Aloisio—Yes. While there is not a specific unit, I could say I am very comfortable that the checks and balances are there. Indeed, as the chairman, that is one of the things that will be high on my list—that is, making sure that all of those processes work and are reviewed on an ongoing basis.

Senator PARRY—Which directorate classification or which executive director would be responsible for internal complaints? Would it be regulation or the regulatory—

Mr D'Aloisio—It would be the executive director of finance, Carlos Iglesias, and the HR department.

Senator PARRY—I appreciate you have only been there a number of weeks, but do you feel as though there is sufficient expertise in detecting any form of systemic corruption within the organisation other than from the finance perspective?

Mr D'Aloisio—Again, coming in as a new commissioner, being there a while and then becoming chairman, I am very comfortable. Perhaps Jeremy has been there longer.

Mr Cooper—I will just flesh out a few things on that. As the chairman says, we have an internal audit function that has a mandate that looks at this sort of thing, a risk management unit that is specifically tasked to look at physical security and so on. We are very big on security clearances, which go through ASIO. You would find that within ASIC a very high proportion of our staff have been through security clearances at very high levels. And of course also we have the ANAO. There is also the issue of non-financial corruption. How we pick matters to look at and what decision processes have to be gone through if matters are dropped and so on is precisely the sort of thing that the ANAO looks at as well.

Senator PARRY—The Audit Office would cover that? Is there any review post investigation? Is there any anomaly? I would be relatively confident that there is no systemic corruption in any of our major agencies, but it is nice to know and to have the comfort that

there is some form of review and to know that an opportunity does not exist for corrupt practices to creep in, particularly for high-profile investigations, where bribery would probably be the biggest threat. Is there any random review of particular cases?

Mr Cooper—From the ANAO's side there is. They track a matter coming in and what happens to it—whether it ended up in some form of action or went away and, if so, why. Also, looking specifically at ASIC, we are an investigative agency and in a criminal matter we would hand the case over to the Commonwealth Director of Public Prosecutions. That is another check and balance in the sense that we do not see a matter through its entire life. That is another agency all together that is an independent check and balance in relation to the prosecution of a matter.

Mr D'Aloisio—I certainly see it as part of the ongoing role of the chairman. That should be one of the critical issues that you are always alive to. You need to ensure that the checks and balances are there. I do understand where you are coming from, Senator. It is critical to the integrity of the organisation in terms of its role in the capital markets. You simply cannot risk that sort of issue.

Senator PARRY—And prevention is far better than cure.

Mr D'Aloisio—Yes.

Senator PARRY—Finally, are you familiar with the new Australian Commission for Law Enforcement Integrity? It is a new commission commenced last year that this government implemented. It only has an oversight role with a parliamentary committee for the Australian Crime Commission and the Australian Federal Police at this point. If you are familiar with it, do you feel as though it could have an oversight role for ASIC? If you are not familiar with it, I would be happy to take that on notice.

Mr D'Aloisio—I will do the latter. I am not familiar with the details of that. That would also be a big issue for us to talk through internally in terms of what would be involved in that and why it would be needed. I will take that on notice.

CHAIR—Mr Cooper, my understanding is that the government has increased funding for ASIC quite dramatically over recent years. My understanding is that it has increased by about 69 per cent above CPI, from $128 million in 1995-96 to a budgeted $129.6 million in 2007-08. Does that roughly accord with your understanding of the figures?

Mr Cooper—Certainly, yes. We are very well funded.

CHAIR—With all the changes to the Corporations Act through CLERP and so on, would it be fair to say that your workload has increased and that the increased funding has been necessary to allow ASIC to do its job?

Mr Cooper—Yes.

CHAIR—Will the new funding allow you to undertake the work set out in those six priorities—in particular, priority 2, to set up a special team to be led by a senior person to examine the risks for the retail investor and respond with specific projects to help address these risks such as quality advice, investor education, better disclosure, blitzes on advertising, early detection and elimination of illegal operators; priority 3, to establish a special team to determine what additional actions ASIC in cooperation with ASX can take in the areas of

continuous disclosure, market manipulation and insider trading; and priority 4, to set up another special team to be led by a senior person to assess how we can use new technology to improve existing services, add new services and reduce cost by reducing the red tape in providing this infrastructure? Is this increased funding going to be allocated towards the resources that will be required for those sorts of projects?

Mr D'Aloisio—The initial approach in setting these priorities and working with the team at ASIC is to stress test doing it within existing resources by reallocating existing and committed resources from government and reallocating priorities where necessary. In other words, we want to stress test the organisation to see if we can do these new initiatives within the existing budgets. It will only be after we have done that, if we then come to the view that we need additional funding, that we will go to government. Conversely, if we find there are savings, we will achieve those as well. But I think the objective initially is to do it within existing funding and see whether we then need additional funding for it.

CHAIR—Can that be done within your 2007-08 appropriation?

Mr D'Aloisio—As chairman of the commission, that is the basis on which we have approached it. Because it is a period of change and review, getting the initiatives, plans and outcomes is going to take a bit of time, so you will not really have a full picture on the financial implications of it all.

CHAIR—But at the moment you will fit it within your current budget?

Mr D'Aloisio—At the moment I feel comfortable.

CHAIR—You have some very significant plans, which I think to a person the committee has been this afternoon applauding as a way forward. Will you have any spare capacity within this year's appropriation, or do you think you will be fully expending that appropriation amount?

Mr D'Aloisio—This year being—

CHAIR—The 2007-08 year.

Mr D'Aloisio—This would only be my gut feeling at this stage, but from what I have seen, as I have said, we are trying to work in the 2007-08 budget.

CHAIR—I am not suggesting you are going over budget, but I presume there is not going to be significant undercapacity within that budget—you will not be left with money at the end of 2007-08 on the program you have?

Mr D'Aloisio—We work on a forward-year budget, so at a balance date you might have some money that is left over but is, in effect, committed and will go into the next year. You might have that sort of thing. But, subject to that and the work program that we have ahead of us, from a planning point of view I am working on the basis that the 2007-08 budget would be fully expended.

CHAIR—And that the forward budget appropriation, or the proposed expenditure, would be fully utilised as well?

Mr D'Aloisio—You will recall that in the budget we were allocated $112 million for effectively the second stage of a major technology upgrade. That upgrade is absolutely

fundamental to two of the priorities I talked about today: the priority of achieving efficiency with the public register at Traralgon and the priority of improving the service levels and the quality of the service that ASIC provides to the more general public and companies. That expenditure on technology is going to be very important for those two projects. I have been told the amount was $116 million, not $112 million.

CHAIR—If your funding was to be reduced by, say, 12 per cent or so, which would equate to about $129.8 million over the four forward years, I take it that your ability to proceed with these priorities and the setting up of the very important special teams that I referred to in priorities 2, 3 and 4 would potentially be put at risk and, indeed, other programs would potentially be put at risk. Would that be right?

Mr D'Aloisio—They are policy issues for government. We will work within the—

CHAIR—But I am asking you: if $130 million were taken out of your forward-year appropriations, would there be programs potentially put at risk, such as those special teams that you will be looking at as the priorities in moving forward?

Mr D'Aloisio—I would have thought that there would certainly be concerns as to whether we could deliver the services and do those projects. I would not be able to predict at the moment whether we would have to cut and, if so, in what areas, but one would assume there would have to be some cuts somewhere to be able to—

CHAIR—You are at your full capacity; you said before that you will have the full expenditure—

Mr D'Aloisio—I do not see a spare capacity such that I could say, 'We will get rid of that area.' I do not see a spare capacity. The people at ASIC work hard. What I am looking at more within the existing budget is to reallocate priorities.

CHAIR—Without asking you a hypothetical question, I will put a proposal to you that this statement of priorities is responding to the Fincorp, Westpoint and Australian Capital Reserve issues and that part of your priorities, as you said in earlier evidence, is to address the sorts of issues that have arisen in the past and to minimise the risk of those occurring again. Presumably, were the matters that you have incorporated into the priorities required to be removed from your forward program, it would reduce your ability to address the matters that you have clearly identified.

Mr D'Aloisio—That is correct, subject only to looking at the net impact. In other words, there will be some projects—for example, a Citigroup case or whatever—that would have rung off. In other words, there will be some capacity that will come from matters finishing, and you would use that capacity. But, overall, subject to that, what you say would be correct.

Senator MURRAY—I refer you to the answer to my question from the last estimates, which is marked AET-74, concerning television advertising. I asked the following question:

Several investors in Westpoint and in other failed schemes have contacted my office and asked why ASIC does not take out TV advertisements to warn investors of such schemes—

and so on. The answer was essentially that ASIC does not generally take paid advertisements in the media other than for the purposes of recruitment, and there is a fuller answer. The point I would make to you, and I think it deserves to be considered—and unfortunately it would

cost you money—is that, if you are trying to reach retail investors of the sort that have been investing in these high-risk markets, it seems to me that many of them are not internet savvy and do not follow your traditional forms of communication, as valuable as they are. Unfortunately, if you are going to reach those sorts of folks and say, 'Be careful,' you are going to have to adopt a more general advertising regime, which almost certainly will have to include the electronic media. Older people listen extensively to radio and television at times. I have made that point to you, and you have rejected the idea in the past. But if this sort of problem is going to continue I would ask you whether you would reconsider your position on it.

Mr D'Aloisio—I think we definitely will. And I agree, because I do see the sense where targeted advertising to the retail sector could work. I would also like to approach it in another way—that is, to work with the advertisers in relation to the advertisements in the first place. In other words, if you tackle it from the point of view of both what the responsibility of the advertisers is and should be in terms of these sorts of ads, as well as what ASIC could do to bring the information out, I think the two go well together—

Senator MURRAY—You said that in your document.

Mr D'Aloisio—With things such as advertorials and advertisements, what advertisers do and their responsibility is equally important because, in a sense, as you know, an ad campaign for a week on television is $5 million to $6 million. That is a lot of money. ASIC is Australia wide; in trying to do that sort of campaign, you could use up a lot of our funds very quickly. It has to be very targeted. I see it as a dual strategy on advertising: deal with the advertisers as well by talking to them and making sure their systems are safe, because they will be the first port of call on those ads and can make the call whether they run them or not. There will be self-interest associated with that in relation to advertising revenues, but we have responsible players in our markets and I think I would like us to approach it with the two initiatives.

Mr Cooper—I should also add—this is only in Melbourne—that we now have a new thing for ASIC, effectively a retail premises in Collins Street, where our new office is. We were lucky enough to be able to take over an old Medicare premises and rebrand it as ASIC and also our consumer brand called FIDO. It is a street-level store. It uses retail layout and so on, inviting people to come in to receive the messages. We can show people how to look up things on our website. We have a number of computers in there that we can take consumers through. It is early days yet. We are thinking of bringing school kids and retirees in to talk about that sort of thing.

Senator MURRAY—The financial literacy side.

Mr Cooper—It is not television, but it is financial literacy and it is very much targeted at retailers, using the sorts of philosophies you would use to sell retail products.

Proceedings suspended from 6.31 pm to 7.29 pm

Senator WONG—Mr D'Aloisio, at the last estimates I asked some questions about whether or not James Hardie Investment NV had, to your knowledge, or to ASIC's knowledge, provided an indemnity to former officers and officers of the company. ASIC answered a question on notice but frankly did not answer the question. It simply indicated that James Hardie had included the required information—that is, as required under section 199A,

in the annual reports filed with ASIC. Can you tell us what the nature is of any indemnity that has or has not been granted to officers and former officers of James Hardie?

Mr D'Aloisio—My understanding is that section 199A applies to James Hardie, the Netherlands company; the sorts of indemnities that have been granted are in accordance with section 199A, and there is also directors and officers insurance sitting behind it. My further understanding is that, in the way that it would operate in the normal course, the costs of the directors and so on are met through that indemnity and then, if they are unsuccessful, they have to repay that. If they are successful, they do not need to do that; the directors and officers insurance would cut in. Disclosures have been made by the Netherlands company, and from our point of view we do not see that those indemnities have any significant impact on the ability of the Netherlands company to honour its obligations to the asbestos victims.

Senator WONG—On what basis have you come to that view?

Mr D'Aloisio—I think it is made on the basis that the amounts that we are talking about in the event that the directors are successful would be substantially covered by D&O cover, directors and officers insurance.

Senator WONG—First, what information can you give us? Are you able to table a document that sets out the extent of the indemnity or that describes the indemnity?

Mr D'Aloisio—The best statement of it is in the group's March 2007 financial statements.

Senator WONG—I will have to go along to ASIC and buy them?

Mr D'Aloisio—I was going to suggest that we are happy to get extracts of that for you.

Senator WONG—I would appreciate that. What is the financial extent of the indemnity? Is there a limit?

Mr D'Aloisio—There is not an amount. I do not think they have disclosed the amount of the policy, but you would expect that would be normal practice. You would not disclose—

Senator WONG—No, they are two different things. There is the insurance—

Mr D'Aloisio—Yes.

Senator WONG—which is an insurance policy issue. Is there any limit on the indemnity that has been granted pursuant to—

Mr D'Aloisio—I am not aware of what the limit would be. I would expect there would be a limit. I am not aware of what that is. I will look into that further as well.

Senator WONG—Have you perused the insurance policy?

Mr D'Aloisio—We would not have access to that at this point. Whether we get access to that as part of a trial would be a matter that would be looked into, but we would not have access to that. I do not know if we have requested it. I can also inquire about that.

Senator WONG—That would be useful, if you could take that on notice. My point is that you have come to a view that the indemnity would not, to paraphrase—and correct me if I am wrong—lessen the amount of moneys available to James Hardie litigants, to claimants, on the basis that even if successful the directors would have insurance to cover that amount; that is,

the pool of money would not be reduced. Presumably, in order to come to that view, you would need to consider what indemnity was offered and what the policy stated?

Mr D'Aloisio—I did not do the work myself, but I would assume in coming to that conclusion we would have done some rough calculations on what we would expect the level of cover to be and what we would expect the costs to be.

Senator WONG—Who did that work?

Mr D'Aloisio—I do not know. Within ASIC we would have done that. I do not know.

Senator WONG—I always get nervous, frankly, when people in estimates speak in the hypothetical, 'We would have done it.'

Mr D'Aloisio—Short of doing it myself.

Senator WONG—No, but obviously getting advice about whether it was done.

Mr D'Aloisio—I will look at it again. The key point we are getting to here is whether there is a feeling that the indemnities could operate in a way that could have some significant impact on the ability of the Netherlands company to continue to meet its obligations. We are very alive to that issue. We are alive to it also in respect of the actual indemnity claim that we ourselves are not pursuing. The advice I have had to date is that that should not be an issue, but I will look at it again and see if I can get some further details.

Senator WONG—If you could provide more information on notice, I would appreciate it.

Mr D'Aloisio—What you would like from us is really the—

Senator WONG—The basis of your assertion in your evidence and perhaps some information associated with that because, to be frank, the question on notice answer was fairly truncated and, some might say, dismissive. But that would be to impute an intention of—

Mr D'Aloisio—I think that would be highly unfair; there is no question of that.

Senator WONG—The 199A provision that prevents the company from paying if they are unsuccessful in the action would apply if they were unsuccessful in defending the claims, too, would it not?

Mr D'Aloisio—Yes, that is my understanding. Is that right?

Mr Cooper—Yes.

Mr D'Aloisio—Yes, that is correct.

Senator WONG—Can you give me a brief update on the progress of the James Hardie prosecutions.

Mr D'Aloisio—As to the action itself, the civil actions are before the court, as you know, and there is a directions hearing. All the defendants have appeared. The next directions hearing to set the timetable for affidavits and so on is on 21 June, I believe. In relation to the prospect of prosecutions in addition, those investigations are still continuing.

Senator WONG—Which are the actions on for mention or some interlocutory proceedings in June?

Mr D'Aloisio—The main body of actions are the civil actions against the Netherlands company, against the Australian former James Hardie company, and the executives and the non-executive directors.

Senator WONG—They are all being undertaken jointly, or concurrently, I should say?

Mr D'Aloisio—No, from memory there are about 11 defendants. They are all separately represented, I think.

Senator WONG—No, you misunderstood me, I am sorry. Just in terms of the progressing of the claims?

Mr D'Aloisio—Yes, all at the one time. Yes, it is one action, and we would—

Senator WONG—I assume they have separate representation?

Mr D'Aloisio—Yes, it is one action and it would be unlikely that that sort of action could be split, because the fact situation is so independent.

Senator WONG—Will there be any impact on the proceedings as a result of any James Hardie directors—

Mr D'Aloisio—Sorry, can you—

Senator WONG—Sorry. I asked: what impact, if any, has there been as a result of the resignations of James Hardie directors on ASIC proceedings?

Mr D'Aloisio—The resignation of James Hardie directors in James Hardie?

Senator WONG—Yes.

Mr D'Aloisio—On the proceedings?

Senator WONG—Yes. Has there been any impact?

Mr D'Aloisio—No, not that I am aware of. There should be no impact at all.

Senator WONG—Can I go to the issue of the levels of foreign ownership, which has had some airplay in terms of the Qantas takeover. There has also been some media commentary about the difficulty in ensuring that companies that are subject to foreign ownership ceilings actually comply with those, particularly given some of the derivatives and other contractual products that might underlie share ownership. For example, the ASA has written some commentary about this in May. The suggestion that was made in that is that, for example, hedge funds and other such entities effectively engineer products that enable some, I suppose, ducking of public scrutiny of who is in fact the legal owner of share interests. Are these issues that ASIC has considered and/or investigated?

Mr D'Aloisio—That is a question that has a fairly wide remit. If we are talking specifically about the threshold issues of five per cent when you need to notify substantial shareholding, for some time around certain types of cash derivatives—I think they are called cash settled derivatives—there has been uncertainty as to whether stock that is subject to that then requires, when they get over the five per cent threshold, that that be notified. I think the market view is 'no' to that, but they have to be—

Senator WONG—Is that a definitional problem or position?

Mr D'Aloisio—It is a very complex area and one that I am not quite as qualified to answer here, but we could get advice for you on it. Basically, as you know, whether it is legal or beneficial ownership, for the five per cent you need to notify. But with certain types of derivative products that are cash settled there is a view that that does not need to be notified, and it is something that the Takeovers Panel has been looking at. I can get you further detail. That is one issue.

In relation to Qantas's ownership register, the 4951, the primary obligations are, through the constitution of Qantas, on Qantas's board to comply with those, and in the absence there is a regime in the legislation that requires the minister to take proceedings. They are the two issues that I am aware of.

Senator WONG—This is what Mr Wilson—and I am sure you are familiar with this—wrote on 15 May in the *Australian*:

When it comes to derivatives and other contractual products, an investor can build significant exposure to a stock without actually owning any shares, or control one aspect of the shares' voting rights but forgo all other rights, including dividends.

The complexity of today's financial landscape means that cunning players can structure their ownership to avoid disclosure to the detriment of the market overall.

Mr D'Aloisio—I am certainly not aware of any evidence of that. I can understand where it is coming from, but the market is well aware of these cash settled derivatives. The market is—

Senator WONG—I do not think he is only referring to those products. That is not my reading of the article.

Mr D'Aloisio—My understanding is that there is also what they call vote renting or something. There are certain types of instruments that are out there, but the market is generally very aware of them. I am not aware that they are distorting the market in any way. Again, we could look at it further.

Mr Cooper—You may well be referring to what they call a total equity return swap. He may be right in what he says, but I am not sure that there are necessarily regulatory issues flowing from that, because the votes and ownership do not change. You are effectively making an exchange, a little bit like the cash settled derivative. You are making, in effect, to put it crudely, a bet and then settling the difference in cash. I am not sure that there are necessarily regulatory issues arising.

Senator WONG—This is the point he makes. He refers to hedge funds and states that they:

… care little for the prevailing Australian laws surrounding disclosure because they are fairly well protected by a maze of nominee structures and will only be holding the stock for a short period anyway. Disclosure obligations feature low in their list of priorities.

One thing is certain: once the regulator defines what contracts and derivatives must be disclosed, investment banks will engineer a product that legally avoids public scrutiny.

I am not endorsing this view; I am saying this is a view that has been put, and I would not mind your response to it.

Mr Cooper—I think the response is that the notion of 'relevant interest', which is what underpins disclosure, has survived very well; it is partially a black-letter concept, but it seeks to regulate arrangements that are unenforceable, arrangements that are built on understandings, arrangements that are not documented and so on. Over the years the relevant interest concept has worked very well to capture exactly this sort of thing, rather than going down the track, every time a new product comes up, of coming up with a new set of definitions, which is completely impossible.

Senator WONG—You are always going to be behind the eight ball if you look at it that way, aren't you?

Mr Cooper—Getting back to the cash settled derivatives, it really becomes a question of fact in each case as to whether there is a pile of shares over which there is a kind of relevant interest vis-a-vis control over voting or disposal. I think the ASIC view is that the relevant interest concept still works and that it would not be the way to go to start trying to redefine derivatives every time a new product comes up. It keeps it principles based.

Senator WONG—As I interjected before, then you would always be behind the eight ball, would you not, because the market is always going to move faster than the regulator?

Mr Cooper—I do not think that is always the case.

Senator WONG—Not always.

Mr Cooper—I know what you mean.

Senator WONG—They will develop new products before you then have to work out how you deal with them. That is the nature of how it works. Can I turn to the implementation of Uhrig in terms of ASIC.

Mr Cooper—You can; you will just have to give me a bit more detail.

Senator WONG—I am sorry. Senator Minchin can speak. It is his bill, I think. Are you not the minister responsible there?

Senator Minchin—There is no legislation involved, but my department coordinates and advises other departments on their application of the Uhrig principles to bodies within their portfolios.

Senator WONG—There is some legislation. My recollection is that there has been a range of bills actually implementing Uhrig across a number of portfolios.

Senator Minchin—The application of the Uhrig principles may result in legislation to give effect to that, yes.

Senator WONG—In fact, the Governance Review Implementation (Treasury Portfolio Agencies) Bill, which is part of the government's response to the Uhrig review and implements the Uhrig recommendations in relation to ASIC, CAMAC and APRA, moves you from the CAC Act to the FMA Act. I just wanted to know—and you might want to take this on notice—

Mr D'Aloisio—No, I can actually—

Senator WONG—now that I have given you all the information. What have you done in preparation and what changes have been made?

Mr D'Aloisio—The process by which we are changing those from the existing legislation has been something through the audit committee that I have started to get familiar with. There has been a very significant process within ASIC over the last six months, culminating on 30 June, to bring all of our operations into line so that we are FMA compliant from 1 July. That extends right through to things like new chief executive instructions on procurement and on a number of issues that were slightly different from the previous legislation, and within which ASIC is being brought into line. From the last report I had on that, we intend to be compliant from 1 July, when it applies to us.

Senator WONG—I hope you intend to be; I think you will be required to be. I am interested in knowing what action has been taken in terms of preparation.

Mr D'Aloisio—It has involved a full review of everything we do and it has been very extensive.

Senator WONG—Procurement matters?

Mr D'Aloisio—Procurement and policies on gifts. We had a commission meeting this week where we went through with the executive director in charge of the project the key instructions that needed to be given to staff, to point out what the differences were and so on. There is a training program to make sure staff have picked up the differences.

Senator WONG—Do you have any documentation you could provide to us, perhaps a report, that the commission has considered?

Mr D'Aloisio—In principle, I do not see why not.

Senator WONG—Obviously if there is something in it and there is a good reason why you do not want to identify people—

Mr D'Aloisio—If I take the question on notice, we could outline what we have done and, if it is relevant to give some documentation, if it helps, we would do that.

Senator WONG—That would be useful.

Mr D'Aloisio—I do not want to unnecessarily—

Senator Minchin—You do not have any concerns about the movement to—

Senator WONG—No, it is a non-political question, actually.

Senator Minchin—I am assuming it was.

Senator WONG—I am interested in seeing, particularly with a statutory agency, exactly what is going to be required, in very practical terms, of the move. I have had some involvement with ASIC, and it would be a useful agency to observe. I am sorry I picked on you.

Mr D'Aloisio—No, not at all. I should say that a lot of the process in moving from one piece of legislation to another does not have a lot of substantive impact in a sense that the processes that were being followed were in line in any event. It is only in a few areas where

the changes have occurred and we can highlight those and provide a short report to you or to the committee.

Senator WONG—That would be useful. One of the provisions requires the establishment of a special account for the treatment of unclaimed moneys. Has that occurred yet or is that pending?

Mr D'Aloisio—Could we take that on notice as well?

Senator WONG—Sure. Did you want to say something, Mr Cooper?

Mr Cooper—As I understand it, the money that we collect in fees is already regulated by FMA. We are partially down that track already.

Senator WONG—Has there been a cost impact? You might want to take this on notice.

Mr D'Aloisio—Of FMA compliance?

Senator WONG—Yes, essentially giving effect to this area?

Mr D'Aloisio—There would be a cost impact.

Senator WONG—It is not just there for making fines. There is a range of other governance issues—and obviously that is the most significant one—giving effect to the Uhrig recommendations required. I am interested in whether that has had any cost impact.

Mr D'Aloisio—You would ordinarily expect that changes do have a cost impact, but because of the way we have been operating and the changes, as I have said, are not that significant, I have not seen it emerge as an issue at this point within ASIC.

Senator WONG—There are some changes at least in terms of the legal duties framing your role. I assume you become the chief executive?

Mr D'Aloisio—Yes.

Senator WONG—What arrangements or changes have been made to take account of the new responsibilities in that role?

Mr D'Aloisio—There is an internal process of signing off through various levels of the organisation. They will sign off, give it to me and then I sign off on those. There are new processes being put in place for that. Also, in relation to instructions I need to give the organisation, there is a manual in terms of complying with that. There is a range of initiatives that we could summarise.

Senator WONG—It would be useful to have those. I turn to the review of ASX monitoring and the supervisory role by ASIC. Obviously, you were in a different role when that occurred.

Mr D'Aloisio—Just to be clear, I had no part in that. Deputy Chairman Cooper will handle this. Insofar as ASX is concerned with that review, I stayed right out of it and only saw the report after it had been published. Mr Cooper will answer those questions.

Senator WONG—The first issue that I wanted to address was one of the aspects of the report detailing staffing pressures in the supervisory section. Is that the best way to describe it?

Mr Cooper—That is a fair description.

Senator WONG—There was a 40 per cent increase in workload and no staff increase for seven years or something like that. Do you know what action has been taken, if any, and has ASIC requested or recommended that action be taken in relation to that issue?

Mr Cooper—You are quite right to say that resourcing is a potential issue. The ASX has been aware of this for some time. Looking at it on a more macro level, with the economy going the way it has been, it becomes a capacity issue. Knowledge organisations around the nation are suffering the same kinds of pressures, an increase in workload and have not necessarily been able to access the staff quickly. There is a mutual understanding of the problem. When we sit down to work through the work plans for this year and what the issues are that ASIC is going to be looking at, obviously staff levels will be one of those, to make sure there are sufficient resources for supervision. Our bottom-line conclusion was that this is adequate but it would be an issue going forward.

Senator WONG—Did ASIC seek a commitment from the ASX to increase staffing in those areas?

Mr Cooper—Yes.

Senator WONG—Has that been effected?

Mr Cooper—We have only just issued the report and it is to go forward—

Senator WONG—Yes, I have just realised the date. Are there any specific staffing level targets?

Mr Cooper—To give you the specific numbers I would have to take that on notice.

Senator WONG—I am happy for you to take it on notice, but I am more interested in the level of detail of ASIC's request of or directions to the ASX.

Mr Cooper—I am sure our operations people would have that information.

Senator WONG—What is the status of the report? Can you direct the ASX to do things or simply ask them?

Mr Cooper—I would not have thought we could in that area. We simply report on our view of whether it is adequate or not.

Senator WONG—That is not one of the matters dealt with in the MOU, in terms of what powers ASIC has in respect of that monitoring function?

Mr Cooper—No. The MOU is about information sharing and that kind of thing.

Senator WONG—How do you intend to deal with the transition from being head of the ASX, in terms of the relationship between the two organisations?

Mr D'Aloisio—I had effectively been out of the ASX since July 2006. I took the view in discussions with Jeff Lucy that I would stay out of ASX matters until about the end of March-April 2007. That is not because I had any particular knowledge or whatever but just from a perception point of view. After that, unless there was an issue on which I did have some information or there could be a real potential conflict, I would get fully involved in all ASX matters. My intention is to continue to do that. At this stage going forward in terms of, say, the

initiatives I spoke about earlier this evening, in relation to insider trading and cooperating with the ASX, I will call on that supervisory role and so on. I certainly struggle to see any real potential conflict so I would get fully involved in that work. However, at the commercial level of ASX, if indeed there is some issue then I would declare my interest to the commission, and Mr Cooper and Mr Lucy would then handle that matter.

Senator WONG—Would the subsequent reviews of ASX be dealt with by you or would you propose that Mr Cooper manage those processes? Obviously they are done at an officer level.

Mr D'Aloisio—They are commission matters and I would like to reserve on that until I have a clearer picture of what those issues are likely to be. Clearly, if they are issues that relate to the time when I was CEO then quite clearly I would leave that to Mr Cooper and Mr Lucy. That would be highly unlikely. I have now read that report, and going forward I do not see any reason why I probably would not remain fully involved. I am always mindful to be careful.

Senator WONG—The report does cover a period for which you were CEO, does it not?

Mr D'Aloisio—Yes, this report does. I was talking about subsequent reports. I would like to comment a bit more broadly on that. In reaching the views that I have reached, I have obviously weighed up the perception issues against what I think is the real credential that I have, having been at the ASX and having seen the equity markets and derivative markets operating. I feel that the expertise and experience that I have developed in that area are very valuable as part of this job. I have to balance that in the equation.

Mr Cooper—For what it is worth, I second that. It is an opportunity that we need to manage well.

Senator WONG—I am not imputing anything negative. Particularly with this report, I was simply trying to work out how you might deal with that and how you are proposing to manage those issues. The issue I want to turn to now is the respective roles of ASIC and the ASX. We have had a discussion before about the MOU and the process whereby ASIC has the responsibility to monitor and enforce compliance; the ASX obviously refers matters to you, but you also review them. One of the questions that occurred to me when I looked at this article in particular, and from some of the discussions about what extent ASIC might have acted on certain referrals, is: do you think there is any conflict in the relationship where you have ASX referring matters to ASIC but also being reviewed by ASIC in terms of its functions? Might that create some hesitance on the part of the ASX, for example, in being critical of ASIC's enforcement practices upon referral?

Mr D'Aloisio—I do not think so. If you go back to the heart of what the ASX is trying to do with its surveillance in terms of the markets and ASIC with its enforcement role, I see part of the insider trading market manipulation priority that we have set actually involving close cooperation between the two organisations to really see what we can do to improve the policing of the markets. If we are working closely together and working well, it is hard to think that the ASX would see that as an aggressive act or an act to be concerned about.

Senator WONG—It is almost the other way around, isn't it?

Mr D'Aloisio—Maybe I misunderstood.

Senator WONG—What if you have this situation—and I am not suggesting this has occurred, but just in terms of the way the relationship is structured. Let us say ASX has some real concerns about ASIC's failure to act on a number of matters they have referred. Is it easy for ASX to raise that, given that ASX is also subject to review and monitoring by ASIC?

Mr D'Aloisio—ASX does raise it, and it made very clear to the public the number of referrals it sent to ASIC. So I have not seen that to date.

Senator WONG—Turning to the report, do you have any concerns that there may have been a number of cases, firstly, missed in terms of the ASX supervision and, secondly, not referred given the demonstrable resource constraints that were identified?

Mr Cooper—No, not specifically. My recollection is that the statistics from year to year are broadly similar, so from a statistical point of view there does not seem to be any data that backs that up.

Senator WONG—Which stats?

Mr Cooper—The number of referrals that come across.

Senator WONG—That is the point. As I understand it from the report and also subsequent comments by Mr Mayne, there has been a greater number of cases for the ASX to look at. You indicated why that would be, in terms of the increased market activity. If you were having the same number of referrals, what does that suggest about what is actually being missed?

Mr D'Aloisio—Referrals went up.

Mr Cooper—They have been up and down.

Mr D'Aloisio—I think they have gone up in the last two years.

Senator WONG—Do you have concerns that things were missed?

Mr Cooper—No. That was not raised in the report. These statistics change from year to year. It does not necessarily follow that, just because market activity increases, the number of aberrances increases. It might, but I do not think that there is necessarily a strict correlation between the two.

Mr D'Aloisio—Within ASIC we also have the Market Watch team, which works independently of ASX to see what is going on and monitoring the market. It may well refer matters to the enforcement arm of ASIC to pursue. As I made the point in the priorities going forward, we feel that there is scope to improve in the market manipulation, insider trading area. We certainly want to see that as a priority next year with a view to adding resources, particularly at the investigative stage—in the early stages—to see if we can improve the scorecard or track record on insider trading.

Senator WONG—Have there been further insider trading cases referred to ASIC by the ASX? I think 18 were reported from the beginning of the financial year to the end of March?

Mr D'Aloisio—There would have been, but I do not have the number.

Mr Cooper—Yes.

Senator WONG—Could you take that question on notice? I have a number of other questions for you to take on notice too. Can you tell me the total number of matters referred to ASIC by the ASX since 2000? Are you able to give me figures as to the proportion of those prosecuted where enforcement action has been taken? Are you able to disaggregate those matters into insider trading, marketing manipulation, continuous disclosures and any other matters? In relation to that last question, perhaps we could just go back to 2004. Since 2000, could you give me the total number for the financial year, but can we have that with a disaggregation into categories for the years ending 2004, 2005 and 2006?

Mr Cooper—Yes, I am sure we can do that.

Senator WONG—What did you describe it as?

Mr D'Aloisio—Market Watch.

Senator WONG—That is a trendy name. Do they deal with continuous disclosure referrals or is that another section?

Mr D'Aloisio—They would deal with continuous disclosure, insider trading and market manipulation.

Senator WONG—I have one last issue regarding these matters. I assume there has been consideration of any possible double jeopardy situation in relation to conduct that breaches both the ASX rules and the Corporations Act?

Mr D'Aloisio—My understanding is that a breach of the ASX rules is a breach of the Corporations Act.

Senator WONG—Correct: of ASX rules is a breach of the Corporations Act. But it can also be separately—there is conduct that could be both.

Mr D'Aloisio—Yes.

Senator WONG—Has any double jeopardy issue arisen in this context?

Mr D'Aloisio—If there is a breach of the rules it will tend to be a breach of the Corporations Act, which is then picked up by ASIC. The ASX itself polices the participants, not the companies.

Senator WONG—Yes, I appreciate that. I am talking about a situation where you have conduct that might be in breach of the ASX rules, which would be a breach of the Corporations Act, but where the conduct would also be a breach of another provision of the Corporations Act.

Mr Cooper—But, Senator, the absence of sanction: the ASX does not—

Senator WONG—No, you do.

Mr Cooper—That is right. So where do you get the double jeopardy.

Senator WONG—So you would just choose one?

Mr Cooper—Yes. The only real sanction is effectively suspending trading.

Senator WONG—What do you do? Is it simply a prosecutorial choice? You would have a range of situations where the same behaviour could result in both civil and criminal proceedings?

Mr Cooper—We do.

Mr D'Aloisio—We do. For example, in the James Hardie case you have a situation where we have taken a range of civil proceedings—

Senator WONG—And you are still considering prosecutions.

Mr D'Aloisio—and we are still considering prosecutions. But if in fact it turns out that the Commonwealth Director of Public Prosecutions does take a criminal proceeding in that situation, the civil proceeding would be stayed and the criminal proceeding would proceed pending the outcome. The courts have looked at this double jeopardy type issue in the context of ASIC's civil provisions and the criminal provisions that operate in the legislation. There is not a double jeopardy issue with the ASX rules because the ASX has not power to take proceedings.

Senator WONG—I was not suggesting that. We are at cross-purposes.

Mr D'Aloisio—I am sorry. That might have been my misunderstanding.

Senator WONG—I understand that. They are not an enforcement body, so they are not a regulator.

Mr D'Aloisio—You do not want them to take power that they do not have.

Senator WONG—I was not suggesting that they were. I do not know how we got onto that tangent. I was more interested in where conduct that breached both might give rise to more than one set of proceedings from ASIC and how you dealt with that. You said that the James Hardie prosecutions were still being considered. Can you give me more detail on that? Where are they at? Have they been referred?

Mr D'Aloisio—They are matters that need to take their course, and we will make announcements in due course.

Senator WONG—I am not wanting to pre-empt anything. Do we have any time frame on it? Have they been referred?

Mr D'Aloisio—I am not prepared to say at this stage. We have to run the case, and there will be other issues for us.

Senator WONG—Which case?

Mr D'Aloisio—The James Hardie case.

Senator WONG—The point I was making is: has there been a decision that the civil case should proceed?

Mr D'Aloisio—The civil cases are proceeding.

Senator WONG—I appreciate that. But should that proceed prior to any consideration of criminal matters or not? I do not want to traverse areas here that might prejudice any prosecutions. I appreciate that.

Mr D'Aloisio—It is quite simple. The position is that the civil cases are proceeding. We are continuing our investigations on the criminal side. Once we have made decisions on that we will announce that. In the meantime, the civil cases proceed.

Senator WONG—This is Senator Sherry's area but I have a quick question about this. I refer to FSR policy statements and the class orders issued on Monday, 28 May.

Senator SHERRY—Yes, you can ask questions.

Senator WONG—Thank you.

Senator WONG—Senator Sherry will deal with all the policy issues about this. These appear to me to be very similar to some of the provisions in the bill, which has passed the House of Representatives.

Mr D'Aloisio—Could you indicate what it is?

Senator WONG—IR0719, Monday, 28 May. It is your information release.

Mr Cooper—They are technical updates on FS policies, aren't they?

Senator WONG—Yes. Have you essentially jumped the gun, assuming that the parliament is going to pass these bills? I am trying to work out the relationship between them.

Mr Cooper—No, I do not believe we have.

Senator WONG—You wouldn't do that, would you?

Mr Cooper—It is what I could call routine maintenance. I do not think it pre-empts legislative changes at all. It is just bringing things—

Senator WONG—I assume that you would need to update these policy statements if the legislation were passed?

Mr Cooper—Depending on the intersection—if it interrupts those policies, then yes.

Mr D'Aloisio—As a general rule, yes, you would.

Senator WONG—My recollection is that these cover some of the particular areas that the legislation deals with. That is why I am interested in to what extent they are consistent with the bill. Do you want to take that on notice?

Mr D'Aloisio—We will have to take that on notice to give you a detailed answer on that.

Senator WONG—Thank you.

Senator SHERRY—I will give my colleague an early night.

CHAIR—You can deliver that same present to us. It is within your power.

Senator SHERRY—And to myself. We will see how we go. At least we have another opportunity in a couple of weeks with the ASIC oversight. I do not know whether you have worked out the time frame.

Mr D'Aloisio—Sadly, we have.

Senator SHERRY—For ASIC there is at least five or six—

Mr D'Aloisio—It is the day after the long weekend.

Senator WONG—'Sadly', he says on the public record.

Mr D'Aloisio—I said it with a smile.

CHAIR—So there is no real need for questions tonight?

Senator SHERRY—There certainly is. I would have to acknowledge that you are the most scrutinised authority in Australian parliamentary history, I suspect.

Senator WONG—I think that point has been made before.

Mr D'Aloisio—I should have known that a long time ago!

Senator SHERRY—I hope that was pointed out to you in your job interview.

Mr D'Aloisio—It was not continuous disclosure.

Mr Cooper—Very low disclosure standards, I am afraid, Senator!

Senator SHERRY—I turn to the last point that Senator Wong was touching on. If I could just loosely describe it as the Pearce legislation, because the parliamentary secretary has presented it to parliament. Frankly, I am anticipating that it will pass the parliament. It is listed for the next Senate fortnight. I know the joint corporations committee has scheduled a hearing to deal with it so that it can be dealt with in the Senate and, in terms of the detail and the approach we take, it will be passed. I would like to go to that. It seems to me there are a number of implications for ongoing operational surveillance by ASIC. For example, there is the issue of financial planners and the role they play in terms of advice. Have you given any thought to the practical implication of how you need to change your approach—if indeed you need to change your approach—assuming that legislation goes through?

Mr Cooper—It would be broadly in line with the work we do at the moment. I take it you are referring to things like: if the bill was passed, is the $15,000 advice threshold being complied with, and are people giving records of advice, and how are all of those new regimes being administered?

Senator SHERRY—Yes.

Mr Cooper—Although they are new, I do not think in substance they are different from the sorts of things we administer at the moment. Our current thinking and procedures, including types of work such as the shadow shopping work—and I am not signalling that we do exactly that work again, but that kind of thing—would be pretty familiar territory for us.

Senator SHERRY—I was interested to know whether you have given any thought to any changes in your approach in that space?

Mr D'Aloisio—Not at this stage, but certainly we would; that is part and parcel of the setting of business plans and so on for the 2007-08 year. We would be looking at that on the basis that this legislation does pass so that when we allocate resources we would pinpoint the areas that are new or may need to change, and really make sure they get resources early on. It is part of what I would call good operational effectiveness.

Senator SHERRY—On previous occasions—as Mr Cooper knows—we have discussed the AMP EU. We have discussed three or four outstanding actions that would possibly arise

from analysis as a result of the last shadow shopping exercise. Where are we up to with those other organisations that were identified, not by name but identified as a group?

Mr Cooper—A fair bit of time has elapsed since we last discussed that. As each month progresses we are doing new and different types of work. We do have a large body of work involved in what I might call financial planner compliance. I take your question to be that there is not necessarily a large piece of work coming out of those programs in the past. However, I can say that there are some fairly substantial surveillances and matters on our plate at the moment that may well end up in an EU or some other type of action.

Senator SHERRY—I am looking for an update on that investigative work. It was identified that there were three or four still in that space. Perhaps you could give an update on notice.

Mr Cooper—We could take that on notice.

Senator SHERRY—It may well be that there is nothing coming out of one, two or more entities. I am just interested to know where it is up to.

Mr Cooper—We can certainly do that. I know what you mean.

Senator SHERRY—We have got the joint oversight in the next couple of weeks. I wanted to go back to the earlier issues around ACR, Fincorp and Westpoint. As to the trustee corporations, is ASIC aware that the Standing Committee of Attorneys-General has been examining the harmonisation of state and territory legislation to ensure uniform licensing and prudential supervisions for these entities?

Mr D'Aloisio—I was not aware of that.

Senator SHERRY—Again, you might take this on notice for the next opportunity.

Mr D'Aloisio—Yes, I will take that on notice. Have they made any recommendations?

Senator SHERRY—Not yet, as I understand it. I asked the question because, in view of the overlapping responsibilities, I would have thought ASIC would be involved in those discussions and at least consulted.

Mr D'Aloisio—I agree with you that we should get across that, and it will be part of the work that we do with the three-point plan I talked about.

Senator SHERRY—There does seem to be an intersection with some of the work that you are now focusing on and what will happen to these entities in the future. Just by way of example, it does remind me—and this may even be before Mr Cooper's time—of the scandals in WA involving mortgage trust entities that were regulated at a state level and the scandal we had in Tasmania involving the solicitors mortgage trusts. There were some strikingly parallel issues to the issues you are dealing with inn terms of the earlier entities we were discussing, namely, valuers, the roles of solicitors and accountants and de facto trustee type entities operating in the property space at a state level. To some extent as a consequence of those scandals we ended up with a transfer of regulatory responsibility to ASIC. So there are some parallels to current activities and issues that are arising. It does beg a fundamental question: just how far do you go in the federal jurisdiction? Valuers, for example, are an interesting aspect to all of this, and are definitely state regulated—I am not sure how successfully.

Mr D'Aloisio—Again, just on that and the comments you made, there is a tendency to go to legislative intervention. But with valuers, for example, if we look at these sorts of cases, there is an issue of disclosure of valuations, and the way that valuations were made and what is a 'valuation as is', as compared with a 'valuation as if complete'. There is a lot of work that we can do on the disclosure side before needing to get to the question of whether or not values ought to be regulated in a particular way. I take the issue that you raise. Certainly at this stage in our thinking when we look at how to get disclosure out here, if people can understand how these property investments are valued and what is meant by 'value as is' and 'value as if complete' and they can see more detail of those valuations, that will add to the understanding of the underlying business models and they can make sensible decisions about whether they will put in their money in the first place.

Senator SHERRY—I accept that. I am not for one moment suggesting Commonwealth regulation of valuers. It is just that in that space there is an issue. There were certainly major issues in Tasmania and WA around what I would classify as more speculative valuations by some valuers that would not be considered reasonable by members of the profession or indeed by anyone with any knowledge of property valuation.

Mr D'Aloisio—That is where you have really got to push back on the disclosure issue and the assumptions. It is one thing for me to come along and say that a house is valued at $5 million; it quite another to say that, based on these assumptions and this work, it is something else. We, as ASIC, need to do a bit more work on the disclosure side.

Senator SHERRY—To give you credit on your earlier statements, you have identified the valuation issue as a key issue.

Senator MURRAY—As a Western Australian, I can say that you need also to bring into your own perspective the issue of proportionate liability. In those matters pursued at law in Western Australia, typically the accounting firms were attacked as having deeper pockets, but the other professionals who contributed to the fault were not addressed in such a rigorous manner. The issue then is proportionate liability where professional advice is flawed. Those are worth exploring from your perspective when you look deeper at these issues.

Senator SHERRY—Linked to this issue of valuers is the issue of research houses, which we have discussed. They may or may not carry out research; certainly there was research house activity in the Westpoint case. I am not familiar with whether there was in respect of ACR or Fincorp. But is there any intention to focus on the issue of research houses and the role they play in these types of property structures?

Mr D'Aloisio—I have to say that in the three-point plan I have been talking about we had not specifically focused on research houses. To the extent that it is about ratings, that is part of it. I had understood you to be looking at more general research houses. They might be short of ratings, but they put out research on particular investments. That is a good point, and we would want to look at that if that is an issue that will add greater clarity to the market in understanding investments. We would do that. It is part of the industry work that we are contemplating.

Senator SHERRY—I would like to go to a couple of specific issues around ACR. I accept at the moment that it is very early days. Looking at your schematic, which is very usefully

laid out, where ASIC did intervene with the various disclosure documents—the prospectuses—was there any accompanying examination of the actual public advertising campaign, both that which accompanied the prospectuses and whether there were any changes as a consequence of the change that ASIC identified was necessary on the various prospectus actions it took?

Mr D'Aloisio—I cannot answer the question about advertising and the way that ASIC monitors this sort of advertising across a range of areas now. Mr Cooper might be able to answer that question. I would assume as part of the blitzes on advertising that ASIC has they would have covered all advertisements of this type. I would have to get more specific information for you on actual ACR advertisements. I do not have that answer readily available.

Mr Cooper—If you had asked the same question about Fincorp we would have given you a very long series of answers.

Senator SHERRY—I was going to ask the same question, but I thought I would start with the easy one first in the sense that it is early days.

Mr Cooper—I am with the chairman; I cannot specifically recall advertising in relation to ACR being an issue. However, we do have systems to look at all of those things.

Mr D'Aloisio—We look at our records.

Senator SHERRY—It strikes me that one of the differences between ACR and Fincorp is that there was a very strong direct major publicity campaign to individuals through the traditional media. Westpoint was quite different. There was some public advertising but it was largely pitched through intermediaries.

Mr D'Aloisio—Fincorp and ACR in that sense is very direct retail advertising of an unlisted and unrated product.

Senator SHERRY—I do not want to overload you with work, but it may be useful at an appropriate stage to carry out a research project analysing some of the people who invested in ACR and Fincorp to ascertain on what they relied for their information. I suspect it was overwhelmingly the advertising campaign as distinct from the prospectuses. That is the feedback that I have had from some of the people.

Mr D'Aloisio—We have started some work on that. We talked earlier with Senator Murray about ASIC advertising. What you are trying to work out is what the influencing point is that prompts the investor to make the choice to go in or not go in. Is it more the advertorials on radio or is it the newspaper advertisement? Is it word of mouth from the point of view of someone who has said, 'This is a great deal, Tony, you should be in it'? There are a number of influences. As part of looking at the advertisers and the advertising side, we need to do some research to try to get what some of the key influences are on these investors.

CHAIR—It would depend on the maturity of the investor, too, and experience et cetera, presumably.

Mr D'Aloisio—Yes, it would. What worries you a little bit here is that the average age is 60.

Senator SHERRY—Yes.

Mr D'Aloisio—That is a very mature, experienced age.

Senator MURRAY—But not sophisticated in investing.

Mr D'Aloisio—That is what this sort of analysis would need to point up, as to what was the decision-making point. Was it, for example, a financial adviser, a newspaper advertisement or a radio broadcaster?

Senator MURRAY—We are on the third phase here. The mass marketed, tax effective schemes were sold door to door and by word of mouth, and that was clamped down on. Then, as you know, they shifted into the seminar routine, and that was clamped down on. Now they have shifted into the advertising area, and that, as you have focused on, is deserving of tightening up.

Senator SHERRY—You mentioned radio personalities. I notice a leading Australian radio personality involved in promoting Fincorp—

Mr D'Aloisio—I said radio broadcaster, Senator.

Senator SHERRY—Okay, I will say broadcaster/personality—was very quick to lay the blame at ASIC's feet, despite his extensive advertorial, for which I am sure he was well paid. It begs the question behind some advice I was given long ago, and that was that if a financial provider needs to use prominent community personalities who have absolutely nothing to do with financial services at all, then just be a touch more cautious. I do wonder about the relevance of Billy Connolly, for example. He is a great entertainer.

Senator MURRAY—I like Billy Connolly.

Senator SHERRY—I love him in a particular space. I am just not so sure that he has a particularly in-depth knowledge of the Australian financial services sector.

CHAIR—Can I suggest you don't put out a press release.

Senator SHERRY—That I love Billy Connolly?

CHAIR—No, the latter bit.

Senator SHERRY—You mentioned the average age of 60. Do we have any preliminary analysis-understanding of the investor's profile in the case of ACR or is it too early at the moment?

Mr D'Aloisio—Not at this point. We will seek to build up a picture with the administrators, but it is too early.

Senator SHERRY—Just on the investor profile, what struck me, in meeting a lot of the Westpoint people, was that they seemed to be overrepresented in terms of an ethnic component, for whom property investment seemed to have a strong appeal, and also the average age was 60. Cautious people are cautious by their nature, and many did a reasonable amount of research. They did not just accept it at face value and decide, 'That is for me.' There was a reasonable amount of research undertaken by some of them, including one in the room who is an accountant. It does beg the fundamental question of just how well we can inform consumers and how well we can expect to actually educate them.

Mr D'Aloisio—Just by way of a general comment, what you have seen in Australia is a very significant period of economic growth and asset values going up. You have a whole generation that is much wealthier than we would have thought 15 or 20 years ago. But the skill set associated with managing that wealth, in terms of not only the adviser level, the accounting level or whatever, has not yet caught up. I think part of why we are attracted to this strategy is that we carry part of the responsibility to get that level of knowledge up as quickly as possible, so it catches up with where the wealth has moved to. There are certain phrases that with our people I do not use. I do not like using 'consumer' and 'unsophisticated investor', because I think the problem is broader. I put myself in the position, at 57 nearing retirement, and I ask myself the basic questions. There are a number of those products that I have a lot of trouble understanding. If I apply that test and I regard myself with the experience that I have had, if I cannot work them out, then there is a much larger group that is having that difficulty. It is not just 'unsophisticated' or 'consumer', it is actually much broader. That is why the investor education side of what we are doing in getting the information out there and working with the industry is very important.

Senator MURRAY—There is something that concerns me as a possible gap in your three-point plan, and that is that external auditors are not mentioned as a focus point. Typically we would think of external auditors with respect to the entities we want to target. External auditors in that sector should be doubly careful and should be red-flagging risk to make sure that matters are properly exposed in the reports. By the way, that is why I said earlier when Senator Bernardi was talking that there are three and not two. The annual reports and the financial statements provide the foundation against which product disclosure statements and prospectuses rest.

Mr D'Aloisio—Yes.

Senator MURRAY—So the external auditor is important. I really wanted to focus on another area of external auditors that we do not commonly think about, and that is with respect to SMSFs. There are very stringent requirements in theory for the auditing of the SMSF, and the auditor, who is typically your local accountant and tax agent, is required to verify that you are investing prudently. In fact I think in the regulations that word appears. Perhaps you should be targeting those people, because every year by law they have to do the accounts, they have to review the investments and they should be relaying back to the investor, 'This is a tricky area that you have entered into, and you are at higher risk than you might think otherwise valid.'

Mr D'Aloisio—At that level, because of the closeness that the accountant-auditor has with the individual, there is a very important potential pressure learning point for the small super funds.

Senator MURRAY—And he or she reaches the investor every time.

Mr D'Aloisio—Yes.

Senator MURRAY—Whereas you do not and cannot.

Senator SHERRY—I agree with Senator Murray; it is probably more of an issue for the ATO to tackle as the regulatory agency responsible in that space. I know they are trying to

apply themselves in that area, but given the volume of self-managed super funds, with something like $330,000 or $340,000—

Senator MURRAY—Except if you talk to the accounting professional associations and let them put in as much of your message as possible.

Mr Cooper—The self-managed super fund association, SPA, has some interesting accreditation proposals and so on. While we do not have direct jurisdiction over that, they seem like very sensible proposals.

Senator SHERRY—I had a meeting with them last week and they raised this very issue with me about the auditing standards being applied to self-managed super funds, and the difficulty in that space. I would like to come back to your earlier comment. This is more of a general comment-observation. The other contributing factor, aside from the issue of a strong economy associated with wealth growth et cetera, is the massive conversion from defined benefit to defined contribution in this superannuation space. At least in a DB scheme there is a significant element of automatic pension. For DC it is totally lump sum at the point of retirement or part retirement, and then a series of decisions has to be made about converting to some sort of pension annuity product or not even doing that. That rise of the lump sum as a consequence of DC is an issue that has significant implications that have not been particularly well thought through in some of its aspects. The other factor that I was going to mention is that, looking at the claims being made by Westpoint, Fincorp and ACR, the actual rate of return, given the average real rate of return in the super space over the last four years, was reasonable in that context.

Mr D'Aloisio—It was low.

Senator SHERRY—Yes.

Mr D'Aloisio—That is what I say about asset allocation and risk-reward premiums, in understanding them, that if you are getting 12 per cent, 14 per cent or 15 per cent on the Australian stock market in terms of growth, why do you chase 9.5 per cent with a high yield-high risk property investment? There is something either in asset allocation or risk profile that the investor wants or there is a lack of understanding. You would have thought that, if you do understand diversification through risk allocation, and you understand how the different asset classes drive their premiums over and above, say, a bond rate of five per cent or six per cent, and for every percentage point above that you actually understand the risk that drives it, and then you make your choice as to whether you have listed securities, shares, offshore, onshore et cetera, then that would be the knowledge and information that you need out there for the small super fund and for the household or retail sector to maximise the wealth they are putting into what is a growing part of the market.

Senator SHERRY—Looking at what are relatively modest claims in terms of rates of return, given the history of the last three or four years—I can recall negative rates of return in the superannuation space—I do not find too many people in the general community today who actually understand that there was a couple of years of negative rates. They just do not remember it. But this association with more modest rates of return gave a false security, probably linked with some misunderstanding that property cannot fail.

Mr D'Aloisio—There is probably not as great an understanding about how franked dividends work for yields on shares, compared with 9.5 per cent. If you have a five per cent yield on shares, you might say, 'That is only five per cent.' When you put your franking credits into that, it makes a difference. Then you have your capital gain and how you factor that in. They are the things that need to be reduced to very simple rules, and I think they will go a long way to dealing with these sorts of issues. You would expect in a market with perfect knowledge that the $8 billion debenture mark that we are talking about—if it were high risk, unlisted and unrated—would no longer be preferred by the market and they would move to other forms of investment. It is the imperfect knowledge at the moment that must be in part driving that sector.

Senator SHERRY—Sure, but you would accept the practical realities of actually being able to lift across the board consumer knowledge. It is a very difficult job.

Mr D'Aloisio—Sure. But I think that is why you need to tackle it at the three or four levels we have talked about so you are looking at it as a whole. Because I agree with you: I think just to focus on investor education, no matter how good it is, is not enough because it is the quality of the financial planners, the advisers, the advertising and all the other things that go with the way these products are developed, distributed and marketed.

Senator SHERRY—We will not have time tonight, but I do want to go to a couple of specific aspects with regard to Fincorp. Was ASIC aware that PricewaterhouseCoopers were the auditors of Fincorp and, if so, were they aware that the auditor had signed off on the Fincorp accounts? How could the auditors not have noticed that anything was wrong as at 30 June 2006 accounts? Has that been an aspect of examination?

Mr D'Aloisio—The prospectus reviews that we have done would have included reviewing the accounts and the audited accounts would have been part of that. At this stage, there is not yet enough information to be able to make a judgement about what caused the problems with Fincorp and when or whether they are attributable to any particular adviser, whether they be auditors or others. It is just simply too early.

Senator SHERRY—That will be an issue for examination?

Mr D'Aloisio—As I have said, there is a team that is doing the investigation and once we get the KordaMentha report they will be looking at the investigation. As we did with Westpoint, they will look at all aspects of the matter and that would include advisers and others who are associated with it, which would be normal ASIC procedure.

Senator SHERRY—I have only seen it reported in the media—I know it is the case with Westpoint—but have there been any legal actions initiated by firms on behalf of investors in Fincorp to date?

Mr D'Aloisio—I do not have specifics. I think there may be a class action—

Senator SHERRY—I have seen reference in the media to a foreshadowed class action—

Mr D'Aloisio—Yes. That would be the only knowledge we would also have.

Senator SHERRY—It might have been a bit more relevant in the Westpoint case where we know that is happening. Going to the Westpoint exercise, at this point in time where are we up to with legal actions by ASIC with respect to Westpoint?

Mr D'Aloisio—If I can turn to the document I gave you headed 'Westpoint,' and I will go to question 2: 'What has ASIC achieved to date against those objectives?' And the objectives are those that are set out under question 1: 'What are ASIC's objectives?' I will just run through them. In relation to freezing and insolvency orders, these are orders that relate to trying to maximise the amount obviously available to investors. You will see that we have frozen $13 million to $54 million of assets against 13 individuals and companies. I accept that is a wide range but that is what I have. We obtained orders stopping people leaving the country and so on. I can read those, or if you cast your eye over that it gives an update of all the actions that we have taken to date. You will see that essentially they are aimed at trying to preserve what is there and trying to increase the amounts available for investors. And then there is a series of actions against punishing wrongdoing and criminal behaviour.

Senator SHERRY—Do you have some sort of indication of the time frame this is likely to take through to conclusion?

Mr D'Aloisio—As part of this, we have a team that is running these and it has timetables for particular outcomes and decisions. My preference is not to disclose those at this point because our investigations are continuing. But I will, if you like, in retrospect indicate how that timetable worked, what sort of objectives we had set, then we have reached certain objectives, some actions continue and others may not. It would be the normal sort of investigative process. But the overall control mechanism is that there is a plan, there are dates and there are particular things that need to be achieved by particular dates so that this is carried out as quickly as we can.

Senator SHERRY—In this case, at the same time there is a parallel case, Slater & Gordon. Do you have interaction with Slater & Gordon between the legal teams?

Mr D'Aloisio—Not at this point, but the work that we do and the documents and everything else will be available in the end to liquidators and so on, and through that they will end up being available, I would have thought, through these court proceedings as well. While not actively being involved in the work we are doing, those sorts of actions will also be beneficiaries of that work and that helps those cases go through.

Senator SHERRY—There is a crossover of information. In this context, the actions against licensees that I know Slater & Gordon have initiated involves the issue of PI insurance. Has ASIC been involved in the development of the PI insurance model for financial planners? There is a work in progress on compulsory PI insurance, or some model of compulsory PI insurance. It has not yet been finalised, as I understand it. What is ASIC's role, if any, in that area?

Mr D'Aloisio—ASIC, as you may know, will clearly administer the adequacy of those arrangements post the new regulations coming in that the government said they would bring out. I think the intention is for a 1 January 2008 start to those with that 30 June date that currently exists being extended by that regulation. That is our latest understanding.

Senator SHERRY—I am just trying to—

Mr D'Aloisio—Then in relation to PI itself we will put out a consultation paper at the time that regulation comes out which will indicate to the industry what our thinking is on the type of PI policies that they should be negotiating with brokers. In addition, we are working with

the industry to hopefully come up with some sort of standard PI type policy and conditions. We also commissioned a report to help us understand the PI market. In other words, we are working with Treasury, which is running the policy side, to see what we can do to maximise the sort of PI cover that can be available to the individual planners and advisers when the regulations finally kick in.

I guess in a broad sense if you could achieve some sort of industry based standard policy that the brokers were prepared to write and issue with insurers issuing, from ASIC's point of view that would be quite desirable because it makes the ability to administer adequate arrangements much easier. We think that is a longer term plan but, nevertheless, we want to work with the industry to see if we can get to that point.

Senator SHERRY—Because it seems to me for a consumer who even asks and has explained to them PI insurance by a planner that, frankly, they would find it extraordinarily difficult to understand and appreciate different definitions and levels of coverage of PI insurance.

Mr D'Aloisio—Yes. I come from a legal background so when I was in practice PI insurance was just a given, but it tended to be an industry based cover. It tended to be an industry negotiated cover. But as it matured, they became individual policies. In other words, the pool was deep enough in the insurance markets that they could write the policy. I think where we can help is in working with the brokers to get them comfortable that these policies are profitable for them in this industry. Really, at the end of the day, that is what it is going to be about.

Senator SHERRY—I know there is concern amongst independent financial planners, if I can use that classification, about the cost of independently purchased PI insurance, if I can describe it that way. Then looking at the website and the money management newsletter tonight during the break AXA were claiming that they could provide PI insurance for their planners at 50 per cent below the cost of the rest of the mainstream industry. I can see some issues in this space.

Mr D'Aloisio—There will be tension there. That is a very good point because going for an industry type cover you have the issue of the bigger players saying why would they want to subsidise the other players, and so on. They are issues that we have to work through. At the end of the day, it has to be driven by the insurance industry being prepared to take the risk that it can write policies for this group. I think it will because in the end there is money to be made.

Senator SHERRY—But there is also the issue of a planner that ceases licensing, which we have discussed before, or you ban or prohibit a planner from practising, whether they are covered for PI insurance. In that sort of case I would have thought it a necessity to have some sort of coverage, whatever it may be.

Mr D'Aloisio—Ordinarily you would need run-off cover. As is the case with solicitors, if your practising certificate is removed, from memory I do not think that means your PI policy is gone for your acts and omissions up to that point.

Senator SHERRY—We are going to have some conclusion in this area as at 1 January. However, there are still going to be some issues working forward beyond that.

Mr D'Aloisio—I think the reality will be that by 1 January we will have in place the regulation and, with our consultation paper, we will have in place the sort of PI arrangements that will be adequate from ASIC's point of view. I think we would not have worked through industry-wide standard policies, and so on. It will be pushed out, if possible, well beyond 1 January 2008.

Senator SHERRY—I touched earlier on the FICS limit. Have we any progress in that area, Mr Cooper? I keep hearing—not from ASIC—that it is under review, under review and under review, and yet it never seems to come to a conclusion.

Mr Cooper—You would be aware that FICS have issued a consultation paper on the subject. I think it is fair to say that ASIC broadly supports the approach that FICS is proposing, which is in very broad terms to line the monetary limits up with other major external dispute resolution bodies.

Senator SHERRY—Which would be?

Mr Cooper—I suppose they are pitching the figure to go to 250. But there is an alternative proposal—

Senator SHERRY—I have had representations with people putting an alternative proposal which just happened to come in significantly lower than 250, but—

Mr Cooper—It is like the last subject in the sense that there are two key points. One is that the members have to be on board with it. It is not for us to impose it on them.

Senator SHERRY—You do have an influence.

Mr Cooper—We do.

Senator SHERRY—ASIC does rightfully have an influence.

Mr Cooper—Yes, absolutely. Secondly, there is a PI element to it. The ideal solution would be that everyone agrees on a new limit and the PI market can come to that limit and everyone is significantly moved forward. They are the parameters. That is what is being chewed over at the moment. ASIC's position is that, without being too domineering about it, we think it makes perfect sense for limits to be increased.

Senator SHERRY—Yes. It is the quantum. I have had some people submit to me that it should be CPI'd since it has been 13 years, and I retorted with: what about indexing it to the growth of the financial services sector and see where we end up?

Mr Cooper—As a general proposition, indexing monetary limits of all types makes sense.

Senator SHERRY—I have one other highly contentious issue that I thought I would throw in. I had almost forgotten about it. A custodian called Northern Trust has been in the media recently. I was surprised when we questioned APRA about this last night that, from an APRA perspective, there is no licensing requirement of a custodian entity that is purely operating in the custodian space as in this case, Northern Trust, and I am very clear about that. What about ASIC? Is there any licensing requirement for a custodian entity?

Mr Cooper—Yes, there is.

Senator SHERRY—Good.

Mr Cooper—And so if the proposal goes forward then no doubt we will receive an application from them that we will deal with in the normal course.

Senator SHERRY—Have you received an application?

Mr Cooper—No, not yet.

Mr D'Aloisio—Not that we are aware of.

Mr Cooper—We might have got one this afternoon, but our briefings tell us no.

Senator MURRAY—Mr Costello, the Future Fund manager who was at the estimates of the Finance Department hearing said to us—and you can check the record, but this is my summary—that he had been advised, not directly but indirectly that assurance had been made that the licensing would be forthcoming and was in progress. That is my summary of what he said. You can have a look at his actual words, but I just want to check with you: has ASIC given any assurance to anybody representing Northern Trust that the licensing process is under way and they are going to get it and it is automatic, or any of those kinds of words?

Mr Cooper—No. There have been some operational discussions, just as you might have with any other entrant into the market, such as what we have to do: how does it work, and so on. We have dealt with those in the perfectly normal course, but certainly no assurances have been given because we have not been provided with an application and nothing resembling an application.

Senator MURRAY—If I can refer you to the *Hansard* record—

Mr Cooper—I have certainly seen some references to that, yes.

Senator Minchin—With respect I think Senator Murray is somewhat, maybe inadvertently, misrepresenting the position put by Mr Paul Costello. My recollection is that he made it clear that it would be a matter for Northern Trust—

Senator MURRAY—Yes.

Senator Minchin—and it was obviously their responsibility to ensure that in order to fulfil the contract and be available they would have to negotiate all the relevant—

Senator MURRAY—That is correct.

Senator Minchin—I do not think it is fair to suggest that he implied or suggested they had approval which had not—

Senator MURRAY—The minister is correct. What I am saying is that he advised us he had been told indirectly that the process was under way and that their licensing would be satisfied. You have a look at the *Hansard*, you can see what he actually said. All I want to know is whether you have given any assurances to Northern Trust, and your answer is no.

Mr Cooper—Yes, a very clear no. There have been discussions but it has been around, 'Do we need a licence? What sort of licence? What do we have to do?' and so on.

Senator SHERRY—Is it determined within ASIC?

Mr Cooper—No. This is with Northern Trust, with their legal advisers and with APRA, which is a perfectly normal chain of events.

Senator MURRAY—Yes, perfectly reasonable.

CHAIR—Minister, the point you are taking—and this matter has been clearly out in the public domain—is that there has to be a requirement for this to occur?

Senator Minchin—Yes. Mr Costello made it very clear that it would be the responsibility of Northern Trust to ensure they did have all the requisite approvals and licences to operate.

Mr D'Aloisio—And we will consider it on its merits in the normal way.

Senator Minchin—Yes.

Senator MURRAY—It was an interesting exercise because all of us meant to be reasonably attuned to who does what and none of us knew who was the licensing authority, so we were glad to discover that.

Senator Minchin—I think the public basically have no idea what a custodian is or does.

Senator SHERRY—That is part of the problem.

Senator Minchin—Except those who go and present awards at custodian—

Senator SHERRY—Of course. I am very privileged to make these presentations from time to time.

Senator Minchin—I am sure you are.

Senator SHERRY—That does not in any way inhibit my forensic examination of the issues, awards or not.

Senator Minchin—Oh no, that is proper. That is proper.

Senator SHERRY—I will leave the Westpoint, Fincorp and ACR issues for the time being. There are other issues to raise but I am conscious of the time, and we have got that other opportunity in the next few weeks. On the issue of dispute procedures more generally, there has been some media coverage of a number of cases involving a number of Australian banks over the last few weeks. I am not going to go to the details of the consumer. I am aware of them and in fact I am aware of more than have been given some media coverage, but certainly a specific issue related to NAB and a specific issue related to Rabobank. There are some other issues around the handling of disputes by the internal disputes processes of institutions. Has ASIC done any recent work in terms of the robustness, timeliness and efficacy of the internal disputes processes operating within financial institutions? I did ask about this, I think, last year, in November. Mr Lucy had not been aware of any work, but it just seems that part of the strength of our system is to ensure that internal disputes are dealt with timely, ethically and robustly, hopefully so they do not have to go onto the next level.

Mr Cooper—Can we take that one on notice.

Mr D'Aloisio—I am not aware of any.

Senator SHERRY—For example, has ASIC gone to any bank or insurance company? It is not an issue purely confined to banks. Every financial institution is required to have its internal disputes process to carry out any examination of the way in which they are operating. I have not seen any statistical data of individual dispute resolutions in a number of cases solved et cetera, even in the aggregate or disaggregated, but also no recent examination of the

status of their operation. So could you take it on notice? It just seems to me that it would be reasonable to have, on a regular basis, a review of the operational standards of these disputes process procedures. Occasionally there might need to be a more detailed examination when there is seen to be a significant number of disputes that are not being resolved in a reasonable time frame. So could you take that on notice because I think it is an area where some work needs to be done. Ideally, disputes would be settled with both parties amicably within the internal disputes processes.

Mr D'Aloisio—We will take that on notice. We might talk to APRA as well about that.

Senator SHERRY—Yes. It would seem to me it is your space to look at.

Mr D'Aloisio—Yes, it is, but I am just thinking through getting the statistics.

Senator SHERRY—But APRA's space has the licensing as well and there has to be an internal disputes process, but the examination of that in operational details seems to me to be ASIC's space.

Mr D'Aloisio—We will look at that.

Senator SHERRY—On the issue of ASIC fee collection and payment to the states, I understand that a segment of your fees collected are paid to the states.

Mr Cooper—Not by us.

Senator SHERRY—They are not?

Mr Cooper—No. Every night, as I understand it, whatever money we have is sent to the Reserve Bank and whatever distribution happens does happen in accordance with the now quite elderly Corporations Agreement that was originally signed in 1990. The distribution and the formula and what is kept and so on is completely out of our hands.

Senator SHERRY—Where would I find this breakdown of payment to the states?

Mr Cooper—It is scheduled to the Corporations Agreement.

Senator SHERRY—I will have a look at that. I was mystified the states were getting any of the money.

Mr Cooper—It really does substantially go to the states as the trade-off for effectively transferring the corporations' power and the fee collection. That was the deal and so the states got their share of fees back. So that is where the money goes. It goes back to the states.

Senator SHERRY—But is it payment for a purpose of state regulation?

Mr Cooper—No.

Mr D'Aloisio—It would be money that, had they kept the corporate affairs powers, they would have got. But the deal was they kept getting revenue.

Senator SHERRY—So they have transferred the responsibility and kept the money. I would have thought the finance minister would be on to this one.

Mr D'Aloisio—It is a policy matter.

Senator SHERRY—I know it is a policy matter. I must say my ears pricked up when I heard that the states were getting part of the fees. We might have competing savings after the

election. That will be further investigated. I just wanted to go to a specific program that was contained in the budget that is described as 'ASIC—information technology security and risk mitigation phase 2 and application development'. There was funding of some $116.7 million over four years, including capital funding of $56.2 million for the redevelopment of IT, and there are a couple more lines of description. Could you give me some more information on this? It is a significant expenditure.

Mr D'Aloisio—Yes. It is really the next phase of upgrading, updating the technology public register systems that ASIC has. The very important initiatives I talked about earlier about improving the public register and access to registration and other information to the public and so on are very much dependent on the IT systems that ASIC has been taking from probably the early 1990s version or mid-1990s version to 2010 versions. It is an important part of technology upgrade, both in its core public register and also in relation to the applications and so on that are used within the office. Having come from outside in other organisations I certainly feel that the technology upgrade is extremely important for ASIC, for its investigation work, enforcement work and public register work. There is a three-stage program known I think as a star program within ASIC. The first stage has been completed. The funding you are referring to is for the second stage and then there is a third stage which gets to the applications in about two years time.

Senator SHERRY—In the funding, in the forward estimates the bulk of it is up to and including
2009-10—

Mr D'Aloisio—Yes, it is two years, I think.

Senator SHERRY—And that is for stage 2?

Mr D'Aloisio—That is stage 2. There is a stage 3. I cannot recall the figure but there will be a stage 3, which is more to do with actual applications that come off. This is really about the technology infrastructure.

Senator SHERRY—Have contracts been entered into for phase 2 yet?

Mr D'Aloisio—No, the procurement processes are to come. This was the funding. There is then a series of projects. There will not be a single procurement. It will be a series of contracts. Quite a lot of the work will be done internally through our own technology people. Quite a lot of it would be outsourced to third parties, I expect. But each contract, each procurement, would be a separate exercise to go through the normal procurement processes for that stage. It has the governance principles that are applied to such a large project, in the terms of responsibility and monitoring of it on an ongoing basis reporting back directly to me.

Senator SHERRY—I think in large part because of the 2006 budget changes, there is a massive IT administration systems upgrade across the entire superannuation sector, which is obviously a big space in financial services, and at the same time the ATO is carrying out a massive upgrade in this space. Are there likely to be any additional pressures, cost or time constraints as a consequence of your, if indeed you are—I do not know—competing in the space for IT upgrade at the moment?

Mr D'Aloisio—In terms of available resources?

Senator SHERRY—Yes.

Mr D'Aloisio—Because of the market?

Senator SHERRY—Yes.

Mr D'Aloisio—Certainly the team that is looking at this has had that very much in their mind to be able to ensure, so they have gone for a mix at this stage between existing internal resources and selected potential contractors for the external work. The advice I received recently when I reviewed that post the budget was that we were comfortable we could get the resources. There is a further review going on, and it will go on over the next months as we plan for it, and I will get a much clearer fix on that in about two or threes months time. But certainly the actual resourcing of it is something our people are looking at very carefully for the very reason you have stated. We are in markets where the demand for these sorts of services is high and we have very low unemployment, so you have to be very careful in these exercises.

Senator SHERRY—From talking to some of the superannuation funds that have, if you like, added on functions to their IT systems as superannuation has become more and more complex over the last 20 years, many of them have reached the point where they have to start again. They can no longer simply just tack on, if I could use that expression, because the point has now been reached with the latest changes that they are so significant in terms of IT implications they have to go for a whole project from ground up as distinct from an add-on; it has become too difficult to continue with that approach. Again, more pressure in the market. A great deal of media coverage was given to the apprehension of a Melbourne businessman, Mr Gabriel Pennicott, who fled the country and I think was caught in Canada and arrested by the police in his rented 'ocean-side mansion', was the colourful description of the point of arrest. He is allegedly a con man. The arrest had come as a consequence of victims hiring their own private investigator, and it was alleged that ASIC had failed to find him. Can you throw any light on ASIC's actions in this matter.

Mr Cooper—I hope so in a helpful way, but this is a criminal matter and so we have to be very careful about what we can say and, in particular, the suggestion that we ought to telegraph what we are going to do in relation to people who are being extradited and so on. I think I can make some comments that will shed light on this. ASIC does not engage in extradition. Getting people back from foreign jurisdictions is a government-to-government matter. So the chain of events, if you like, in relation to a matter, where we allege criminal conduct on the part of someone who escapes the jurisdiction, is that ASIC does the normal investigation work and refers it to the Commonwealth Director of Public Prosecutions. The DPP will then refer the matter to Attorney-General's, because under our system it is the department that handles the extradition. So the proposition that ASIC somehow failed to find Mr Pennicott is many steps wide of the mark in the sense that we, as an agency, simply do not have a role in extradition in a direct sense. Were we in contact with other law agencies? Did we know Pennicott's whereabouts, et cetera? Absolutely. But there is that sequence and that chain. The proposition that ASIC was so hopeless, did not know where Pennicott was and the bounty hunters or the vigilantes or whatever they were got him is simply not true. We were in contact with a number of people. The information that people gave us was helpful, but it does

pay to bear in mind that agencies like ASIC under our system do not get involved in a direct sense in extradition.

Senator SHERRY—You would provide information to A-G's for them to initiate extradition proceedings in another jurisdiction, which may or may not be successful.

Mr Cooper—Correct, yes.

Senator SHERRY—And then presumably it would be up to A-G's, liaising with the police in that jurisdiction, to arrest once the extradition proceeding has been approved.

Mr Cooper—That is right.

Senator SHERRY—And if information came to ASIC that X is living at a particular address, you would communicate that to A-G's?

Mr Cooper—Absolutely. There has been a loop, if you like, between the DPP, A-G's and ASIC right back. We referred briefs to the DPP back in March 2005, so that is how it works. The popular view of things is simply not right.

Senator SHERRY—It was reported that he initially fled Australia the day after ASIC had interviewed him. This is back in December 2004, so it is some time ago. Do you have any information as to why, if indeed it were possible, he was not prevented from leaving the country then?

Mr Cooper—We cannot just take somebody's passport away from them. The process is that we apply to court and a court decides whether that person has a passport or not. I can make some specific comments in relation to Pennicott but the question is wider.

Senator SHERRY—Let us deal specifically with Pennicott because it was a major feature of the media coverage.

Mr Cooper—Yes. Without going into too many details, as you said, it was very shortly after we had spoken to him. He had a family; he had a current passport and had been backwards and forwards to Australia on a number of occasions. He left very shortly after we had spoken to him. He had been cooperative with us up to that point and he shot off. It is not much more complicated than that. But to put that into wider context, how many other Pennicotts have we had this experience with? Going back to the 2001 figures, we have done 1,600 investigations involving around about 5,400 possible defendants. In that timetable about 10 have fled the jurisdiction and also in that timeframe we have made 169 successful applications to court but we do not always get what we want. Sometimes the court says, 'Look, ASIC, you do not have enough evidence here. This person is going to keep their passport. Thanks very much.'

Senator SHERRY—So you obviously have to go through an interview process with the individual prior to making application. It would be very unusual not to have to go through that to gain a level of proof before application for removal of passport.

Mr Cooper—Yes. And just flicking over to the Westpoint situation, you will be aware of our success in getting Mr Burnard back from the United States with the assistance of the FBI. So it comes up a lot, but the important thing is we cannot just grab someone's passport. It has

to be through a court and in the Pennicott case, yes, he ducked off very quickly and he just slipped the noose.

Senator SHERRY—You mentioned that 10 have fled the jurisdiction. Do you have a figure on how many we have been able to extradite back to Australia and why we have not if we have information about where they are?

Mr Cooper—Not in my materials, but obviously we can look into that.

Senator SHERRY—I can recall the case of a tabletop dancer, or a person in a relationship with a tabletop dancer, who fled the country for somewhere in Central America—Guatemala or Honduras or something—and we could not get them back. He was in financial services.

Senator MURRAY—The things you know.

Senator SHERRY—This was 10 years ago. I remember I asked a question in Senate question time 10 years ago about this and what had happened with the extradition. I think there may have been no extradition treaty—that may be an explanation with some of them. But anyway, we have another meet in a few weeks so perhaps you can provide some more information. Did you issue a press release around the media coverage on this episode? I could not find one.

Mr Cooper—I do not think so because firstly it is criminal; and, secondly, although as you would be aware action has been taken in Canada, the fact is we have not got him back yet and we really do not want to telegraph any punches.

Senator SHERRY—You have explained the process from your perspective tonight and I would not have thought it would have done any harm to have explained that in a media release, given the significant adverse comment. There were current affairs shows and news shows; anyway, that is your call.

Mr Cooper—As I understand it, what you are suggesting is that it would assist in the confidence that people have in the regulatory system that this is how it works.

Senator SHERRY—Yes. I do not think the information is readily available.

Mr Cooper—We did put out a release specifically on Pennicott to say that he had been arrested but I take your question to be going to just what does happen, what is the process and what are the stats.

Senator SHERRY—To the extent that the average punter in my community on the north-west coast of Tasmania takes notice of these things, I actually had people asking me about this particular case. They want to know what was ASIC doing and said it was outrageous. They had obviously been influenced by current affairs and some of the news coverage. I have to say that it is relatively rare for people where I live to comment about these types of issues. But there was some significant interest in the matter.

Mr D'Aloisio—By the same token we do not want to discourage people who have information to pursue it and let us know. It is not a competition between whether we find the person or not. I think what is important is that the person is found.

Senator SHERRY—Yes, that is right. I did go through all your media releases since the last meeting as part of the preparation. As I say, I could not find anything on that issue. I want

to come to the issue of First Capital Financial Planning. This was effectively a misleading and deceptive exercise, and pretty blatant on the face of it. That has now concluded, as I understand?

Mr Cooper—Yes, very recently in the court.

Senator SHERRY—Now that the court case has been resolved, what is to happen with the mechanism for ensuring redress for the consumers who were misled?

Mr Cooper—There is a blend, if you like, of court order and enforceable undertaking; so they work together to get the result. What happens is that First Capital has to write to all of the affected clients correcting the misleading information they had been given and then the enforceable undertaking involves compensating or reimbursing the super accounts of people who have been misled.

Senator SHERRY—That will be an automatic process or is it an opt-in by the individuals affected?

Mr Cooper—It is an opt-in so that—

Senator SHERRY—This concerns me. Why should it be opt-in and not opt-out, because there will be at least some individuals, I think, where inertia will mean they may say, 'Why should I go back through this process even though I have, on the face of it, been misled and deceived?'

Mr Cooper—It is partly because of the actuarial considerations. We have a series of schoolteachers in New South Wales who are with First State Super. They have had misleading advice to switch to another product. So the people get the letter and say, 'Gee, it looks like I have been misled. I want to go back to First State Super.' It is very clear then because you can work out had they stayed in First Super that their situation would X. They have left First State Super and they want to come back; their position is Y. They have triggered an exit fee, and it is very easy to calculate the difference. So that is a really neat solution. We can say for those people who want to come back to First State Super you will be reimbursed and First Capital will pay for it. For people who stay in the new product, because superannuation is a long-term product, you would have to get into some sort of exotic actuarial calculation. You would be coming up with some sort of specific and very hypothetical way to put it into real dollar value to actually compensate the person. What would you do? Would you say, 'Well, I am projecting out 25 years or I am giving you money now.' They get it in writing, 'You have been misled. You have the option of going back and you will be reimbursed.' If they elect to stay there really is not a sensible and workable remedy for them.

Senator SHERRY—Was there any element of DB involved in this, in the switch?

Mr Cooper—No.

Senator SHERRY—Where do they get an independent assessment of the moneys lost? It is a hypothetical calculation. Sorry, it is not a hypothetical, but there is an assumption made of loss. Who will provide that information to them?

Mr Cooper—It is a fairly elementary kind of a case in the sense that they were misled about their insurance so they had insurance X and they got insurance Y and they were not told

properly about the fees. But as for the deeper question of is the new product going to perform as well as the old one, again we get into that imponderable—

Senator SHERRY—Yes, I understand that. Let us assume ongoing investment rates of return are identical.

Mr Cooper—I think we almost have to assume that.

Senator SHERRY—Yes.

Mr Cooper—In all of these sorts of things you come down to something that is really close to that.

Senator SHERRY—That is right. Because if you try and do it on the basis of if there are 20 different investment rates of return, what is the long-term rate of return and that sort of thing?

Mr Cooper—Exactly. And how would ASIC know and all that.

Senator SHERRY—That is right. The impact of the fees and the insurance are much more easily quantifiable. But my question goes to where would they get that information about 'How does this affect me?'

Mr Cooper—Maybe we need to have a look at the pro forma letter because, I must admit, I do not have an example of what the letter would say. Maybe we have not drafted it yet; I just do not know. So the question is: when the superannuant opens up the letter explaining all of this, do they need external advice to help them make the decision or is it clear from the document that they have been misled about fees, misled about insurance, they can go back to First State Super and they will be topped up and put back in the position that they were in?

Senator SHERRY—Yes. You have obviously done some hypotheticals based on real-life examples, but my assumption would be that in the letter there would be an illustration of those hypotheticals, without names, in the correspondence. My other assumption is that there would be some provision for them to, if they wish, get an individual advice at no cost, and it should not be at any cost given the circumstances, paid for by the recipient fund. There should also be that advice provision for them if they wish to seek it. They are just practical issues that I think would be reasonable in the circumstances.

Mr Cooper—Can we take just that aspect of that matter on notice, because I just do not know the answer to that.

ACTING CHAIR (Senator Bernardi)—Can I pick up on one comment there that Senator Sherry made. You mentioned, Mr Cooper, actuarial calculations and advice. I think this goes to what Senator Sherry is asking. Who seeks actuarial calculations and who provides those calculations to the individual policy holder?

Mr Cooper—The point I was making was that nobody does in the sense that to estimate what position a person would be in staying in the new product and to try and reimburse them or compensate them for doing that would involve an acutely hypothetical actuarial calculation about where they might be at some unknown end point. So what I am saying is that we just did not run the case against First Capital going into that territory. We decided to keep it fairly simple and say, 'You can go back to your existing product, the one that you were misled out

of, if you like, and the court order will say that you have to be compensated as if you never left that.' But to go down the other route would simply be too hard.

ACTING CHAIR—So would those who choose to remain in the existing fund or in the new superannuation fund receive the same quantum of compensation, or did they?

Mr Cooper—No.

ACTING CHAIR—They would just say, 'This is my choice.'

Mr Cooper—'I made a choice.'

ACTING CHAIR—And they would stick to that.

Mr Cooper—Yes. 'I read that I've been misled but nonetheless I'm going to remain in the new product.'

Senator SHERRY—The other observation is that 170 teachers were misled. If we are concerned about literacy in the community and the capacity of people to understand financial products, if 170 teachers do not, we have a issue of education, I would suspect, in the broader community.

Mr Cooper—If you select anyone, whether it be architects, dare I say judges or whatever section of the community, I think you would find that they would find some of these issues challenging.

ACTING CHAIR—Politicians?

Mr Cooper—No.

Senator SHERRY—It would only be a recent possibility because they are now in DCs, not DBs. Is it possible to provide the committee with some of the calculations of the losses that ASIC made in this case? I do not want names attached. I am just interested to know what some of the scenarios were of the losses calculated in a variety of circumstances.

Mr Cooper—I will see what we have.

Senator SHERRY—I am sure you would have had to have worked that out for the case.

Mr Cooper—For the case, yes.

Senator SHERRY—Thanks for that. Again, what has struck me going through your extensive volume of press releases, was just the sheer number of issues around self-managed super funds in the main and an attempt to access superannuation early through a variety of names, titles and contrivances. It does not seem to me that misuse of self-managed super funds in an attempt to access people's money early is dropping off in any sense. It seems to be a constant, steady attempt to access moneys by a range of individuals in this area.

Mr Cooper—It is a combination of that and I suppose our focus on it. Our business plans have had us in this area really as part of—I will not use the word 'legacy'—Super Choice because in our planning for Super Choice we asked ourselves where are the risks going to come from and we scoped various risks. One of those risks was people seeking to manipulate the self-managed super fund pot. So it is a combination of perhaps the frequency of the conduct but also we keep catching people at it because that is where we are focusing our attention.

Senator SHERRY—One of the cases involved the Little Super Fund. I thought that was an odd description, the Little Super Fund. That has all sorts of implications. Your release of 24 May mentions that you were receiving assistance from the Australian Transactions Reporting Analysis Centre, AUSTRAC. The clear implication there is that presumably some of the monies have gone offshore. Is that the case in this case?

Mr Cooper—Not necessarily. To be honest, the Little Super Fund does not ring a bell with me. But AUSTRAC might also pick up for us of course cash transactions over $10,000.

Senator SHERRY—Okay.

Mr Cooper—So that may well be where that came from.

Senator SHERRY—And I do note that there was a restraining order preventing the operator from leaving or attempting to leave Australia. It does not give an indication of the quantity of money involved. You might just take that on notice for the next hearing. Another case that caught my eye was the appointment of a liquidator. That in itself did not catch my eye but in a release of 4 May you said you had appointed a liquidator to a transport logistics company, On Ground Logistics, in order to ensure that the approximately 13 employees who were owed about $180,000 would then be able to receive their entitlements under GEERS, General Employee Entitlement and Redundancy Scheme. It seemed to me that is a fairly unusual reason to appoint a liquidator, to literally force the payment. Can you tell me what the rationale was behind that?

Mr Cooper—I will have to take that one on notice. That case is not one I am familiar with I am afraid.

Senator SHERRY—It was just an unusual aspect that caught my eye.

Mr Cooper—I agree with you. That is not a normal reason for appointing a liquidator.

Senator SHERRY—Another release that caught my eye was one of 23 March relating to ASIC's work with Singapore and the US to stop cold calling schemes targeting currency and commodity options. It begged the question: is this a significant problem area and, if so, is it confined to Singapore and the US or are there some other jurisdictions where it is an issue for Australia?

Mr Cooper—I think it has been a problem. It is hard to rule a line but over the last 10 years and certainly from 2000 onwards there has been cold calling from foreign jurisdictions. We have had Bangkok boiler rooms and a number of jurisdictions have been involved. But this is one of the examples where ASIC's international cooperation, if you like, has worked extremely well. In the Bangkok case, for example, cooperation with the Thai SEC meant that that was shut down and in fact they got some prosecutions at their end and so on. So it is a range of jurisdictions and an ongoing problem.

Senator SHERRY—Do you know of any other countries where we have got to discussions, besides Singapore and the US, to try and minimise this problem?

Mr Cooper—At a guess I think most of the jurisdictions that we do business with would involve some of this sort of thing.

Senator SHERRY—Another release caught my eye mainly because I will be interested to see what the response was. The release of Monday, 2 April, was titled 'Don't be fooled this April Fools' Day: ASIC helps you spot a scam.' You launched a fake investment website on April Fools' Day to alert investors about the dangers of investment opportunities on the internet. I am interested to know what the response was to the fake website.

Mr Cooper—We might have to take that one on notice because I think the commission is also interested—

Senator SHERRY—I am not criticising the initiative. I am interested to see in fact how many consumers you did manage to attract on April Fools' Day.

Mr Cooper—I am not sure we have that data to hand, so we will have to take that on notice.

Senator SHERRY—Again you may have to take this on notice. You have launched a simpler super calculator. What has the response been to that? That was launched on 5 April.

Mr Cooper—We will have to take that one on notice.

Senator SHERRY—There are some other issues to explore, but I think for tonight that is it.

ACTING CHAIR—Thank you very much, Gentlemen.

Committee adjourned at 9.39 pm