



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

STANDING COMMITTEE ON ECONOMICS

ESTIMATES

(Supplementary Budget Estimates)

THURSDAY, 2 NOVEMBER 2006

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SENATE

STANDING COMMITTEE ON ECONOMICS

Thursday, 2 November 2006

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

Senators in attendance: Senators Bernardi, Brandis, Chapman, Conroy, Joyce, Murray, Parry, Sherry and Wong

Committee met at 9.04 am

TREASURY PORTFOLIO

Consideration resumed from 1 November

In Attendance

Senator Minchin, Minister for Finance and Administration

Senator Colbeck, Parliamentary Secretary to the Minister for Finance and Administration

Department of the Treasury

Dr Ken Henry, Secretary

Outcome 1: Sound macroeconomic environment

Output Group 1.1: Macroeconomic Group

Dr Martin Parkinson, Executive Director

Mr David Parker, Alternate Executive Director

Mr David Pearl, General Manager, International Economy Division

Mr David Turvey, Manager, International Economy Division

Mr Nathan Dal Bon, Manager, International Economy Division

Dr Steven Kennedy, General Manager, Domestic Economy Division

Mr Graeme Davis, Manager, Macroeconomic Policy Division

Mr Paul O'Mara, General Manager, Macroeconomic Policy Division

Mr Greg Coombs, Macroeconomic Policy Division

Mr Russell Campbell, Manager, Macroeconomic Policy Division

Ms Meghan Quinn, Principal Adviser, Domestic Economy Division

Mr John Hawkins, Manager, Domestic Economy Division

Mr Roger Brake, General Manager, International Finance Division

Outcome 2: Effective government spending arrangements

Output Group 2.1: Fiscal Group

Mr David Tune, Executive Director

Mr Jason McDonald, Manager, Budget Policy Division

Mr Rob Heferen, General Manager, Social Policy Division

Mr Peter Robinson, Principal Adviser, Social Policy Division

Mr Michael Willcock, General Manager, Commonwealth-State Relations Division

Ms Maryanne Mrakovcic, General Manager, Industry, Environment and Defence Division

Mr Michael Burton, Chief Financial Officer, Corporate Services Division

Mr Neil Richardson, Manager, Budget Policy Division

Outcome 3: Effective taxation and retirement income arrangements

Output Group 3.1: Revenue Group

Mr Nigel Ray, Acting Executive Director

Mr Paul McCullough, General Manager, Tax System Review Division

Mr John Lonsdale, General Manager, Superannuation, Retirement and Savings Division

Mr Patrick Boneham, Senior Adviser, Superannuation, Retirement and Savings Division

Mr Phil Gallagher, Manager, Tax Analysis Division

Mr Colin Brown, Manager, Tax Analysis Division

Mr Martin Jacobs, Acting General Manager, Individuals and Exempt Tax Division

Mr Mike Rawstron, General Manager, International Tax and Treaties Division

Mr Haydn Daw, Manager, International Tax and Treaties Division

Ms Jo Laduzko, Manager, International Tax and Treaties Division

Mr Damien White, Acting Manager, Tax Analysis Division

Mr Patrick Colmer, General Manager, Indirect Tax Division

Mr Nigel Murray, Manager, Superannuation, Retirement and Savings Division

Mr Matt Flavel, Senior Adviser, Business Tax Division

Ms Sue Vroombout, General Manager, Board of Taxation

Outcome 4: Well functioning markets

Output Group 4.1: Markets Group

Mr Jim Murphy, Executive Director

Mr Ian Beckett, Acting General Manager, Foreign Investment and Trade Policy Division

Mr John Hill, Manager, Foreign Investment and Trade Policy Division

Mr Mike Rosser, Manager, Foreign Investment and Trade Policy Division

Mr Chris Legg, General Manager, Financial System Division

Ms Vicki Wilkinson, Manager, Financial System Division

Ms Veronica Glanville, Manager, Financial System Division

Mr Trevor King, Manager, Financial System Division

Mr Andre Moore, Manager, Financial System Division

Ms Kerstin Wijeyewardene, Manager, Financial System Division

Mr Geoff Miller, General Manager, Corporations and Financial Services Division

Mr Andrew Sellars, Senior Adviser, Corporations and Financial Services Division

Mr Matt Brine, Manager, Corporations and Financial Services Division

Mr David Love, 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 James Chisholm, 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 Peter McCray, General Manager, Financial Literacy Foundation
Mr Grahame Crough, Manager, Financial Literacy Foundation
Mr John Riley, Financial Literacy Foundation
Mr Peter Martin, Australian Government Actuary

Australian Bureau of Statistics

Mr Denis Farrell, Deputy Australian Statistician, Services Group
Mr Peter Harper, Acting Australian Statistician, Economics Statistics Group
Ms Barbara Dunlop, First Assistant Statistician, Population Statistics Group
Dr Siu-Ming Tam, First Assistant Statistician, Information Management and Census Division
Ms Teresa Dickinson, Assistant Statistician, Office of the Statistician
Ms Julie Evans, Director, Secretariat
Mr Mark Whybrow, Chief Financial Officer

Australian Competition and Consumer Commission

Mr Graeme Samuel, Chairman
Mr Brian Cassidy, Chief Executive Officer
Mr Adrian Brochlehurst, Chief Financial Officer
Mr Joe Dimasi, Executive General Manager, Regulatory Affairs Division
Mr Mark Pearson, Executive General Manager, Enforcement and Compliance
Ms Margaret Arblaster, General Manager, Transport and Prices Oversight
Mr Michael Cosgrave, Group General Manager, Communications
Mr Scott Gregson, General Manager, Adjudication
Mr Tim Grimwade, General Manager, Mergers and Assets Sales
Ms Helen Lu, General Manager, Corporate
Mr Nigel Ridgeway, General Manager

Australian Prudential Regulation Authority

Dr John Laker, Chairman
Mr Ross Jones, Deputy Chairman
Mr John Trowbridge, Member
Mr Charles Littrell, Executive General Manager, Policy, Research and Statistics
Mr Tom Karp, Executive General Manager, Supervisory Support Division
Mr Ramani Venkatramani, General Manager, Central Region, Specialised Institutions Division

Australian Securities and Investments Commission

Mr Jeffrey Lucy, Chairman
Mr Jeremy Cooper, Deputy Chairman
Mr Malcolm Rodgers, Acting Commissioner

Australian Taxation Office

Mr Michael D'Ascenzo, Commissioner
Mr Greg Farr, Second Commissioner
Ms Donna Moody, Chief Finance Officer
Ms Margaret Crawford, Chief Operating Officer

Ms Raelene Vivian, Deputy Commissioner

Mr Mark Jackson, Deputy Commissioner

Mr Mark Konza, Deputy Commissioner

Corporations and Markets Advisory Committee

Mr John Kluver, Executive Director

Inspector-General of Taxation

Mr David Vos, Inspector-General of Taxation

Mr David Pengilley, Senior Advisor, Office of the Inspector-General of Taxation

Productivity Commission

Mr Bernard Wonder, Head of Office

Mr Garth Pitkethly, First Assistant Commissioner

Mr Michael Kirby, First Assistant Commissioner

Australian Securities and Investments Commission

CHAIR (Senator Brandis)—I welcome to the table officers of the Australian Securities and Investments Commission. Mr Lucy, do you have an opening statement?

Mr Lucy—I do not.

CHAIR—Thank you. We will proceed to questioning.

Senator SHERRY—I want to congratulate you, Mr Lucy. I believe you have been appointed the inaugural chairman of International Forum of Independent Audit Regulators.

Mr Lucy—That is correct. Thank you for your observation.

Senator SHERRY—That is a very impressive title.

CHAIR—On behalf of other senators, we wish to join in those expressions of good wishes to you, Mr Lucy.

Mr Lucy—Thank you.

Senator BERNARDI—Mr D'Aloisio is not here today?

Mr Lucy—No, he is not. He has not taken office yet.

Senator SHERRY—Okay. When will that occur?

Mr Lucy—That commences on 22 November.

Senator SHERRY—If you could pass on our congratulations.

Mr Lucy—Thank you.

Senator WONG—Good morning. The indications over recent months are that there is a strong possibility of private equity starting to occupy a rather different position in the market, potentially in relation to some fairly large Australian companies. I am not particularly interested in talking about the detail of proposed takeovers that may or may not be on foot. I am interested in whether ASIC has turned its mind to any governance and accountability implications which might flow from private equity taking a different position in the marketplace?

Mr Lucy—That is an astute observation. Certainly we support the fact that there has been a lot of activity from the private equity market—in particular the international equity market.

It is a complex issue. In the first instance, one needs to reflect on why they might be looking to Australia in particular, and I think there are a number of factors to that. Firstly, there is the success of many Australian companies in the international marketplace. To the extent that Australia is regarded as a destination that is politically stable, there is strong financial growth and it is well-regulated—and that is regarded internationally as being the case. So I think there are good ingredients for people to seek to invest into Australia.

There are a number of observations that I think are potentially superficial as to whether or not, for example, some of these people are looking to avoid some of the requirements that might otherwise be applied to listed public companies. I think that is a superficial observation. I think more so it is to do with some of the parties looking for opportunities where perhaps they are less accountable. For example, in the remuneration area, they do not have the same level of accountability regarding levels of remuneration than they would if they were a listed public company. So it is a broader area. It is a complex area. Yes, we have turned our minds to this and we are in the process of further developing some thoughts on this.

Senator WONG—As you correctly pointed out, you picked disclosure around remuneration as one example—

Mr Lucy—But one example.

Senator WONG—Yes, there are a range of other accountability mechanisms—to use a generic term—which are predicated in terms of their application on the assumption that these sorts of companies where there is a public interest in requiring a certain level of disclosure and accountability in relation to governance et cetera are going to be publicly listed companies. How might you deal with private equity firms, for example, taking over companies which were previously large Australian publicly listed companies?

Mr Lucy—I think the first instance—which has already been in the press—is that we are looking at the level of disclosure that needs to be made by the companies that are in receipt of such offers. Again, that is a very complex issue because some of these offers are accompanied by very significant conditions. Therefore, they are not automatically offers that need to be communicated to the market. You also have the motives of the offer as to whether or not they are looking for material to be in the marketplace or not. Conversely, you have the motives of the company, the receipt of such an offer, as to whether or not they want to disclose it and adjust the share price. Right throughout it is very complex. We are looking at it closely. At this stage all parties have a responsibility to comply with the Corporations Law and we will make sure that they do so.

Senator WONG—It is not an anti-private equity position. Clearly, private equity interest can regenerate companies and can increase the efficiency of the market.

Mr Lucy—Quite so.

Senator WONG—But, as you point out, it might be suggested by some that the current regulatory framework does not encompass private equity in the way that might be warranted to some extent if they occupied a different position in the market.

Mr Lucy—The regulatory environment is a matter for the government and ultimately the parliament.

Senator WONG—Yes.

Mr Lucy—Certainly from our perspective, having regard to the laws which we administer, we are watching it closely. We are trying to understand, firstly, the motives, but secondly, the issues that may come out of some of these activities, and we are doing that diligently.

Senator WONG—From a publicly listed director's perspective, is there perhaps a little inequity in terms of the relative accountability requirements which apply to them but which do not apply to directors of private equity companies.

Mr Lucy—I think this needs to be looked at in the context of an international financial market. These activities are undertaken on the basis of where in the world one might identify opportunities. In this case, Australia is being seen as such a destination. Australian companies have substantial investments and undertakings throughout the rest of the world. So people come to Australia. They need to comply with our laws of course, and to the extent that there is arbitrage between laws in Australia and the United States, the UK or whatever, that is just a fact of international markets.

Senator WONG—I was not so much referring to that as to how the publicly listed director might perceive the relative requirements which apply to somebody who is a competitor, but because of the different mechanism or corporate vehicle they are utilising obviously does not have the same sort of requirements.

Mr Lucy—For our part we would certainly not be canvassing with the government any diminution or reduction of the responsibilities of the directors as they exist at the moment. We are comfortable with the laws. Going forward, as to whether the government wishes to look at any other changes for these parties, that is a matter for the government.

Senator WONG—Just to clarify, you have indicated that you are looking at this issue.

Mr Lucy—Yes, we are.

Senator WONG—I presume you have not been asked by government for advice on this as yet?

Mr Lucy—Not as yet.

Senator WONG—What is the process whereby you will look at it? Is there some internal consideration? Are you looking to perhaps prepare some sort of discussion paper?

Mr Lucy—Potentially. I am not in a position to indicate what sort of a paper we are going to come up with because at this stage we are not quite sure of the issues that might be contained within such a paper. If in the end we form a view that we should be communicating with the government then we certainly will.

Senator WONG—I am sure we will have a further discussion about this over the coming months. I think you described as superficial analysis a suggestion that any move to private equity is driven by a perception or reality around the regulatory environment for public companies.

Mr Lucy—Yes.

Senator WONG—Are you aware of the CSA—Chartered Secretaries Australia—report?

Mr Lucy—Yes, I read that.

Senator WONG—It suggested that publicly listed companies were not having difficulty in placing or finding directors. Is that your recollection of that report?

Mr Lucy—Yes.

Senator WONG—Do you have any views about it?

Mr Lucy—From my own observations, I would support it. I think there continues to be a pool of outstanding people who are capable of serving on Australian boards.

Senator WONG—I turn now to the issue of listed property trusts. I presume you would be aware of the ASX report in relation to reporting and disclosure requirements applying to listed property trusts.

Mr Lucy—Yes.

Senator WONG—In that report a number of concerns were raised about the consistency of reporting of governance practice, the structure of the board and independence or otherwise of directors and a lack of consistency in remuneration reporting. What is ASIC's response to these issues being raised?

Mr Lucy—I will ask Jeremy Cooper to respond to that.

Mr Cooper—We are certainly alive to the issue. A managed investment scheme and a public company are different entities and regulated in different ways. So I guess we see the issue, but ultimately it is a matter of what the law and the accounting standards prescribe.

Senator WONG—There is the legal framework, but we have what you call a co-regulatory framework. The government, supported by the opposition, has taken a view that it is beneficial for a portion of our regulatory framework to be undertaken by the ASX, through its listing rules essentially. It appears from the report that I have had regard to that there are a number of listing rules or corporate governance principles which some of these trusts are not observing. Does the ASIC have a view about that?

Mr Cooper—Not as such in the sense that, as you have already mentioned, the way corporate governance is handled in this country is a blend of principles and law in the Corporations Act. We are not necessarily the dominant player when those sorts of issues are raised.

Senator WONG—Have you read the report, Mr Cooper?

Mr Cooper—No, I am afraid I haven't.

Senator WONG—I will just read you some things:

2.1 The key differences between the review of listed trusts and the review of listed companies fall into four categories:

- Lack of clarity as to which entity should be reporting.
- Not differentiating between obligations under the Managed Investments legislation and obligations in relation to Listing Rule 4.10.3 and the Guidelines.
- Independence of directors - Principle 2.
- Director and executive remuneration disclosure - Principle 9.

2.2 The listed trust sector demonstrated little consistency about which entity was reporting on its governance practices.

There is such a conflation of identity between two different corporate vehicles. I accept that they may be branded the same way or bear the same brand, but certainly in terms of their listing vehicles they are different corporate entities. As I understand the report, they are not even reporting as such and sufficiently on every occasion.

Mr Cooper—This is a rapidly evolving area. We started off with what you might call the ‘vanilla’ listed property trust, or the REIT, as they are called globally.

Senator WONG—The ‘vanilla’ listed property trust—that is a good term. I understand what you are saying.

Mr Cooper—A single entity, not in a group. That structure has evolved at a very great speed into other types of assets, into multi-trust structures, into global multi-trust structures. Inevitably, those sorts of developments and the complexity involved sometimes put a strain on the system. It is a bit difficult to talk right across the board because a few of those issues you are talking about are more relevant to the multi-asset, infrastructure style vehicle and not necessarily the more traditional property trustee.

Senator WONG—I think that is correct. In terms of the former—I don’t know how you described them, the multilisted property trust infrastructure or something—have ASIC had any discussions with ASX, or do you intend to, resulting from this report? I should just also remind you—since you have not had an opportunity to read it yet, Mr Cooper—that there were issues raised in the ASX report in relation to independence of directors, because the responsible entity might actually appoint directors who are frequently employees or otherwise linked, and there was a lack of consistency in terms of the remuneration reporting. I am wondering whether ASIC is in dialogue with the ASX about how to deal with those issues. I accept what you say, that the architecture of this sector is changing, so obviously this may not have been something we would have been alive to, say, 10 years ago.

Mr Lucy—I might introduce Acting Commissioner Malcolm Rodgers at this point.

Senator WONG—I know Mr Rodgers.

Mr Lucy—Malcolm is involved with regular liaison with the ASX and, indeed, he and I also meet at CEO level with them quarterly. But this particular issue has been raised at that liaison meeting, so I will invite Malcolm to respond.

Senator WONG—Sure.

Mr Rodgers—I will begin by saying that not only in the ASX context but more generally we are often invited quite strongly by parts of the capital market to fully equate the rules that apply to listed companies to listed trusts. We have generally resisted that as a broad proposition, and said, ‘We do not see that in the scheme of the law that we administer.’

The parliament has gone to some trouble to make some rules for managed investment schemes, and we are not inclined to accept the argument that once you are listed you can behave in all respects as a company. There are arguments put to us saying, ‘You should treat us as a company.’

On things like the independence of directors, you might remember that the rules that apply to managed investment schemes require either a majority of independent directors or a compliance committee composed of independents. If you look at that, you say, 'Those rules in the law are intended to do the same kind of work that ASX corporate governance rules do about the independence of directors of listed companies.'

So there is actually a lively debate with the market as a whole about the extent to which the rules for listed companies and listed trusts should be brought together. We have a fairly continuous dialogue. The independence of directors is one area where we would, I think, start from the proposition that we would not allow the rules that apply to responsible entities of a listed trust to be displaced merely because it is listed.

The remuneration is complicated because, as the accounting rules apply, the remuneration disclosures that apply at the responsible entity level—that is, effectively, the manager of the trusts—will apply in the reporting to every trust. That is not as clear an accountability mechanism as applied to a listed company, because the sum of all of the remunerations will appear in the accounts of all the individual trusts without being differentiated to that trust.

I think, as Jeremy Cooper has said, this issue has become a more important issue. There are now 120-odd listed trusts, some of them of real economic significance. So we are an active participant in the debate. We have generally brought to that a willingness to adapt where we can see a good reason for that without giving away the rules that the parliament has decided should apply to all managed investment schemes.

Senator WONG—I will move on from this, but I understand the ASX is considering this issue, which I welcome; I think it is obviously much better if it is dealt with there than you having to deal with it or the parliament having to deal with it. So we welcome that. I suppose I flag that it is an issue that has, as you correctly pointed out, Mr Rodgers, received a bit of airplay and discussion. It is an expanding section or aspect of the market. I presume that ASIC's view at this stage would be to let ASX deal with it; is that right?

Mr Lucy—Yes.

Mr Rodgers—To a certain degree the ASX has no power to adapt the rules. It can add to the rules through the listing rule process, but in the end where people want to end up is to, as it were, disapply rules that applied to a listed trust in its capacity as a managed investment scheme and replace them with listing rules. That can be done by us modifying the law. As you know, the ASX Corporate Governance Council has just considered where it has got to over the last two or three years, and we are beginning quite a dialogue with the ASX about a number of the positions that they—

Senator WONG—I presume this will be one of the issues raised. Can I just make the point, Mr Rodgers, I think there are two issues. One is the issue you have correctly pointed out, which is not substituting the listing rule requirements to obviate some of the legal requirements which exist in relation to managed investment vehicles. The second issue is about to what extent compliance with listing rules is desirable once these entities are listed. I accept they are probably a different component of the market than was had in mind to some extent as the front and centre focus in terms of listing rules and other requirements. It may be that some alteration is required. I do not know. But certainly if you read the report—and I am

not sure if you have—it does raise some issues that might need to be addressed. I turn now to the Cowra abattoir. Is ASIC conducting an investigation into the circumstances surrounding the administration and liquidation of the Cowra abattoir?

Mr Cooper—Not a formal investigation. We have certainly been in contact with the administrators. We have requested to be kept in touch with their ongoing investigations. We are certainly aware of the allegations concerning employee entitlements in connection with that insolvency. We have received a preliminary report from those administrators, but we have not received any formal complaints. I guess this is an issue that has been quite widely covered in the media, which has prompted us to be in contact with the administrators, but we have not received any complaints through our normal complaints channel. We have not had any objections from creditors about how the administration is proceeding. So I suppose the matter sits with many other insolvencies that we have on our books from time to time, so to speak, as something that we are on notice of. We have decided not to commit our precious resources in this direction until we receive something tangible from the administrators who are really on the ground and dealing with all the normal issues that administrators deal with: where has the money gone and so on.

Senator WONG—So you say you are not in formal investigation but you are in contact with the administrators. When was first contact made between ASIC and the administrators?

Mr Cooper—The entity went into administration in August of this year and the first creditors meeting was held at that time. We received a preliminary report from those administrators in September.

Senator WONG—Was that the first contact between ASIC and the administrators?

Mr Cooper—As far as I know, yes.

Senator WONG—Are you able to provide us with a preliminary report?

Mr Cooper—We have not received a finalised report. The administrator's indication is that it will take at least several months to complete that.

Senator WONG—You indicated that you have received a written preliminary report. I am asking you to provide that to the committee.

Mr Cooper—We would have to take that on notice. We do not have that report here, naturally enough. The report will be with us, so we would have to take that on notice.

Senator WONG—Did you make any contact with the administrators or did the administrators make any contact with ASIC prior to this issue being raised in the media?

Mr Cooper—Not as far as I am aware of, no.

Senator WONG—Was the contact initiated by ASIC or by the administrator?

Mr Cooper—It was initiated by us. Again, we have to be careful; sometimes the media is a very useful way for us to become informed of matters, but, as I have already stressed, that is the only input that we received. We have not received complaints from employees or from creditors.

Senator WONG—Was ASIC prompted to make contact with the administrators by virtue of the media coverage?

Mr Cooper—As far as I am aware, yes.

Senator WONG—Has any contact or discussion occurred between ASIC and any minister's office in relation to this issue?

Mr Cooper—Not as far as I am aware, no.

Senator WONG—Has ASIC ever had any discussions with the Office of Workplace Services regarding its investigation of the Cowra abattoirs?

Mr Cooper—Not as far as I am aware, no.

Senator WONG—Have you ever seen the OWS report in relation to the Cowra abattoir?

Mr Cooper—No, Senator, I have not.

Senator WONG—The government has indicated that the Office of Workplace Services conducted a thorough investigation in relation to Cowra abattoirs. Has ASIC been apprised of that investigation?

Mr Cooper—Not as far as I am aware, Senator. I suppose—

Senator WONG—Are you concerned, Mr Cooper, that what is on the public record is the government saying that OWS conducted a thorough investigation, and then we have in the media a report—and I am happy if you want to tell me this is not the case—of the administrator suggesting that there was a million dollar transfer, which would have been within the purview of the OWS investigation. Is ASIC concerned that one arm of government is failing to pick up something which subsequently arises in an administrator's report to you?

Mr Cooper—I suppose we are a corporate and securities regulator. We do—

Senator WONG—You have responsibility for considering an administrator's report, Mr Cooper.

Mr Cooper—I was going to go on to that.

Senator WONG—Yes.

Mr Cooper—We do have an interest in this area through part 5.A of chapter 5, where we specifically, by parliament, have been given the responsibility to have an interest, but only in situations where there has been specific and deliberate transactions engaged in to deprive employees of their entitlements. We do have an interest. We do not have an overarching interest to follow every governmental inquiry and every activity in relation to allegations that have been in the press. We are in communication with the administrators, we are alive to the issue and this is just one of many external administrations that we are looking into.

Senator WONG—Isn't the normal process that, if an administrator believes there has been an improper or potentially improper avoidable transaction, they would indicate that in the administrator's report which goes to ASIC?

Mr Cooper—As I have already explained, we have received a draft report from them.

Senator WONG—That is the usual process, isn't it?

Mr Cooper—Yes.

Senator WONG—I just find it somewhat odd that we have an entity of government—the Office of Workplace Services—which investigates, supposedly thoroughly, according to the government, the financial situation and operations of Cowra abattoirs but which at no point advises ASIC, which is responsible for the issues you raise, about a potential suspect transaction of a million dollars.

Mr Cooper—I cannot speak for that agency and I could not categorically say that they had not been in contact with ASIC. If you like, we can take that particular question on notice. I am certainly not aware of contact.

Senator WONG—You are not able to tell me that today? This issue has been raised in the parliament; I am sure you are aware of that, because ASIC is always aware when we ask questions in question time.

Mr Cooper—I am certain that we can answer that today.

Senator WONG—I would appreciate that.

Mr Cooper—We will make inquiries on that. I would stress that this is a very short time frame. This company only went into administration in August, and in the scheme of—

Senator WONG—I am sure the employees who are without entitlements would agree with you! I am being ironic, Mr Cooper.

Mr Cooper—I do not take that as a trivial matter. Certainly that is nearly always the case in administrations.

Senator WONG—Would you agree with the statement that the Cowra abattoir had a clean bill of health at the time that the employees' employment was terminated?

Mr Cooper—I could not comment on that.

Senator WONG—Does the preliminary report from the administrator concur with that view?

Mr Cooper—As far as I am aware it does not deal with that issue. I would stress also the Cowra abattoir is not in liquidation but in administration, which is a different species—the belief is that the underlying business is capable of being resuscitated, unlike a liquidation, where it is in termination.

Senator WONG—Yes, I understand the difference. My recollection of part 5A though is that the fact that it is in administration does not preclude consideration of whether there has been an improper transaction.

Mr Cooper—Certainly not.

Senator WONG—Why is it the case that ASIC has determined not to investigate that transaction?

Mr Cooper—I guess we have not really made a decision one way or another. This is a matter of interest to us. We have been in contact with the administrators, but we have various mechanisms and risk ratings for determining how we apply our resources.

Senator WONG—How often has there been contact with the administrators; are we talking about one phone call or is there some active discussion?

Mr Cooper—I could not comment on the specific number of interactions, but the normal situation is that the administrators have their job to do under the fairly—

Senator WONG—Perhaps on notice you can indicate to me what contact has been made between the administrators and ASIC. The minister representing your minister in the Senate has indicated that ASIC is working closely with the administration. I would like to know what that comprises.

Mr Cooper—We will take that on notice.

Senator WONG—Is ASIC aware that Minister Coonan has said that it is entirely appropriate that this matter be investigated—this matter being the possible improper transaction?

Mr Cooper—No, I am not aware of that.

Senator WONG—You are not aware of that?

Mr Cooper—No.

Senator WONG—You have not received any instruction from government or suggestion that this matter should be investigated?

Mr Cooper—Certainly not as far as I am aware.

Senator WONG—Has there been any contact with any minister's office regarding this?

Mr Cooper—Not as far as I am aware.

Senator WONG—So there is really nothing being done by ASIC in relation to Cowra?

Mr Cooper—No, no—

Mr Lucy—If I could interrupt: the point is, to the extent that we need to mount an investigation, we will. We are not at the point of having reached that conclusion. The administrator is doing their work and we are in contact. The process being undertaken is entirely typical and normal and to the extent that there is anything to investigate we will.

Senator WONG—When will you come to that view, Mr Lucy?

Mr Lucy—In a perfect environment, when the administrator provides their report. We are in contact with the administrator, keeping them under pressure as to when they are going to provide it. We are not aware of the complexities as to the background as to how long it is going to take them. But if, for example, we reach the point where their time line is unreasonable, then we will take our own action. In the meantime, quite appropriately, we will wait for them to do their work.

Senator WONG—Although, as we have pointed out, the fact of a potentially improper transaction is not dependent on whether the administrator finalises its work. ASIC could look at the issue now, couldn't it?

Mr Lucy—It is not a matter—

Senator WONG—There is nothing to prevent ASIC considering this issue now?

Mr Lucy—No.

Senator WONG—But you have chosen not to?

Mr Lucy—Yes, because in the normal course we would wait for the administrator to do their work and to provide a report to us.

Senator WONG—Can I turn to the last issue I have, which is in relation to an article which appeared in the *Financial Review* on Thursday, 26 October regarding the granting of shares to directors without the seeking of shareholder approval. This is the purchase of shares on market. You are aware of this, Mr Cooper; you are nodding?

Mr Cooper—Yes.

Senator WONG—As I understand this, a company can buy a share on market and then, via some mechanism which I am not necessarily au fait with the detail of, can transfer the interest in the shares to a director or an executive, presumably?

Mr Cooper—Yes.

Senator WONG—I will ask this first, because it has been running in the media as a loophole: do the current requirements under 300A of the Corporations Law capture this type of remuneration, in your view?

Mr Cooper—I imagine it would.

Senator WONG—You imagine it would

Mr Cooper—Yes, but of course that is an annual accounting obligation.

Senator WONG—Are you aware of this practice?

Mr Cooper—Yes.

Senator WONG—In your view, is it remuneration that should fall within the purview of the requirement for a nonbinding vote in relation to remuneration of directors and executives?

Mr Cooper—The way the nonbinding vote work is it relates to the remuneration report in general that is tabled at the annual general meeting. So in a sense, collectively the nonbinding vote would relate to all forms of remuneration whether it is shares allotted to the director, shares brought on the market or what have you. It is all supposed to be in the remuneration report.

Senator WONG—Have you taken any action or considered what might be the next step as a result of what has been in the media?

Mr Cooper—I suppose, as I understand it, it follows listing rule amendments that enabled companies to do this. It seemed to me that the objection being made in the press was more of a judgement from a corporate governance or from an ethical point of view as to whether this was appropriate and not an allegation in the sense that they are referring to a loophole. It is a loophole that seems to be expressly catered for in the listing rules.

Senator WONG—In ASIC's view is that appropriate?

Mr Cooper—I guess we do not pass judgement on that. We are part of the listing rule process, but it is not for us to comment on whether or not—

Senator WONG—Come on, Mr Cooper. You are the regulator in this area. You have indicated to me that you imagine that this type of remuneration would fall within the purview of the Corporations Law. There is a suggestion, and appears to be a practice as well, that the

listing rules do not require disclosure of this particular practice. Are you saying to me the regulator does not have a view about that?

Mr Cooper—There are a number of different themes running here. We have talked about the annual disclosure in 300A. That is one thing. It seemed to me that the substance of the articles was more about whether shareholder approval was being bypassed. That seemed to me to be the substance—there was not so much a disclosure problem.

Senator WONG—I would have thought it is twofold: disclosure and then, therefore, that shareholder approval was required—at least in process.

Mr Cooper—There is a fairly clear disclosure regime around director's interests in securities and that is supported in the listing rules. So I do not think there is a leakage or an issue there. We have talked about 300A. It seemed to me that disclosure was pretty well covered and that the sort of complaint and allegation of loophole was one that went more to 'how come some companies issue shares to directors and seek to express shareholder approval to do that while other companies will buy shares on market without seeking shareholder approval'. That seemed to be the thing.

Senator WONG—The principal is that remuneration should be transparent. I do not have an issue with this being part of someone's remuneration package; it is a matter for them to negotiate with their employer or the company. But if the policy direction taken by parliament and the ASX has been for transparency remuneration, would you agree that nondisclosure of these transactions is problematic?

Mr Cooper—I would in a hypothetical sense, but I am not sure that that is a problem. There is a very clear regime in the listing rules where directors are required to notify their interests in securities in the company, and I was not sure that that was what was being complained of.

Senator WONG—But not shareholder approval for this type of share transaction?

Mr Cooper—I believe that was the substance.

Senator WONG—You do not have any concerns about that?

Mr Cooper—It depends how many layers of approval you want, I suppose. We have the nonbinding vote. We also have a regime in chapter 2E that requires shareholder approval other than for reasonable remuneration. That is sort of putting it around the wrong way. If you are remunerating directors beyond what is reasonable—whether it be by way of cash, shares or what have you—then you are required to seek shareholder approval. So it is a question of how many layers of approval is thought to be appropriate.

Senator WONG—So you do not have a view about it?

Mr Cooper—Not strictly, because I think the disclosure system works.

Senator WONG—Is ASIC engaged, through its regular liaison with ASX, in discussions about this potential anomaly?

Mr Cooper—I might pass that question to Mr Rodgers. He is in close contact with the ASX.

Mr Rodgers—We have had some preliminary discussions about it, driven by the kind of reportage that has been going on. I think we have not yet made up our mind whether this is a problem, because one of the things that it replaces is—it is true that shareholder approval attaches to it—the common practice of issuing shares at a discount. Some companies have taken the view that if they want to divide director remuneration into cash and shares, which is open to them to do, the fair thing to do is for those shares to be acquired on the market at current market value and not be subject to the kinds of valuation questions that would arise if they were on issue. In other words, I think there are balanced arguments—

Senator WONG—Yes, but that is not a problem. I agree with what you are suggesting there. The issue, as I understand it, is that there is no shareholder approval process when the shares are transferred then for that transaction. So they are bought and then transferred through some mechanisms to the relevant executive.

Mr Rodgers—Because the approval process applies to the issue of shares—

Senator WONG—Correct.

Mr Rodgers—At least normally it has an impact. It has, potentially, a diluting effect on other shareholders when you are issuing new shares. There is no diluting effect here.

Senator WONG—So there is not that policy imperative?

Mr Rodgers—Yes. In short there are a number of policy issues in play. There is a good, robust dialogue emerging about this and we will stay in touch with those—

Senator WONG—No doubt you will be part of that dialogue, or ASIC will be.

Mr Rodgers—We will.

Senator WONG—Mr Cooper, in answer to my 300A question, where you said, ‘I would imagine so,’ I would invite you on notice to clarify the imagination a little further.

Mr Cooper—Certainly.

Senator MURRAY—Mr Rodgers, on the not-for-profit sector, I think you will need to take my first question on notice. I wonder if you would mind asking someone to add up the total number of press releases ASIC have issued since 1 July 2005, and then let the committee know how many of those were directly related to not-for-profit entities and how many were indirectly related. That will help me get some sense of how much emphasis you have got on that sector.

Mr Rodgers—As you predicted, I will need to take that question on notice.

Senator MURRAY—I did not think even the amazing ASIC could pop that one out just out of its head. My next question to you relates to attitude and focus. I am cognisant that all regulators have to pick their priorities to an extent. My sense of things is that ASIC has not had the not-for-profit sector in its sights. We have had some correspondence on that which has been between us, so let us get it on the record. I have the view that you are a bit light handed in that respect. Perhaps you would like to rebut my sense that you are not paying enough attention to that area.

Mr Rodgers—There are two things in response. One, we have followed the debate about the extent to which there are good governance practices that accord with the law in the non-

profit sector. There has been work done, as I am sure you are aware, in one of the Victorian academies over the last few years and there is the work in which you have been involved. The normal way in which we choose priorities is through the emergence of systemic evidence of failure of governance, the reliability of financial reporting, the complaints that come to us or evidence that there is a significant failure to comply that ought to cause us to give that regulatory priority. You are in fact right: we have not over the last little while had enough in front of us that would justify the decision that effectively we have to make, which is to take resources that we have decided should sit with one priority to that as a priority. I think that probably is a fair description. It is not a rebuttal but, for our part, we have been aware of a level of debate about the quality of governance of parts of the not-for-profit sector and about the extent of compliance of Corporations Act entities. There are many entities that are not Corporations Act entities in the non-profit sector. In other words, we are aware of the issue, but not enough has come to us to say that we should make that kind of resource transfer decision.

Senator MURRAY—My interest has arisen because of many aspects, but from a good governance point of view entities which fall under ASIC that can be described as not-for-profit matter because of the huge provision of public services, which is now made through not-for-profit entities—health, education, job and employment services and so on. The areas where I would like you to indicate whether you are taking a professional interest in contributing to improved standards are these. Accounting standards is the first one. As you know, there is considerable international and national interest in improving the accounting standards that apply to this sector. The second is the issue of capital raising. Not for profits are as much in the capital market as anybody else. They have to build infrastructure and raise funds. What are you doing about the prospectus side of things? The third area is reporting—namely, that the annual reports that are produced are covered by you in the same detail, I suppose, as you would cover those reports in the for profit sector. So please answer on those three sectors.

Mr Rodgers—I have learned from long experience to never speak in front of my chairman on accounting issues, so I might pass that one to him and I will come back to the fundraising part.

Mr Lucy—Indeed, this whole area came up at our most recent business consultative panel, but it came up from a slightly different direction. The point that was put there was that, as you correctly identified, there are some issues of governance and accountability more generally. On the other hand, the point has been made to us that there are a number of people who are formal office bearers of some of these not-for-profit organisations who are, frankly, looking at whether they should continue in those roles because of the responsibilities. These people are desperately needed to be involved because of their expertise. The not for profits play an extraordinarily valuable part in the Australian fabric. So you are quite right to raise this as an issue and, indeed, we are looking at it very closely, both from the perspective of making sure that there is not an inappropriate regulatory burden on one hand but on the other hand an appropriate level of regulatory accountability, both in fundraising accounting standards and the actual reporting itself. It needs to be looked at from 360 degrees and we are in the process of looking at it.

Senator MURRAY—Could you be more specific on the accounting standards area as to whether you are providing any input into the FRC and AASB's examination of these issues and the way in which it interrelates with the international standards body?

Mr Lucy—Yes. Indeed I am seeing over 20 within a fortnight and I certainly intend to raise this as one of the issues. The difficulty internationally is that there is an agenda that is being driven, as you would expect, from an international perspective. So there are a few areas in which Australia I think has a particular interest—namely, the smaller business and the accounting for the smaller business but also the not for profits. So therefore we will be restating our interest in that area.

Senator MURRAY—I would distinguish with not for profits, as you would with for profits, between the small business sector and the large business sector.

Mr Lucy—But there are both, aren't there, in that sector? That is the issue for us.

Senator MURRAY—Yes. My main concern is not the soccer mums kind of entity but the very large business, which is providing services on a not-for-profit basis but which nevertheless is very much a part of your aegis, if I may describe it as such. There is a question of course as to how it links through into the public sector. The Auditor-General, from whom moneys are provided, which they mostly are, from government to not-for-profit entities, has a requirement of oversight—so the whole question of accounting standards and good governance practice matters vitally. Are you going to be exploring this in any particular manner or just a general manner?

Mr Lucy—I think comprehensively is the correct response, in that there is no point looking at a particular area without looking at it in its entirety. You are quite right that some of these businesses that are operating, albeit not-for-profit, are very significant businesses, with large numbers of staff and high levels of turnover, exposure and community benefits. Therefore, we need to look at it very maturely so that, on one hand, we have some interest in trying to make it easier for the cake stall operators and, on the other hand, we have to make sure that we do not inadvertently trigger something which would be quite inappropriate at the bigger end of town. So it does need to be looked at comprehensively and that is the process we are undertaking.

Senator MURRAY—Talk to me then about capital raising and prospectuses—if that is the proper plural for that; I will never forget the time I decided that mongooses was wrong but it was right, so I am a bit wary of the plurals. Are you applying the same prudential oversight to not-for-profit prospectuses as you are to for-profit prospectuses?

Mr Rodgers—Historically we adopted and have maintained a policy where we try to distinguish between, in a narrow sense, charitable fund-raising which may trigger the Corporations Act and fundraising by a company that happens to be a not-for-profit company. We apply the policy that, if you are in that genuine fund-raising category, the ordinary rules ought to apply to you. I hope I did not give the impression that we have paid no notice to this issue. We have had some regulatory interactions with some who we think have overstepped the line and who, in our view, should be raising funds via prospectus. In some cases it is actually a financial product, so there should be a PDS. We have pulled a couple of major institutions into line in that area and made clear that our policy is intended to apply only to a

charitable transaction that might formally trigger the Corporations Act but is not genuinely a fund-raising or other thing that needs a prospectus or a product disclosure statement. So, with that small exception, we have applied the law to charitable or not-for-profit companies in the same way as we would apply it elsewhere. Where we have seen that some have stepped over the line we ensured that they actually comply with the rules.

Senator MURRAY—Your practice with prospectus matters for for-profit companies is generally that when you have taken an action you announce the action and the view you have taken with respect to a particular company and a particular prospectus—not, I gather, in the naming and shaming sense but as an indication to the market that you are active and these are the things you are looking for. It is a kind of precautionary warning advice. Do you adopt the same principle with not-for-profits? Do you publicise the work you have done on that prospectus?

Mr Rodgers—Just to clarify what the policy is, as you know we have the right to intervene with a document. Ordinarily we will begin by an interim stop order, simply saying: ‘We have a problem with that document; please fix it up. You are not allowed to raise any money on it until it is fixed.’ We would not ordinarily publicise that intervention. We would, and we do, either on a quarterly or six-monthly basis—our timing has changed a bit and I cannot remember which one is applying at the moment—reflect back to the market what we have done over the previous six months to say, ‘We have had a problem with this kind of disclosure in a prospectus.’ That is just to keep the market informed about what is on our minds and what we think product issuers should be careful about. I cannot recall that we have singled out not-for-profit fundraisings in that way, remembering that we do not examine in detail every prospectus or disclosure document and no disclosure document carries our tick or sanction. I am not close enough to reflect on our actual experience in looking at these documents, but there would be no difference in the policy that I have just described or the way of regulatory intervention.

Senator MURRAY—There might not be any difference in the policy, but there is a difference in the publicity. Again, you can rebut this if I am wrong, but my sense of things is that you are quite happy—and I support it, I must say—to expose prospectus weaknesses in the for-profit sector as a way of educating and encouraging changed behaviour in the market as a whole. But I have not seen you do that in the not-for-profit sector, which I think needs it as much as does the profit sector.

Mr Rodgers—I would need to talk in detail.

Mr Lucy—Perhaps we can just look retrospectively at what we have reviewed over the last 12 months and see how we have actually dealt with any not-for-profit issues which we might regard as deserving of publicity. We will see how we responded and come back to you.

Senator MURRAY—Perhaps you would indicate whether I am wrong in my feeling.

Mr Lucy—Absolutely.

Senator MURRAY—The third area I want you to comment on is the annual reports area. I think some of the work you have done across corporate annual reports and financial statements has really been excellent. The cost comparison and the critical analysis have been instructive and helpful to better market behaviour. I have not seen you do that, but you might

have, with large not-for-profit entities that fall under your aegis. Perhaps you could indicate your attitude there.

Mr Rodgers—What we committed ourselves to, I think now four years ago, was to make sure that, over a four-year period, we had examined in detail the financial reports of all listed companies; and we will have completed that exercise this year. Ordinarily that review contains, as it were, a sort of random set. We intended to make sure that every listed company's annual report was looked at over that four-year period. Probably about 20 per cent of what we look at we put there because we think it is an area where particular problems might occur in that particular year. So of the about 400-odd that we look at each year at least 50 or 60 are there because we have been keeping an eye on an issue or a particular company. That has been confined to the listed company sector.

We do engage with accounts in other areas, but only when we have a specific reason to believe that there is a problem—a complaint has been made to us or something comes to our attention that says there might be something awkward. At the end of this four-year cycle, I think it is our intention to step back from that and say, 'We do think we've done good work there. Do we need to expand the thinking around that into other potential risk areas?' Of course we receive about 25,000 formal financial reports each year, and a great number of them are from the not-for-profit sector.

Senator MURRAY—From the perspective of a listed market analysis, what you have there is public moneys at risk through the share market and you have a mechanism whereby you can identify those who you should analyse and so on. We do not have that advantage in the not-for-profit sector, and yet the taxpayer is at risk because millions of dollars go to individual large entities in education, health, employment services or other areas. So my interest is that you are cognisant of that difference and need and that you are not reactive in the sense of responding to complaints but proactive in the sense of trying to lift good governance standards in the area.

I am not all that sympathetic to those who run these things because the chief executives of the large organisations are extremely well paid in the not-for-profit sector and they have the resources and ability to report, and they do report. I am extremely sympathetic to the small organisations. My question to you, in closing off this section from me, is: when you step back and look at a future program of action, will you take into account whether you should do a sample evaluative kind of exercise in the not-for-profit sector which matches what you have been doing in the for-profit sector?

Mr Rodgers—I think I can say that that will be in the mix as we have that discussion.

Mr Lucy—Yes, we will.

Senator MURRAY—I appreciate that.

Senator SHERRY—Just following on from the line of questioning from Senator Murray, APRA has a major role to play in respect of not-for-profit licensing in this general examination of the not-for-profit area, doesn't it

Mr Cooper—Some of them; for example, friendly societies.

Senator SHERRY—Superannuation not-for-profit funds, which have just been through a re-licensing together with the general superannuation sector. They have a role and indeed can examine vigorously. There are issues I will be taking up with APRA in regard to that.

Mr Lucy—But that is a specific segment that you have identified.

Senator SHERRY—Yes. As an avid reader of your publications, guidance notes and press releases on the not-for-profit sector, I notice that one of your press releases dated 11 October refers to the jailing of a former CEO of the Queensland Teachers' Union Health Fund and the actions that ASIC took in regard to that. There was one count under the Friendly Societies (Queensland) Code. Presumably that came under the not-for-profit sector. That is one example I could find specifically of activity in the not-for-profit sector in the last three months.

Mr Lucy—Without restating what was addressed to Senator Murray, I think the point is that, as far as any complaints or issues that are brought to our attention, whether or not they are for-profit or not-for-profit is not an issue for us. It is more about where we decide, in the absence of any particular concern, how we allocate our priorities. In reviewing financial accounts, in the first instance it is to do with when there were issues with the United States and income recognition, for example. We clearly focused on that. With the adoption of international accounting standards we have been focusing on that. Our next cycle is to say, 'Okay, we've done that. We have a good feeling as to where the issues are. Now let's broaden it.' Not-for-profits will be part of that focus.

Senator SHERRY—Certainly, I do not have any concerns at the moment with your balance, given the understandable pressure on your resources and time. That brings me to a number of aspects of Westpoint that I want to take up. Firstly, I am being utterly bombarded with emails from clients of a planner by the name of a Mr Ian Bristow; I do not know whether any of my parliamentary colleagues are receiving the same emails.

Mr Lucy—I expect they are.

Senator SHERRY—So you are aware of the issues being raised by the clients of Mr Bristow, demanding the return of the files?

Mr Lucy—I am. Indeed, you will find that I am also on the addressee list of those emails.

Senator SHERRY—I will give you a list of those who have communicated with me. Is ASIC considering a response, some sort of information to these specific clients in view of the specific communications, albeit I suspect as part of a coordinated campaign of emails, that have been sent to us?

Mr Lucy—We are. We have received some 20 complaints today, but we get each more each day.

Senator SHERRY—Yes, I am in the same position.

Mr Lucy—There are some issues within that that are frankly somewhat concerning because a number of the parties that are writing to me at least are indicating that they have provided pin numbers, original wills and so on. That superficially causes us an issue because we wonder why those sorts of pieces of information in documents would be in a client adviser's file. We have certainly sought that under notices information from Mr Bristow. He chose to provide the information in a potentially lot broader segment of information than we

required. We are fully entitled to seek the information that we have sought and so therefore the emails are factually incorrect as to what our entitlements are. We are in the process of scanning the documents and, as soon as we can identify which documents are simply of no interest to us, we will return them. Within a week—indeed, I hope before the end of the week—we will be writing to those complainants just to let them know that this is the process. I guess it is also fair to say, particularly because of these levels of inquiries, we can advise that we are investigating Mr Bristow.

Senator SHERRY—Certainly he seems to admit himself that he is under investigation.

Mr Lucy—The word ‘investigation’ can be used loosely. I am not using it loosely.

Senator SHERRY—Investigating his file, certainly.

Mr Lucy—Yes.

Senator SHERRY—Thank you for that. That is appreciated. I notice that in some of the emails you are copied in along with Mr Cooper and my colleagues Senator Wong, Senator Murray, Mr Kevin Andrews, Mr Chris Pearce. On other emails you and Mr Cooper are not copied in.

Mr Lucy—Okay.

Senator SHERRY—Thank you, if you could have a look at that.

Mr Lucy—Thank you for that. From our perspective, we can do it as soon as you like, because we are in the process of writing and it would be good to catch all the people who are expressing an interest.

Senator SHERRY—Yes. I have about 35 or 40 at this stage. A few seem to keep coming in each day. I will get my office to provide you with a list.

Mr Lucy—Thank you.

Senator SHERRY—But I suspect that it is largely common, if not totally common.

Mr Lucy—Yes.

Senator SHERRY—Thank you for that. On the issue of the promissory note and the \$50,000 exclusion zone, or the \$50,000 figure which we have touched on on other occasions, I refer to your public statement in the *Australian Financial Review* that, whilst any change was up to government, adding an extra zero or two to the \$50,000 benchmark could be a simple way to give unsophisticated investors more protection from any copycat schemes. Where is this at? I have to say that, surprisingly, I have heard of no action from the government in this regard.

Mr Lucy—I am not able to speak on behalf of the government.

Senator SHERRY—I understand that, but have you had liaisons with them? Given your public statements, you must have had some communication with the government or the department on this issue.

Mr Lucy—We have with the department.

Senator SHERRY—Can you indicate to me approximately when you raised this issue of the promissory note exclusion?

Mr Lucy—We have had discussions more than once. It really has been an ongoing dialogue. But certainly to the best of my knowledge the most recent would be perhaps a month ago.

Senator SHERRY—Can you recall—again I do not want the exact date—when you first raised this issue with the department?

Mr Lucy—Around the time of that press comment that you refer to.

Senator SHERRY—One of the reasons I raise this is that in Senate question time Senator Coonan, representing in the Senate, claimed in her response—in terms of the issue of the \$50,000 and increasing it—there was no loophole.

Mr Lucy—I am aware of that. The truth is that this is an extraordinarily complex legal issue, frankly. I guess the discussions and the matters which we have had before the court really identify just how complex it is. I do not think that the \$50,000 or some greater figure could ever be described as a loophole, and I think that the government is correct to say that there is no legislative loophole. My observation regarding the increase to the cap, as I said, is not under the heading of a loophole or otherwise; it is just simply a mechanism of addressing one part of it—that is, the sophisticated or investor part.

Senator SHERRY—Senator Coonan claimed in question time that ASIC has always had sufficient power to deal with promissory notes under chapter 5C of the Corporations Act.

Mr Lucy—I guess that again has been before the court and, indeed, this week it is again before the court in a matter regarding FICS.

Senator SHERRY—I understand that that will be handed down today.

Mr Lucy—Certainly this week. I cannot say that it will be today, to be honest. But this is an area that is extremely complex. For our part, we are anxious not to get into too much dialogue about the interpretations of some of these legal issues because we do not want to be in a position that will prejudice some of the actions that we are now taking.

Senator SHERRY—But you have expressed general concern on a number of occasions about at least potential limits to your power to act early in respect of Westpoint.

Mr Lucy—That was more to do with the issue of the intelligence we were getting regarding whether or not the business was insolvent and/or having financial difficulties as far as their business model is concerned. The issue was regarding the promissory notes we took to the courts in 2004, from recollection. It was before the Western Australian Supreme Court and then went on to appeal, and we heard the outcome of that appeal earlier this year.

Senator SHERRY—But that was part of it. Part of your general difficulties with Westpoint, certainly as you have argued, has been this issue of the \$50,000 promissory note.

Mr Lucy—Because of the complexity of it; that is quite so.

Senator SHERRY—Yes.

Mr Lucy—But the complexity has not gone away; it still exists.

Senator SHERRY—I know. I want to get to some other complex issues or new issues I have been made aware of. Do you consider this issue—the \$50,000 level—as part of the overall difficulties of Westpoint, an important issue and one that does need to be dealt with?

Mr Lucy—Frankly, I think that as time has gone on it has become less crucial. Initially, we thought that many of the investors might have been involved because of direct marketing and/or being advised by unlicensed advisors. We are now in a position to know that the overwhelming majority of investors went in through licensed advisers. So in that sort of an environment the \$50,000 and/or the issues to do with the promissory note probably are not quite so relevant.

Senator SHERRY—But they are still an issue.

Mr Lucy—They certainly are not so acute.

Senator SHERRY—But they are still an issue.

Mr Lucy—They are an issue as far as ultimate enforcement action goes. But as for the decisions by people to invest, they are probably not so relevant.

Senator SHERRY—How do you justify then the appeal in respect of the WA Supreme Court decision on this matter?

Mr Lucy—Do you mean the first appeal?

Senator SHERRY—Yes.

Mr Lucy—It was because we disagreed with the decision.

Senator SHERRY—You mentioned FICS in an earlier response. I understand that you met with some members of the Westpoint investors group and indicated to them that the issue of lifting the cap—it is \$100,000—that FICS has in respect of its ability to award compensation was under consideration by FICS.

Mr Lucy—I do recall that discussion. I think that it was more of a recommendation to FICS that they might seek from the advisers an increase in the amount.

Senator SHERRY—Did you specifically mention any figure?

Mr Lucy—Not to my recollection.

Senator SHERRY—Are you aware that FICS has released its new rules?

Mr Lucy—I am not.

Senator SHERRY—Are you aware of the special edition, issue 41, from 26 October?

Mr Lucy—My office almost certainly is, but I am not.

Senator SHERRY—Are you aware of that, Mr Cooper?

Mr Cooper—No.

Senator SHERRY—Unfortunately the Westpoint people are in for a bit of a disappointment because, right at the end of it, it says:

Consideration of any increase to FICS' monetary limits has been deferred pending a separate consultation—

albeit that this issue had been part of the consultations that led to this.

Mr Lucy—Yes.

Senator SHERRY—It continues:

The current monetary limits have been retained in the new Rules pending that consultation—whenever that will finally conclude. What is your approach to this? Do you still believe this limit should be increased?

Mr Lucy—I note that you referred to the fact that they have deferred it. I am obviously not able to talk about the reasons that they have deferred it as distinct from making a decision. It can, of course, still be increased with the consent of the parties. So, to the extent that the parties agree to extend it, they can.

Senator SHERRY—But I think that is hardly likely the way things are going.

Mr Lucy—It is still early days. One of the consequences of our investigations is that the level of tension being applied to a number of these parties is certainly increasing, and it may well be that in the fullness of time some those parties therefore, because of that tension, decide that FICS might still be the appropriate mechanism for dealing with these issues.

Senator SHERRY—But the fact is that there is \$100,000 limit.

Mr Lucy—Yes.

Senator SHERRY—You believe it should be increased.

Mr Lucy—We have suggested that, where parties have amounts greater than \$100,000, they should seek an increase. So, yes, we are certainly on the record for saying so.

Senator SHERRY—FICS carried out a review of their rules, including the \$100,000 limit. They have finished the consultation, published new rules, amendments to FICS rules, but they have decided to defer this decision of the \$100,000 limit. Can you—not necessarily you personally—take this issue up with them?

Mr Lucy—I will.

Senator SHERRY—It is certainly causing concern amongst some of those people who would wish to apply for compensation through FICS and are unable to do so. Do you have any specific regulatory power over FICS other than giving the general authorisation for it to be a dispute resolution process?

Mr Rodgers—No.

Senator SHERRY—You can withdraw recognition of it if you do not believe it is operating adequately, can't you?

Mr Rodgers—Theoretically we could.

Senator SHERRY—It seems to me you are in a position to apply some guidance to FICS.

Mr Rodgers—I think 'encouragement' would at least be a fair description.

Senator SHERRY—I use the word 'guidance'. 'Thumbscrew' might be another.

Mr Lucy—Our dialogue with FICS has been constructive and helpful. We will take the point that you raise on notice and go back to them.

Senator SHERRY—One of the problems that has been drawn to my attention with this \$100,000 limit is the example of a Ms Lawrence, who, through Brighton Hall Financial Services, sought financial advice. She invested \$102,000 in Cinema City and then went back to Brighton hall and was convinced to invest \$85,272 in Ann Street. One amount was over \$100,000.

Mr Lucy—Yes, \$102,000.

Senator SHERRY—The other amount was under \$100,000. Clearly there are two separate transactions, though, and not contrived in any sense. But FICS are taking the view that they cannot deal with the transaction under \$100,000. Is that your understanding of the way FICS operates?

Mr Lucy—That specific example I would have to take on board because, again, many of these issues are quite complex because the description of that matter for that lady that you referred to is not uncommon in that we have a number of people who have multiple investments, but it is not automatic as to whether or not they are separate advances and so therefore should be treated separately by FICS. I will certainly take on board that particular example.

Senator SHERRY—Yes, because there are, as you say, a number of people in these circumstances with clearly two separate occasions, two separate investments and two separate entities, but—

Mr Lucy—Indeed many go well beyond two.

Senator SHERRY—Yes, but in this case they argue that they cannot deal with the one that is under \$100,000. There is another issue with respect to FICS's jurisdiction—and I must say I was surprised to hear this. I understand that, if ASIC bans a financial adviser with respect to Westpoint, or anything for that matter, and the issue and the compensation has not been determined by FICS at that point, FICS no longer has legal authority to handle the dispute because the planner has been banned. Is that correct?

Mr Lucy—I will ask Mr Rodgers to respond to that.

Mr Rodgers—I think that is correct in the sense that the obligation to remain a member of FICS flows from the holding of a licence or being a representative. So that obligation drops away once they cease effectively to be a person regulated through the Corporations Act.

Senator SHERRY—Doesn't that present FICS and you with somewhat of a dilemma if you justifiably remove the licence from a planner before FICS has determined compensation for these Westpoint victims?

Mr Rodgers—The case you are talking about will apply where you have an individual planner who holds a licence in their own right. It is the obligation of the licensee—and, of course, a banning order applies against an individual rather than a licensee. So taking a large firm with 100 advisers, the fact that we ban one of those advisers will not disable FICS from making compensation orders in relation to the licensee, because the licensee, of course, is responsible for the conduct of all of its then advisers.

Senator SHERRY—Unless, as you say, it is an individual, not paid under licence.

Mr Rodgers—Yes. It is being a licensee that commits you to being a member of a dispute resolution scheme like FICS and it is true that we understand that removing a licence has the potential to disconnect that compensation route. You can be confident that we are well aware that consequence.

Senator SHERRY—So this matter has been discussed with FICS?

Mr Rodgers—It is an operation of the Corporations Act rather than FICS, I think.

Senator SHERRY—Yes, but I understand from the concerns that I have had referred to me that it is an issue of concern in FICS.

Mr Lucy—If it has not been discussed with FICS, I will ensure that it will be.

Senator SHERRY—But it is almost a catch-22 here.

Mr Rodgers—It is the voluntary surrender of a licence that creates the problem area.

Senator SHERRY—At least some of the Westpoint victims have raised this issue—naturally, where it is found to be appropriate by ASIC wanting action taken against a particular planner, if that is found to be appropriate after you have completed your investigation. But the difficulty for some at least is that that then removes their ability to receive compensation. That is causing them some concern and distress. But you seem to be aware of the issue and presumably you will be able to take that into account, at least in your timing on these matters.

Mr Rodgers—We are well aware of the issue.

Senator SHERRY—Another difficulty about compensation and FICS is the issue of PI insurance. Are you aware of some of the issues concerning lack of or insufficient PI insurance?

Mr Lucy—That is on compensation more generally, so again I will ask Malcolm to respond to that.

Mr Rodgers—There is no current obligation under the act for people to hold PI insurance. I do not speak as an expert on this, but my understanding of the information that we have gathered through Westpoint is that it is not universally true that all advisers hold PI insurance. It is true that the terms of some of the PI insurance that advisers currently hold look problematic if you are looking for PI as a source of investor compensation.

Senator SHERRY—We could end up in the situation where, because of lack of PI insurance—whether it is not sufficient or, in fact, does not apply at all—even if fault is found and even if you do take action and withdraw their licence, some of the investors may not end up with anything.

Mr Lucy—I think that is a big assumption. Before one looks at the levels of insurance, for example, there is a question of what is returned by the administrators, liquidators and so on. Therefore, in the final analysis, which is the point you are raising, quite so; it may well be that in the end that top-up that people are looking for to be provided under the PI cover may not be available.

Senator SHERRY—It may not be there, yes.

Mr Lucy—Correct.

Senator SHERRY—I thought the issue was that PI insurance was to be a requirement. What has happened?

Mr Rodgers—The general provision in the Corporations Act that requires a licensee to have arrangements for compensation came into effect on the enactment of the financial services regime.

Senator SHERRY—Which was when? Can you remind me of the date?

Mr Rodgers—It was 11 March 2002, I think. At that stage, as you would be aware, the market for general insurance products in Australia was in some disarray following the collapse of HIH. As I understand it the government undertook to examine in more detail the use of a requirement that contemplated rather than necessarily expressly required that the obligation would be met by PI insurance. The government issued consultation papers a couple of times, but the final form of the obligation—in effect, the regulations that sit under the Corporations Act provision—is not yet settled.

Senator SHERRY—Here we are in November 2006 and PI insurance has not been finalised for, in this case, planners. And again this is potentially a difficulty in respect of Westpoint, and other people for that matter, because they have either insufficient PI insurance or none at all. Is ASIC concerned about this lack of PI insurance, given that it was supposed to apply from March 2002? I accept the difficulties with HIH and the fallout and all that, but here we are in November 2006 and the PI insurance still has not been settled. This will be an issue for other investors in terms of any difficulties they have outside the Westpoint matter.

Mr Lucy—Potentially.

Senator SHERRY—Yes, potentially it will, won't it? So are you concerned that this matter has not been settled yet?

Mr Rodgers—I think it would be fair to say that we would welcome the finalisation of what has been a difficult area to develop.

Senator SHERRY—Yes, I understand that it has been difficult, but it seems to me that, in the case of at least some of the Westpoint investors, when all this is concluded, the lack of PI insurance will be an issue for at least some of them.

Mr Lucy—That is likely.

Senator SHERRY—If this matter of PI insurance were settled tomorrow—I know that it is not going to happen tomorrow, even though we are more than four years on and it should have been settled—would that have any effectively retrospective application to the cases currently before FICS? When would it effectively apply from?

Mr Lucy—My understanding with PI insurance is that, firstly, it is an extraordinarily complex area because it requires people to give undertakings and to give full disclosure. It is also a question of whether or not it is on a claims-made basis. So one could imagine that, if I was taking out PI insurance with a prospect of being sued, on a claims-made basis I am not going to get insurance cover.

Senator SHERRY—Or you will get it at some extraordinary cost.

Mr Lucy—Precisely. So it is a very difficult area and it is also made difficult when you seek to cover illegal acts, because any act that is within the capability of the insured to trigger—that is, trigger essentially the collapse of the cover or make the cover void—is very difficult to manage. For example, even the most basic obligation of the insured to give notice of when a claim is likely can just simply be set aside either deliberately or inadvertently by the insured.

Senator SHERRY—Indeed, I am told, not just by people who are claimants in respect of Westpoint but also by at least some of the compliance people who operate in this area, that this is a significant difficulty—the lack of PI insurance in settling or at least attempting to settle some of these issues.

Mr Lucy—Our observations would be that it is too early for us to form that view because we are not at that point, frankly, so I could not support that comment at this stage.

Senator SHERRY—Let me take the converse. Where a person has PI insurance, isn't it generally true that they cannot settle a dispute with a client, Westpoint or not Westpoint, without the agreement of the PI insurer and, if they do settle, it is highly likely that they will not receive the PI insurance from that company?

Mr Lucy—You are talking generally. Certainly it is my experience that, when an insurer is obliged to, in essence, stand behind their cover and they look as to whether or not there are opportunities to step aside from the obligations, they often stand in the shoes of the party to see whether or not they can mitigate or reduce any such responsibilities and negotiate. So I think that is likely down the track.

Senator SHERRY—Are you also aware that on 12 September FICS sought a declaration in the Federal Court regarding its ability to deal with complaints and hence financial advisers in respect to Westpoint?

Mr Lucy—I believe that is the matter before the court at the moment.

Senator SHERRY—Does ASIC believe FICS have sufficient powers to deal with issues on promissory notes?

Mr Lucy—I do not think we should comment on that because that is before the court and that is very much the heart of the issue.

Senator SHERRY—Did you make any submission at the hearing?

Mr Lucy—I understand that we did take an intervening role in that proceeding, yes.

Senator SHERRY—Can you indicate in what way?

Mr Lucy—Supportive of FICS.

Senator SHERRY—I understand that to date FICS have now received 240 complaints, so a substantial number are now entities before FICS in respect to Westpoint.

Mr Lucy—I cannot verify that number, but it is consistent with my expectation.

Senator SHERRY—On another matter—and I have raised this with you before on at least two occasions—have you kept the tax office informed in respect to self-managed superannuation funds where there was a Westpoint investment?

Mr Lucy—Yes, we have. Indeed that liaison and discussion is literally ongoing. I am aware of further discussions held this week.

Senator SHERRY—I will pursue it with the ATO. I accept what you say, but when I have gone to the tax office and raised this matter with them there has been no action—nothing.

Mr Lucy—I am personally aware of ongoing discussions, again including this week.

Senator SHERRY—The discussion is fine, but I have asked the ATO, ‘What have you done about investigating the self-managed superannuation funds structures?’ They have regulatory responsibility for this. Certainly as at the last estimates, which was the second time I raised it with them, nothing had been done.

Mr Lucy—That is a matter for them of course.

Senator SHERRY—I accept that it is a matter for them.

Mr Lucy—All I am saying is that there is very effective dialogue in all sorts of areas between ASIC and ATO.

Senator SHERRY—Okay. In terms of alternative disputes, are there any other dispute mechanism that exist if FICS did not exist?

Mr Lucy—Are you talking about the Westpoint environment?

Senator SHERRY—No, generally.

Mr Rodgers—There is the statutory dispute mechanism, the Superannuation Complaint Tribunal. I cannot be certain of the exact number, but there are four or five, perhaps six schemes that we have approved under our powers under the act.

Senator SHERRY—Could you take that on notice and provide me with just a brief overview of them?

Mr Rodgers—Yes.

Senator SHERRY—In terms of super, for example, that is fine, but a lot of the FICS is nonsuper.

Mr Rodgers—That is correct.

Senator SHERRY—Probably the majority, I think from our previous discussions.

Mr Lucy—I am not sure about that. I think you are right in saying that a significant amount is from super.

Senator SHERRY—I think you have given us a figure of approximately a third.

Mr Lucy—Again, I am not sure whether that is referring to the dollars or the actual transactions.

Senator SHERRY—Whatever it is.

Mr Lucy—Whatever it is, it is a lot.

Senator SHERRY—It is a lot, but there is a lot nonsuper as well.

Mr Lucy—Correct.

Senator SHERRY—I will return briefly to the issue of PI insurance. Have ASIC been in dialogue with the department on the matter of the lack of PI insurance?

Mr Lucy—The whole issue of PI insurance is part of the ongoing dialogue, and I am aware that certainly the insurance industry has also been involved in those sort of discussions.

Senator SHERRY—What should investors do at the moment? Is there any formal disclosure to investors that when they go to a licensed planner they do not have sufficient PI insurance at the present time?

Mr Lucy—It is a broad question.

Senator SHERRY—I know it is.

Mr Lucy—Step one is whether or not the adviser is licensed.

Senator SHERRY—Yes.

Mr Lucy—I think whether or not the adviser has forms of compensation in place, and the nature of those forms and what that compensation might be, might be quite a legitimate question. Again, advice regarding PI insurance does not automatically mean that there is a level of cover that, at the end of the day, is going to be there to provide.

Senator SHERRY—I accept that.

Mr Lucy—So therefore right now, without this formal platform being in place, one has got to be very careful that you do not mandate it because otherwise an investor might quickly conclude a level of comfort that may indeed be unreliable.

Senator SHERRY—Sure, but at least there is a possibility of something. If there is no cover, there is nothing.

Mr Lucy—Yes.

Senator SHERRY—If there is cover, there is at least a possibility of cover.

Mr Lucy—That is true, but then again that is a question of the quantum of the cover and the level of claims. It is a very complex area.

Senator SHERRY—I accept that it is complex. It is intended that PI insurance should be provided.

Mr Lucy—That is one alternative.

Senator SHERRY—So you are suggesting that perhaps there may be no PI insurance coverage at all after all these consultations are finished.

Mr Lucy—It is not for us to make that observation. All we are saying is that PI cover by itself may not be the total answer. It may be that it is a very key plank of any response, but it may not be the entire answer.

Senator SHERRY—I accept that it is not the entire answer and that it is complex. Are consumers being informed at the moment that there is no PI coverage requirement? What are they being informed about in this area, if anything?

Mr Lucy—I think it is a matter that is generally known in the community.

Senator SHERRY—Do you think so?

Mr Lucy—Yes. The licensed advisers—

Senator SHERRY—In the adviser community?

Mr Lucy—Yes.

Senator SHERRY—Yes, I am sure that is the case.

Mr Lucy—They are the people who are giving the advice.

Senator SHERRY—I am sorry; when you said the community, I thought you were referring to the general consumer.

Mr Lucy—I think that it has received a fair level of press in any event but, in particular, the licensed adviser community would be very well aware of it.

Senator SHERRY—I accept that the licensed provider community would; there is no doubt about that. But you certainly would not contend that the average punter on the street is aware that financial planners do not have PI insurance.

Mr Lucy—I think the likelihood is that the average punter, as you refer to them, would not understand the issue of compensation, frankly, at all, let alone whether or not it is provided by PI or any other form.

Senator SHERRY—I think that is probably right. But, given that more than four years ago it was indicated that PI insurance would be required and there is no requirement as of today, some consumers would at least expect that there is insurance coverage of financial planners in this country.

Mr Lucy—I cannot speak on behalf of those consumers but the facts are that this is a matter that is before the government and I am sure that they are working on it.

Senator SHERRY—Yes, they have been working on it for more than four years and it is still not concluded. As you say, that is not your fault.

Mr Lucy—It is not our responsibility.

Senator SHERRY—But you are responsible for consumer protection information generally; you have significant responsibilities in that area.

Mr Lucy—Quite so, but this is not an issue that people are blind to. This is an issue that is very complex. There has been a high level of stakeholder engagement on it and at this stage the government is still yet to conclude their position.

CHAIR—Senator Sherry, I was going to take the morning break about now. Is this a convenient time for you?

Senator SHERRY—Yes.

CHAIR—Can you give us some idea of how much longer you will be with ASIC?

Senator SHERRY—What time is lunch break?

CHAIR—It is at 12.30.

Senator SHERRY—Certainly through to 12.30.

CHAIR—Assuming that we resume with APRA at 1.30—and under the current arrangements we have APRA, then the Productivity Commission and then the ATO—can we send the ATO away until after dinner now?

Senator SHERRY—We certainly will not have as much in APRA as in ASIC.

CHAIR—Can we send the ATO away until, say, after 3.30?

Senator SHERRY—Yes.

CHAIR—What about the Productivity Commission?

Senator SHERRY—The same with the PC.

Senator Minchin—Mr Chair, could I respond to a question that Senator Sherry raised?

CHAIR—Yes, Minister.

Senator Minchin—Senator Sherry just asked in the context of the government's proposed changes to superannuation taxation the question of what might or might not appear in MYEFO with respect to those decisions. I am advised that, indeed, MYEFO will reflect the government's decisions as announced in, I think, September in respect of that legislation and that measures dealing with both the expenditure and revenue effects of those proposals will be reflected in MYEFO.

CHAIR—I should have asked you too, Senator Sherry, about the fiscal group of Treasury. I do not think we sent them away until after dinner. Are they still likely to be reached later this afternoon, or should we send them away until after eight?

Senator SHERRY—After dinner, because the tax office will take us through to dinner.

CHAIR—That is what we will do. Officers of APRA will not be required before 1.30; officers of the Productivity Commission and of the ATO will not be required before 3.30 and officers of Treasury in output groups 2, 4 and 1 will not be required before 8 pm.

Proceedings suspended from 10.49 am to 11.05 am

Senator SHERRY—Just returning briefly to the issue of self-managed superannuation funds—not in the context of Westpoint—when I go through your press releases, which I do read almost every day because there is almost one issued every day, what strikes me about the level of activity of ASIC is that a significant proportion seems to be around issues to do with self-managed super funds, either illegal contrived schemes and actions taken in respect of promotion thereof et cetera. That would be a fair description, wouldn't it—a significant amount of activity?

Mr Lucy—Yes, it would be.

Senator SHERRY—When you become aware of a difficulty involving a self-managed superannuation fund, do you pass that identification on to the tax office?

Mr Lucy—It depends upon the nature of it but, yes, our MOU between the Taxation Office and ourselves requires that there is regular liaison and communication. So, yes, we meet that.

Senator SHERRY—Given that the tax office are responsible for regulation of the SMSF sector, do they come back to you? If you pick something up and inform them—because,

frankly, they do not pick much up at all in this area—do they come back and liaise with you about what their investigations have revealed, if anything?

Mr Lucy—No, invariably not. They may well come back and ask for further information. But as far as their own activities go, again, they have their own secrecy provisions, so they are very careful to make sure that they do not breach those secrecy provisions.

Senator SHERRY—You have a working relationship with APRA, obviously.

Mr Lucy—Yes.

Senator SHERRY—They are the regulator of other superannuation funds.

Mr Lucy—Yes, the big end of town, so to speak.

Senator SHERRY—Yes, that is broadly true. So, in a sense, the secrecy provision may be a greater deterrent than the tax office coming back to you. I do find that rather strange.

Mr Lucy—I am not sure whether ‘deterrent’ is perhaps the right word, but it certainly is a restriction in that the Australian Taxation Office is quite severely curtailed as to information they can provide regarding taxpayers.

Senator SHERRY—Even to another regulator such as you, where there is an issue that you may jointly hold?

Mr Lucy—Yes.

Senator SHERRY—You would not have the same constraint in your relationship with APRA?

Mr Lucy—Correct.

Senator SHERRY—That is interesting. Is there any consideration of this difficulty at present?

Mr Lucy—Yes, in particular in Wickenby, and there is likely to be legislation considered regarding communication of information from the Australian Taxation Office to ASIC under Project Wickenby.

Senator SHERRY—So it is an issue in other areas of oversight and regulation.

Mr Lucy—Yes.

Senator SHERRY—Wickenby is the high-wealth individual investor?

Mr Lucy—Not necessarily high wealth but I guess aggressive tax avoidance and evasion schemes.

Senator SHERRY—Whilst we are dealing with the issue of coordination with other regulatory authorities, there was the recent report on so-called red tape, if we could dub it that—a review which identified a number of issues, certainly 19 or 20, regarding coordination between APRA and ASIC. Can you give me an update as to the progress that has been made in dealing with those recommendations?

Mr Lucy—Are you referring to the Banks report?

Senator SHERRY—Yes.

Mr Lucy—I will ask Mr Rodgers to provide additional detail, but firstly ASIC very strongly welcomed the Banks report. We felt that it was a very useful and constructive exercise. We also are very pleased that the government has picked up the overwhelming majority of the recommendations. For our part, ASIC had already commenced a lot of work in respect of better regulation—that is our description, ‘better regulation’—and part of that is to recognise that we need to work closely with APRA to ensure that there is no inappropriate or unnecessary duplication. So we formally formed a working group of both APRA and ASIC to look at this and Malcolm Rodgers is leading that from an ASIC perspective, so perhaps I can invite him to speak to it further.

Mr Rodgers—The work that we are doing in that working group builds on an already close relationship, if you like, in ordinary operational matters between ourselves and APRA where we have connections at our compliance level, at the enforcement level and to some extent at the policy level as well. The joint working group is looking at whether there are opportunities for removing duplication or rationalising in areas where we are talking about a commonly regulated population. Each regulator’s legislation requires something that looks as if it serves the same purpose as the other regulators’ legislation. We are looking at the moment at whether we can streamline some of the standardised reporting that comes to both APRA and ASIC. We have been looking at the regime about breach notifications, because there is, as you will be aware, I think, some noise amongst the regulated population about effectively different rules.

Senator SHERRY—Yes, a different approach.

Mr Rodgers—That may require a legislative solution. The other area we are looking at is the extent to which we can streamline the licensing process for entities, particularly superannuation entities that require a licence from both of us.

Senator SHERRY—Do you have any indicative time frame when you think these issues will be concluded one way or the other?

Mr Rodgers—We made what at this stage of the year looks like a slightly aggressive promise that we would actually bring that phase of the work to a conclusion by 31 December and at least be clear about the conclusion that we had reached. I say it is aggressive, but it is still doable and I think we are on track to do that.

Senator SHERRY—Maybe we can explore this matter again in February next year. Coming to a case that did involve joint ASIC-APRA activity, I want to go to the case of the enforceable undertaking that ASIC received in respect of AXA and their superannuation fund. I do not think we discussed this with ASIC; it was raised with APRA. It is my understanding that you did receive an enforceable undertaking from AXA—I think it involved seven officials—regarding decisions in respect of a defined benefits superannuation fund that AXA operated for some of its staff?

Mr Lucy—We are not prepared for a discussion on AXA because AXA happened quite a long time ago. So I expect the best thing for us to do is to take your questions on notice and respond more comprehensively.

Senator SHERRY—Okay. The issue of the defined benefit fund and the changes made and the notification of the changes to the affected employees—that would have been the area of ASIC’s concern, wouldn’t it?

Mr Lucy—Yes.

Senator SHERRY—Then my understanding is that, when the enforceable undertaking was entered into, ASIC did not proceed any further.

Mr Lucy—That is my understanding.

Senator SHERRY—That is my understanding, yes. However, APRA had another action—

Mr Lucy—Quite so.

Senator SHERRY—which has just concluded, which I will be going to them about.

Mr Lucy—Yes, that is for APRA.

Senator SHERRY—In respect of those seven individuals with AXA, ASIC, once the EU was entered into, determined to take no further action against those particular individuals.

Mr Lucy—That is my understanding.

Senator SHERRY—What action would be open? Potentially, could you take banning action against those individuals if you wished?

Mr Lucy—I guess the key point is that we chose not to.

Senator SHERRY—Exactly. But you had the power. I am not suggesting that it should have been used in those circumstances, but you had potentially the power to utilise.

Mr Lucy—I think we should take that on notice because we are identifying seven individuals and we should be very clear, very precise, in that response.

Senator SHERRY—In asking these questions I am making the point that I do not believe you should have gone any further. I actually agree with the conclusion you entered into with the enforceable undertaking. I am not criticising or suggesting criticism in any way, shape or form of ASIC’s role.

Mr Lucy—Yes, I understand your approach.

Senator SHERRY—On a somewhat related matter, a defined benefits superannuation fund, are you aware of the issues facing some 1,800 Telstra employees in respect of the cessation of membership of the current superannuation defined benefit fund arrangements?

Mr Lucy—No.

Senator SHERRY—Are you aware of the notices that have been issued to these employees by Telstra in respect of them being required to cease their membership of the CSS superannuation fund?

Mr Lucy—Still no.

Senator SHERRY—So you have had nothing referred to you at all on this matter to date?

Mr Lucy—I cannot speak for the agency, but I have not. To the extent that we have, I will come back to you.

Senator SHERRY—Good. I will provide you with a copy of a notice that Telstra has issued to approximately 1,800 employees—I do not have it here now, but I will send it on—which I would think requires examination on this issue, because I suspect prima facie it does breach FSR requirements. There are a range of other issues about disadvantage to be suffered et cetera. So I will send you a copy of that notice that Telstra has issued to the employees and ask that you examine whether or not in fact it is a legal document in the form that it has been issued, and I will also ask you to investigate other issues surrounding this matter. I will be in communication with you on the matter.

Mr Lucy—Again, you understand our use of the word ‘investigate’ is not necessarily the way that it is widely described, but we will have a very close look at what you send to us.

Senator SHERRY—‘Examine’?

Mr Lucy—Examine, certainly.

Senator SHERRY—APRA are certainly aware of the matter because I have referred it to them—not the notice specifically but the general issue of the disadvantage to be suffered by those employees. But I note that in the AXA case you did take action and got an enforceable undertaking, so I have every confidence that ASIC will act very vigilantly in respect of the Telstra employees—the 1,800 of them.

Mr Lucy—Without fear or favour I think is the response.

Senator SHERRY—Yes. I am pleased to note your activity in this regard, and I will refer some documentation on to you about the matter.

Senator Minchin—Chair, can I for the record—seeing as Senator Sherry has raised the issue of superannuation with respect to Telstra employees—just make the point that the government has followed long established practice in regard to this matter in that employees of an entity that is no longer owned or controlled by the federal government should no longer be members of the government’s superannuation schemes. This is the policy adopted by the former Labor government with respect to entities it privatised, and it is long-established practice that that is the case. Once the government ceases to own more than 50 per cent of Telstra, it is appropriate and proper—with great respect to the taxpayers—that those employees in superannuation for the projected forward be the responsibility of the company. We of course will honour the obligations that involve the accrued superannuation entitlements of those employees while they have been in the CSS and PSS, and they will be honoured in full. The matter of Telstra informing its employees who remain in the CSS and the PSS of the arrangements going forward is a matter for Telstra. I think a certain amount of partisan politics is involved in Senator Sherry using this committee to seek to assert, without any evidence or any justification, that Telstra is somehow possibly in breach of some rules with respect to that. It is a wild assertion, and one that I have no evidence of and he has not produced any evidence to support.

Senator SHERRY—I have a document.

CHAIR—Thank you, Minister.

Senator SHERRY—Can I just conclude on this matter of Telstra, Chair?

CHAIR—Yes.

Senator SHERRY—I think there are two issues here, Mr Lucy. One is the disclosure document issued by Telstra to its employees in regard to this matter. That is one issue—and I do get a lot of secret documents or documents that some people try to keep secret on this matter. So there is that issue, and I will send you the document. I certainly believe prima facie—I do not believe that I am making a wild accusation—that the document that Telstra have issued prima facie does not comply with FSR.

But there is the second and I think much more important issue about the legal capacity of either the government or Telstra to effectively breach the promise made in respect of a defined benefit superannuation scheme and effectively force the employees to leave that scheme without adequate compensation. That was a central issue in the AXA case. But I will refer the documentation on to you.

Senator Minchin—Again, Mr Chairman, I cannot let that accusation go without some response. As I said before, it is long-established practice and properly so—and as practised by the former Labor government—that, when employees cease to be employed by a government owned or controlled entity, their membership of the CSS/PSS ceases. That is clear to all members when they enter these schemes. It is well known. It has always been telegraphed that, at the point at which the government's ownership of Telstra drops below 50 per cent, their membership of the CSS/PSS would cease, while all their benefits accrued to that point would, of course, be honoured in full well into the future at taxpayers' expense. But to suggest that there is any improper activity on our part is, again, a partisan political assertion which totally contradicts the behaviour of the Labor government on this matter, which is entirely consistent with ours.

Senator SHERRY—There is one point of inconsistency, and this relates to the specific example.

CHAIR—Senator Sherry, I am not going to limit you, but this is not really a forum to debate the issue; it is a forum for questions. If you want to put propositions to Mr Lucy and the officers and ask them to comment on those, you can do that of course. But I would rather avoid a debate on this issue, and I invite you to proceed with questions.

Senator SHERRY—Sure. As part of your investigation, Mr Lucy, and the issue of removal of individuals from a defined benefit fund, in this context, as you will note from my previous comment—and this is a question—in the Qantas case, which the minister has referred to on frequent occasions, a comparable alternative offer was made in respect of the pension promise, which is not occurring in respect of the Telstra matter. You might care to investigate that aspect of it as well. But I will refer that matter to you in writing. I have already made the referral to APRA.

Mr Lucy—We will look forward to receiving it; thank you.

Senator Minchin—Just for the record: as I understand it, it should not be believed or asserted out of this hearing that ASIC has agreed to investigate this matter, which is no doubt what Senator Sherry will put in his press release. I understand that Mr Lucy has indicated that he acknowledges that Senator Sherry will be sending him something, but I would hope that there is no suggestion that ASIC has agreed to any sort of investigation at this point.

CHAIR—It was perfectly clear to me, Senator Minchin, that what Mr Lucy politely agreed to do was to receive a document that is going to be sent to him and nothing more.

Senator Minchin—Thank you, Mr Chairman.

CHAIR—That is right, isn't it, Mr Lucy?

Mr Lucy—That is quite so.

CHAIR—Senator Joyce, were you looking for the call on anything?

Senator JOYCE—No, I am here to give moral support today.

Senator CONROY—I want to talk about prospectuses, and I am looking at your fido page on your website, under the prospectus section, as to why you must read them. It says:

At a money show, some people came up to the ASIC stall to comment about prospectuses they had received. They were unsure about ASIC's role. For example, one lady said: 'I don't need to read this, do I, because you people (ASIC) have approved it?'

And further it states:

Beware—this is a dangerous misunderstanding.

I wonder whether you could just outline for me in general what ASIC's role is in relation to prospectuses.

Mr Lucy—You will recall that before March 2000 the approach required parties to lodge or register a prospectus with ASIC. Parliament changed that in March 2000, so prospectus are lodged with ASIC to an extent on a random basis but also, to the extent where we believe that the prospectus itself has a significantly higher level of public interest, we will consider the prospectus. In considering the prospectus, there are three options. The first is to have regard to what is contained in the prospectus. Bearing in mind that we are relying entirely on what is contained in it and presented to us—we do not make our own independent inquiries—if we form a view that what is contained within that prospectus is satisfactory, we take no action at all. The second is, to the extent that we form a view that there are matters in the prospectus that require clarification, elaboration or adjustment, then we might extend the period of seven days and allow the company or the parties to make corrections. The third action available to us is to stop the prospectus.

Senator CONROY—So, in terms of this lady who says you have approved it, that is not an accurate reflection of the role of ASIC? I am just quoting from your own website at the moment.

Mr Lucy—Correct.

Senator CONROY—So just because something has been lodged with you and has gone forward, it does not mean that ASIC have approved it?

Mr Lucy—Quite so.

Senator CONROY—There is not some kind of sign-off or tick? People should not think that, because it has gone through your process, it has been approved or ticked off or anything at all like that, should they?

Mr Lucy—That is correct.

Senator CONROY—On 9 October this year, the Minister for Communications, Information Technology and the Arts, in response to a question without notice, told the Senate:

ASIC has signed off on the prospectus. Clearly, the prospectus complies with ASIC's view as to what are appropriate regulatory conclusions.

Is that an accurate description of ASIC's role in the development of the Telstra prospectus?

Mr Lucy—I think there was quite a level of discussion in that series of general discussions.

Senator CONROY—I want to come back to that particular issue but, when the minister said that ASIC had signed off on the prospectus—'Clearly, the prospectus complies with ASIC's view'—I just want to understand what that means.

Mr Lucy—There was a lot of what I would describe as sort of colloquial discussion as to what was being dealt with by ASIC. I think the minister and a number of other parties referred to—to use your description—'signed off'. But you are quite right. Indeed, ASIC's role is not to sign off on any prospectus.

Senator CONROY—That is essentially what I want to confirm—that, notwithstanding that the minister said it was signed off, as you say on your own ASIC website, 'Beware, this is a dangerous misunderstanding.'

Mr Lucy—That is correct.

Senator CONROY—You did mention that you were involved in some discussions. At what stage were you called in?

Mr Lucy—The parliament was involved in a number of discussions; I did not mention that I was.

Senator CONROY—It was reported widely in newspapers—and this is not about the content, Senator Minchin, so in no way am I seeking to go to the content; I just want to know what ASIC's role was in the preparation—that ASIC had been called in for discussions around the prospectus. Did you initiate those? Did Telstra initiate those? Did Senator Minchin initiate those? Is it correct that you were called in for discussions on the Telstra prospectus?

Mr Lucy—No, it is not correct.

Senator CONROY—You would have seen, I am sure, those media reports?

Mr Lucy—Yes. There were a number of discussions in the media about that matter, but the facts are that we were not called in to any such meeting.

Senator CONROY—Were you involved in discussions?

Mr Lucy—With the government, no.

Senator CONROY—With Telstra?

Mr Lucy—Yes.

Senator CONROY—I am being careful not to transgress. I am just thinking of how to phrase the next question. Did Telstra contact you or did you contact Telstra?

Mr Lucy—I think it is perhaps better if I just provide a broader explanation—that is, because of the nature of the Telstra prospectus, this clearly falls into an area where we did take an interest in the prospectus generally, as we have undertaken in a number of significant public offerings. So our engagement is an entirely normal and consistent matter in that we looked and we had dialogue with the solicitors acting for both the vendor, the government and also Telstra. During that dialogue we were engaged with, as I said, the solicitors and representatives of the company and representatives of the department.

Senator JOYCE—Contingent legal issues that were going around in the background—you would be aware of them though, wouldn't you, with Telstra?

Mr Lucy—Almost certainly, but our role is very much to deal with what is presented to us. Our role is not to make inquiry; our role is to deal with what is presented to us. To the extent that we have information that is presented to us where we feel there could be a better manner of disclosure or whatever, we would communicate that.

Senator JOYCE—I am referring to those COTS cases that just go on and on. Do you get to a point in time where you say, 'Well, that issue is past,' or does it always have to be declared?

Senator Minchin—Mr Chairman, this has nothing to do with the question of the process by which the Telstra prospectus is dealt with by ASIC. With great respect to Senator Joyce, the matter that is now raised really has nothing to do with the subject matter we are dealing with—which is, as I understand from Senator Conroy, the interaction between those responsible for the production of the Telstra prospectus and ASIC. I would ask Senator Joyce that, if he wants to pursue other matters, they be dealt with in another forum. They really do not have anything to do with this particular question.

CHAIR—I was not sure, I must say, Senator Minchin, where Senator Joyce was going. It is my practice generally to allow other senators to come in on the line of questioning of a senator who has the call if they have some germane point to make or want to elaborate on it. Without, I must confess, listening very carefully, I was not sure where Senator Joyce was going with that.

Senator JOYCE—It was in reference to ASIC and knowledge of contingent issues that are floating around in the background because the Telstra issue had been brought up.

CHAIR—Have you finished with that line of questioning?

Senator JOYCE—Yes.

Senator CONROY—Thank you for that before, Mr Lucy. Did you contact Telstra or did Telstra or the government contact you?

Mr Lucy—In respect of what?

Senator CONROY—Of the prospectus. I think you were involved in discussions. Now I am just trying to ascertain how those discussions came about.

Mr Lucy—At officer level there was, as you would expect in a situation like this, open dialogue between the solicitors acting for both parties and our officers were involved in that dialogue from time to time.

Senator CONROY—I am asking whether they contacted you. Who contacted you? Did Telstra contact you, did the government contact you, or did ASIC contact them? Who initiated the contact?

Mr Lucy—There has been no communication from the government, so we can eliminate that. But there was communication backwards and forwards between ourselves and Telstra.

Senator CONROY—Who initiate the contact?

Mr Rodgers—Perhaps I can assist here. At quite an early stage—and I cannot remember the month; it would have been in the early months of this year—in the planning work in the areas for which I am responsible, we needed to understand how much work might be involved for us in dealing with the float of Telstra. I am not absolutely certain who initiated the phone call, but we had been in preliminary dialogue with the legal firms we knew were acting for the parties and at some stage, perhaps at our initiative—but those who deal in these things reasonably regularly know that, if it is not our initiative, it will be theirs—we said, ‘We should actually sit around a table and talk about what work might be involved.’ There were a number of those conversations throughout this year. I cannot tell you exactly who initiated the phone call.

Senator CONROY—Could you get back to me on who initiated the very first contact that then led to that process you are talking about. I understand that ASIC would normally, with something that is going to be the biggest float of the year, have initiated it themselves. I accept all of that, which is all general. I want to move to the specific though. Who contacted whom? Who initiated contact over the dispute over the form of words in the Telstra prospectus to do with the regulatory issues, the ones that were contentious in those last few days? I would like to know who contacted ASIC or whether ASIC contacted the parties when that dispute appeared to be flaring around those issues. Who initiated that contact?

Senator Minchin—Chair, I am getting increasingly concerned about the line of questioning being pursued by Senator Conroy and this goes to the issue we discussed last night. I take seriously Senator Conroy’s assertion of last night that he did not want to create any circumstances in which there could be any damage done to the current T3 process and I hope that he is serious—

Senator CONROY—I am trying to combine my questions—

CHAIR—Let the minister finish. Stop interrupting.

Senator Minchin—I accept that the Labor Party does not support this sale, but I would have thought, given the parliament has now approved it and that the executive government has initiated a sale process and much is at stake, that the opposition would not seek to use this estimates process to do anything to disrupt or damage that process. I think this line of questioning is now beginning to become partisan and political and it does risk the potential for inadvertent comment that could affect the sale process. I would again raise the process that was agreed to last night—if opposition senators have questions they want to raise about the mechanism of the creation and final production of the Telstra prospectus, that is a matter that they can ask any questions they like about once this very significant float has been completed. I seek the indulgence of the committee to ensure that such a line of questioning is conducted

after this float and I think Senator Conroy is now starting to go down the path of issues that could affect this float. I hope this committee would not allow that to happen.

CHAIR—Thank you, Senator Minchin. I was listening with care to what Senator Conroy was saying. I think in the circumstances what we might do is what we did yesterday. I will convene a quick private meeting of the committee with a view to resolving this with ASIC as we resolved it yesterday with the ACCC, particularly now that we know that there is going to be an adjourned hearing of these estimates concerning what I might broadly call Telstra related issues. The hearing is suspended momentarily and I will ask the secretary to convene a short private meeting.

Senator CONROY—Given that it takes a little bit of time to round up the senators, you might want to keep going because I would like to say something on the record before—

CHAIR—I think Senator Conroy is entitled to do that. If you want to say something on the record to clarify your position, I think you can do that. But, in the meantime, would the secretary please convene a private meeting.

Senator CONROY—Thanks for that, Minister. As I indicated last night, I think that is a reasonable compromise. I thank you for the offer and I trust that the committee will take up the offer. I thank Senator Brandis for convening the meeting because, quite genuinely, I am not interested in causing any impact on the Telstra share float.

But I do have a generic concern about what happened yesterday and now. There are many companies involved in fundraising all the time, which is essentially what Telstra and you are doing; it is fundraising. The precedent that is being created here today and was being created late yesterday is that apparently we cannot now ask the regulatory authorities questions about matters if there is a prospectus issued or if there is an issue around the content of a prospectus while it is happening. This is a patently absurd position to put the regulators and the parliament in, where just because there is a capital raising taking place all of a sudden Mr Lucy will be able to say: 'As with the Telstra example, there's a capital raising taking place at the moment. We can't possibly comment on it.' This is a patently absurd position.

Capital raisings take place right across the economy all the time, and we have one that we are banned from asking questions about just because it is live. Many issues arise about live prospectuses that are in the marketplace at the time and we have never been stopped previously. I think it is a very dangerous precedent.

I accept the point you are making and I am wholeheartedly happy with the offer of your compromise, but as a precedent it actually cannot stand. The parliament cannot not be allowed to ask the ACCC, ASIC or APRA about a company involved in a capital raising just because it is in the middle of the capital raising. It is actually a patently absurd position.

CHAIR—Senator Conroy—

Senator CONROY—Having said, that I defer now back to you, Chair. I have made the point. I appreciate it.

CHAIR—You have made your point. Since the decision to convene the private meeting was mine, can I simply say that, if my memory serves me correctly, the decision to postpone Telstra related questions to the ACCC yesterday afternoon was arrived at by the mutual

agreement of all. If my memory serves me correctly, the motion was actually, at least in form, moved by an opposition senator, Senator Stephens, at the private meeting.

Senator CONROY—I accepted that the government had gagged Mr Samuel and refused to allow questions, and I accept that they are about to do the same to Mr Lucy. I simply make the point.

CHAIR—You can say that—you can say anything you like—but the record reveals what happened.

Senator CONROY—I am not denying it.

CHAIR—That is, Mr Samuel declined to answer questions. He took questions on notice. The minister suggested a compromise.

Senator CONROY—I actually suggested the compromise and the minister kindly took up the offer. I am on the record as having suggested the compromise and I accept that it was a reasonable offer.

CHAIR—Senator Conroy, a fortiori the position is one of consensus between government and opposition senators.

Senator CONROY—It is. As I say, I was just make being the general point.

Senator Minchin—I accept the integrity of Senator Conroy's position. He has legitimately raised a significant issue and perhaps it might well be that the government and opposition should seek to discuss this general question. I think parliamentary committees do need to act with great care when there are significant floats in train. I think the parliament should be very careful and parliamentary committees should be very careful not to do anything untoward that could affect the commercial life of this country. Nevertheless, parliamentary committees have work to do and, as a general statement on behalf of myself and my portfolio, I would be happy to discuss separately with the opposition a mechanism by which proper parliamentary inquiry can be conducted consistent with common sense with respect to the commercial life of this country.

CHAIR—Indeed.

Senator BERNARDI—In relation to this, I would regard the public float or capital raising of a government or a quasi-government organisation as significantly different to that of an external entity. I think we have to tread with great caution when we are quizzing government agencies about their role in a government float that is currently under way.

Senator CONROY—A government may want to tread very carefully; the parliament is an entirely different matter. But I accept the offer, I accept the compromise.

CHAIR—Everybody has made their views on this matter abundantly clear.

Senator CONROY—Senator Murray has not.

CHAIR—Those who have had something to say could not have been more unambiguous. I understand that Senator Stephens is on her way.

Senator SHERRY—I am sorry, Chair, while the senators are gathering, could I go on with a couple of other matters?

CHAIR—I was just going to say that Senator Stephens is literally on her way and I think we will suspend now because it will only be a matter of a couple of minutes.

Proceedings suspended from 11.44 am to 11.49 am

CHAIR—The hearing is resumed. Can I advise those present that the committee in private session has unanimously resolved that questions directed to ASIC in relation to Telstra should be postponed to an adjourned hearing of these estimates in the next parliamentary sitting fortnight, but after 20 November.

Senator MURRAY—Chair, I just want to put on the record that I was not present for yesterday's private meeting and the consequent agreement and motion that emerged from that, but I was present today and I do agree with the opposition and the government with respect to the motion to adjourn consideration of these issues of ASIC. I want to make the point on record that I consider these matters a response to specific, unusual circumstances and therefore do not reflect a general view that either this committee or the parliament should take with respect to prospectus issues.

CHAIR—This matter was raised briefly in the private meeting. Can I also put on the record the view, which I think was shared by all of us after some discussion, that this is a special case. I suppose there may in the future be other special cases, but the decision we have made not to have questions in relation to Telstra because there is a capital raising or a share issue in the market at the moment ought not to be regarded as establishing a general rule. I think I will leave it at that.

Senator SHERRY—Can I just turn to the outcome of the shadow shopping exercise and some related issues on the EU with respect to AMP? Firstly, where are we up to with concluding outcomes for the non-AMP institutions that were identified with respect to the shadow shopping exercise?

Mr Cooper—When the shadow shopping work was concluded in April of this year, ASIC wrote to all of the 104 licensees that had been involved in the survey, informing them of the results of the survey as it related to them. Of that group there were 14 licensees for whom we had fairly significant concerns about their compliance arrangements. One of those was AMP and another was the first capital matter, which I think we have discussed in this venue on previous occasions. We got into discussions with two of the 14 licensees and decided that their systems were adequate.

Senator SHERRY—In respect of those two, was there any follow-up action with any individuals who had purchased superannuation?

Mr Cooper—Not that I am aware of, no.

Senator SHERRY—You used the term 'adequate', which seems to me to indicate there may still have been a few individuals who were adversely impacted on.

Mr Cooper—No, I do not think you can necessarily draw that conclusion. In many of the cases the failures were failures to give statements of advice, for example, where the consumer was advised to maintain existing superannuation. So the failure was really—

Senator SHERRY—It was a failure to document—

Mr Cooper—Correct.

Senator SHERRY—not of inappropriate advice.

Mr Cooper—Not in all cases, but in these two cases we felt satisfied with the way things stood. In a further seven cases, the licensees undertook a range of improvements to their systems and they were able to satisfy us that that was going to be sufficient. That left us with five matters. That five includes AMP and no doubt we will talk about that. The end result there is the EU and the first capital matter that we discussed. The other three matters are confidential because they are ongoing matters. We are dealing with the remaining three.

Senator SHERRY—Is there any indicative time line on when the remaining three matters will be concluded?

Mr Cooper—They are all large organisations. The way we are heading in general terms with those three is that we are undertaking major surveillances right across the board. We have already commenced one in relation to one of them.

Senator SHERRY—Arising from the shadow shopping outcome?

Mr Cooper—Yes.

Senator SHERRY—So it is a major surveillance and it is three large organisations?

Mr Cooper—Yes.

Senator SHERRY—I understand that AMP have appointed an ‘independent arbiter’, if I could use that term.

Mr Cooper—They have indeed, in terms of the EU, and that is Deloitte.

Senator SHERRY—Are Deloitte to report to ASIC about their independent oversight of the matters that were raised?

Mr Cooper—Yes, they are.

Senator SHERRY—Have they reported back as yet?

Mr Cooper—No, they have not. It is going to take some time. I say that because the date by which AMP is required to write to the 7,000-odd clients is 21 November. That is quite an involved process. Those letters will go out and the number of people is relevant to how long it is going to take Deloitte.

Senator SHERRY—Will Deloitte be directly liaising with any or all of those 7,000 individuals?

Mr Cooper—I would imagine not.

Senator SHERRY—Could I suggest to you that they should. The reason I raise it is the outcome of your own shadow shopping exercise. AMP will write to the approximately 7,000 people, but your own shadow shopping exercise showed that a very high proportion of individuals—I think it was 80 per cent plus who effectively had been inappropriately advised, for whatever reasons—were not aware of the potentially adverse outcome. It seems to me that AMP writing to those 7,000—I do not know what the right language would be—drawing attention to the fact that they have been required to write following your enforcement, would

not, given the outcome of the shadow shopping exercise, adequately resolve the matters for those individuals.

Mr Cooper—I think it is different from the conclusions that came out of shadow shopping. The reason for that is that people were asked generically, ‘Were you satisfied with the advice that was given?’ When you ask an open-ended question like that of a nonexpert, it is a bit like—and I think we have used this before—the analogy of the dentist. If a person has a sore tooth and when they come out of the dentist the pain has gone, the average person would say that they were satisfied with the work that had been done. However, in this case, the letters that will be going to these clients will actually tell the clients what the circumstances are and will ask them what they want to do.

Senator SHERRY—What concerns me is the general issue of inertia in superannuation. We have discussed the issue and the problems around inertia default compulsory system. If you place an onus on people to be proactive then necessarily, due to inertia and default, they are not proactive; they will not change.

Mr Cooper—You asked me whether the expert was going to get in contact with the clients and I said that I did not think they would, but they will do pretty well everything else. In other words, they will assess the clients that AMP identifies as being affected, what is on the file, the rectifications, any decisions made, whether or not to award compensation to those clients and so on. All of that will be assessed by the independent expert.

Senator SHERRY—I do not recall this in the EU, but is there any provision for some form of contribution for non-AMP related independent financial advice for these individuals?

Mr Cooper—I can answer that by saying that part of the relief involved, if they wanted it, their being transferred to a non-AMP fund.

Senator SHERRY—Without loss?

Mr Cooper—Yes.

Senator SHERRY—But presumably that involves at least some of them going and getting another set of advice and paying for it—hopefully not on a commission—in order to make a decision.

Mr Cooper—Yes, I understand the question you are asking me. The EU is some 30 pages long. Perhaps we could just take that specific question.

Senator SHERRY—I have read the EU and I cannot recall there being anything in there about it, but please take it on notice. There is one other matter I want to raise on the AMP issue. As you know and as I have publicly said, I fully support your activity and your conclusions et cetera in your EU. But I was a little surprised with your annual report—not at the outline of the promoting compliance on pages 26 and 27; I think that is fair enough. I cannot recall seeing this in a report before: you have a collage of headlines at the bottom of page 27. Do you think that is wise? As I say, I am all for vigilant crackdowns on AMP and anyone else with an enforceable undertaking where it is appropriate, but isn’t it really a little excessive putting those sorts of collages in an annual report?

Mr Lucy—No, I think is the short answer. I think the annual report is a document where we are communicating to interested parties and key stakeholders. I guess any annual report, in aspects, tries to get a message over as best it can and that was our attempt to do exactly that.

Senator SHERRY—I expected you to say something like that. I have long learned in politics that you never hang anyone on the basis of a headline, despite the fact that in politics headlines are often used. Has this happened before? Have you placed collages of headlines from newspapers in the annual report before? I cannot recall it having been done.

Mr Lucy—I cannot recall. I think you will certainly observe that the style of our annual report for the 2005-06 year is different from the style of previous reports, in that we are trying to communicate in a manner that people are going to find perhaps more interesting so that they will be more inclined to read it and pick up some of the key messages that are contained therein. The use of references—and there are several quotes we have extracted out of the media and also the one you referred to regarding AMP—is all part of our approach to try to make this document one which people are more likely to engage with.

Senator SHERRY—I certainly engaged with it with or without the headlines and collages.

Mr Lucy—True—but, with respect, I would hope that you would. But it is more the wider population, the wider community, that we are trying to reach.

Senator SHERRY—All I can say is that I am a little concerned about it. As I say, you know my attitude to planners and commissions and the industry knows it, but I am a bit concerned about effectively rubbing it in in an annual report in this way.

Mr Lucy—All I can do is respect your observation and take it on board. We obviously thought about it. We felt that it was appropriate. The AMP issue was a serious issue.

Senator SHERRY—Let us say that you failed in a compliance action and there were big headlines, ‘ASIC fails: done over in court, wasted \$10 million in legal fees’. Would you put a collage like that in your annual report to highlight your activity?

Mr Lucy—You are now talking hypothetically.

Senator SHERRY—Yes, I am.

Mr Lucy—I guess we would deal with that hypothetical situation when we were confronted with it.

Senator SHERRY—I think we have had those situations in the past.

Mr Lucy—Not that I can recall.

Senator SHERRY—There is one in respect to APRA that I can think of, and we will get to that with APRA.

Mr Lucy—I think your point is well made. I think, in our attempt to try to make this a document that the man and woman in the street is looking to engage with, we have used that level of licence in reference to the media and we will take care of such an approach going forward.

Senator SHERRY—Sure, there is the issue of balance in making the community aware, but the community is aware of the AMP EU through the newspaper headlines that occurred at

the time and the ongoing reporting of it. I just wonder about the difficulties that can arise. AMP is a reality, a substantial financial organisation, and whilst I have my significant concerns with their activity, there has to be some sort of degree of cooperation in an ongoing working relationship. That is what I worry about, I suppose, in this context.

Mr Lucy—Again I thank you for your observation. We are aware of our ongoing dialogue in relation to the AMP, and we continue to make sure that that is at the appropriate level.

Senator SHERRY—There is one other issue that I want to raise in respect of shadow shopping, which I do not think was identified, let alone examined. A number of people have raised with me the issue of a corporate master trust arrangement with an employer. In a corporate master trust, there is generally a bulk purchase fee involved. I think you would be aware that that is generally the case. When the employee ceases employment with that employer, with whom there is a bulk master trust arrangement, in some cases at least that I am aware of they are no longer eligible to be a member of that arrangement. They have ceased employment and have moved to another employer who obviously does not have the same arrangement. Are you aware that that can happen?

Mr Lucy—Yes.

Senator SHERRY—The former employee then is still a member of the master trust but is moved either to a separate section of the master trust, the retail section, or to within the same financial entity from the wholesale master trust or group master trust to a retail master trust arrangement. Are you aware that that can happen?

Mr Lucy—Yes.

Senator SHERRY—Again it has been brought to my attention that, generally, there is a higher fee when they move from the wholesale master trust to the retail master trust arrangement, whatever that may be. Are you aware of that?

Mr Lucy—Yes.

Senator SHERRY—Have you examined this issue in the context of shadow shopping?

Mr Cooper—No, we have not, but for some time we have certainly been aware of the relative lack of transparency, if you like, of the fees that are charged in this sector because, in effect, they are by negotiation. The headline fee rate might be some number of per cent but, depending upon the scale of the employer—which is the issue that you are directly referring to—those fees are negotiated down in some cases to be competitive with the industry fund sector. That is where the debate has centred but, because of the relative lack of transparency in finding out exactly what fees are charged, it has been somewhat stymied. But I do understand the question that you are putting and it really comes down to the fact that, if you are unlucky enough to move from a very large employer to a smaller one, unfortunately you lose the buying power that is able to negotiate those fees down.

Senator SHERRY—I understand that. My concern really focuses around disclosure when the person enters the wholesale area. The wholesale bulk purchase is generally at a lower fee. They cease to be eligible to be a part of that arrangement when they change jobs. What is the disclosure process in their being shifted from the wholesale to the retail arrangement? What authorisations are required? Does the individual formally have to be given a new disclosure

product at that time about what the newer, higher fees will be? In addition, what is the process of authorisation, if any? There are a significant number of people in this situation who move from a lower fee to a higher fee. I just put that series of questions on notice and ask you to come back and explain to me what the current requirement is in this area. You are obviously aware of the issue. Perhaps we can explore on the next occasion how these issues can be dealt with.

Mr Cooper—Yes, I think we can do that. You would appreciate, of course, that with the expression ‘corporate master trust’ we are talking about numerous, different arrangements.

Senator SHERRY—Yes.

Mr Cooper—I am sure that we can give you generic information based on a certain number of assumptions—for example, that the member is not moved outside the trust. We can paint a landscape, but there are some millions of employees in these arrangements and they are all different.

Senator SHERRY—Yes. The wholesale corporate arrangement is generally negotiated by the employer. They have not negotiated it and often have had no choice because it is a binding arrangement; that is perfectly possible under the choice of fund legislation. When they move out of that environment, I do not think they are generally aware that they will end up with a higher fee as a consequence of moving out of that environment. I can go to a website and look at some of these arrangements, in terms of the wholesale fee and the master trust—I have done this in response to a number of individuals who have approached me—and then look at where they have ended up in the retail environment in terms of the cost. At this time I am particularly interested in what the disclosure requirements are, what the requirements are at the time of shift and what authorisation is required.

It seems to me that it is fundamentally a very different arrangement and I do have concern about the way in which this is operating, certainly—from the individuals who have spoken to me about it—with the apparent lack of awareness, lack of knowledge, lack of disclosure to them and, indeed, lack of authorisation that is going on in these circumstances. We can explore it at the next estimates hearings if you can provide me with some basic information.

I will not go to the individual cases referred to me. Perhaps I could put on notice that there are a number of complaints about pistachio investments and Perpetual Plantations of Australia, as I am sure you are aware. Please give me some response on notice about what is happening in this area, as best you are able. Likewise, again as best you are able, issues have been referred to me about firms Paramount Financial Services and Tax Express Pty Ltd. Perhaps you could examine those and give me something back on notice there.

Mr Lucy—Agreed.

Senator SHERRY—Another issue I want to explore in a little more detail is the complaints handling processes within banks. Before I get to any detail, would it be of concern to ASIC if a bank manager discussed the financial details of a customer in a public place?

Mr Lucy—I expect that it would certainly be of concern to the client, but I doubt very much that it is a matter that is relative to our legislation. With the manner in which you described that example, I think it would be more to do with privacy requirements.

Senator SHERRY—But would that seem to indicate a lack of compliance activity by the bank?

Mr Lucy—It would certainly be the indicator of that.

Senator SHERRY—Other than the privacy legislation, you do not know of any specific area of financial regulatory law that that would breach?

Mr Lucy—Let us take that on notice and I will also look at the extent to which we have received any inquiry about that issue.

Senator SHERRY—Please take it on notice and perhaps identify, in areas of your responsibility, where a bank manager discussing in a public place the details of a client of the bank would be a breach of any law that you are responsible for.

Mr Lucy—We will undertake to do that.

Senator SHERRY—The provision of bank statements has been raised with me and the issues around the lack of provision by a number of banking authorities in this regard. Are you aware of the issue and do you have any current complaints before you?

Mr Lucy—This general matter came up in a question on notice, so we are aware of the issue.

Senator SHERRY—As a general principle, isn't it true that banks are required to provide basic bank statements to their customers?

Mr Rodgers—The short answer to that is yes. My own banking experience suggests to me that at least my bank delivers statements to me far more often than the regulation requires them to.

Senator SHERRY—I suspect the couple of banks that I am thinking about are not the bank you are with. One of the reasons I am raising this is that at least one of the banks I have had details of—and I understand that complaints have gone to ASIC—primarily operates in the rural and regional sector. At a time of spreading drought, the non-provision of bank statements to people in these circumstances is just another additional difficulty they have to deal with. Are you concerned about the non-provision of bank statements in any circumstances but particularly in the current circumstances of drought and increased financial pressure on farmers?

Mr Lucy—'Concerned' would not be the right word. We would certainly seek that they meet their obligations and, to the extent that there were any complaints in that area, we would follow them up very vigorously. Absolutely, as it involves people who are suffering hardship with the drought, that would be a matter we would look at very promptly.

Senator SHERRY—I am sure you have had a number of cases in this regard drawn to your attention and I am not going to mention the banks here today—certainly the two that I have in mind. But I would ask that you examine those cases as expeditiously as possible, understanding the pressures there are on your resources.

I turn to the general issue of the internal disputes procedures within banks and the way they are operating—and I think I touched on this at the last estimates. Do you have any further

update on examination of the operational processes and procedures of banks' internal dispute processes?

Mr Rodgers—Generally, we have an articulated position regarding internal dispute resolution schemes. I do not think we assert this as a matter of law, but in terms of whether we ask licensees to measure their internal dispute resolution systems against the applicable standard, that is a really useful benchmark for people to be able to work out whether they have something that meets those kinds of benchmarks. This is an area where internal disputes have a mechanism to go external as well, through the Australian Banking Industry Ombudsman. As I recollect, the last ABIO report suggested a decline in complaints to that office from the banking sector.

Senator SHERRY—I draw a distinction between a bank or, for example, any financial institution having an internal disputes procedure and whether it is actually operating reasonably, fairly and effectively. I will not speculate as to why there is a decline in internal bank disputes procedures; there might be a whole number of reasons for that. But APRA licensing requires—and obviously APRA are appearing later—an internal disputes procedure, doesn't it? That is my understanding.

Mr Rodgers—That is a question that I think is much safer for APRA to answer.

Senator SHERRY—But ASIC is responsible for consumer protection; therefore the outcome, the actions and the activities of these internal dispute procedures seem to me to fall within your bailiwick.

Mr Rodgers—There is an obligation on a licensee to have internal dispute resolution procedures under our legislation as well as under any APRA rules.

Senator SHERRY—But whether they are operating reasonably and fairly surely requires some analysis of the consideration of the cases and the way they are being considered.

Mr Lucy—Let us take that on notice and provide a more complete response. The point you raise is an interesting one, and we should respond more comprehensively.

Senator SHERRY—I have received complaints claiming that the internal procedures of some banks are not operating reasonably and fairly. On the basis of examining some of the matters in this area, I think there is at least an arguable case that, in the case of some banks, the internal disputes procedures are not working reasonably and fairly in terms of time and issues relating to their operation. I would have thought that this is a matter that ASIC should keep under some sort of examination.

Mr Lucy—We certainly do, but again we would be very much dependent upon complaints. I will take that on notice and have a look at what sorts of complaints we are getting in respect of that area.

Senator SHERRY—Without going to the individuals who have raised the issues with me, some of them have been referred to ASIC.

Mr Lucy—Good.

Senator SHERRY—If you could, I would like you to have an examination of those cases in the context of whether those bank dispute procedures are working reasonably and fairly in the interests of consumers.

Mr Lucy—We will respond.

Senator SHERRY—Thank you. There has been some commentary in the media that Queensland—I have not had it confirmed yet—have announced they intend to go it alone in respect of mortgage brokers. My understanding is that this area was to be co-regulated by some joint approach by the states. Does ASIC have any interest in this area of the attempt to regulate mortgage brokers?

Mr Cooper—Certainly we have been involved in the lengthy discussions that the states have been having at the ministerial council for consumer affairs level by way of being an interested observer. But we also, of course, regulate certain aspects of what mortgage brokers do, because they advise about credit. When we become aware of matters that we think require our enforcement or intervention, we do so. Very recently we took action that you probably saw—

Senator SHERRY—Yes, I did.

Mr Cooper—in relation to a case in the ACT which, because it is before the court, we cannot talk too much about. So we are there in that sense, but it is a matter for government as to whether, for example, they wish to give us jurisdiction to license mortgage brokers or whatever. It is really a matter for the government.

Senator SHERRY—I understand that. From a federal level, it is a matter for the Commonwealth to act if they decide.

Mr Cooper—It is a little more complicated than that, I suppose, because the states would have to agree to refer power, so that is why there have been lengthy—

Senator SHERRY—But my general concern is the lack of progress or the lack of a final outcome, as was agreed at the ministerial council. Are you aware that Queensland decided to go it alone?

Mr Cooper—I have seen press reports to that effect.

Senator SHERRY—I have too and I have not had it confirmed. But that means that, almost inevitably, if Queensland does one thing in its jurisdiction, we will end up with—at least in non-Queensland jurisdictions—a different set of rules, no matter how minor. That will be the outcome, won't it?

Mr Lucy—Yes. But I think, just to clarify the point that Jeremy made, it is governments. It is not something which is in the sole jurisdiction or the power of the federal government; it requires the participation of the states and the territories. Without that, there is nothing that the federal government can do.

Senator SHERRY—Sure. But do you see the problem that potentially can arise when Queensland has its own regulatory regime?

Mr Lucy—Certainly.

Senator SHERRY—The other states might all have a common regime at the end, whenever that happens.

Mr Cooper—It repeats the current situation where you have certain states that have laws about finance brokers and others who do not.

Senator SHERRY—So we do not have a uniform national outcome and, therefore, for example, brokers operating across state borders have different regulatory regimes to comply with.

Mr Lucy—Correct.

Senator SHERRY—You do see that there are some difficulties with that?

Mr Lucy—ASIC has participated fully in this debate.

Senator SHERRY—I am not criticising ASIC for it in any way, shape or form.

Mr Lucy—No.

Senator SHERRY—I will raise two issues again just to put them on notice and ask whether you could have a look at them. You may be able to inform me whether you have carried out an examination or are contemplating any action. The issue of default funds under superannuation choice I have raised before and touched on it as a potential problem area. The employer is now able to select the default fund. Have you considered the consumer protection issues in those circumstances?

Mr Cooper—We have and I am sure we have spoken about this before. Unfortunately, some time has elapsed between then and now. I would have to take that one on notice and find out in more detail what our people have done in that area.

Senator SHERRY—Have you issued any guidelines at all in this area?

Mr Cooper—I would have to take that on notice as well.

Senator SHERRY—I regularly look at the APRA list of licensed entities—I do not want to name names at this stage—and I have noticed a couple of new superannuation entities and then tried to find, behind the name, some details of their creation. They would be a default fund arrangement; it may even be a monopoly arrangement because they preclude choice, depending on the industrial provision applied. I suppose my concern was that I was not able to identify what the particular fee structures were and other elements of these newly created arrangements—they are a default fund in large part. It seems to me that there is potential for abuse here, given the new provisions that now act, both federally and state. Perhaps you could give me something on notice and we could discuss it in more detail.

Mr Lucy—Yes.

Senator SHERRY—The issue of clearing houses again I have raised in the context of superannuation choice. Clearing houses obviously have become yet another intermediary in the superannuation chain, if we could describe it that way. Have you been examining issues and potential guidance for clearing house operations?

Mr Cooper—We have.

Mr Rodgers—I should know the answer to exactly where it is, but I am afraid that I do not. We will have to take that on notice. Yes, we have been looking at it and we have a fairly active dialogue going with the industry as well.

Mr Cooper—I think we have formed the view that they need to be licensed.

Senator SHERRY—But as yet there is no formal directive regulation guidance?

Mr Rodgers—It embarrasses me to say this, but I will have to take that on notice. I do not know whether it is actually publicly released or not.

Mr Cooper—We have issued a release. You must have missed it.

Senator SHERRY—I must have done. I do go through them. I read them every day. I must have missed that one.

Mr Cooper—We do put out a lot.

Senator SHERRY—You do; a couple a day—and I am not criticising that.

Mr Cooper—Obviously too many for us to remember as well.

Senator SHERRY—Part of the difficulty is that I end up with my night-time bed reading being guidance notes from APRA and ASIC, annual reports from financial institutions and your press releases. It does get a little tiring at the end of the night to wade through all this.

Mr Lucy—Chairman, might I provide a clarification to a response I gave to Senator Sherry earlier regarding self-managed superannuation funds and our dialogue with the Australian Taxation Office?

ACTING CHAIRMAN (Senator Chapman)—Certainly, Mr Lucy.

Mr Lucy—I confirm that we are in dialogue with the Australian Taxation Office. But perhaps there is an expectation that you might have, Senator, that I did not respond to—namely, that we sought communication from a number of investors by providing them with a questionnaire. A significant number of investors have responded to us through that questionnaire process. We have treated that information at this point as being confidential between the investor and ASIC. At this point we have not passed on the information we obtained through that process to the Australian Taxation Office.

Senator SHERRY—Why haven't you passed that on?

Mr Lucy—The view that we take at the moment is that it is confidential—that, when we sought that information from the investors, we did not flag to them that we might pass it on to the tax office. We are looking at it, but I want to make it clear that you did not have an expectation that, when I referred earlier to the dialogue backwards and forwards with the tax office, that included that material.

Senator SHERRY—I did have that expectation, but thank you for clarifying it. It is difficult for the tax office to act on these entities without knowing their names, isn't it?

Mr Lucy—From our perspective, our default is that we would like to communicate with the tax office, but we need to respect obviously the level of confidentiality and that is a matter of work in progress with ourselves and that office.

Senator SHERRY—Is that going to be a matter of work in progress for the individuals to at least—

Mr Lucy—We will need to at least test back to a number of individuals to see how they would respond.

Senator SHERRY—Will that be done?

Mr Lucy—Yes.

Senator SHERRY—There has been an advertisement, I think partly in response to the ‘compare the pair’ advertisement. I never think it is a good idea to form your defence on the basis of your opponent’s theme if it is working. Have you seen the new you ‘compare the pair’ ads in the newspaper?

Mr Lucy—Yes, we have had those advertisements brought to our attention.

Senator SHERRY—Have you examined them and given them a tick of approval in terms of their accuracy?

Mr Lucy—We are comfortable. I think there is a level of competitive tension out there and there have already been some responses to those advertisements. We have chosen to not to take any action.

Senator SHERRY—I am happy for the area of competitive tension, if you want to call it that, but I was a little concerned. Under the title ‘Industry Superannuation Fund’ it just has ‘Superannuation’, but at least the majority—if not the overwhelming majority—of superannuation funds do provide financial advice, as I understand it, in either a direct or contracted form in a number of areas.

Mr Lucy—I think that is right. We have had dialogue with a number of parties about those advertisements but, as I have said, on balance, we have decided to not take any particular action.

Senator SHERRY—In the context of superannuation, I must say that I was a little puzzled at some of the activities that certainly can be implied related to superannuation under the financial planner list. I accept they are all things that financial planners do or hope to do. But, in that context, did you examine the list of claims made in respect of a financial planner and the sole purpose test of superannuation?

Mr Lucy—We looked at that list and it is a broad and extensive list.

Senator SHERRY—Do you think some of these activities fit the sole purpose test of superannuation?

Mr Lucy—I think that is going to a level of specifics, frankly. The activities and levels of expertise listed are appropriate for the FPA to list. They are not necessarily contrary to the sole purpose test.

Senator SHERRY—Is state planning appropriate? My concern is not that a financial planner cannot do those activities; my concern is whether it is legitimate to claim that they can be done within the context of the superannuation sole purpose test.

Mr Lucy—We certainly did not read it in that manner.

Mr Rodgers—I can see how you might place an interpretation on that. I did not read the ad as claiming that all of those services provided by planners were to be provided strictly in the superannuation context. As you will no doubt know, the interpretation of advertisements generally is a difficult issue, including for regulators. I can see how you can read that into the ad, but equally I have looked at the ad and I have not seen assertions about the ability of a financial planner to do things in accordance with the single purpose test. My reading of the ad is quite different from that—and there is exactly that potential for a variety of reasons.

Senator SHERRY—The parliamentary superannuation scheme does not provide any of these particular advices; there are about a dozen of them.

Mr Rodgers—The advertisement fundamentally is inviting you to go to a financial planner if you wanted any of those things.

Senator SHERRY—Yes. I question whether, in a superannuation context, issues such as general budgeting, savings and investment—outside of a superannuation context, trust structuring, estate planning, redundancy planning—are all issues to be paid for from the superannuation system in the context of the sole purpose test.

Mr Rodgers—As my chairman has said, these advertisements are part of a series of competitive assertions. It is equally open to those who might be on the other side of that set of advertisements to respond in kind, I suspect.

ACTING CHAIRMAN—Is it being suggested in those ads that that advice is being provided through superannuation funds? I think it is being suggested it is being provided by financial planners, isn't it?

Mr Lucy—Yes, that is how we read it.

Senator SHERRY—One of my concern is that, if you add all these things up that the planner is doing, there is not going to be much of your superannuation left by the time you have paid for it all.

Mr Lucy—We cannot respond to that.

Senator SHERRY—That in the context of the sole purpose test begs some questions. Did you see the ads before they were placed?

ACTING CHAIRMAN—You can pursue these issues in a separate inquiry, Senator Sherry.

Mr Lucy—Yes.

Mr Rodgers—We saw the ads but only after they had appeared publicly for the first time. I think we saw them at a stage when they were not in the general press, in the way they have become in the last couple of weeks. We had not seen or otherwise engaged with them until they were public.

Senator SHERRY—Having seen them, did you suggest any changes?

Mr Lucy—No.

Senator SHERRY—You may want to take this question on notice. Hedge funds have been in the media a lot recently—the issue surrounding hedge fund activity. Perhaps you could let

us know whether you have some information about any ASIC concerns, regular industry compliance issues in that area.

Mr Lucy—We will take that on notice.

Senator JOYCE—Potential liabilities: what process does ASIC now use for disclosure or the expectation of disclosure for contingent liabilities in regard to prospectuses generally?

Mr Rodgers—I am not sure that I understand the question. But generally, if a prospectus is to contain information of a financial kind that would ordinarily be prepared in accordance with accounting standards, our expectation is that those standards are what apply to the way in which the disclosure is made.

Senator JOYCE—So it has not jumped the hurdle for international accountancy standards?

Mr Rodgers—As I have said, that is the beginning point expectation. I think we are aware of a couple of other issues with disclosure of contingent liabilities in the formal financial reporting sense. I am not aware of them having come up in a prospectus issue to this point.

Senator JOYCE—Secondly, related entities: with the advent or the greater exposure of Australia to overseas equity funds, those funds having no register of interest, what are our control mechanisms for dealing with related entities being able to mask their appearance by involvement of overseas equity funds?

Mr Rodgers—The obligations that apply under Australian law, including disclosure of related party interests, will generally only apply to an Australian incorporated entity; they will not apply to a Cayman Islands company of their own force. Once a private equity firm is active in this market—for example, one making a takeover bid—it is bound by all the disclosure obligations that apply to any entity, wherever it is incorporated, that is making a takeover bid. So in some cases the Australian rules will not apply, but in other cases they will apply in full. As far as access to share registers and so on is concerned, this committee has heard from us before about some of the difficulties of access to information about ultimate shareholders in other jurisdictions.

Senator JOYCE—What power of disclosure do you have over those overseas equity firms? Using a case example, if we have two overseas private equity companies and one invests and in media in Australia, how do we know that they are not ultimately the same controlling entity in both if they do it through an overseas equity fund without a register of interests?

Mr Rodgers—They will not be obliged to maintain a share register in Australia, which is ordinarily where all this information sits. The ordinary operation of the Australian law that we administer will not produce that result. Depending on whether there are other rules about who may own shares in a particular sector, those responsible for that legislation might need to make sure. But the Corporations Act will not produce that result, unless you are talking about Australian corporations.

Senator JOYCE—That is what I am saying. The Corporations Act will not be able to lift the veil, so to speak, to get greater disclosure of who those participating parties and overseas equity funds are.

Mr Rodgers—It is open to an entity and to us to seek information about the underlying shareholding. But, as I said, we have not always been successful in having our requests for that information met because we have no power under our own laws to compel a company in a foreign jurisdiction to comply with our law or our requests.

Senator JOYCE—Has this issue been discussed back and forth with the government? Have you conveyed these concerns to the government?

Mr Rodgers—We are in pretty much the same position as most other jurisdictions. Where this works well is in jurisdictions that are interested in maintaining relations with us. For example, if it became a matter of some importance for us to find the underlying shareholders of a US company and we were not being given any cooperation by the company with that, the ordinary arrangements we have with our counterparts in the US would be likely to result in their using their own compulsory powers to get that information and pass it to us. So this is not, as it were, a mainstream problem for us. These issues arise where we are dealing with what are politely called ‘less regulated’ jurisdictions. There are some notorious ones—which I think are well-known to this committee. It is sometimes difficult to get information out of Switzerland, for example, because of bank secrecy and other rules. In the ordinary course of events for US or UK companies, this is not a practical problem if there is a real regulatory need to get hold of that information.

Senator JOYCE—So the issue would be a cautionary one if the equity fund were based in Switzerland or the Cayman Islands.

Mr Rodgers—I would not want to be on the record as saying that. I am saying that, in practice, it is sometimes more difficult to get the information.

Senator MURRAY—I have a very brief question. I will forward you a question on notice I have to the government with respect to private equity funds and who might lie behind them. I would like you to examine that question on notice and respond to this question on notice—you do not have to respond to it now: will you take a heightened interest in any private equity fund which is investing in a sector which is officially described as ‘sensitive’? Under the Foreign Investment Review Act, there is a list of the sensitive sector—I think it is section 17H, although I might be wrong. That includes media, so you will understand why I am interested.

Mr Lucy—We will take that on notice.

ACTING CHAIRMAN—As there are no further questions, we will excuse the Australian Securities Investment Commission and thank the witnesses for their attendance.

Proceedings suspended from 12.46 pm to 1.32 pm

Australian Prudential Regulation Authority

CHAIR—The proceedings are resumed and I welcome to the table the parliamentary secretary, Senator Colbeck, and Dr Laker, the Chairman of the Australian Prudential Regulation Authority, and officers. Dr Laker, do you want to make an opening statement?

Dr Laker—Yes, a brief opening statement. APRA’s 2006 annual report, which describes APRA’s most active year in its relatively short history, was tabled in parliament on Tuesday.

Since the committee may not have had the opportunity to study the report in detail, my opening statement will highlight the main themes.

Firstly, Australian financial institutions continued to prosper in 2005-06, supported by strong global conditions and the ongoing momentum in the Australian economy. These same factors will continue to provide opportunities for good business and sensible risk-taking strategies in the current year. At the same time, competition has intensified across a range of financial products, credit standards need close watching and financial institutions face challenges in meeting the expectations of owners and investors who have become accustomed to high rates of return. The report cautions that high returns will prove transitory if, in seeking to emulate past successes, financial institutions are tempted into pursuing market share for its own sake, venturing into new territories, products or sectors ill prepared, underpricing risk or cutting corners on risk management.

Secondly, the substantial task of licensing superannuation trustees was completed on time and other major reforms to Australia's supervisory framework were introduced after extensive industry consultation. Australia now has a supervisory framework that compares well with that of any other mature economy. This has been acknowledged by the government's task force on reducing regulatory burdens on business and our regulatory arrangements also received strong endorsement from the International Monetary Fund following its recent financial system stability assessment of Australia.

During 2005-06 APRA revised its approach to prudential requirements with the aim of reducing the compliance burden on institutions while providing a strong and flexible supervisory framework. The previous emphasis on detailed rules has given way in recent reforms to more principles based prudential standards and separate, non-binding prudential practice guides. This revised format has been well received by industry.

Thirdly, APRA has continued to develop its supervisory processes and skills. Our risk based supervisory approach, based on a robust risk rating of each of our financial institutions, has been acknowledged by the International Monetary Fund as leading edge and embodying many best international practices. APRA reached its staffing target during the year, but we have found it difficult to hold these numbers in the current hot employment market for financial and risk management skills. Nonetheless, we are not slackening in our recruitment efforts and we have a number of initiatives underway to enhance APRA's working environment and extend the range of learning and development opportunities for our staff.

In summary, APRA has made considerable progress in delivering on the commitment given by APRA's Executive Group on our appointment; namely, to be a vigilant, vigorous and effective prudential regulator. The report provides some indicators on which APRA's performance can be judged. It draws out, in particular, that since APRA's risk based approach was introduced three years ago the greater majority of institutions identified as needing more intensive supervisory effort have either lifted their game or left the industry in an orderly fashion and without loss to beneficiaries.

Finally, there has been a changing of the guard within APRA's Executive Group itself. Mr John Trowbridge replaced one of the three initial APRA members, Steve Somogyi, when his three year term came to an end. Mr Trowbridge has had a long and distinguished career in the

financial sector, particularly the insurance industry, and I am pleased to introduce him to the committee today. Thank you. We would now be happy to take your questions.

CHAIR—Thank you very much. Welcome, Mr Trowbridge. Senator Sherry?

Senator SHERRY—Following on from your opening statement, Dr Laker, in terms of risk in the financial sector, would you care to give us areas of particular concern, focus or concentration that APRA has been examining?

Dr Laker—I think it has been obvious for some time that in the deposit-taking sector our focus has been on credit risk: the exposure of our lending institutions to the housing sector in Australia and to highly geared individuals. That has been an ongoing focus of attention for us. Within the general insurance area, a particular focus has been on the build-up of risk management systems, where we think we have seen very good progress. Currently we are directing our attention to the question of premiums in the general insurance industry, where we seek to be satisfied that they are appropriately pricing for the risks involved. I think these are quite specific risk areas that we have identified in the annual report that are part of our focus. We cover, of course, the whole gamut of risks; one that has become increasingly important to all our institutions in the current environment is operational risk. That now gets increasing attention not just from us but also from the institutions themselves, where their processes and systems fail, not their credit assessment or their pricing.

Overall, the assessment that we provided is a positive one and I would encourage you in your bedtime reading to also read the IMF's financial system stability assessment, because that is an endorsement by international experts of not just our regulatory arrangements but our financial system and how it has been travelling, and it is a very positive assessment.

Senator SHERRY—I have that document on my 'in tray to read list' at the moment. Because of the length of these estimates preparations and processes, it is still to be done. I have had the opportunity to glance at the annual report, but I have not gone into it in the depth that I would have hoped for today. So thank you for that overview. The first issue I wanted to raise is that I have sent a letter to APRA with respect to Telstra CSS employees; are you aware of that?

Mr Jones—Yes, I am aware of that.

Senator SHERRY—Have you commenced to examine the issues raised?

Mr Jones—Actually, we have responded to them this week; I do not know whether it has reached your office yet.

Senator SHERRY—I have not seen it yet, but it may have reached my office.

Mr Jones—The response is that essentially what we look at is to ensure that the accrued benefits are secure and that those benefits have been protected. Under the legislation there is not a requirement that future benefits are protected, and in this arrangement we do not think that there is an issue.

Senator SHERRY—Have you taken constitutional advice on that as well as advice on the act?

Mr Jones—We have not taken constitutional advice, no.

Senator SHERRY—There is the forcibly removing individuals from a defined benefit fund. You would agree, would you not, that that is occurring; they are required to leave the fund?

Mr Jones—They are required to leave as a consequence of a change in the status of the employer.

Senator SHERRY—But they are required to leave the fund without a comparable replacement benefit by the pension promise or without an offer of compensation. That is of particular concern.

Mr Jones—Without compensation for what? For the loss of future benefits?

Senator SHERRY—No, there is a pension promise. When you enter a defined benefit fund, as you are aware, there is a pension promise made. You do X time, make X contributions and you get Y outcome. There is a pension promise made in a defined benefit fund. That promise, in these circumstances, will not be met, will it?

Mr Venkatramani—Can I provide some context here? As you correctly point out, in a defined benefit plan a pension promise is made, but that promise can be broken up at any point in time into two parts: the benefit which has been accrued by dint of past service and the current applicable final salary; and an expectation of future benefits which will accrue as a result of rendering future service and any increase in the current salary until an exit takes place by retirement, death or whatever. In our experience we have found that most defined benefit plans would require that the accrued benefits with respect to past service be funded or provided by the employer, but the employer would always have a right to say, 'From tomorrow onwards, I am moving to another arrangement.' As long as those arrangements comply with the generic SG obligations of 9 per cent or thereabouts, you would find a lot of people have moved from defined benefit plans to accumulation plans.

In this particular case, we understand that the ability of people to remain in CSS/PSS has been governed by the Superannuation Act 1976. Following from that, as has been made clear by Ross Jones, we have really focused on the trustee and what the trustee could or should have done under the law. We have found no instance that the trustee has not acted appropriately. We do not have a focus on or, if you like, powers over what employers do as part of their employment arrangements.

Senator SHERRY—Let's deal with the issue of the trustee. Have you examined the actions of the trustee in this case at all?

Mr Jones—It is my understanding that we have been in contact with the trustee in response to your letter and we have received information from the trustee. The staff who investigated it took the view that there were not issues with the behaviour of the trustee.

Senator SHERRY—As part of that investigation, have you seen the letter that Telstra provided to its employees on this particular issue?

Mr Jones—I have not seen the letter.

Senator SHERRY—Have the officers seen the letter?

Mr Jones—I cannot say with certainty.

Senator SHERRY—Notifying the employees of the process that is to take place. I will send a copy of it to you. I am going to refer it to ASIC. It would seem to me, prima facie, the letter breaches FSR disclosure requirements.

Mr Jones—Okay.

Senator SHERRY—That is another issue in this. Has APRA ever had a case that it has been required to consider where employees are required to leave a defined benefit fund?

Mr Jones—When the employer status changes leading to this circumstance that would always lead to this outcome.

Senator SHERRY—That is not what I asked.

Mr Jones—Whether there have been any in the history of APRA, I can't say. It would depend upon what privatisations have occurred.

Senator SHERRY—It is not necessarily a privatisation issue; it can be a defined benefit in the private sector as well.

Mr Venkatramani—On a broader basis the answer is yes. It has happened time and again. Our focus would be whether the trustee has followed proper processes, whether the trust deed requirements are being met and, to the extent members need to be communicated, we would be working with our sister regulator, ASIC, to make sure that appropriate disclosures have taken place. As I said, our ability to approach the employer or take action against the employer, as you would know, under SIS, is strictly limited to section 64, which talks about post-tax contributions being remitted within a 28-day period from the end of the month in which they have been deducted from an employee's pay. Other than that, we really have no legal power to take action against an employer.

Senator SHERRY—If you could take this on notice, because I would not expect you to have it here—and I will be reasonable about this—details of cases that have come before you on this principle in the recent past.

Mr Jones—Cases whereby employees have moved from a defined benefit to a—

Senator SHERRY—Where they have been required to move from a defined benefit fund, with effective loss of pension promise, without either an offer of compensation or some comparable benefit being established. I think that is the core of the issue here: a pension promise made, not being met, without an alternative scheme with comparable benefits and/or compensation—as occurred in the Qantas case. In the Qantas case, with privatisation employees required to leave the CSS, there was a comparable new section, as I understand, inserted in the Qantas trust deed to deal with this particular matter.

Mr Jones—This, I assume, was a decision made by the employer?

Senator SHERRY—As part of the discussions and negotiations in that privatisation process. You say you have had legal advice on this issue—I am not talking specifically about Telstra, but you have had general legal advice on this matter?

Mr Jones—On the issue of changes in the status of the employer and the consequences.

Senator SHERRY—Yes. Can you provide me with that legal advice?

Mr Jones—I am not sure; I can have a look at it and see what we have.

Senator SHERRY—Take that on notice. We touched on this earlier: have you examined the constitutional issues involved here?

Mr Jones—No, we have not.

Senator SHERRY—Could I ask you to have a look at that?

Mr Jones—Can you be a bit more precise in terms of what constitutional issues there might be?

Senator SHERRY—Removing a promised benefit without compensation—expropriation of asset without compensation. I have seen some legal advice on this issue in the context of Telstra employees and I believe there is a question. Coming back to your earlier comment, an entry into a defined benefit fund is not an expectation made. There is a promise; there is a contractual obligation entered into. So it is a bit more than an expectation, is it not?

Mr Jones—It is an obligation assuming that you stay within the fund for the designated period to receive the consequences of that promise; but, when one of the requirements are that, to stay in the fund, you have to be a public sector employee, there may now be other issues as part of it.

Senator SHERRY—But it does not stop there. Certainly on the material I have seen, an effective freezing of benefit part way through a defined benefit fund, which limits you concluding the final point of the defined benefit fund in terms of the benefit—you cannot reach that point—can be to the significant disadvantage of an employee given the structure of a defined benefit fund?

Mr Jones—Yes.

Senator SHERRY—You would accept that?

Mr Jones—Yes.

Mr Venkatramani—In that case, the disadvantage, as you correctly point out, occurs to the employee. APRA, as the prudential regulator for superannuation funds, focuses on the trustee. There may well be in individual cases a breach of an employment promise, which under our current regime has to be prosecuted by the concerned employee in the capacity of the employee rather than a super fund member against an errant or a breach of promise employer.

Senator SHERRY—But there also may be a breach by the trustee in the promise that they have given to the members of the fund. Have you examined the trust deed to see whether the trustee of Telstra's super fund can require the removal of those employees from the trust?

Mr Venkatramani—Our understanding is that we have looked at the outgoing trust, which CSS or PSS, as well as the incoming trust, which is Telstra, and that in relation to both these trust deeds we have not identified any breaches of trustee obligations.

Senator SHERRY—Put it this way: are any APRA employees in the CSS or PSS? I think there are some, aren't there?

Mr Venkatramani—I am one.

Dr Laker—It may well be that there are.

Senator SHERRY—That is my understanding. Could you understand the concern of employees as a matter of government policy on the establishment of APRA if government policy deemed that APRA employees could no longer be members of the CSS or PSS?

Mr Venkatramani—Absolutely. I would have written to you in my personal capacity asking you to help me.

Senator SHERRY—Good! I am glad you would do that, because there would be a conflict of interest, given where you sit at the moment. In all seriousness, I think there is an issue here about the ending of a promised benefit without either compensation or the establishment of a comparable benefit. I think it is a serious ethical issue but I also I think there is a questionable legal matter here, particularly constitutional. We will leave that matter there for the time being, but I suspect it is not going to be the end of the matter in terms of the Telstra employees affected.

Whilst I am on defined benefit funds, I note the vigilant action that you took in respect of AXA, a seeming matter of lesser impact in terms of the number of employees and the degree to which they are affected, as we have just been discussing, but nevertheless. Let's go to the AXA case. I had a brief discussion with Mr Lucy about this matter earlier, in the ASIC estimates. AXA entered into an enforceable undertaking with ASIC.

Mr Jones—With ASIC and APRA.

Senator SHERRY—Yes. Let's just deal with ASIC's role. The enforceable undertaking with ASIC satisfied ASIC and, even though they could have taken further consequential action, they chose not to. That is the evidence, not a direct quote from Mr Lucy. Once the enforceable undertaking was concluded, why did APRA choose to take further action against the seven individuals in the case of AXA and on what legal basis did they choose to take that action?

Mr Jones—APRA's concerns essentially were that, despite the restoration of the balances of around \$10 million, APRA was of a view that the trustees of the fund may not be operating in the interests of members and that the trustees may not have exercised due standards of care. So the consequence then is that there is a process, and that process is worth explaining, I think. The process involves an investigation of the behaviour of individuals. Show causes are issued whereby those individuals have the ability to respond and provide information as to why they should not be disqualified. The responses and all of the relevant information from the investigation are then given to a qualified delegate. In this instance, APRA deliberately chose to use external delegates who had expertise in administrative law. We also took the advice of senior counsel. The first delegate made the decision to disqualify. There was a subsequent review by the second delegate and the second delegate upheld the decision to disqualify.

Senator SHERRY—Did APRA have any discretion in terms of referring a matter to a qualified delegate?

Mr Jones—We did an investigation and we had appointed an inspector when we began the process, which was in 2003. We went through a series of processes whereby we made an investigation and there was then the decision to go to the show cause and—

Senator SHERRY—Sorry, where within APRA would this decision to go to the show cause have been taken?

Mr Jones—The decision would have been taken at APRA's Enforcement Committee. That committee is chaired by me and it has three of the four executive general managers on it with me.

Senator SHERRY—You were chair at that time?

Mr Jones—I was.

Senator SHERRY—Yes, I thought so. Coming back to the focus of my earlier question, there is a discretionary power—it is not an absolute power.

Mr Jones—Discretion in the sense of what—as to whether or not to investigate anything?

Senator SHERRY—No, you carried out an investigation and received an enforceable undertaking and corrective action was taken.

Mr Jones—Yes.

Senator SHERRY—Was there then discretion to go the further step?

Mr Jones—Discretion to go a further step in what sense?

Senator SHERRY—In referring further investigation, referring it to a qualified delegate?

Mr Jones—The delegate is the decision maker. The process involves collection of information and an investigation. However, the decision to disqualify is made under the legislation by a delegate.

Senator SHERRY—Yes, but the reference to the qualified delegate—

Mr Jones—Yes.

Senator SHERRY—That is a decision for—and it may or may not have been you personally—APRA enforcement to take within the organisation.

Mr Jones—Are you asking the question: do we decide to pass the material to a delegate for a decision?

Senator SHERRY—Yes.

Mr Jones—Yes.

Senator SHERRY—Do you have any discretion in making that decision?

Mr Jones—Yes, we would have had discretion at the stage to say, 'We've got the money back; we don't want to do anything more.'

Senator SHERRY—Would you at that point in time have taken legal advice as to the likely success or otherwise of any further legal action?

Mr Jones—We have taken external legal advice at a series of stages through every part of this process.

Senator SHERRY—I accept that. Had you taken external legal advice, for example, at that point in time, before you referred it to the qualified delegate?

Mr Jones—This is where I need some precision. In terms of the investigation, did we take external legal advice before we began the investigation?

Senator SHERRY—Yes.

Mr Jones—I will have to take that on notice. I cannot imagine that we would take external legal advice before we started investigation on it.

Senator SHERRY—Let's get to the point where you had done your investigation and you had decided, which is a matter of discretion, to refer it to the qualified delegate. Had you taken external legal advice at that point in time?

Mr Jones—We have taken external legal advice at each of the various stages. For example, when we issue the show cause notices which say it is our intention to move towards disqualification, those external processes had already gone through external legal advice. So I think the answer to your question is yes.

Senator SHERRY—At what stage were the seven individuals interviewed as part of this process?

Mr Jones—The individuals are not interviewed as part of this processes.

Senator SHERRY—At what stage were they ever interviewed?

Mr Jones—The individuals were not interviewed.

Senator SHERRY—At all?

Mr Jones—At all. There are no formal requirements under the SI(S) Act for an oral investigation.

Senator SHERRY—That was my understanding. Do you think that is reasonable?

Mr Jones—If you are asking for my personal opinion, I think it is actually a fairer way. To give people a list of questions and say, 'In your own time, with your own legal advice, go through and respond with whatever information you want to and provide subsequent follow-up,' is often fairer than having an oral hearing where sometimes people are under pressure to answer very quickly and may make less than appropriate responses.

Senator SHERRY—It would be an interesting approach to apply elsewhere. Senator Brandis is not here. He might have some possible concerns about that approach. Nevertheless, that is the approach that was taken. Whether the action was proportional or justified, given that the further action had been resolved with the EU, obviously APRA believed the further action was appropriate.

Mr Jones—APRA believed that the breaches were quite serious in that APRA's view was that the trustees of the fund had not operated in the interests of members.

Senator SHERRY—I do not have the transcript here but I remember when Senator Watson raised this issue. I do not think it was you who responded, and I cannot recall the name of the officer at the time, but certainly words were used to that effect and an impression was given that the individual's actions were not regarded as a major issue by APRA.

Mr Jones—I do not recall the question from Senator Watson and I do not recall the response. I would be surprised—

Senator SHERRY—I will go back to the transcript. I will get a copy of it.

Mr Jones—I assume I was here and I would be most surprised if that were the response.

Senator SHERRY—I wish I had a copy of the transcript here, but I do recall that, when Senator Watson raised this, certainly the words used by the officer gave the impression that the matter was being investigated, that corrective action would occur and that it was not regarded as a major and serious issue. Why do you believe in the circumstances that the corrective action was being taken, even before the EU was entered into? I understand that the individuals concerned should effectively have been disqualified from their employment in ACSA or, for that matter, within the financial services sector.

Mr Jones—We have one power. The power that we have against individuals is disqualification. We can take an enforceable undertaking. No enforceable undertakings were offered by any of the individuals. Further, your comment that the enforceable undertaking was in progress, the enforceable undertaking was entered into after the show causes were issued.

Senator SHERRY—Do you think in these circumstances it is desirable to have just the one power? It seems to me to be a very black and white approach: you either do nothing or you go ‘bang.’

Mr Jones—We have been giving some thought to whether or not there may be alternatives. In the case of disqualification, individuals do have rights of appeal but also, even if the disqualification is upheld, you can come back to APRA and seek to overturn the disqualification. For instance, after a certain number of years, people might come back and say, ‘My behaviour has been exemplary ever since and I would like the disqualification lifted.’

Senator SHERRY—One of the things I find interesting—and I do not have any argument with the corrective action and the EU in the circumstances—is that ASIC chose not to go any further once the EU was signed and APRA did. Mr Lucy explained to me earlier that ASIC could have taken further action against one or more of the seven individuals but chose not to and APRA did.

Mr Jones—Yes.

Senator SHERRY—You do not see a contradiction in approach here?

Mr Jones—No, I do not see any contradiction at all. I see that we are operating under different pieces of legislation and that the two organisations have different objectives. Our concern is with appropriate trustee behaviour; looking after the interests of members.

Mr Karp—If I could just add to that because I was involved in discussions with ASIC right through this particular case. One of the reasons that ASIC decided not to take any further action was that they knew we were investigating further and, given that there was the possibility that what may have been found was not appropriate trustee action, it was judged by both the agencies that APRA had the better powers in that particular case. So it was decided that ASIC would stop and we would continue our investigation and see where it ran.

Mr Jones—I might actually have a point of clarification for you now in relation to your earlier question from Senator Watson. Apparently Senator Watson's question was related to whether or not member funds were at risk, and member funds in that circumstance were not at risk.

Senator SHERRY—I will have to check on the context of the response. I think it was a little broader than that. I will have a look at that. I notice in the annual report one of the comments made in respect to enforcement activity is:

APRA's enforcement activities seek to minimise financial losses to beneficiaries and where losses are inevitable, to limit the immediate damage caused by the troubled entity; the containment effect—

and that obviously happened in this case. Further:

APRA's actions may also send a public message in order to discourage unacceptable conduct; the deterrence effect.

Is the deterrence effect part of the considerations in this matter?

Mr Jones—Part of the considerations in circumstances such as this are deterrent effects because in the absence of this, if you take a black-and-white situation whereby the only sanction for trustee misbehaviour is that the money is put back into the fund, I think that is a fairly peculiar message to send to an industry.

Senator SHERRY—Surely there has got to be some judgement about the degree to and the events and circumstances in which that occurred and the decision taken by the trustees.

Mr Jones—I think that is the case, yes.

Senator SHERRY—I hope you take this hard line with those Telstra trustees by the time we get through all of this. It would be interesting to contrast. We have seen some very significant issues surrounding AMP and an enforceable undertaking. Would you accept that?

Mr Jones—Yes.

Senator SHERRY—Mis-selling. Does APRA propose any further investigations—and I am not suggesting you should, by the way—into the individuals involved in that particular event and circumstance?

Mr Jones—They are not APRA issues, the mis-selling; they are ASIC issues. This goes back to your earlier comments that ASIC decided not to do something in this circumstance, and we did.

Senator SHERRY—For example, have you examined the actions of the AMP trustees in the context of the mis-selling that occurred? That would be an APRA issue, wouldn't it?

Mr Jones—That would be an APRA issue if it involved activities of trustees that were misleading their beneficiaries, certainly.

Senator SHERRY—You have not looked at that issue?

Mr Jones—I am not certain.

Senator SHERRY—I am not suggesting you should, by the way, just to reassure AMP who I am sure will be reading the transcript. I look at what I think was a very serious set of issues with respect to AMP compared to the set of issues involved with respect to the AXA

episode, which I would rate less serious—however less serious; we have degrees of less seriousness—and the course of action that APRA followed in respect to those seven individuals. I do worry and query whether the follow-up response was proportionate and warranted in the circumstances.

Mr Jones—I think there are lots of checks and balances along the way. As I mentioned before, there is a very precise arrangement whereby every individual concerned is given substantial opportunity to put their case. In this instance, to try to avoid any perception of bias, we used an external delegate with experience in administrative law to actually make the decision. There is a second internal process using a second delegate. It is not a kangaroo court.

Senator SHERRY—I am not suggesting it is a kangaroo court. When you say ‘experience in administrative law’, I am not familiar with the names of the first or the second delegates. Who were they?

Mr Jones—The first delegate was Peter Kennedy. I think he is the former Public Service Commissioner. Our second delegate on this matter was Suzanne Tongue.

Senator SHERRY—Are they chosen by APRA?

Mr Jones—Yes.

Senator SHERRY—Did they have any experience in superannuation law? Had they dealt with superannuation issues prior to this matter coming before them?

Mr Jones—No.

Senator SHERRY—Do you think that would have been useful?

Mr Jones—No, not particularly, because the investigation is done by APRA investigators who are extremely experienced. In the same way, the AAT members are not experts in superannuation law.

Senator SHERRY—I am not suggesting that they need to be experts; I am just suggesting some experience in superannuation would have been useful in this context. You picked the delegates.

Mr Jones—Yes.

Senator SHERRY—I raised the issue of publicity previously. It was alleged that someone within APRA leaked to the *Financial Review* activities around this action. Was that matter investigated?

Mr Jones—That matter was investigated. We asked AXA for any evidence they had to support their allegation. We wrote to them asking them for information and they did not supply us with anything. We did an internal investigation, but I do not believe that there was any leaking of any information from APRA.

Senator SHERRY—Did you get someone externally to carry out an investigation on that potential leak?

Mr Jones—No.

Senator SHERRY—Was it done internally?

Mr Jones—Yes, it was.

Senator SHERRY—We talked earlier about black and white, and all or nothing. What consideration have you been giving to that matter?

Mr Jones—It is early days yet and it would require a legislative change. We only have one power, which is the power of disqualification. However, I would point out that there are also opportunities for individuals to supply us with enforceable undertakings. So it is not completely black and white, as you might suggest.

Senator SHERRY—So you are saying that it is open to any one of those seven individuals, up to the point of decision by the delegate, to provide a further enforceable undertaking.

Mr Jones—Not so much a further enforceable undertaking but to have provided an enforceable undertaking. There was no enforceable undertaking provided by any individual. However, that is correct.

Senator SHERRY—But they could have done that?

Mr Jones—Yes.

Senator SHERRY—Did APRA seek that as an alternative?

Mr Jones—APRA cannot seek that.

Senator SHERRY—Not formally, anyway. Do you know whether it was presented informally by anyone involved on behalf of APRA in the negotiations?

Mr Jones—We make sure that our processes are totally clean in this. We do not have the power to ask people for enforceable undertakings.

Senator SHERRY—I accept that you do not have the formal power, but we all know that in any set of negotiations, discussions or exchanges there are formal requests made and there are informal requests and indications made.

Mr Jones—Each of the individuals concerned had their own law firm working for them and I am sure that their law firm would have provided them with information as to the availability of enforceable undertakings that could have been provided.

Senator SHERRY—Nevertheless, despite all of this, at the end of the day APRA effectively lost.

Mr Jones—Correct.

Senator SHERRY—What was the approximate total legal bill in this exercise?

Mr Jones—Ours?

Senator SHERRY—Yes, APRA's bill.

Mr Jones—I would have to take that on notice.

Senator SHERRY—As part of that, obviously there is external legal advice.

Mr Jones—Yes. That is why I have to take it on notice. There is external legal advice, internal legal costs and so on.

Senator SHERRY—Has losing the case given APRA cause to examine its ability to win comparable matters in future and to examine a future course?

Mr Jones—APRA has looked at the judgement very carefully. The interesting thing about it is that there was no dispute at all over the facts; there was no disagreement there whatsoever. The principal area of disagreement was the view that the AAT took, which effectively was that the trustee of the fund could deliberately disadvantage one class of member if such action was in the interests of the aggregate. That was not the view that APRA had taken prior to the AAT decision.

Senator SHERRY—While an action is going on, is there a formal requirement for individuals concerned to stand aside from decision-making in their employment?

Mr Jones—It depends on whether they are disqualified. If they are disqualified, they may have to stand aside.

Senator SHERRY—They may but they are not required to?

Mr Jones—It would depend upon the position they are in. They are disqualified as trustees of the fund. Being disqualified as trustees of the fund, they would have to stand aside as trustees of the fund.

Senator SHERRY—They would have to stand aside as trustees of the fund, but what about their normal employment relationship? Are they required to stand aside from that?

Mr Jones—That would depend upon the circumstances and on exactly what they are doing.

Senator SHERRY—What occurred in these circumstances?

Mr Jones—I am not certain of what happened in all seven circumstances.

Senator SHERRY—In terms of them being a fit and proper person to work within the financial services industry, would they have been required to stand aside?

Mr Jones—If they were disqualified and were declared not fit and proper, they would have had to stand aside from a senior position of responsibility, yes.

Senator SHERRY—A senior position?

Mr Jones—Yes.

Mr Karp—In this particular case, being disqualified as a trustee under SIS also effectively disqualifies you from being a senior person responsible for investment of superannuation moneys. That has a flow-on impact to people in certain positions, and they would automatically have to step aside.

Senator SHERRY—There is another matter in the annual report that I want to turn to. Specific mention is made of the Wall and Ceiling Superannuation Fund. I read about this in some of your past releases. What has happened to the people who were in this particular fund?

Mr Karp—I am sorry; the people?

Senator SHERRY—Not the operators but the members of the fund.

Mr Karp—I will have to take the detail of that on notice, to be honest. I am fully aware of what has happened to the operators but not to the fund.

Senator SHERRY—It looked totally bodgie to me—an absolute sham.

Mr Jones—It was pretty much in-house asset stuff.

Senator SHERRY—Did the members suffer a loss as a consequence of the structure of the fund?

Mr Karp—There was a loss, yes.

Senator SHERRY—Would those members be recompensed? Presumably, they would need to move to a new superannuation trust arrangement.

Mr Karp—Yes. I need to take that on notice because potentially it is a fraud situation and they might have access to part 23 compensation.

Senator SHERRY—Yes, theft and fraud.

Mr Karp—Yes.

Senator SHERRY—Are you aware of whether that has happened yet?

Mr Karp—I would need to take that on notice. I am not across that detail.

Senator SHERRY—Okay. Was this effectively a default fund arrangement?

Mr Karp—I do not believe it was, but I will check that.

Senator SHERRY—Presumably, it was some sort of binding arrangement on the employees of the particular employer.

Mr Karp—I think this goes back to before choice was introduced.

Senator SHERRY—Yes. I had some issues in that context to raise. You are aware that in the choice system there are circumstances where employees can be bound—where choice does not exist?

Mr Karp—Yes.

Senator SHERRY—It is in that context that I touched on this with ASIC—the issue of employer selection, of the default fund. I notice that on the APRA website there are a couple of new funds. I am not going to name them, but I did attempt to go to the website to get some information on a couple of newly established funds which to me are certainly in part acting as default funds, but which also may operate as a monopoly type arrangement. But there is no information about the particular industrial instruments that may or may not be used. Is APRA examining the issue of default fund arrangements and the potential abuse around this under the choice of fund?

Mr Jones—Not at this stage. If we have particular complaints we would investigate.

Senator SHERRY—If a new fund, which would probably be a corporate fund, I suspect, is established in the environment either as a default fund, and choice operates, or as a monopoly arrangement, given the industrial considerations beyond the normal prudential requirements for the establishment of a fund, APRA would not investigate in any further detail?

Mr Jones—Not necessarily. I would have to say it would be fairly unusual these days for new corporates to be applying for trustee licences.

Senator SHERRY—I saw two new ones on the website the other day, which did puzzle me—but anyway. If a new corporate fund is presented to APRA for establishment, would you normally examine as a matter of course and want to know the industrial instrument to determine whether or not it is a monopoly arrangement in which the employee has no choice? Would that be part of your examination for licensing?

Mr Jones—I don't think it would be, but I would have to get confirmation of that.

Senator SHERRY—Okay.

Mr Venkatramani—Can I provide a bit of context here, Senator. Our focus, as I mentioned earlier, is on the fund and the trustee. The fact that a particular fund might be operating as a default fund to a number of employers or might be in an industrial arrangement, the monopoly fund, as you referred to it, would not by itself be an issue of interest to APRA. What we would certainly be interested in at the trustee level are the various risk management processes—identification as well as implementation—so that once a member, by whatever means, comes into the fund as a contributor, then the interests of those members would be safeguarded. So we do not particularly go around looking as to whether moneys in a fund arise as a result of default, inertia, or compulsion unless, as Ross points out, we have evidence to show that that is causing inappropriate behaviour at the trustee level.

Senator SHERRY—But isn't there—I have raised this with ASIC—some potential for abuse in employer selection of default funds?

Mr Venkatramani—I think it goes back to the earlier issue I pointed out. What employers do with reference to their employment arrangements with their employees who might then morph into superannuation fund members is not something that we look at. That is not our focus. If you believe your fund is not being managed in the best interests of the members, whether it is AMP or anything else, we would then look at it and take appropriate action.

Senator SHERRY—‘Managed in the best interests of the members’—would that include consideration as to the fees being paid, for example? Or is that an ASIC matter?

Mr Venkatramani—They would look at it in terms of proper disclosure obligations, related party transactions, conflict of interest risks and how they are being managed. But we do not actively go out and make judgements on whether the fees are high, low or in-between because first of all most of it relates to an ASIC disclosure aspect and, more importantly, even in the compulsion, or monopoly as you referred to it, with the agreement of portability, members have the ability to move their funds.

Senator SHERRY—I would suggest that is more theory than reality. Are you aware of any data on the members who are in an effective monopoly situation, where they have transferred? They are in that fund, fund ABC. It is a corporate—it is binding. Are you aware of any circumstance, or any data, that would indicate they are in that situation and they are therefore transferring the moneys at some point in time into their previous fund or funds?

Mr Venkatramani—We are aware that it happens, but if you are asking, ‘What is the incidence of that happening and have we collected data?’, no, I do not think we have.

Senator SHERRY—Yes, and I would suggest that is not much of a safeguard because I would suggest not many people do that. And, secondly, you have still got the problem where people, informed or otherwise, are not necessarily aware of the problems they could be facing, and the shadow-shopping exercise indicated that. So, if a new corporate arrangement is presented to you tomorrow—

Mr Jones—Such as somebody applying for a trustee licence?

Senator SHERRY—Yes. It is a corporate arrangement—a new trustee licence. It probably would be in the form of a corporate arrangement. You would not, at this point in time, ask about the industrial instrument underpinning that?

Mr Jones—No, I do not think so.

Senator SHERRY—Are they required to provide their annual reports?

Mr Venkatramani—Who?

Senator SHERRY—The operator. There is a corporate fund—

Mr Venkatramani—Do you mean the fund's accounts?

Senator SHERRY—No, the fund itself; their annual report, their PDS and their fund accounts—are they required to be lodged with APRA?

Mr Venkatramani—The accounts are required to be sent to members and APRA asks for information which goes beyond the fund accounts in our regulatory returns. And when we review the funds in our various cycles, one of the issues which we will be looking at is annual accounts.

Senator SHERRY—Yes, but that is annual accounts; what about the annual report to the members of the fund and the PDS disclosure documentation? Is that required to be lodged with APRA?

Mr Venkatramani—No. But we will be seeking that when we go and do a review.

Senator SHERRY—I accept you will be checking it. I can go to the web now and I can go behind most superannuation funds that are now licensed through APRA. I can go behind and access the annual report and I can access the PDS; I generally can't access the fund accounts, except in the abridged form in the annual report. But I cannot do that with all APRA licensed funds. I can do that with most but not all. And I cannot do that through the APRA website. I go to other websites and obtain the information. It is relatively easy to obtain. Has APRA given any thought, firstly, to ensuring that the annual report and the PDS are lodged as part of a licensing process, and, secondly, making it publicly available on the web?

Mr Venkatramani—PDS is usually an ASIC responsibility, as you would know. So if we asked for the same thing again without cause, as part of a review, there might be some kind of a suspicion of regulatory overlap or burden. We would be working very closely, if we have regulatory prudential issues, with ASIC, who, as you would know, are across this issue.

Senator SHERRY—I can take up that matter of the PDS with ASIC. What about the annual report? The company—

Mr Venkatramani—Do you mean the trustee?

Senator SHERRY—No, the annual report. Each fund issues an annual report.

Mr Jones—Do you mean the annual report of the employer sponsor?

Senator SHERRY—Yes.

Mr Jones—No.

Senator SHERRY—You do not think that is reasonable in an era of fund choice to make a comparison?

Mr Jones—I do not really think it is an issue for the annual reports of the corporate sponsors to be on the APRA website.

Senator SHERRY—Sorry, the annual report of the fund.

Mr Jones—I thought you were talking about the annual report of the—

Senator SHERRY—No, the annual report of a fund.

Mr Venkatramani—The fund's annual report, as in financial report, is, as you would know, audited and we get an audit certificate as part of the annual return. Supervisory staff have a number of risk indicators and, if any of those risk indicators are flagged in the analysis, that would be an immediate—

Senator SHERRY—I understand all of that. The annual reports are audited and, if there is a problem, it is picked up, you will get into it; I understand all of that. But with respect to having the ability to determine, for example, rates of return, investment options and those sorts of things which are generally all in the annual reports now, don't you think it would be useful if, firstly, you would see that and, secondly, have it lodged with you? There are not that many superannuation funds now.

Mr Littrell—The data that APRA collects for its own use, both annually and quarterly, substantially exceeds the quantitative data in the annual report. So in terms of our official use of fund data, it substantially exceeds what we can get from the annual report.

Senator SHERRY—In the aggregate, yes, but that is not what I am getting at.

Mr Littrell—The collection of the annual report by APRA for prudential purposes is not a statutory requirement. As a practical matter, I think most supervisors would pick that up either on the mailing list or in routine visits. Again, it is not really all that useful for data because we have a far better source to collect—

Senator SHERRY—No, I am not suggesting it from an aggregate data point of view; I am suggesting it from a consumer point of view. If you are in a corporate arrangement, a binding master trust corporate arrangement, an industry fund, or whatever the type of fund, at the moment there is not an ability in all cases to go to the fund annual reports and obtain a public copy of them. There is in most, but not in all.

Mr Littrell—It is not a requirement under the law that funds provide to the public their annual reports—although, as you say, many choose to do so.

Senator SHERRY—That is not a requirement. It is not a requirement to provide it to APRA?

Mr Littrell—If we ask for it, it is, and we routinely do.

Senator SHERRY—I accept that, but it is not an automatic requirement.

Mr Littrell—It is not an automatic process.

Senator SHERRY—You publish a list of all the super entities now on the web. But in terms of going behind that list and looking at such things as the annual report, it is not possible to do that in some cases. Do you think that would be desirable? I do not see that it would be a lot more work for a fund, actually.

Mr Littrell—I could, I guess, take the pro forma approach and say that is really an ASIC matter because, again, consumer protection and disclosure is their issue. If they ask us to produce something like that, we could probably put it together without too much difficulty. But, again, under the law there is no requirement. The funds would have to volunteer.

Senator SHERRY—I accept that. I am just interested in exploring this, particularly in the context of fund choice.

Mr Littrell—The fact that we collect a lot of data which might be publicly interesting does not mean we would make it publicly available. There has to be someone ask us—

Senator SHERRY—That information, as far you have been able to go, particularly on that commission issue which we discussed before, is all great in terms of the macro. I am talking about the ability of an individual—and I do not think I am overly obsessive about this—in a fund choice environment to examine on a comparative basis the particular characteristics, outcomes and fees of a particular fund, and one of the very useful instruments in this regard is the annual report.

Mr Littrell—Yes, and I would refer you there again to the ASIC website. ASIC does collect fee information on funds. They do not collect net return information. ASIC has put a fairly substantial amount of effort into comparative fee work, which is not, as you would know from previous conversations, where we live. As an IT matter, we could provide links to fund annual reports if the funds chose to make those available, but you would need some impetus for us to do that other than us thinking it was a good idea. It is not part of our natural mission, if you will.

Senator SHERRY—The issue of clearing houses is touched on in the annual report—not regulated by APRA. I did raise the issue with ASIC. I am aware that there are some issues around clearing houses and potential problems, if not some problems, in some areas. You have obviously written to all trustees, as it says in the annual report, but does APRA propose any further activity in respect of clearing houses, who assume much greater importance in the choice of fund environment.

Mr Jones—We have certainly indicated to the trustees that it is an issue that they should pay particular attention to and the APRA type issues for clearing houses are things that we will be looking at. Now that we have powers to look further at outsourcing arrangements, we can look at a variety of arrangements that we were not able to look at before.

Senator SHERRY—But there is no specific licensing of superannuation clearing houses is there?

Mr Jones—No there is not—that is correct?

Senator SHERRY—Have you considered the issue, say, a clearing house is insolvent, for whatever reason, and there are therefore superannuation contributions that have not been passed onto the fund or funds—what would occur in those circumstances in terms of liability? Where would it lie?

Mr Jones—Can I take that on notice, unless some of my colleagues can help. We actually have had a look at that because that is one of the very issues—maybe Ramani can help.

Mr Venkatramani—We are taking a practical protective attitude toward this. Our guidance to clearing houses, amongst other issues, addresses that prospect. That is a core prudential issue. Moneys that should come into the fund get tucked in a clearing house and something happens to the solvency of the clearing house and therefore they are not able to reach the intended destination of the super fund.

We have said in structuring and entering into clearing house arrangements, trustees must work with employers to make sure when it becomes super money and minimise the risk of the money staying there for too long and to look at what kind of protections are available. As Ross points out, in other reviews, we do look at outsourcing arrangements, including clearing house arrangements. We look at whether the existing arrangements sufficiently recognise that risk and what would happen should such a risk eventuate.

Senator SHERRY—The guidance note you refer to, that is the superannuation funds, in terms of the contractual arrangements they enter into with a particular clearing house?

Mr Venkatramani—Right.

Senator SHERRY—It is not a direct guidance note to clearance houses is it?

Mr Venkatramani—No.

Senator SHERRY—Because you do not have any authority?

Mr Jones—That is correct—we do not have the authority.

Senator SHERRY—Do you think there is a legislative gap in this area?

Mr Venkatramani—Not any more than there is a legislative gap in respect of administrators or all the other myriad service providers to the super industry. Our current arrangement is to work through the outsourcing standard which is an operating standard which does give us, as Ross pointed out, a much greater reach as a regulator than we have had in the past.

Senator MURRAY—Just on that point, Mr Chair if I may—the question was about a legislative gap—but I ask you about a regulatory gap. Are not clearing houses very different from other service providers in that they actually hold superannuation assets—albeit temporarily—but they hold them? Now that makes them materially different to somebody giving advice to the superannuation industry. I think they are quite different.

Mr Venkatramani—With respect Senator, the same argument could be mounted in terms of investment managers who keep super money or custodians who hold custodial super money. If a policy decision had to be made that APRA as the prudential supervisor should be regulating them, then clearing houses would be one of the many which would come under that category.

Senator MURRAY—Again I am not sure you are right. Let us use your specific example of an investment fund or trust which is taking the assets, which are superannuation assets, and investing them. They are covered by the Managed Investments Act and there is a regulatory regime which covers them. As far as I am aware, clearing houses fall outside of the regulations which cover banks or finance houses, they fall outside the managed investment scheme regulation and they fall outside APRA's regulation. Perhaps you can clarify that for me but it does seem they are in a hole on their own if I may say so. Perhaps you would like to think about it and come back to us.

Mr Jones—I think we might have to, because it is an area that has been of interest to us and we have had some preliminary internal legal advice as to the roles and responsibilities that trustees have in their dealings with clearing houses for precisely these sorts of reasons.

Senator SHERRY—It would seem to me to be difficult for a trustee, particularly with the significant and dramatic growth of clearing houses, for obvious reasons. How would they know? You say the onus is on the trustee, when they enter into a contractual arrangement, to use a clearing house. I am sure of the vast majority of them are fine, but how would they know? You obviously do expect them to examine the systems of the clearing house.

Mr Jones—In the same way that we would expect they had confidence in any other outsourced providers—administrators, investment advisers and so on.

Mr Venkatramani—Without trying to defend the clearing houses—because we have not had a huge track record of examining them—the issue is not in any way dissimilar from the absence of a clearing house. If you are an employer, you have a fund, and the trustee is responsible for making sure that the employer contributions come into the fund. As a trustee, you need to make sure that you have a robust arrangement with your employer, their bankers and your bankers, and that the money flows through to the fund in an appropriate fashion. You have to have an ageing analysis and make sure that contributions come in the time frames and in the orders of magnitude of money that you are used to. If it does not happen then flags must go up.

Senator SHERRY—But, in reality, it is another intermediary—and generally it is an intermediary with spokes shooting out everywhere, in and out. That is a much more complex arrangement and, therefore, I would argue it has a greater level of risk attached to it. What if the clearing house cannot clear the fund and the fund returns the money to the clearing house? This is probably not an APRA issue, but, if the money is at the clearing house, where does it go to? Is it returned to the employer? If it cannot be cleared to the recipient fund or the fund cannot receive it for some reason, who is liable? Has SG been paid in those circumstances? It seems to me there are a number of issues around clearing-house usage that have not been resolved. But the matters I have referred to are not particularly APRA issues; presumably, they would be ATO SG compliance issues. Have you had any liaison with the tax office on the issue of how clearing houses are operating?

Mr Venkatramani—ASIC, ATO and APRA have a quarterly forum at which we discuss a range of issues, including clearing houses.

Senator SHERRY—Coming back to the reference: the licensing is now completed.

Mr Jones—Yes.

Senator SHERRY—We touched on the guidance notes you have issued in respect of trustees' contractual obligations. I understand that, as part of the licensing process, an examination was made of trustees' contractual arrangements and processes with the subcontracted entities. I understand that was part of the licensing process.

Mr Jones—Yes.

Senator SHERRY—Is part of that licensing process now concluded? Were you able to identify any issues of major defect between any superannuation fund trustees and their subcontracted entities—competitive tender processes, value for money and those sorts of issues?

Mr Jones—I would have to give you a general answer. This is similar, I think, to a question that you asked at the last estimates about the extent of various types of undertakings and conditions that were imposed upon licences. It is the same sort of issue. There were bound to have been circumstances where we had concerns and where we imposed conditions on the licence that were related to a relationship between the trustee and an outsourced provider. It is probably not appropriate for me to talk about any individual trustee and any individual outsourced firm, but, in terms of the general issues, there are definitely some arrangements that we have had concerns with—and they have probably been dealt with via conditions on the licence.

Senator SHERRY—Yes, with some arrangements, but were there concerns in the overwhelming majority of cases? You mentioned there were some concerns, but with how many of the entities that were licensed?

Mr Jones—I will have to take on notice how many there were where there were concerns. In fact, we may need a bit more precision in terms of whether the concerns were addressed during the licensing period or whether the concerns were such that they led to conditions being imposed on the licence.

Senator SHERRY—Let us just deal with the issue of conditions being imposed on the licence, because I take it that if you had concerns during the licensing process some of those concerns would have been dealt with to your satisfaction.

Mr Jones—Yes.

Senator SHERRY—So let us just deal with the area where there was a specific reference as part of the licensing process.

Mr Jones—My understanding is that we have already supplied the information that you requested in June as to the number of licences that had conditions imposed.

Senator SHERRY—Yes, it is in this area of the contracted arrangements.

Mr Jones—So specific conditions dealing with the licence holder and an outsourced provider?

Senator SHERRY—Yes. The reason I ask this—and we could probably take it up at the corps and financial services committee hearing—is that the FPA have alleged in their submission that there are serious problems in the industry fund sector with these types of schemes and arrangements, the subcontracted ones. What I would like to know as a matter of

fact is: is there a serious problem in the industry funds sector? As I understand it, there is not, but I want to know as a matter of fact. I do not know whether you are coming to the Canberra hearing of the corps and financial services committee in a couple of weeks time or whether APRA is appearing.

Mr Jones—It is on 20 November, isn't it?

Senator SHERRY—Yes. There is a particular allegation—and it is a fairly serious allegation—in the FPA's submission about open, competitive tendering processes applying to industry funds, and I would just be interested to know whether the facts sustain that. Is it true that, as part of this licensing process, you would have examined all of the contractual arrangements within all types of superannuation funds, including retail funds presumably?

Mr Jones—Yes.

Senator SHERRY—Let us take a retail fund that effectively owns, a sub-entity, the administration service or the funds management service. Owning, in itself, does not necessarily prevent a subcontracted relationship being entered into, does it?

Mr Jones—That is correct.

Senator SHERRY—What do you do in a retail circumstance where, presumably, there would not be competitive tendering? A major retail fund is hardly going to competitively tender its funds management out to a competitor, is it?

Mr Jones—We have the expectation that the trustee has looked at potential conflicts of interest in any outsourcing arrangement regardless of whether it is outsourced to, notionally, an in-house provider. They need to be able to justify the reasons for the particular choice of provider.

Senator Sherry—But a conflict of interest in itself does not necessarily mean you cannot have an arrangement between two owned entities, with one entity sub-owned by the other?

Mr Jones—That is right.

Senator SHERRY—Otherwise, you could have the ludicrous situation where AMP could be competitively tendering to an industry fund or to another retail fund's funds management service, couldn't you?

Mr Jones—You could.

Senator SHERRY—But that is not where we are at, is it?

Mr Jones—I am not aware of many circumstances where that has occurred.

Senator SHERRY—That is not the approach APRA is taking, is it?

Mr Jones—No.

Senator SHERRY—I have had it drawn to my attention that, as part of a licensing process, APRA sought information about, for example, which particular hotels trustees and employees were staying in, their particular class of air travel and even who was paying for particular meal arrangements in the case of some funds. Are you aware of that level of investigative activity?

Mr Jones—I am not aware of that level of investigative activity, no.

Senator SHERRY—Could you check it out for me, because if that is the sort of information that was being sought as part of the licensing process, I would like to know the basis on which it was being sought.

Mr Jones—Do you have a context?

Senator SHERRY—As part of the licensing process. My understanding is that, at least in the cases of some funds, that level of information was sought as part of the process by some APRA personnel.

Mr Jones—As part of the licensing process, APRA personnel asked trustees who paid for their meals?

Senator SHERRY—Yes, in one case—and also the class of air travel and the hotels they were staying at. I am just intrigued as to how that could possibly be a role for APRA in terms of a licensing process. It seemed to me that that degree of micromanaging in any superannuation fund would be absolutely ludicrous.

Mr Jones—If you would like to provide us with the example, I am sure we would be very keen to—

Senator SHERRY—What I would like you to do is to check on whether or not that sort of information was sought from any superannuation fund. It goes to the issue I raised earlier—not earlier today but in a previous hearing—of the fine line in issuing guidelines which contain guidance which does not appear to be in the SI(S) Act or the regulations but which nonetheless a fund has to comply with because it does not have a licence.

Mr Jones—We discussed that last one—

Senator SHERRY—We did. Just on that issue—and, again, perhaps you can deal with this at the corporations and financial services committee—I think it was the Law Council that was critical of APRA's licensing process and exceeding its powers in SI(S) and the regulations. I am not seeking a response today but, if you are not aware of that, could you have a look at it in this context.

Mr Jones—Yes. We are certainly aware of their comments.

Senator SHERRY—Okay. I just draw that to your attention, because I will certainly ask about it whenever you come to the corporations and financial services committee. It did appear in the media—it was in *Money Management* anyway. That is where I saw it. Are you issuing a sort of overview or general conclusion report on the licensing process and what was found?

Mr Jones—Sorry, I missed your question.

Senator SHERRY—Are you issuing a general, concluded, overview report on findings—fair, medium, pass, tick; the outcomes—in respect of the licensing process of superannuation funds?

Mr Jones—No.

Senator SHERRY—Not at all?

Mr Jones—No, not at all. We have gone through a process where we have gone from 1,200 trustees to 307. We are satisfied that those 307 were of sufficient quality to receive a licence. Over the next 12 months, we are going to look to see whether in fact those 307 are meeting the conditions of their licences, particularly looking at their risk management.

Senator SHERRY—So you are examining whether they have met those particular provisions in those cases?

Mr Jones—Yes.

Senator SHERRY—Presumably you will still be continuing your normal activity in respect of those who did not have conditions?

Mr Jones—Certainly.

Senator SHERRY—I do have a range of other issues, as is always the case, but I am not going to get to them today, given the time constraints we are operating under. I think they are matters I can leave to the Parliamentary Joint Committee on Corporations and Financial Services, where they are relevant, and to future hearings. Thanks.

CHAIR—Thank you very much, Dr Laker and gentlemen. As no other senators have questions for APRA, you are excused.

[2.57 pm]

Productivity Commission

CHAIR—Welcome. Is there an opening statement?

Mr Wonder—I will make a brief opening statement. I will make it short and sweet. I was just going to update you on where a few of our reports are in their passage through our systems, which the committee might find useful. The first group I will mention is our inquiry reports. We have a report on waste management which we have just finalised and forwarded to the government. We have several other draft inquiry reports, including, first of all, the commission's report on road and rail freight infrastructure. That is a pricing related inquiry.

CHAIR—When is that one due?

Mr Wonder—A final report is due with the government in late December but a draft was issued on that recently. The second one, which is well known to this committee, I suspect, is the commission's report on the Tasmanian freight subsidy arrangements. We have issued a draft report and the final report is due with the government in late December.

CHAIR—It is certainly well known to Senator Sherry.

Senator SHERRY—I am surprised you are issuing a final report given the Prime Minister's comments yesterday!

Mr Wonder—Is that a question or shall I finish?

Senator SHERRY—No, I will get to the question.

CHAIR—I think that was an amusing observation.

Senator SHERRY—Yes; sorry.

Mr Wonder—The third one is a draft report on price regulation of airport services. That draft report has also been issued and a final is due with the government in early January. On the research studies the government has asked us to do, we prepared a final of our report *Rural water use and the environment*. That was released in August following a draft report earlier in the year.

We have several other research studies underway. One is on standards and accreditation. We released a draft of that in July. A final is expected later this month. We have released a draft today on public support for science and innovation, and a final of that study is due in March next year. The third one is a research study on performance benchmarking of Australian business regulation. We expect to circulate a draft of that report later this month to COAG. A final will be made available in February next year.

There are a couple of other things that I should mention. One thing is our work on the COAG National Reform Agenda. We are required to complete a report on that by the end of November. Finally, I should mention the establishment in the commission of a new Office of Best Practice Regulation, which is a successor organisation to the Office of Regulation Review. That new office follows the government's response to the report of the task force on reducing regulatory burdens on business. The new office will not only report on compliance and adequacy of regulatory impact statements but also take on specifically the roles of training and technical advice on regulatory impact statements, cost-benefit and risk analysis and compliance cost estimation for Australian government departments and agencies. That is all I wanted to say.

CHAIR—Thank you. Have you seen the second editorial in this morning's *Australian Financial Review*?

Mr Wonder—I have seen the article in relation to our science study. Is that the one you are referring to?

CHAIR—No, it is not. That is a different article. Let me read to you the relevant portion of the editorial in this morning's *Australian Financial Review* under the headline, 'This is no time for reform fatigue'. It says:

The Council of Australian governments should lift its game or the country will miss out on the benefits of an ambitious reform agenda. That exact sentence does not appear in the carefully crafted words of the Productivity Commission, but it's the clear message in the commission's annual report.

Is that the clear message in your annual report?

Mr Wonder—I can say what the message is in our annual report, and I hope it is clear.

CHAIR—Do not let me put words in your mouth. I would not do that.

Mr Wonder—The message that we have in our annual report in terms of the conclusions we have drawn are that we believe there are three matters that are essential to securing the future progress on the National Reform Agenda. The first is in respect of establishing a robust governance framework for the agenda. The second surrounds the effective implementation plans that might be there for the first tranche of reforms. The third is settling the financial arrangements that would support the reform process. So we are very positive in this annual report piece that you refer to, which we tabled in parliament on 31 October.

CHAIR—That is your 2005-06 annual report?

Mr Wonder—That is correct.

CHAIR—I am looking at your 2004-05 financial report, which seems to contain the same message. You have been calling our attention to this problem for a while.

Mr Wonder—In the 2004-05 annual report we reported on a workshop paper that we prepared. You might recall a workshop that was held in Canberra in October or November last year—I cannot remember which month now. It was on federalism and it was held at Old Parliament House here in Canberra. It was prior, of course, to the government's decisions in February this year on the National Reform Agenda. So things have moved on quite a bit. We had a lot more material to look at and consider when we finalised this article for the annual report for 2005-06. Indeed, since that time we have been asked to undertake a major study that we will report to the COAG senior officials on by the end of November. That was the piece I referred to earlier in my remarks. We are required to undertake a major study looking at the potential benefits and effects of the National Reform Agenda, and we have undertaken a major study on that front.

CHAIR—I wonder, Mr Wonder, whether when the Productivity Commission undertakes that study, it is going to look at the issue of wastage, and handling and transaction costs, in circumstances in which the states take responsibility for infrastructure projects funded wholly or partly by the Commonwealth. I want to reassure my friend Senator Sherry that I am not making a partisan point; it is just a coincidence that at the moment all of the state governments are in the hands of the Australian Labor Party. I am obviously making a generalisation, but it does seem me, as a senator from the state of Queensland, which has major infrastructure issues as you know, that so often when the Commonwealth provides a large tranche of money to the Queensland state government for expenditure on major infrastructure, in particular and notoriously road infrastructure, it is like pouring money into a black hole.

The disjunction between the funding of the project and the completion of the project by the state government is just so manifest that one is exasperated as to how a state government could possibly be so inefficient and negligent with public money. I am sure that that is the story not just in Queensland, and I am sure it would be the case if the political complexions at the different levels of government were different. The issue is to get states to competently and efficiently spend Commonwealth sourced money and major infrastructure—

Senator Murray interjecting—

CHAIR—and in a timely manner, as Senator Murray rightly interjects. We who live in south-east Queensland are, at the moment, suffering in relation to road infrastructure in particular. I think it is a very acute issue and I would be very eager for the Productivity Commission to look at it closely.

Mr Wonder—I could say a couple of things. First of all, as with all of the work the commission undertakes, we have terms of reference, and those terms of reference clearly specify what we have been asked to do. They are on our website and are available for all and sundry to see. The second point that you will find of interest, I think, is that in respect of roads—not just in reference to Queensland—we are including in our national reform agenda

work, the scope for potential benefits from reforms pertaining to roads. That interacts, very importantly, with the other inquiry I mentioned in my opening remarks. We are doing a separate inquiry on road and rail freight infrastructure. Our intention is to combine those two pieces of work later in the process. The road and rail inquiry has its own separate pathway but we will be comprehensively, we hope, taking account of road and rail transport issues in our report. As for the remarks you made about financial arrangements, I refer you to work that we have included in our annual report. We have included some material in there on the role of financial arrangements. They address some of the comments that you have made.

CHAIR—I suppose, in saying that, I was reflecting a somewhat similar view to that which came from the Treasurer in a speech he gave getting on for four months ago. The more public attention in Australia is focused on infrastructure needs—and I think at the moment it is—and the more we have double handling of the money so that the Commonwealth funds it but the state constructs it, the greater is the danger of public money being wasted, and wasted in greater magnitudes by incompetent state governments.

Mr Wonder—I do not have any further comment to make, Senator.

Senator JOYCE—When is the inquiry that you just mentioned finishing?

Mr Wonder—The road/rail inquiry. As I said, there has been a draft report already issued and the final is due to be with the government in late December.

Senator JOYCE—You are obviously aware of the Roads to Recovery program. Building on what Senator Brandis has just mentioned, does that give you some more efficient utilisation of funds? If we were to turn dollars into tarmac, is the best delivery via a Roads to Recovery process or through the state government?

Mr Wonder—Senator, I cannot claim to be familiar with the details of that program, I am sorry. That program, as you would know, is administered by the Department of Transport and Regional Services. In the work we are doing for the national reform agenda, which I referred to earlier with respect to the road/rail inquiry, which you just asked about, we are looking at a number of issues in respect of competitive neutrality in road/rail pricing, whether or not cost recovery is occurring or otherwise, competition between the two modes, where that competition does occur and where it does not occur, scope for productivity gains in each of the modes, what those productivity gains might mean for GDP outcomes and the like. That is the nature of our work. I cannot claim any expertise on the Roads to Recovery program at all personally. I do not know whether my colleagues want to add to that comment.

Senator JOYCE—I will make it broader then. In your role, can you tell me what you think the biggest advantages are of having states?

Mr Wonder—I do not have any comment on that question, Senator.

Senator MURRAY—What a wonderful question!

CHAIR—I think that might be a little philosophical.

Senator MURRAY—Don't you want to take it on notice?

CHAIR—Going back to Senator Joyce's narrower question, may I lend my support to the observation he made about that particular program. Senator Joyce and I, as Queensland

senators, spend an enormous amount of time in rural and regional Queensland. I have never come across a government program which is more universally acclaimed than the Roads to Recovery program. The way it works is that the Commonwealth funds local governments directly to build secondary regional roads. It cuts out the middleman of the state government. So the money is spent by the local authority, using local contractors and employees, and it seems to be a wonderful program—of which I think my colleague Senator Ian Macdonald, in years gone by, was the progenitor. There are other modes of the Commonwealth putting Commonwealth dollars into the ground, as it were, that do cut out the middleman of state governments. I would have thought that if you were looking at this, particularly from an infrastructure point of view, one of the things the Productivity Commission ought to have regard to is alternative modes that avoid the inefficiencies of state governments. Let me make that suggestion to you. Now, we might give you the call, Senator Sherry.

Senator SHERRY—Thank you—after that bit of self-promotion and self-praise.

CHAIR—No, praise of my colleagues Senator Ian Macdonald and Senator Barnaby Joyce.

Senator SHERRY—Yes. I actually do want to go to the reason we have states—the Tasmanian Freight Equalisation Scheme! That is why I think we do have a state of Tasmania.

CHAIR—That is why we had to have a Federation.

Senator SHERRY—I make no apologies for it, either. With respect to the Freight Equalisation Scheme, which you recommend in the draft report be phased out, one of the comments in the report says that overall Tasmania benefits but at the expense of other states and at a small net cost—I emphasise ‘small’ net cost—to the Australian economy. Frankly, isn’t that the point of the scheme?

Mr Wonder—My colleague Mr Pitkethly will want to comment. But, as I understand it, Senator, the objectives of the scheme are outlined in our report. It goes to the freight cost disadvantage that occurs in respect of freight between Tasmania and the mainland. There have been other objectives attributed to the scheme as well with regard to regional development and the like. They are the principal reasons that I think have been used historically to justify the scheme.

Mr Pitkethly—I guess ideally, Senator Sherry, what we would like with a well-designed scheme is for Tasmania to benefit, of course—that being the primary objective—but for Australia as a whole not to go backwards.

Senator SHERRY—This keeps dragging Australia backwards—poor old Tassie’s bit of assistance is dragging the whole country back! It is up to you how you answer, but I think you should be a bit careful with your choice of words.

Mr Pitkethly—The modelling carried out by the Tasmanian government and submitted to us is the source of the quote that you gave us is—that is, it shows that, in terms of the Tasmanian economy, it is a reasonably significant plus, but when you take Australia as a whole there is a small—underlined, as you emphasised—loss. I suppose what I am saying to you is that, ideally when you look at programs in this sort of framework you would like both Tasmania and Australia to be doing better at it. That is the intent behind that sort of statement.

Senator SHERRY—The commission's perspective was that there was no clear rationale for providing freight assistance to particular Tasmanian shippers. How did you reach that perspective? Is that more a critique of the form of delivery or of the entire nature of the scheme?

Mr Pitkethly—I think it is more about the actual intent of the scheme. What the draft report—I do stress it was a draft—was trying to say there is that it is certainly clear that Tasmania is different from the other states in that, if you want to ship to mainland markets, you do not necessarily have to rely on sea freight in any other state. The report is saying that there is a cost disadvantage with that. Sea freight is more expensive over short distances than road and rail, which we accept.

Senator SHERRY—Yes, because there is no road or rail.

Mr Pitkethly—That is right, yes. However, there are other areas of Australia which also have a significant transport disadvantage because they are remote from markets—northern cities in Queensland, for instance.

Senator SHERRY—Maybe they should have their own scheme. I do not follow the logic. Tasmania is disadvantaged; you accept that. I certainly agree with that in this context. If there are other areas of Australia that are disadvantaged, isn't it logical that the scheme should be extended to those areas rather than scrapping the scheme that applies to Tasmania? Isn't that a logical approach?

Mr Pitkethly—The report does not agree with that line of logic. It is actually saying that all areas have a collection of advantages and disadvantages. Tasmania has some disadvantages with respect to freight. Of course, it has other advantages. It has advantages in terms of its climate, its soil and things like that.

Senator SHERRY—I agree with that—did the report go into that analysis, by the way?

Mr Pitkethly—We did mention it as a factor. Each region has a set of advantages and disadvantages.

CHAIR—Isn't the logic to address those comparative regional advantages and disadvantages through horizontal fiscal equalisation principles applied by the Commonwealth Grants Commission?

Mr Pitkethly—That was raised in the report. That is the intent—to try to compensate some of the smaller states, who are disadvantaged, and try to put them on an equal footing.

CHAIR—It seems to me to be very artificial to isolate a single program that is peculiar to a particular state from the general fiscal position of that state as a beneficiary state under horizontal fiscal equalisation principles.

Mr Pitkethly—I think you are agreeing with a point made in the draft report.

CHAIR—I have not read the draft report, so I am glad we seem to be thinking along the same lines.

Mr Pitkethly—There is an attempt to do some equalising in the supply of services between states through the Grants Commission.

Senator SHERRY—I note that in the report it says:

... many inquiry participants were concerned that there was scope to manipulate the scheme.

Was significant evidence produced to show manipulation of the scheme, as distinct from 'participants were concerned that the scheme could be manipulated'? There is quite a significant difference, I believe.

Mr Pitkethly—My understanding is that it is very hard to show hard and fast evidence of manipulation. However, players such as the Tasmanian government, and even the Victorian government, agree that there is a bit of manipulation of the scheme. The question then becomes: what do we mean by manipulation? We are not saying that it is necessarily illegal. It is the old avoidance-evasion thing. It is the way the scheme is set up which allows—and this was readily admitted by a number of participants at our inquiry—claimants, or often agents acting on behalf of claimants, to arrange for a bill to be structured in such a way as to increase the claim. There is fairly general agreement with that sort of premise.

Senator SHERRY—But isn't that a governance issue, surely? The scheme has been around now for almost 30 years—just a shade over 30 years, actually. If there are concerns about manipulation of the system, they can be dealt with in governance. It does not necessarily justify abolition, does it?

Mr Wonder—Putting aside the option of abolition you have referred to, we do elsewhere in the report refer to design improvements that go to the heart of the issue we are now talking about in respect of possibly striking a single rate of assistance or the like. Whether or not you want to call that 'improved governance', I do not know; it is probably not a governance matter but it is an alternative option that addresses some of the problems that have been identified.

Senator SHERRY—I suppose my concern goes to the commentary. It seems to me that there is lack of clear evidence that that is occurring on any significant scale.

Mr Wonder—Perhaps we could take it on notice as to what that evidence is and get back to you.

Senator SHERRY—Yes, if you could. The bottom line is that Bass Strait is still there, and I do not think this scheme will be abolished—and nor should it.

Mr Pitkethly—The government has made it clear that the scheme is part of the landscape looking forward. To that end, as we have made clear to participants in the draft report hearings, the major focus for the remainder of this inquiry is: how can we make the scheme more effective?

Senator MURRAY—I am not sure who to address this to—probably you, Mr Wonder. In the title of the new organisation or, I suppose, the successor to the old organisation—the best practice regulation body—is the word 'business'. Is business defined for you in any way?

Mr Wonder—It is not in its title. It is the Office of Best Practice Regulation. Did you say 'business' is in the title?

Senator MURRAY—Yes, didn't I hear you say it is the 'Office of Best Practice Regulation with Respect to Business'?

Mr Wonder—No, the title of the organisation is the Office of Best Practice Regulation.

Senator MURRAY—Does it apply only to business? Does it apply right across the economy?

Mr Wonder—It applies across the economy in respect of any regulation coming forward to the government to consider which has impacts on business or, more generally, on the economy. But the principal focus in the work of the Office of Best Practice Regulation is on the impact on business and industry.

Senator MURRAY—I am really interested in what you will exclude rather than what you will include, because I think there is a kind of universal hope that your work will streamline regulation and prevent overlap and excessive regulation in our economy and society. For instance, if you are looking at business regulation, you would not exclude not-for-profit businesses, would you? You would be looking at those regulations which affect not-for-profit bodies.

Mr Pitkethly—Yes. As Mr Wonder said, the focus is really on regulation that impacts on business. In particular there are new procedures that have been introduced by the government targeting regulations which have a significant impact on business or restrict competition. I would have thought that your not-for-profit organisation was probably covered by the business definition.

Senator MURRAY—I would hope so. It would be clear to you that, both by the provision of government funds to large suppliers of services—health, education and employment, for instance—and by the fact that large not-for-profit-entities are regulated by ASIC, which is a signal they are of substance, they would be as impacted and as affected by regulation as for-profit businesses. Do you accept that as a general proposition?

Mr Wonder—In principle they could be, yes.

Mr Pitkethly—I think the government has enunciated that there are two areas of concern with regulation. One is the stock and one is the flow. The new Office of Best Practice Regulation is an attempt to address the flow, to actually make sure we adopt a better regulation-making process so regulators are only putting up regulation which is effective and efficient. So this office is really looking at the flow, not the stock. There are some other measures in place to look at the stock over the next few years.

Senator MURRAY—I accept that prioritisation. It is probably the easier way to go about it, frankly, at the moment anyway. I just want to be absolutely clear—you will not exclude businesses that are not for profit, because it is a huge sector ranging from self-managed superannuation funds run by APRA all the way through to those bodies I have outlined to you, including some very large commercial mutuals or not-for-profit organisations.

Mr Pitkethly—A lot of the new regulations that we will be looking at affect equally firms in the not-for-profit sector and firms in the commercial sector. That regulation as a whole is the focus of this new office.

CHAIR—Thank you, gentlemen.

Proceedings suspended from 3.28 pm to 3.44 pm

Australian Taxation Office

ACTING CHAIR (Senator Bernardi)—I welcome Mr D'Ascenzo from the Australian Taxation Office.

Senator SHERRY—I suspect you are aware that we did have the opportunity to discuss with Mr Vos last night his critique in the annual report—I think 'critique' would be an accurate description; in fact there were very strong criticisms contained therein—of the ATO. Why has this occurred and is this justified in your view?

Mr D'Ascenzo—The tax office is one of the most frequently reviewed government agencies. Over the past two years we have had something like 34 external reviews. I am on record as welcoming constructive criticism from all external scrutineers—including parliament and this committee, the Inspector-General of Taxation, the Australian National Audit Office, the Taxation Ombudsman, the Privacy Commissioner and a whole range of consultative forums that I have with the community. That does not mean that we will always see eye to eye with external scrutineers. If you look at the Auditor-General's 2005-06 annual report, it says that what is important is that we try to work together to improve administration and there will be occasions when differences of opinion are held.

In the last week or so we have had two annual reports: one by the Inspector-General of Taxation and the other by the Ombudsman. I think we need to reconcile some of the views between the inspector-general's report and the Ombudsman's report. The Ombudsman's report at page 62 talks about complaints handling in particular. That was an emphasis of the review. It says:

This year, we believe the continuing decline in the number of tax complaints is due to improvements in ATO administration, and particularly to the increasing effectiveness of the ATO's internal complaints process.

I think yesterday, Senator, you and others were talking about responsiveness. The Ombudsman continues:

The ATO's positive response to that report—

this is the ATO complaints review—

has resulted in a system that reflects best practice complaint management principles and that maintains a consistent approach across the ATO.

You also made reference to culture. The Ombudsman goes on at page 62 to say:

The ATO's responsiveness suggests a cultural commitment to complaint resolution within the agency. This commitment perhaps offers taxpayers better remedial options than externally imposed rules. While there is always room for improvement, the ATO's progress during the year in this area is acknowledged.

There are further comments in the report that are relevant.

Senator SHERRY—Before you go on, I do not think it was me making reference to responsiveness; it was me questioning Mr Vos about his comments in this area contained in his annual report—which, I have to say, are as strong as any comments I have seen on the tax office from any organisation, be it the Audit Office or whatever. Frankly, I am giving you the opportunity to respond.

Mr D'Ascenzo—I appreciate that, and I did not mean that in a negative way. I just thought there was a question of responsiveness and a question of culture and I wanted to juxtapose the views of one external reviewer with the views of another external reviewer in that context. In terms of the inspector-general's reports, it is very pleasing that the inspector-general in his evidence yesterday noted that the tax office was very efficient when compared with other tax administrations around the world. This mirrors his 2004-05 report where it said:

It was very interesting to note the high regard the Australian Tax Office is held in by other revenue agencies.

The inspector-general also said, and I think you gave him the opportunity to do so, Senator, that the tax office is providing information that he needs in current reviews. Ultimately the point that I think is important is that the inspector-general's annual report now needs to be read in the light of the clarifying comments made by the inspector-general last night. My response is that I think it is time to move on from those comments and look at where we can go in the future to try to improve tax administration.

I do not know whether the committee has had an opportunity to see our strategic statement, which we released in August. I wonder whether I can hand that up. I think this is relevant to your question, Senator, and I am pleased that you have given me the opportunity to put it on the record. I will take you through it very briefly. It was published in August of this year. It reflects many of the concepts that I have put on the public record over the course of this year. One of the key points you will see sprinkled throughout the strategic statement is the concept of differentiation. We are trying to develop our systems to be able to identify those people who are trying to do the right thing and those people who are not, with the emphasis being on trying to help those who are trying to do the right thing to get over the line, so to speak, and, on the other hand, trying to ensure that there is a level playing field by having effective deterrents for those who are not. I commend the statement to the committee as valuable background material about the tax office's values and aspirations for, and cultural commitments to, improving tax administration.

Senator SHERRY—I took some of the comments made by the inspector-general last night as more a clarification of style than a clarification of comments, because I asked him whether he stood by the criticisms contained in the IGOT annual report and he responded that he did, but he did clarify an approach of style. In the report he effectively accuses the ATO of hindering his inquiries, failing to be transparent and accountable, and issuing sugar-coated information to maintain public image. They are strong criticisms and strong statements. Do you believe they are justified?

Mr D'Ascenzo—Senator Watson raised questions about their justification, and I think the inspector-general resiled from those comments or put them in a different context. When you look at the seven reports that the inspector-general has produced—the seven out of the 34 that we have had—the most recent one says:

The assistance and co-operation provided by the Commissioner of Taxation and his officers to the Inspector-General and his team during the course of the review are gratefully acknowledged.

This is very consistent in all seven reports.

Senator SHERRY—In noting that, I find it odd then that he would come to the conclusions of a hindering of his inquiries and a lack of transparency and accountability.

Mr D'Ascenzo—I think you had the opportunity to question him about that.

Senator SHERRY—So you do not agree with the specific criticisms that are made?

Mr D'Ascenzo—I start from the proposition of trying to welcome constructive criticism, and I have put on record our response to other reports and also to the inspector-general's report, which is one of saying: 'What is there? What are the insights that we can learn to improve tax administration?' That is what we are all about; that is what we like to achieve. Part of tax administration of course is trying to ensure that the community has trust and confidence in the tax system and in the administration of that system, and so comments that are perhaps colourful and not grounded on facts are not necessarily helpful to that process.

Senator SHERRY—You had an opportunity to see the annual report, didn't you, before it was published?

Mr D'Ascenzo—The draft annual report, yes.

Senator SHERRY—Did you respond in writing to it prior to publication?

Mr D'Ascenzo—I did.

Senator SHERRY—Are you willing to make available a copy of the correspondence?

Mr D'Ascenzo—I have no problems if the committee wants a copy of the correspondence, but I suggest, as a matter of courtesy, that that should come from the inspector-general. I sent it to him. It is his correspondence now. I have no problems with the inspector-general making that public.

Senator SHERRY—It is just that it is your letter.

Mr D'Ascenzo—To him, which he has.

Senator SHERRY—Yes. If you have no problem releasing it, would you release it?

Mr D'Ascenzo—If the committee were to request it, yes, I would.

Senator SHERRY—The normal process here is that an individual senator requests it.

Mr D'Ascenzo—Whatever is the best process.

Senator SHERRY—We do not have a collective vote on a request.

ACTING CHAIR—I think Mr D'Ascenzo has a point in that he has sent some private correspondence to the inspector-general and he has no problem with that being released, but we should ask the inspector-general whether he would be prepared to release it.

Senator SHERRY—We could take that up with the broader committee. In addition to the annual report, the inspector-general raised concerns in the *Financial Review* in July. It was a fairly extensive interview. Are you familiar with that article?

Mr D'Ascenzo—I have seen many articles in the newspapers, but I do not know that particular one. I may have seen it, but I just do not know which one it was.

Senator SHERRY—I would be surprised if it was not drawn to your attention.

Mr D'Ascenzo—I am sure it would have been.

Senator SHERRY—Yes, I am pretty sure it would have been too. He says in that article, among a range of comments:

“All sorts of comments have surfaced over the last month and I'm not convinced that the Tax Office is taking on our recommendations. We had said, broadly speaking, that Tax was slack in its debt collecting and needed to get tougher but we said it carefully and that they needed to get tough on serial offenders and seek to educate other small-business owners to better manage their cash flows.”

That was one of a number of comments he made about the tax office. Do you have anything in response to that?

Mr D'Ascenzo—I actually thought that the debt report by the inspector-general, the debt report by the Ombudsman and the debt report by the Australian National Audit Office were relatively complimentary of the initiatives that we are taking in that area.

Senator SHERRY—I think there were two recommendations in the IGOT review into ATO small business debt collection. Have they been adopted?

Mr D'Ascenzo—We agreed to the recommendations. In fact, the reason I gave to you was in the strategic statement. It is a very clear articulation of our policy of trying to differentiate and also of taking on board the comments of people. If you would like, I could take you through some of the specific references there.

Senator SHERRY—More to the point of my question, I said: have they been adopted? You said they have been accepted. Have they been adopted and implemented?

Mr D'Ascenzo—We are implementing them.

Senator SHERRY—You are implementing them.

Mr D'Ascenzo—That is right. On the question of differentiation, I recall that yesterday you asked the inspector-general whether he had an answer and he said, ‘No, I don't know how to do it.’ What we have to do is to develop intelligent systems that allow us to understand the circumstances of a taxpayer, both through our data analytics in terms of trying to address people who have had history or experiences of noncompliance and also with processes that allow the genuine circumstances of the taxpayer to be made known.

Senator SHERRY—I think he did specifically allude to the difficulty of effectively going to the motive of a particular taxpayer who is deliberately entering into a contrived type of arrangement—whatever the arrangement may be—or someone who either through poor advice, accident or, frankly, ignorance enters into that. I think he did acknowledge that it was difficult in the systems of the tax office at this point in time to differentiate.

Mr D'Ascenzo—I think the reason for the strategic statement is that in terms of conceptual direction we are in the same space. There are plenty of references here, but if I could take you to page 8. If you look halfway down, you will see:

We recognise that there are many different participants in the tax system. Different taxpayers have their own set of circumstances, and take different postures in meeting their tax obligations. Our compliance model provides for proportionate and tailored responses depending on the causes of non-compliance.

New systems give us richer information about taxpayers' compliance histories and a better understanding of their likely behaviour. This information allows us to differentiate our responses taking into account the causes for non-compliance and the taxpayer's circumstances.

A key approach for us—

this is going forward—

is to differentiate between taxpayers trying to comply, and those who are not; supporting those trying to do the right thing and taking a firmer response for those that are not.

ACTING CHAIR—I just wonder if you have further copies of that document for Senator Murray and me?

Senator MURRAY—I have seen it, thank you.

Mr D'Ascenzo—By all means.

Senator SHERRY—I assume that Mr Vos was provided with a copy of this or that it was drawn to his attention. I notice that the publication date is August.

Mr D'Ascenzo—All these copies are sent to all external scrutineers.

Senator SHERRY—I thought that would be a safe assumption. That does beg the question, given your reference to aspects of this, as to why he included some of the commentary at least in the annual report, which was only very recently published.

Mr D'Ascenzo—You would have to ask Mr Vos about that one.

Senator SHERRY—Okay.

Mr D'Ascenzo—Just in terms of the criticism in newspapers, we have an intranet newsletter for our staff. It is a weekly newsletter and one of the features of that newsletter is a column by me—'The Commish', as they call it—about what we are seeing. One of the things is about the media comment about the inspector-general's annual report this week. What I say is: 'We continue to work with the Commonwealth Ombudsman, the Auditor-General, the Privacy Commissioner, parliamentary committees, the inspector-general and others to identify ways of improving tax administration.' Again it has a little bit more there, but I can make available to you as well.

Senator SHERRY—I make the point that I am not necessarily agreeing with Mr Vos. I am just trying to get to the bottom of whether he has any basis to hold these theories and make these criticisms. What is the response and, if there is an issue, is it being resolved?

Mr D'Ascenzo—I think the inspector-general made a point last night—which I am taking on its face—that he was trying to help identify areas that are perhaps not defects in our approach but areas of warning to us to keep alert to possible problems that we could encounter if we are not cognisant of those effects.

Senator SHERRY—I think that is a pretty kind interpretation.

Mr D'Ascenzo—I take that on board.

Senator SHERRY—I want to turn to the issue of high-wealth individuals. Can you provide an update on the ATO's crackdown on high-wealth individuals—obviously not individual names—since the May budget estimates hearings, on activity and outcome?

Mr D'Ascenzo—I will get Mr Konza to go into the details.

Senator MURRAY—Just before you do that, did you mean that to include the Wickenby matter or not?

Senator SHERRY—Yes; I have questions on that.

Mr D'Ascenzo—Sorry, I was misunderstanding. There are about three or four different programs. One is a high-wealth individuals program, which is in relation to the wealthiest individuals in Australia and is to review their compliance behaviour. Another one is in relation to people who are executives of private and public companies, which is a new initiative for us. A third one, of course, is our focus on alleged fraudulent activities using countries with tax secrecy provisions.

Senator SHERRY—Let us deal with the high wealth first.

Mr Konza—What was announced in the budget was funding to allow a significant expansion of the task force that works on high-wealth individuals. This year we are planning to see an expansion from around 110 people who are involved in the task force to 200. Our activities since 1 July, therefore, have been mainly around building up the task force. We have been seeding new teams and have opened a number of new teams within various taxation offices. They are being trained and are being allocated cases. But the build-up in the task force is just starting.

Senator SHERRY—As part of the build-up or over this period of time have there been any new quanta of money identified or recovered? Have any new issues come to your attention?

Mr Konza—No, I would not say so. There is a stock of cases which are done within the task force and there are cases that have been completed in the last few months, of course. But you would appreciate that, particularly in this area, you start a task force and you do not get results in four months.

Senator SHERRY—No, I am not suggesting that.

Senator MURRAY—What sort of people are you adding to your task force? You say you are enlarging the numbers. That could mean you have a lot of clerks doing basic work or it could mean you have high-level investigators. What sort of people are you adding?

Mr Konza—We are adding almost exclusively audit teams. We are reviewing every aspect of the task force operation, but in terms of expansion the great predominance is in audit teams.

Senator MURRAY—That implies that you have a lot more work to get through.

Mr Konza—The purpose of the funding was to allow greater coverage levels with our audit products and that is what we are building up to do.

Senator MURRAY—Does that mean you are covering known targets more in depth or you are covering more targets?

Mr Konza—I think a little bit of both. There is a trick in the annual report where, if you look at the raw numbers of audit products that we are going to do, they do not appear to be going up by so much. That is because we have had another look at some of the audit products

we have done and the definitions have changed so there is more depth of examination behind some of those audit products. At the same time, we are looking to expand the number of high-wealth individuals that we are covering.

Senator SHERRY—On what basis would that expansion occur?

Mr Konza—It is because we identified 867, as I think I advised the committee last time, high-wealth individuals and quite a number of those have yet to be risk assessed. We have a process where we get leads, so to speak, on high-wealth individuals. We profile those high-wealth individuals. We have a profiling section because the nature of high-wealth individuals is that you cannot point to an entity or even a small number of entities to say, 'That is the wealth of that person.' We are talking about people who control wealth in excess of \$30 million. A great deal of effort goes into profiling people to understand whether in fact they do control \$30 million.

Senator SHERRY—Just before you go on, the \$30 million criteria has not changed. It is not proposed to change.

Mr Konza—No, it has not changed, although the budget announcement did also recognise the reality that sometimes the task force investigates people whose wealth may not technically fall over the \$30 million.

Senator SHERRY—On the face of it, it may be difficult until you have got partway through an inquiry to identify that they actually have \$30 million in control.

Mr Konza—That is right.

Senator SHERRY—I am not going to go to the detail of operation Wickenby now, but presumably there is some coordination. Do any of the individuals overlap? Are any of them common to more than one inquiry?

Senator MURRAY—You mentioned three inquiries.

Mr D'Ascenzo—There would be high-wealth individuals involved in the use of tax haven activities. It may not necessarily come within the Operation Wickenby specific ACC determination, but it does come within our wider scope of work in relation to tax havens more generally, and there would be some high-wealth individuals within that scope.

Senator SHERRY—This second and new inquiry you indicated—was it executives in private companies? Was that the description?

Mr D'Ascenzo—That is right. I think it is executives earning in the order of \$1 million a year. One of the concerns there, I suppose, is sometimes not necessarily the wage and salary component; it is more the question of a whole range of different fringe benefits or share options and whether or not they can be provided to other parties and then not declared or whether they can be provided overseas and then are not obvious to the revenue.

Senator SHERRY—When was this group set up?

Mr D'Ascenzo—It only started this year, and it is part of our compliance program—and I now provide this to the committee as well.

Senator MURRAY—I have read that one also. I am afraid I read all your important stuff!

Mr D'Ascenzo—I am pleased, Senator.

Senator MURRAY—I have a sad and miserable life!

Senator SHERRY—I have it. I have read it too.

Mr D'Ascenzo—and I hope that, by making it public, people can provide some feedback to us as to whether or not we have the parameters and the compass right in terms of what we are trying to achieve.

Senator SHERRY—Yes. In terms of the number of individuals that will be targeted in this group, what are we looking at approximately?

Mr D'Ascenzo—I am not sure. Is it 1,000?

Mr Konza—No. We have said all along that this is a pilot program. The media, I think, have run away with themselves over it, talking about 'blitzes' and so forth. We have jargon. We call it 'capability building', which is the ability to do our job. It involves systems, people, processes and so forth. This really is a capability-building exercise, so we have a small group of people in our microenterprises and individuals business line within the Taxation Office who are currently looking at 40 individuals.

Senator MURRAY—Four zero, or one four?

Mr Konza—Four zero—40. They are currently looking at 40 individuals and devising the processes and assessing the skills that are going to be required to allow this to build up in future years. I will give you an example of what they are currently working on. The commissioner referred to other forms of remuneration. One of the projects we are currently undertaking is comparing the market-available information on option grants to directors and other executives and also the market-available information on the disposal of shares. Then we are comparing those to tax returns. In doing that, we are actually working with those 40 individuals—or some of those 40 individuals—to identify whether they have a problem or whether we have a data-matching problem. So it is early days.

Senator SHERRY—According to question on notice BET131, the ATO is apparently considering applying anti-avoidance provisions to around 12 high-wealth individuals or their associated entities, and 13 additional high-wealth individuals have been identified as 'using complex offshore structures to conceal assets and income'. But BET131 has 36 high-wealth individuals under audit. So what is happening with the 11? Is there a discrepancy there?

Mr Konza—I do not know as a matter of fact, but I can only speculate that there are other issues in those other cases. Quite often we have issues regarding the purchase and disposal of businesses, for example. If they are domestically based, they may not appear in either of those sets of figures. But I would need to find out what all the issues are.

Mr D'Ascenzo—The concern may be not so much a use of an anti-avoidance provision but whether or not the substantive provisions of the law operate in a way that the taxpayer believes appropriate or the commissioner considers appropriate.

Senator SHERRY—Of the high-wealth individuals who have been investigated, are there some for whom investigation has ceased and, if so, how many?

Mr Konza—I do not know the numbers; I will clarify that up-front.

Senator SHERRY—Just approximately; I was not seeking a precise figure.

Mr Konza—Yes. But, yes, it does happen. We profile these individuals, as I said before, to confirm that they are in fact high-wealth individuals; we sometimes find that they are not. Indeed, you might be amused to know that we have had occasions where people have asked us to make sure that we do not tell people that they are not in fact high-wealth individuals because their banks might be a bit surprised. Of course on other occasions we find that there is not a tax risk. They can fall out of the process for either of those reasons.

Senator SHERRY—Of those who have not fallen out of the process, approximately how many of them have had a settlement as a consequence?

Mr Konza—We would have to take that on notice. I thought we supplied some settlement numbers in the last round of questions on notice, but we can check that again.

Senator SHERRY—If you could update that, I will double-check that in terms of notice. According to BET131, three cases in 2004-05 and two cases in 2005-06 were discussed with the DPP with a view to prosecuting. What were the reasons for not taking action?

Mr Konza—I think that answer explains that in some of those cases it was simply too early in the process. What had happened was our officers had been concerned that a prosecutable offence had occurred and had gone to the director. I think the director said in those cases to keep on going but that it was not time for them to get involved yet. That is why it was returned to us. I think we intend to go back to the director for further advice later.

Senator SHERRY—Can that be described as reconsidering or pending?

Mr Konza—I would have thought pending rather than reconsidering.

Senator SHERRY—Are there any cases that you consider are being actively reconsidered as distinct from further investigation put on hold?

Mr Konza—I do not know.

Senator SHERRY—Is it correct that about 91 settlements have been negotiated relating to 27 cases?

Mr D'Ascenzo—Is that information we have previously given to you?

Senator SHERRY—I am not sure because I do not have that with me. I just have the question.

Mr D'Ascenzo—It sounds like good information. I do not know if it is right or not.

Mr Konza—I do not know off the top of my head. We would need to look at the questions on notice.

Senator MURRAY—Can you confirm for me that, when you are looking at a high-wealth individual, you crosslink all the entities of both a commercial and non-commercial nature. I am thinking particularly of not-for-profit entities. There have been some recent court cases and allegations that assets have been covered or disguised through charitable trusts and then are used—for example, expensive paintings are used within somebody's home. Are you doing that as well?

Mr Konza—Yes. The high-wealth individual's process is, as I said before, focused on control. In profiling, whilst we consider legal ownership and legal links, we do not stop at those links; we look for potential control. So in profiling a high-wealth individual we look at all entities associated with that individual and all entities associated with all entities associated with that individual. We look at all entities associated with family members unless we are able to establish that there is sufficient independence of mind between various family members. Included in that we look at any not-for-profit organisations that are associated as well.

Senator MURRAY—Such as a charitable trusts.

Mr D'Ascenzo—To put it in context, we also do risk manage the case, so we do not necessarily follow down every trail.

Senator MURRAY—No. I am not suggesting—

Mr D'Ascenzo—That is what Mr Konza was saying beforehand—that we are now able with more resources to perhaps chase up more trails than we did previously.

Senator MURRAY—I just wanted to be assured that you were not automatically excluding altruistic bodies such as charitable trusts, which may be used for disguising assets.

Mr Konza—No. Regrettably, we have seen some very poor behaviour in that area, so we have no illusions about what can occur on occasions.

Senator SHERRY—Regarding the figures that were provided in response to answer 155—I have just found it—and the details contained therein, what is the approximate amount of money settled for in total and individually? In the answer to the question on notice, in 2004-05 there were 56 high wealth individuals with whom negotiators settled agreements and in 2005-06, 35.

Mr D'Ascenzo—I think we will have to take that on notice.

Mr Konza—Yes, we will.

Mr D'Ascenzo—Are you asking how much they were settled for?

Senator SHERRY—Yes—the total settlement and individually. They are not in the annual report?

Mr D'Ascenzo—They could be.

Senator SHERRY—You will have to forgive us; we have been bombarded with annual reports in the last week. I have never seen so many coming through before.

Mr D'Ascenzo—I have a copy here for you.

Senator SHERRY—I have my copy here but I have to confess I have not yet had a chance to read all the annual reports from cover to cover—nor have my staff.

Senator MURRAY—I will accept a copy because mine is downstairs.

Senator SHERRY—On page 166 you have the revenue collected from high wealth individuals and associated entities by year.

Mr Konza—Settlement information appears on page 171 and does not appear to be disaggregated at all.

Mr D'Ascenzo—No, it does not.

Senator SHERRY—Would you take that on notice, please?

Mr D'Ascenzo—Yes.

Senator SHERRY—Thanks. What are the approximate estimates for the cost of the task force going forward and the expected revenue?

Mr Konza—I am drawing on my memory because it was a few months ago now. I think it was \$80 million over four years and \$600 million in revenue over that same period.

Senator SHERRY—That is cost versus revenue. Okay.

Mr Konza—If I find those figures are incorrect I will correct them.

Senator SHERRY—If it is significantly different, let us know. We are not overly worried about a couple of million here or there but if it is in the tens of millions, just let us know. I noted that in the unveiling of this year's compliance program it was announced that the ATO would be performing comprehensive risk assessments for these high-wealth individuals. We have touched on some of the issues. What does that entail?

Mr Konza—A comprehensive risk assessment entails the complete mapping of all economic resources available to the taxpayer, including a check of any international transactions and, where possible, international assets; a check of all intelligence that might be able to be obtained, such as all information on published business deals or published information about links to other people; and then a check of the taxpayer's economic performance versus their tax performance. That includes growth in wealth and consumption of wealth versus the gross income declared for tax purposes.

Senator SHERRY—Would that include an examination of bank transfers—movements of money through not just banks but any financial institution?

Mr Konza—Yes. It is a standard part of an auditor's craft to look for trace transactions because they may lead to bank accounts held in other places or give a clue to transactions that have not been disclosed.

Senator SHERRY—Would that include an examination—I am sure it must—of trust structures, both here and overseas?

Mr Konza—Yes.

Senator SHERRY—What are some of the issues and difficulties that you face with trust structures, both here and overseas?

Mr Konza—With overseas, the existence of the trust is the biggest issue. The existence of assets overseas is the big challenge for us in the high-wealth task force because having attained high wealth many of these individuals either have gained overseas assets as part of that process or seek to move assets offshore to escape detection or as a form of insurance, I guess. We are working increasingly with our international colleagues in other jurisdictions to try to get information about people's offshore deals.

Senator SHERRY—I imagine that is not easy to do in some jurisdictions. They may not even permit you access to any information, or to a very limited range of information.

Mr Konza—And there are some places where, for example, the trustee of the trust will be a company incorporated in certain places where shareholders are identified by bearer shares, for example, so there is no record of who owns the company. They are significant challenges.

Mr D'Ascenzo—It is for that reason that we have, perhaps over the last decade particularly, been very actively trying to forge a level of international harmony in terms of an acceptance of tax administrators anyhow being able to share information with each other in accordance with the treaties. We have also been playing our role in the OECD in relation to tax haven jurisdictions. We host meetings of groups of OECD countries trying to encourage other countries to reduce their bank secrecy. We work with Treasury to negotiate information exchange agreements with tax havens such as Bermuda. We had one signed, I think, in November last year. We are in negotiations with another nine tax havens to try to open up the international environment to a much more transparent process but, as Mr Konza said, it is hard when people try to conceal information overseas.

Senator SHERRY—I can certainly imagine why it would be so difficult. In the case where there is an identifiable flow of money from overseas in an entity you cannot examine, for whatever reason, to an individual in Australia, are you able to intercept, halt, freeze, that flow of money because you cannot obtain an explanation as to where it is flowing from?

Mr Konza—There are provisions that allow us to halt a flow of funds if we have legitimate concerns. It is probably, because of the consequences of that sort of action, not always the best course of action, but we do have another provision in respect of international transactions which allows us to require the taxpayer to answer questions and then, if they plead that they were unable to answer those questions because the international links were uncooperative or whatever, bars them from subsequently using information from those overseas sources in their defence. It is the legislature's creative way of trying to get some leverage essentially on people who are outside the jurisdiction.

Mr D'Ascenzo—We work very closely with AUSTRAC. In terms of flows of money out of Australia, that is a very, very rich source of information for us. For flows into Australia, rather than stopping them, we often ask the taxpayer what the source is and to provide an explanation of whether it is in the nature of income, capital, a gift or something else. You will see many, many AAT cases where the taxpayer has argued that it was a gift from a long lost relative, and we have won many of those cases, and there are a lot of other cases that do not find their way to the AAT because the taxpayer agrees with our position. In other cases, the taxpayer is able to substantiate a flow that is not on a revenue account, such that on the balance of evidence we are not able to pursue it further.

Mr Konza—It is an area where the requirement by the tax law that the taxpayer needs to supply their information is crucial because the commissioner has been put in a position of being unable to detect and prove anything. The commissioner just referred to gifts and so forth. I have recently been informed that one of the international scheme promoters has a full-time genealogist on their staff in order to try and identify relatives overseas of Australians so that they can build a premise that it was an inheritance or a gift.

Senator SHERRY—So prima facie construct a cover story, effectively, from one of their long-lost relatives, who is now dead. It seems to be an incredible level of detail to go into to erect a cover story.

Mr Konza—They are professional at what they do. That is the warning, I guess, for the Tax Office.

Senator SHERRY—You never know—the genealogists might uncover a legitimate relative who has died and they might get a double benefit out of it.

Mr Konza—You spoke about trusts generally. I refer to the need to identify control rather than legal ownership. Equally with trusts, lawyers have been very inventive in working out ways of giving people control, with more and more tenuous links. So whereas the man in the street might understand that a trustee might control the assets of a trust even though they are not a beneficiary of the trust, high wealth individuals may not want to be the trustee of the trust because you are identified with those assets, so they might become the ‘appointor’. The appointor is the person who has the power to appoint the trustee. Or you might become the ‘governor’ of the trust. The governor has the ability to appoint the appointor. So you have these more and more inventive methods.

Senator SHERRY—It was an issue touched on in passing with Mr Lucy this morning in the superannuation context. I think he mentioned in the context of Operation Wickenby that there was some particular difficulty with their ability to transmit or pass material to you in the superannuation trust area. What would that be?

Mr D’Ascenzo—I think it is just the respective secrecy provisions in the law.

Senator MURRAY—They hadn’t got the permission of the providers of the information. They didn’t ask for it at the time. They asked for the survey. So he said he therefore couldn’t pass it to you. That is what you are referring to, isn’t it, Senator?

Senator SHERRY—Is that a significant problem in the context of Operation Wickenby?

Mr D’Ascenzo—We put in a joint submission to government about the proposal to have information in relation to task forces like Operation Wickenby able to be shared between participants. The government has announced that it will change the law to that effect. The government has also announced that it will look more broadly at the ability to provide more information exchange in the context of these areas of potential fraudulent activities.

Senator MURRAY—To be effective, it would have to be retrospective, surely.

Mr D’Ascenzo—That is a question for government.

Senator MURRAY—But Wickenby goes back two or three years.

Mr D’Ascenzo—It does. The form of the legislation has not been progressed. As far as I am concerned, one of the aims of Project Wickenby was to see whether areas of law could be improved to provide an ongoing platform for a whole range of government or Commonwealth enforcement agencies to be able to do their work more effectively.

Senator SHERRY—We also touched on, with Mr Lucy, how the flow of information that you are able to pass to and discuss with organisations such as ASIC is restricted by the secrecy provisions in areas that are regarded as legitimate.

Mr D'Ascenzo—This is one of the reasons, I think, behind the review of the secrecy provisions, because they do cause a legislative block sometimes and sometimes a block in terms of caution or inertia until you discover whether or not you are able to provide the information on it. That adds time and problems to proper administration.

Senator SHERRY—It reminds me of the issue of unpaid superannuation and the difficulties that many people are having because of that secrecy provision in that context.

Mr D'Ascenzo—Very much so. Telling the employee—a classic example.

Senator MURRAY—I was amused by the genealogist. I also read recently that they have done some DNA testing on Margaret Thatcher and found out some interesting aspects of her origins. But you need to be careful, in case you discovered that maternity was a fact but paternity ended up as an opinion.

Senator SHERRY—I want to go to some issues on the childcare rebate. According to the *Australian*—I do not know whether or not this is accurate—the 30 per cent childcare rebate has been claimed by only 13 per cent of eligible parents. How many eligible parent families have claimed the 30 per cent childcare rebate?

Mr Konza—We would have to take a number like that on notice. But I can confirm that we have been concerned that the take-up is not what we expected.

Senator SHERRY—What did you expect?

Mr Konza—I do not know off the top of my head.

Senator SHERRY—Isn't there anyone here who could help us with this? It is a fairly important area of public policy.

Mr Konza—I am sorry; I am the person who was briefed on this and I do not know those numbers. What I do know is that we have been matching data with the Family Assistance Office, and next week we will begin amending assessments for those people who have failed to make a claim. We intend to remedy the situation ourselves.

Mr D'Ascenzo—The background to this was that when the introduction of the new law occurred we were not able to get information from relevant childcare providers to be able to auto-amend returns. We now have an additional period of time, so we have taken a decision to auto-amend. There is a bit of an issue with auto-amend if you cannot use the benefit; therefore you can make an election to transfer it to another spouse. We will have to provide that in the information we give to taxpayers as we auto-amend. So we will pick that up. Next year we have the full cycle of information and we will go through and auto-amend with the proviso that people can make different elections, and we will explain that to them with the documentation we will give to them.

Senator SHERRY—On the issue of providers not being able to provide the information, is that one of administration—a general refusal to provide it or just not being able to provide it—

Mr D'Ascenzo—No, I think it was just the time frame to provide the information to us in line with the date of effect of the new law. It is more a practical administrative issue. As I

said, for next year, we should be able to automatically amend virtually all childcare rebate cases from the information provided to us in the return.

Senator SHERRY—Where it was not able to be provided last year, can the person still receive the rebate retrospectively once the information is provided? I am not aware of the parameters of the rebate.

Mr D'Ascenzo—I am not sure either, but we are now finding who has not claimed but could be claiming, having regard to what is in the information on the tax return, and auto-amending and saying, 'Here you are. You've actually forgotten to claim this; this is what you're entitled to. Here are some options for you if you've got different circumstances.'

Senator SHERRY—So, where they have not provided a claim and you have identified that they are highly likely to have one, what do you do? Do you send them a letter or notification and say, 'Come and claim,' or do you send them a cheque?

Mr D'Ascenzo—No, we just send them a cheque. We have made a decision to do that. We have not actually started sending the cheques out, but that is the outcome—

Senator SHERRY—Do you think that with this approach the level of take-up will be significantly greater, effectively?

Mr D'Ascenzo—Certainly for people who are lodging returns it will almost be automatic for them. There may be people who might be entitled to it who do not lodge returns. We still have a lot of educational material out in the marketplace, both for tax agents and for the community more generally.

Senator SHERRY—I have some specific questions as to figures in this area which I will put on notice. I want to deal with an issue relating to payment of customs duty and GST on goods flowing into the country—specifically, crude petroleum. Is there anyone who can assist me?

Mr Jackson—I will look at the question and see if I can help you. It sounds like it might be a bit specific.

Senator SHERRY—Let us take general principle first. Crude petroleum is brought into the country; that would be subject to customs duty, wouldn't it?

Mr Jackson—Normally equivalent to the excise.

Senator SHERRY—At what point does the assessment occur? Is it when it is offloaded from the vessel at the port?

Mr Jackson—I am not totally sure on this, it is probably a question for Customs, but I understand that there is a containment area at the port where the products are unloaded. They are under the control of Customs in that area and, once the arrangements for the customs duty are made, the products are released.

Senator SHERRY—Is the customs duty paid to Customs?

Mr Jackson—That is correct.

Senator SHERRY—What is the arrangement in the case of GST?

Mr Jackson—There are two possibilities, but the one you describe would normally be deferred GST. What happens is that Customs identify and classify the product. They then provide information electronically to us and we populate the taxpayer's next BAS with that information and a payment is received through the BAS. In the case of ad hoc or one-off importations, which would normally not be the case for petroleum products—

Senator SHERRY—No, it is the big assessment.

Mr Jackson—Yes. There is a provision for people to pay GST directly to Customs and I think each year about \$2.1 billion is paid directly to Customs for ad hoc small importations but, as I say, not normally petroleum.

Senator SHERRY—So it is Customs at that point of entry on the dock that would send the information to you? You do not have your own people involved in this process at the coalface, so to speak?

Mr Jackson—No. Some money is provided to Customs through the budget process that flows through the tax office and Customs provide staff as part of their compliance program.

Senator SHERRY—It is pretty hard to miss a petroleum vessel, I assume.

Mr Jackson—I would think so.

Senator SHERRY—They would do that as a matter of course as soon as the vessel docked.

Mr Jackson—Certainly, for things like petroleum, the offloading procedures would normally be fairly sophisticated.

Senator SHERRY—So it is a process effectively initiated and controlled by Customs in respect of the GST element?

Mr Jackson—That is right.

Senator SHERRY—You are notified and follow through. Would that be an immediate notification? Is it on the same day?

Mr Jackson—It is quite soon. I think it is at the end of the month in time for the preparation of the BAS.

Senator SHERRY—From Customs to you?

Mr Jackson—From Customs to us, yes. They send it to us before the end of the month—I forget the exact date—and then we use that to populate.

Senator SHERRY—I will just pass up to you a paper with some details—registration, all the refinery and loading capacity et cetera—of a vessel that unloaded some crude petroleum. This is a real-life example of a shipping movement. As an example, when a crude petroleum vessel docks at Fremantle, would the process you have just outlined in general apply?

Mr Jackson—Yes, that is right.

Senator SHERRY—Presumably, there is no exception?

Mr Jackson—Yes, that is right.

Senator SHERRY—I am not familiar with Fremantle dock, but it has an oil refinery berth. It would be there that Customs would make the assessment in respect of the duty and the GST.

Mr Jackson—Again, I cannot speak for Customs, but I would expect that to be the case.

Senator SHERRY—I know that you cannot respond with respect to individual taxpayers, but could you check to see whether compliance in accordance with the law on GST payments and customs duties occurred with respect to this vessel in the particular details that I provided to you?

Mr Jackson—I will take that on notice and deal with Customs on it.

Senator SHERRY—I will now move to couple of superannuation issues to get them out of the way. There are a number of issues that I want to raise in the context of the annual report, but they can wait until next year—maybe because I have been overloaded with annual reports. But one issue I do want to raise concerns the number of people on the lost superannuation register and the quantum of moneys held. Could you give me the two figures?

Ms Vivian—The figure on hand, as of 30 June 2006, is \$9.713 billion for lost member accounts.

Senator SHERRY—The approximate number?

Ms Vivian—The number of lost member accounts was about 5.676 million.

Mr D'Ascenzo—The average account balance was \$1,710.

Senator SHERRY—I could not find it in the annual report, and that could have been because of annual report overload.

Ms Vivian—It is in there. I can refer you to the page number.

Senator SHERRY—No, that is fine. If it is there, it is there. The other issue I was going to raise—

Senator MURRAY—Before you do that may I ask one?

Senator SHERRY—Yes.

Senator MURRAY—I have not read the annual report yet, so can you tell us whether the figures for both the account numbers and the total superannuation funds have declined relatively to the overall quantum?

Mr D'Ascenzo—They look like they have increased from—

Senator SHERRY—I think last year's figures were 5.2 million accounts and just over \$8 billion.

Senator MURRAY—There might have been an absolute increase, but I am looking for whether there has been a relative increase.

Ms Vivian—I am just trying to work that out.

Senator MURRAY—Perhaps you could come back to us. The reason I asked this question is that you and the government generally have been putting a lot of effort into publicising this issue and trying to get the whole area addressed and sorted out in a better fashion. I want to

see whether there any signs that you are actually making inroads. One of the ways in which you can see whether there is a sign of that is an improvement in the relativities.

Senator SHERRY—Relativities against what, though, Senator Murray?

Senator MURRAY—Let me use an example. Let us assume that last year the total amount of superannuation funds was \$100 billion and the total amount of lost funds was \$2 billion. If the amount of superannuation funds doubled to \$200 billion but the amount for lost funds went up by only \$1 billion, the relativities would be better.

Senator SHERRY—The only possible caution is that the amount in super at the moment, which I think is about \$914 billion, is heavily influenced by the rate of return. You could actually have a decline, as we have experienced, if the rate of return drops.

Senator MURRAY—Yes. That is why I would like your considered reply on notice.

Ms Vivian—I can give you some of those answers now. In terms of percentage of lost accounts to total assets in super—what I am looking at here is as of December 2005, but that would be reasonably accurate—

Senator MURRAY—Can you give us the reference? Where are you finding this material?

Ms Vivian—It is some analysis I had done in preparation. The percentage is about 1.15 per cent. But, as Senator Sherry was saying, last year it was 1.1 per cent and the year before it was 1.15 per cent so it varies depending on how the super funds are going. In terms of the absolute value of lost member accounts, there has certainly been an increase this year. Last year we had 1.2 million new accounts come in but we removed about one million off the lost register, so there was a net growth.

Senator MURRAY—If I were to summarise my question in layman's language it would be this: with all the efforts you have been putting in, are you winning the battle or losing the battle? In other words, is it something that you just cannot get on top of?

Ms Vivian—Some of the announcements in super simplification will assist us. One of the things that we have been doing over the last year is a major letter campaign out to lost members. We have been targeting those people with multiple accounts and those people with high-value accounts. We have had about 34 per cent to 35 per cent of those individuals actually come in and remove themselves from the lost members register. Clearly, what that has shown to us is that there are a number of people out there on the lost members register because of the rules. One of the rules of the lost members register is that if you have an account that has been inactive for over two years, in other words, no amounts have been put in, the funds are required to report that.

Senator MURRAY—So it is not lost at all; it is just parked.

Ms Vivian—Yes, parked. The funds are required to report it. Not much mail comes back to us so you would say that people were getting the letter, but there is not a lot of action taken. We have rung some of those people to ask them why they have the money there. They say, 'We know the money is there; we are just leaving it sitting there.' As part of the government's super simplification, they are looking at doing some work on the definition of what a lost member is, in addition to us doing some more work with the funds about improving the overall data.

Senator MURRAY—Senator Sherry and I sit on the Joint Committee on Corporations and Financial Services inquiry into the superannuation industry or certain aspects of it. I was shocked by a particular story, which seems to indicate a low level of responsiveness to people's investments in this area. The witness concerned told us that they contacted 6,000 people who had made co-contribution payments but they had not provided their tax file number so therefore they were not entitled to the benefit. So they contacted these 6,000 people and told them they would not get the benefit for which they made contribution unless they gave them their tax file number, and only 2,000 responded. The contact was by mail, phone and email and there was still that low level of response. That is why I am asking the question: is it almost impossible to activate some people in this area? Do you have less anecdotal and more verifiable data as to the way in which this whole area can be segmented and what the psychographic, if I can call it that—the psychological kind of response rate—is likely to be in particular areas?

Ms Vivian—With some of the administrative improvements through the government's super simplification package plus working with the funds I think that in several years we will be in a better position to answer that question.

Senator SHERRY—I think that, nonetheless, we do not know what the impact of that will be yet—and I am not criticising the ATO in this regard. I was just looking for the section in the annual report. There have been a number of initiatives, pronouncements and indeed campaigns over the last five or six years that I can recall, but the number remains, at best, relatively static proportionally. The numbers are going up, but they are proportionally relatively static. I think the annual report lists the initiatives—

Ms Vivian—On page 183.

Senator SHERRY—The super seeker and the super match are useful initiatives but the problem still grows, nonetheless. Then we have the other issue. With regard to the collection of TFN numbers and the change proposed, there will be a penalty on the employee where the employer does not provide the TFN number, and that is another issue in itself. I just wanted to sort out the detail there today.

Mr D'Ascenzo—We can say that we do have similar information to you in terms of some people just wanting to be parked in the lost members register.

Senator SHERRY—There would be some people in this category, too, who are not able to transfer their money out of the account—it would be a minority, I am sure—because of past experience with exit fees. There are barriers still there, even on relatively small amounts, unfortunately. I have never seen any figures on that, but I know there are exit fee barriers. The transfer to an eligible rollover fund, ERF, of a lost account is not within your jurisdiction, is it?

Ms Vivian—No.

Senator SHERRY—That is an APRA or possibly an ASIC matter.

Ms Vivian—Yes.

Senator SHERRY—I did not want to go into great detail, because we did explore some of the issues yesterday in respect of the superannuation budget announcements and then the final

announcements in August. I want to turn to the proposal to send out a form with these details on it to the individual, as distinct from the individual having to complete a form. Is a standard form going to be issued to this category of people, where their address can be identified, the lost member account? I understand the proposal is that the tax office will send out a form with the details, and it will be a standard transfer form. Is that what is proposed?

Ms Vivian—It is proposed that there will be a standard portability form that we will send out to people who are on the lost members register.

Senator SHERRY—Is that to be a standard portability form for the entire industry to use or just for the purposes of the tax office?

Ms Vivian—I think that is a matter for Treasury. I am not quite sure about that.

Senator SHERRY—You are right, but I just thought you might have been aware, in the context. When will that start operation?

Ms Vivian—The aim is that it would start operation from 1 July 2007.

Senator SHERRY—But, at the end of the day, that form is sent out. What is to happen if the person fails to act on the form that you send them and presumably the details contained therein?

Ms Vivian—It is still up to the individual about whether they act on it. We have talked here about the fact that there are a number of reasons why people choose to act or not act. I guess in sending it out we would be encouraging people to act on it, trying to make it as easy as possible for them to act on it, but at the end of the day the decision is theirs.

Senator SHERRY—What are you going to do with the people who are former temporary entrants who have left the country? Again, it is not identified, although you may have some idea. Do you intend to send them a form? How would you do that?

Ms Vivian—Naturally, we would only be able to send a form to people whose address we know and can identify.

Senator SHERRY—While I am on this issue, there are a couple of quick cases where I am going to name some names and ask you to follow through. I have got the people's permission to do so. A really interesting case, I thought, and one that is of concern—and it is not a case where there is any criticism of the tax office—is that of a Sri Lankan, Chandima Alahakoon.

In this case, the person was in Australia on a restricted visa and returned to Sri Lanka. She was on bridging visa A, which gave her work rights. She left Australia and went back to Sri Lanka to live. Apparently this particular type of visa is not within the coverage of the temporary entrance provision where, if you are a temporary entrant and you leave the country and you are not coming back, you can actually claim your money when you are leaving the country or have left the country. There is about \$4,000 involved and there are some particularly distressing personal circumstances for her. Firstly, could you determine why bridging visa A is not included in the temporary entrance classification, if you like, of visas? It seems to me that *prima facie* there is no good reason why it should not be. Secondly, can you liaise with, presumably, Treasury or perhaps the department of immigration on this?

Ms Vivian—It is probably both.

Senator SHERRY—Can you liaise with both because I am sure that, if there is one person in this particular circumstance, there would be others. It seems to me that certainly the intent would be to cover them within that temporary entrance provision and then they can claim their money. But I will send you a communication on the name. You may not be personally familiar with the case, but I am pretty sure that it has been drawn to the ATO's attention.

Another issue that I want to raise is that I received correspondence from a Mr Caudwell. The guts of it was that he claimed compensation from the tax office because he notified the tax office of unpaid superannuation and apparently, according to this correspondence from the tax office, the file was lost by the tax office for three years. He was awarded some compensation, of approximately \$500, because of the lost file. It did concern me that a file could be lost for that period of time within the ATO. Are you familiar with the case at all?

Ms Vivian—No, I am not familiar with the case.

Senator SHERRY—Could you take on notice how many other files have been lost in this area—the approximate number—and the approximate period of time that the files were lost? I am aware generally—and this is not a criticism of you—that there have been difficulties of processing and administration in this area in the past.

Ms Vivian—I was going to say that I think you would be well aware that we have had some major issues with our super guarantee systems. Over the last two years there has been considerable work. As we speak, we are in the midst of actually transferring most of our cases now onto the new systems and the change program. So I can certainly take that on notice and work out what we can provide to you.

Senator SHERRY—Okay. We have discussed the issues of the system's problems on previous occasions. The other issue involved a person who did receive their unpaid superannuation contribution from the ATO. However, the interest was not paid. Again, I can give you the name.

Ms Vivian—I am more than happy to follow that up if you want to provide us with the details.

Senator SHERRY—I will give you the correspondence. The core issue is that apparently she now has to now provide written documentary evidence of the lack of interest in order to collect it. That seems to me to be an odd process for her to have to go through, having received the money.

You kindly provided some useful information in respect of super guarantee non-collection in an answer to question on notice BET150. It contains the total amounts that were written off in five financial years. In 2004-05, for example, it was \$55 million; in 2003-04, it was \$49 million; in 2002-03, it was \$12 million. They are not moneys that are uncollected. The amount of moneys uncollected in a year is much higher. These are quantum amounts that have been written off. One of the difficulties in providing the information is that moneys written off may have accrued over a period of time—a year, two years or three years. What I am trying to identify is the approximate level of money that is on average written off each year. The reason I ask this is that the figure for 2000-01 is \$4 million and the figure that you gave for 2004-05 was \$55 million. On the face of it, that looks like a dramatic increase. But there is the issue of the write-off being difficult to relate to one year—it may relate to a couple of years or it may go

back eight years. Are you able to make a considered assessment about the average write-off in a given financial year?

Ms Vivian—We can certainly take that on notice. One of the issues for us has been that we have started doing some major work in this area over the last few years. That has combined with some systems issues. We have also moved from just including in those totals the amount of SJ to also including penalties and interest. Can we take that on notice and see what we can provide.

Senator SHERRY—Okay. I notice that the data that you gave me about the number of employers that have write-offs says that, except for a peak in 2002-03, it has been reasonably constant over the five-year period. I am not sure how these figures relate to each other in this area. I want to turn to issues relating to tax office leaks. Two prominent Australians have complained that their personal tax affairs were leaked to the media. This relates to Mr Michael Brereton and John Cornell, tax avoidance as part of Operation Wickenby. Has the ATO investigated how these names were leaked to the media?

Mr D'Ascenzo—Yes. Any time we see any allegations of leaks to the media we have a review internally. We did in this case. Not only did we have a review internally but, because it is part of the wider Operation Wickenby mantle, I also asked other partner agencies in Operation Wickenby to ensure that there were no leaks from their perspective. My advice, both from internal sources and from sources such as the ACC, is that there is no evidence of any leak from the tax office or from any other Wickenby agency. You have to remember that there have been over 20 legal challenges to the ACC's access to information, and therefore there is a lot of information on the public record through those legal proceedings.

Senator SHERRY—Are you suggesting that that is the case in this instance?

Mr D'Ascenzo—I am not sure with regard to this particular instance. In other situations, the media has gone to some of the overseas countries or jurisdictions involved, such as Switzerland, and interviewed people in Switzerland about these activities. That is another avenue. The third avenue could be the promoters themselves in terms of some of their clients. The fourth one could be the taxpayers themselves. They are possibilities. All that I am saying is that we take allegations of leaks very, very seriously. We have investigated them.

Senator SHERRY—Was there a formal complaint laid on behalf of these two individuals?

Mr D'Ascenzo—Not that I know of.

Senator SHERRY—In this investigation, was there anything in addition to the normal investigation of leaks that you carried out in these circumstances?

Mr D'Ascenzo—The thing that was different was the very forensic approach taken by the ACC in cross-checking information that is not on the public record with what was in the newspapers. So the level of checking by the ACC was probably higher than might normally have been the case if it was just our own internal review.

Senator SHERRY—When you say 'the level of forensic checking', that is comparing the details published to try to cross-reference that to who, presumably within the ATO and the ACC, would have access to that detailed information that was ultimately published to try and focus down to see if someone could be identified?

Mr D'Ascenzo—They take it very seriously. It is a major operation with a lot of Commonwealth authorities. The whole aim is to send a very clear message to the community that, for people engaged in or allegedly engaged in illegal activities, fraudulent activities or questionable activities using overseas secrecy provisions, there will be consequences and the Commonwealth of Australia will work together to try to ensure that those consequences come to book. We do not want that unravelled by improper processes along the way.

Senator SHERRY—So, in the case of the ATO, there were no additional checks beyond your normal ones but, in the case of the ACC, there were?

Mr D'Ascenzo—They may have been their normal checks. All I know is that I am comforted not only that the information that I received from my people was that it was not an internal leak from the tax office but that the information received from the ACC was that, as far as they know, it was not a leak from anyone under the Wickenby arrangements.

Senator SHERRY—Has there been any legal action in respect of the newspapers?

Mr D'Ascenzo—From whom?

Senator SHERRY—From the ATO?

Mr D'Ascenzo—No.

Senator SHERRY—There is nothing proposed?

Mr D'Ascenzo—No.

Senator SHERRY—Can you prosecute media groups and journalists under section 8XB of the Taxation Administration Act 1953?

Mr D'Ascenzo—It really depends on their activities and whether or not the charge is made out. I think it would be a very high hurdle to prosecute people such as the media, who are saying, 'We are making information available to the community.' I must admit, it has not crossed my mind.

Senator SHERRY—When you say a 'high hurdle', what is the high hurdle?

Mr D'Ascenzo—I think it is a question of whether the nature of the activity is such that it has a mens rea of obstructing tax administration.

CHAIR—Is it not a strict liability offence to do that—is that right?

Mr D'Ascenzo—I am not sure what the offence is, but either way the question is that, if someone is carrying out their legitimate business of providing information which is not defamatory to anybody, it is hard to say that that is in some way obstructing due administration.

CHAIR—That is a different point, though.

Mr D'Ascenzo—I am not sure. I have the act here; I could look it up.

CHAIR—No, that is fine. I was just trying to be helpful.

Mr D'Ascenzo—It is still a question of whether or not it meets that standard, whether it is a mens rea standard or a strict liability standard.

Senator SHERRY—On a related matter, we know there were some 27 ATO staff who admitted last year to inappropriately accessing taxpayer records. Apparently 12 of the staff resigned. Was that a consideration with respect to not prosecuting them for breaches of privacy in any or all of those 12 cases?

Mr D'Ascenzo—I do not know about the specific details of any of those cases other than that we reported it through the annual report and the consequences that occurred. These processes are reviewed. The fact that we have 27 in relation to an organisation like the ATO, given the extensive checks and balances we have, is not a bad outcome. We monitor our dealings with these arrangements through forums such as our audit committee, which of course includes a range of external experts. I do not know specifically what the answer to that is, but I can take that on notice.

Senator SHERRY—Is there anyone who can help us on this?

Mr D'Ascenzo—I do not think anybody here can.

Senator SHERRY—Okay. Of those 27 ATO staff, were any part of Operation Wickenby or the other two operations we were discussing earlier in relation to high wealth at any time?

Mr D'Ascenzo—No. We checked whether or not any of those 27 had access to any of that sort of information, and I am advised that that is not the case.

Senator SHERRY—There are some issues in relation to facilitation payments. Are there any taxpayers currently being investigated for breach of the antibribery provisions of the tax act?

Mr D'Ascenzo—Yes.

Senator SHERRY—The approximate number?

Mr D'Ascenzo—I know there is one.

Senator SHERRY—And the value?

Mr D'Ascenzo—I think that might get too close to the mark.

Senator SHERRY—Might it! I do reflect on the questions. We went for half an hour without actually getting so close on the last occasion.

Senator MURRAY—But last time there were zero. Now there is one.

Senator SHERRY—No, it actually got to the point where the chair intervened when I got to a figure.

Senator MURRAY—I remember it well.

Senator SHERRY—But I did get a fair way before that.

Senator MURRAY—You did.

Senator SHERRY—Does the ATO accept in theory that it is possible for a bribe to be minor in nature but major in value?

Mr D'Ascenzo—I have always interpreted the provisions such that if it is high in value then it would not be minor in nature, but I have been reflecting on the comments you made at Senate estimates and it is certainly feasible that that could be the case.

Senator SHERRY—You mention there is at least one investigation under way. What is your time frame on that before it is referred to the DPP? Or it may not be referred to the DPP.

Mr D'Ascenzo—That is an operational question of how long it takes to get the requisite amount of information. We are conducting investigations and I am hopeful that we will come to some conclusion as soon as possible.

Senator SHERRY—Has the ATO started requiring companies to reveal on their tax returns whether they paid any facilitation payments?

Mr D'Ascenzo—We are in the process of changing the return form to put a box to cover facilitation payments. So we have not done it yet, but that was one of the recommendations and we are currently considering that option and whether or not that is feasible in terms of our systems.

Senator SHERRY—When will that be introduced if it is feasible?

Mr D'Ascenzo—If it was feasible, we would be using it for next year's tax returns.

Senator SHERRY—In considering this change, will the ATO require companies to provide details of who the payment was made to?

Mr D'Ascenzo—I am not sure what the parameters of that change might be. It might be sufficient to say, 'If you had facilitation payments, tick,' or 'Put an amount in.' Then we could follow that up outside the return form process. We have not finalised those details.

Senator SHERRY—In considering this issue, is there a grey area when the ATO has to distinguish between a facilitation payment and a bribe or kickback? It is not an easy issue to describe, I would have thought.

Mr D'Ascenzo—I have been reflecting on our discussions—another indication of a responsive and listening tax administration—

Senator SHERRY—I was just going to comment on the words 'reflecting' and 'responsive'.

Mr D'Ascenzo—That could be run along the lines you suggested, Senator.

Senator SHERRY—When you have finalised the guidelines and determined how this will be dealt with, will that information be published? Will companies be informed as to these provisions, aside from the box, or whatever it is, that is going to appear?

Mr D'Ascenzo—We have developed some guidelines that we have already provided to our auditors. We are working with the Corporate Tax Association to see how we can provide those guidelines to their members and more broadly. They will be on our website. We will make the information open and transparent, and hopefully that will help Australian companies comply. Hopefully, through that discussion, we may think of other ways in which we can monitor this sort of activity in a way that meets the objectives of the law and reduces compliance costs for the taxpayer.

Senator SHERRY—Do you have any idea of when those guidelines will be issued?

Mr D'Ascenzo—I think they are already issued to our auditors. If not, they are in the course of preparation for issue.

Senator SHERRY—If they are issued to the auditors at the present time, will they also be made public?

Mr D'Ascenzo—Yes.

Senator SHERRY—Do you have any indication of when that will be?

Mr D'Ascenzo—If they are already been issued to the auditors, I will make sure they are on the web as soon as possible.

Senator SHERRY—Excellent. Transparency International has raised concerns about the ability of companies to meet ATO requirements to gain a tax deduction for facilitation payments. Are you aware of that concern?

Mr D'Ascenzo—I have not heard of that concern.

Mr Konza—No, neither have I.

Mr D'Ascenzo—Someone else in the organisation might have heard of it, but I have not heard of it.

Senator SHERRY—Could you take that on notice?

Mr D'Ascenzo—Sure.

Senator SHERRY—The Taxation Institute of Australia has criticised the ATO for not providing private sector auditors and tax accountants with information about these requirements. I take it that that will be addressed by the issuance of those guidelines in the not too distant future?

Mr D'Ascenzo—Yes, it would be. I am not aware of that criticism either, but it certainly will be addressed. It was not raised at the last NTLG meeting that I chaired.

Senator SHERRY—Apparently the Taxation Institute has also said that you will be inundated with useless information unless the definition of 'facilitation payment' is clear and is clarified. You are not aware of that concern?

Mr D'Ascenzo—It may well be that they are having discussions with our large business area on this point. That is interesting feedback. As with the Corporate Tax Association, I am hoping to work with the Taxation Institute to have the right level of guidance for people to be able to comply with the law.

Senator SHERRY—This is perhaps another area you could consider: if an Australian citizen pays a facilitation payment for process of passport on entry to a foreign country, would that be classified as a facilitation payment?

Mr D'Ascenzo—I am often asked to give rulings on the run.

Senator SHERRY—I was not asking for a ruling; I was just asking you to consider it as an issue in this context.

Mr D'Ascenzo—I will.

Mr Konza—Section 26.52, which covers this, specifically describes moneys that have to be paid for minor official duties, so section 26.52 would not rule them out.

Senator SHERRY—When we talked about this in May the committee heard that the extent of your audit activity to that point was limited to developing a booklet for large businesses and for auditors if they happened to be auditing a company that did business in a particular listed country where known corrupt payments exist. Given that discussion and your responsiveness earlier, have you had any cause to reflect on that as an approach?

Mr D'Ascenzo—I think it is still a good approach, and I have a copy of the large booklet for you. You will see also in our compliance—

Senator SHERRY—That is okay. I have in my office a pile of about 10 or 12 annual reports, of which yours is the largest, plus all of my other superannuation annual reports, disclosure documents and everything else I am trying to get through at the moment.

Mr D'Ascenzo—I am only trying to assist.

Senator SHERRY—I know; it is okay.

Mr D'Ascenzo—The point I am trying to make is that we have put it in that booklet. We have also put it in our compliance program, which you have a copy of as well. We are working with the Corporate Tax Association on what further guidance we need to provide to companies. We have given guidelines to our auditors. Part of our compliance program will include us checking companies on whether or not they have a system to regulate the way that they deal with these things. It is a fairly comprehensive strategy of which, at this point in time, I am not sure about the extent of the risk.

Senator SHERRY—That leads into my next question. Apparently there was a study released by the Centre for Australian Ethical Research which revealed that in Australia only half of the companies in the ASX 100 have policies prohibiting the giving and receiving of bribes. In Britain the figure is 92 per cent, in Europe the figure is 91 per cent and in the US it is 80 per cent. Are you aware of those statistics from that report?

Mr D'Ascenzo—No, I was not aware of those statistics, but again it reinforces the sort of strategy that we are trying to apply, which is trying to work with businesses to increase a level of self-regulation through providing them with guidance and ensuring that they have governance processes that pick up these sorts of problems. In fact for the large business sector, if you look at our *Large business and tax compliance* booklet, the cornerstone of this is trying to build in good governance processes with the sector so that they can manage their own risks.

Senator SHERRY—I have some questions in respect of the annual report. You should not take it that I have read the annual report with regard to all of the questions I am going to ask. Could you outline the change program identified in the ATO annual report, please?

Mr D'Ascenzo—The change program which started out a couple of years ago was a major \$453 million redesign of our systems which involved three major releases. The centre stone of release 1 was a client relationship management system. Release 2 was a case management and workflow management system and release 3 was the integration of our systems into one ICP, integrated core processing system. Since then we have had super simplifications, so we now have to broaden our change program to include a rebuild of the super system that links into our integrated program. We now have a change program which—

Senator SHERRY—Has changed.

Mr D'Ascenzo—It has changed.

Senator SHERRY—Significantly.

Mr D'Ascenzo—The level of risk has increased and the cost has increased to \$590 million or thereabouts. We are currently in a process of trying to work out what different sequencing we need to do now, given the different requirements.

Senator SHERRY—I note in the 2005 annual report you said that at the ATO: ... we have reached the limit of our ability to implement major new systems, and our wherewithal— Sorry, it would not have been you; it would have been Mr Carmody, presumably.

Mr D'Ascenzo—No, that was me.

Senator SHERRY—As I said, I cannot remember that far back to the 2005 annual report. The report states:

These inherent risks will need to be closely managed and may require different approaches.

What do you have in mind when you say 'different approaches'?

Mr D'Ascenzo—It is really a question of whatever we need to do to deliver a system that works in implementing the government's policy agenda, but also our agenda of trying to improve tax administration, within the confines of value for money to the Commonwealth in terms of our costs and budgets. That can involve a whole range of things. For instance, we have spoken to other departmental secretaries in terms of whether or not there can be some sharing of resources across the Commonwealth rather than someone taking from Peter to pay Paul because there are competing demands for limited skills. There are situations where we have sent some people to an expo in the UK in terms of trying to get some specialised skills, particularly in Seibel. We are looking at other constructive approaches. Do you have any other suggestions?

Mr Farr—Yes. As the commissioner has said, I think one of the things that we are doing quite purposefully is recognising that there is a limit to our capability. We are looking at the way we are scheduling, so that we do not put ourselves at risk on that. As the commissioner also said, we are sharing some resources with a couple of the agencies. We are also sharing some of the products. But I think the main thing we are looking to do there is to realise that it is no longer that we can just add on things. If we have to add something on, it means we have to take something off as well, to keep that balance.

Mr D'Ascenzo—To be quite frank, the successful implementation of our expanded change program, including superannuation, is probably my biggest risk as commissioner, in terms of being the CEO of the organisation, to achieve an outcome. I am really relying on the change program to deliver government policy but also to allow us to lift the bar on what we think is excellence in tax administration.

Senator SHERRY—When you talk about the risk here, you also said, 'They also put a cap over the next two years to do more than is planned without seriously affecting our current commitments.'

Mr D'Ascenzo—Which means that, if there is more to be done, I have to go back to the table and either resequence what has to be done, or something may have to fall off that table.

Senator SHERRY—Given the comment, and given that this was made before, for example, the budget plan on superannuation—which, as you referred to, is a very major change.

Mr D'Ascenzo—I think the report had the superannuation change in mind already.

Senator SHERRY—Sorry? This was last year's annual report.

Mr D'Ascenzo—No, this is this year's annual report: 2005-06.

Senator SHERRY—Okay.

Mr D'Ascenzo—So it had taken that into account. I was aware at the time that I had a very ambitious change program, which initially was budgeted \$453 million over a four-year period. And now I have superannuation, as well as a range of other policy perspectives, and that gives me limited leeway and a job of trying to resequence the current program.

Senator SHERRY—With respect to the superannuation change—I don't want to go there in any great detail—there would be a need for additional staff, wouldn't there? Presumably that is part of the funding.

Mr D'Ascenzo—We do have funding for a super rebuild. That is part of that exercise. The problem is not so often just a funding issue; the question is very much the availability of specialised IT resources.

Senator SHERRY—That was the issue I was going to go to. Is the issue the IT specialists to build the systems?

Mr Farr—It is a combination. It is certainly the people to build the systems or write the code, if you like—business analysts, specialist designers, project managers and database analysts. The whole ambit of things is quite tight.

Senator SHERRY—In the case of the superannuation changes, the people that you are talking about are going to be in big demand by superannuation funds to do the complementary things and other things as a consequence, and at the same time you have to do it.

Mr D'Ascenzo—And at the same time there are other major Commonwealth and private IT projects on the go.

Mr Farr—From our perspective, clearly the implementation of government policy is a priority, so that is where the first resources go. Then essentially we look at what capability we have left to deliver the other things, like improving productivity and improving the experience of the community in dealing with the tax office in other ways. But clearly government policy implementation is the priority for us.

Mr D'Ascenzo—We are in the position where we do not want to let anything go but the risks are very high.

Senator SHERRY—On the risks being very high and having to let something go, you say your wherewithal is stretched. How so—in the areas we have already talked about?

Mr D'Ascenzo—Exactly right.

Senator SHERRY—Also you mention a major review into the ATO's written correspondence. What is that in reference to? Are we not going to get any letters any more from the ATO?

Mr D'Ascenzo—No. This is going to be an ongoing exercise. It will take some time. We have a lot of letters. Some are automatically despatched, some have partial templates and some are manual. But too many of those letters, in my mind, are written in bureaucratic, technical jargon, which makes it not as clear as it could be for taxpayers. That causes confusion for taxpayers but it also causes a lot of reverse workflows while people ring up to ask us what a letter is all about. For example, we sent out some letters with a heading 'Level 6 taxpayers' and then you had the explanation, 'Level 6 taxpayers are taxpayers that have had to pay over \$20,000 tax.' It could have been easier. We could have said, 'If last year you had to pay \$20,000 tax, could you please,' and that is the difference in style.

Senator SHERRY—Was that a standard letter? It was not written by an individual office.

Mr D'Ascenzo—No, it was a hard-wired computer letter.

Senator SHERRY—As a matter of policy, do you consumer test that type of standard letter?

Mr D'Ascenzo—These letters have grown over 40 years of development of a national taxpayer system.

Senator SHERRY—They are still there.

Mr D'Ascenzo—This is one of the problems with trying to make changes to our legacy systems, which have served us and the nation well but which are really hard to deal with in terms of making these simple changes. This is one of the reasons why we need a change program, to improve the taxpayer experience. In terms of the user testing, we have what we call a 'simulation centre' in Brisbane. Greg can say more about it, but it is state of the art. We have two-way mirrors. We bring people in to see how they operate using the system or using a form and then take that—

Senator SHERRY—Sorry; is this your internal operators in the ATO or consumers?

Mr D'Ascenzo—We have both. It is very strong road testing. As an organisation, again, you will see from our strategic statement that we are very keen to build on the concept of user based design.

Senator SHERRY—As a part of this written correspondence examination will you be re-examining written correspondence?

Mr D'Ascenzo—It will be a progressive relook at our letters to see where they are not really needed, where they are causing confusion and where they can be drafted better. But it will be a progressive program. It reflects the responsiveness of the tax office. It reflects some feedback we have from the taxpayers charter survey that we did. One of the concerns from some people was that we could improve the written expression of our letters.

Senator SHERRY—It is difficult sometimes, though. You have the balance between simplicity and the need to inform at a level that is required. That is not easy to achieve, is it?

Mr D'Ascenzo—No, it is not, but I also think the style could be more personalised—more empathetic to the way people think, talk and behave.

Senator SHERRY—Does that mean you are going to sign every one?

Mr D'Ascenzo—I currently sign all our certificates of appreciation on separation within the tax office and I am already getting arthritis, so I think I will have to have that system based.

Senator SHERRY—How long do you believe this review will run?

Mr D'Ascenzo—I think it is a progressive review. We have started to schedule that work. We are already making some changes to the literacy part of our change program. I think we will continue to build it in a number of iterations. So I am not proposing to give it a closure date other than to say that we will do what we need to do first and foremost in the current change program and then we will go and have another look at it.

Senator SHERRY—Net tax collected increased to \$232.6 billion, a rise of 8.3 per cent on the previous year. What do you attribute this to?

Mr D'Ascenzo—I think the economic conditions of Australia would be the main factor.

Senator SHERRY—There was no factor in terms of identification of the ATO's particular—

Mr D'Ascenzo—I think the fact that our collections were above budget and MYEFO estimates is a positive indicator of our effectiveness, but I still think that the major increase in tax was due to the economic conditions.

Senator SHERRY—I had a series of questions about your comments on dated and disparate systems, but we have already covered that in earlier comments. On page 44 the issue of ATO staff accountability is highlighted as a concern, along with how they deal with complex queries. How do you intend to deal with that issue?

Mr D'Ascenzo—This was part of our charter research which I mentioned beforehand. There was a significant response that we could be more accountable. I found that a little hard to understand, because we are a very accountable organisation, not only to parliament, external scrutineers and the media but in our own reporting—as you can see from the thickness of our annual report. We asked for more research in that area.

When people talked about accountability, it was the process of trying to resolve issues—to reduce the amount of, 'Well, this is the information I can give you but I am not able to take the extra step of resolving your particular issue.' Part of the change program will drive a level of what we call 'enterprise-wide approaches', which will mean that we do not have the pass-over we currently have under our disparate systems. This is why I have been saying that our change program is quite fundamental in enabling us to do things differently from the way we do them now. That answered your first question. What was the other thing you mentioned?

Senator SHERRY—Dealing with complex queries.

Mr D'Ascenzo—We have some three million telephone calls from tax agents annually, as well as the portal. Quite a percentage of them relate to information agents could obtain from the portal, but they instead use the quick priority telephone service that we provide. What I

am trying to do is help tax agents use the portal so that they do not come into our organisation for the more simple queries.

Then at the other end of the scale they are saying that our call centres are very capable but the level of scripting that we have for them covers the common question. For tax agents that are looking for some further dialogue on technical matters, they find that a call centre approach may not be advantageous to them as some more personalised service. We are codesigning, with the advice working group of the ATO Tax Practitioner Forum, better processes that can help them address what they see as a current perceived weakness in our processes.

Senator SHERRY—You referred to the research in this area. Did you actually have an outside consultant examine issues relating to ATO staff, either in this area of accountability or any other area?

Mr D'Ascenzo—All that research is done through external research firms.

Senator SHERRY—I note that the ATO recorded a 12 per cent increase in complaints and problems with phone services. What were those problems relating to?

Mr D'Ascenzo—What I understand to be the case is that it was not necessarily a single matter but a range of issues including our platform and some power outages.

Ms Crawford—Generally I think that the call centre services throughout the year were performing fairly well. Towards the end of the year we did suffer some difficulties, both with our systems and our level of staffing, as the number of calls started to increase. I think that is probably what generated some of the complaints.

Senator SHERRY—What were the major factors contributing to the 12 per cent increase in complaints?

Ms Crawford—I do not have that breakdown with me today. I would have to take that on notice.

Mr D'Ascenzo—We have recently done three things in our client contact centre approach. We have amalgamated the different call centres within our internal divisions to allow a much more purpose-built management of our client contact centres. We have recently engaged a new person to head our client contact centres and we have had a review done by an external consultant about ways in which we can improve. While we perform very well—in fact, two of our client contact centres won state awards in their category for best call centres, competing both in the public and private sector, and one of our coaches won coach of the year—there is no complacency and we think that there is more work that can be done to improve our operations in that regard.

Senator SHERRY—To sum up, do you believe that the problems that led to the 12 per cent increase in complaints have been resolved?

Mr D'Ascenzo—Ms Crawford could not give you the details but my memory does suggest that we did suffer some power outages.

Senator SHERRY—Power outages?

Mr D'Ascenzo—The electricity did not work.

Senator SHERRY—I understand that.

Mr D'Ascenzo—What I am saying is that some of these were outside of our control. That is the short answer. But, having said that, our client contact centres performed very well this year and their level of resourcing, given the amount of information that they were asked to provide to taxpayers, it has been remarkable. We underestimated the amount of calls that we would get and so they have been asked to really perform over and above what could otherwise be expected. I think they have done a fantastic job. Part of my role as a CEO of the organisation is to see whether or not we can better estimate call usage and find some efficiencies along the way.

Senator SHERRY—I note that the delays in tax returns and GST refunds made up 18 per cent of complaints. What were the reasons for the delay in this area?

Mr D'Ascenzo—This is one of those years when we have had a number of reviews by a number of external scrutineers, and this is how tight we do the checking before we release high-risk refunds. It is one of those ones which are very hard to calibrate. In fact, even those reviews are not unanimous or not consistent in terms of the recommendations. On one side, people legitimately say 'We have got to be able to ensure that refunds get out to businesses early because they need the refund; that is cash flow to carry on their businesses.' On the other side, we would be criticised if we were to release large amounts of GST without checking. That is seen to be risky.

Senator SHERRY—So as an unfortunate consequence of attempting to contain risk there would be some people in that category who are not a risk but who are caught within that new approach.

Mr D'Ascenzo—That is right. Margaret might have some figures for the aggregate ones, but I am sure that within that approach there would be some in that category. We keep on trying to refine it, and I think as we build up our risk engines we can continue to make that better and better.

Senator SHERRY—Do you have some figures?

Ms Crawford—Yes. During 2005-06 the tax office received 12.8 million activity statements and issued 1.9 million refunds worth \$29 billion. High-risk refunds made up four per cent, which is approximately 76,000 of the total refunds, and accounted for \$12.7 billion of the total value of refunds. However, overall 92.2 per cent of activity statement refunds were issued within 14 days. That is the broad context.

Senator SHERRY—You say 'within 14 days'; is that the average length of time?

Ms Crawford—I think the average is a bit shorter than that. That is the service standard that we target meeting.

Mr Farr—I might just add that, as the commissioner said, we are improving the risk models that we apply to these refunds and getting progressively quicker. Of those people who lodge their activity statements through the business portal, for example, in 95 per cent of the cases the processing is done on the screen in front of them in real time and they get a note saying the money has been paid into their bank account, obviously subject to the normal banking clearances. That is the direction we want to be able move in in the majority of cases.

Senator SHERRY—So it is effectively almost instantaneous?

Mr Farr—It is instantaneous.

Mr D'Ascenzo—There will still be some that will fall within our risk profile, and I cannot guarantee that all of them are risky. But we are trying to minimise that and balance that with protection of the community's revenue.

Senator SHERRY—Are figures available for the current debt owed to the ATO relating to small business and microbusiness, as you define them?

Mr D'Ascenzo—They are in the report.

Senator SHERRY—Oh, the annual report. Sorry, I have not read it yet. Do you know what page that is on?

Mr D'Ascenzo—While they are looking for that, I have here a presentation that was given to the ATO exec, so it is not done for this committee. It is on August 2006 about our debt strategies. I noticed last night that you were making some comments about our debt strategies, and I am happy to be open and transparent about what we are doing in this area if that is of interest to you. One of the things I would like to bring to your attention is the emphasis on trying to see how we can better differentiate and take into account circumstances of taxpayers.

Mr Farr—It is page 103, Senator.

Ms Crawford—They are the total numbers. They are not specific to small business. But I do have the small business figures if you would like them precisely.

Senator SHERRY—I would, thank you.

Ms Crawford—Under the definition of small business, we have combined both micro and small to medium. The total number of cases was 914,470,000, the value was \$8.105 billion.

Senator SHERRY—That is the combined small business and micro?

Ms Crawford—Correct. I can break that down if you—

Senator SHERRY—Do you have that there?

Ms Crawford—Yes, so micro was \$6.836 billion and small to medium was \$1.269 billion.

Senator SHERRY—Do you know the approximate proportion of that debt that relates to GST debt in those categories.

Mr Farr—It is very difficult to get a GST figure because it is actually what we call a running balance account which combines a whole range of things, so to get a specific GST debt figure is actually quite difficult.

Mr D'Ascenzo—But we have made some assumptions and we can provide you with our estimate.

Senator SHERRY—On the basis of your assumptions.

Ms Crawford—Again, I do not think I have got it specifically for small market, I have the estimated proportion related to—apologies, I might just have to find the exact number, I have it here somewhere.

Senator SHERRY—Okay. In respect to GST rulings, I have a couple of questions. The ATO has issued a number of GST related tax rulings in relation to property transactions, financial transactions and cross-border transactions, has there been a business response or a response received from the business community in respect to these rulings?

Mr D'Ascenzo—Just to put the context in, with the introduction of the New Tax System there were calls from the business community for a range of what we call framework public rulings to explain in more detail the requirements of the law, or at least how we saw the law operating. We have issued those. Since then, as part of our public rulings program, we have been developing public rulings on issues that businesses, through their community business representative bodies have seen as the most important for them, and these rulings that we have issued are part of that program.

Senator SHERRY—What is the reaction from the business community?

Mr Jackson—We obviously consult with the business community extensively prior to the release of rulings and in general their concerns and observations are taken into account in the construction and final shape of the ruling. Of course, the final outcome, in terms of the interpretation of the law, might not always meet the preferences of stakeholders.

Senator SHERRY—I understand that.

Mr Jackson—You do get a varying result. I guess one of the issues that we have faced around rulings is making sure that affected stakeholders are more proactively guided through the process a little, and we do have a number of industry forums and liaison groups as well as the formal rulings panel process. We did make a practice of writing to the affected stakeholders, but we have found on occasion that that does not necessarily elicit a response until the final issue of the ruling perhaps, and then consequences can occur to individual businesses and sometimes associations, and they sometimes do respond after the event. We are moving now in the development of the ruling to be more proactive and approach those industry groups that we think may have a particular interest or concern with the ruling and be very assertive and clear with them about what we think those consequences are.

Senator SHERRY—You would perhaps send out some information to them requesting a response, if they do not respond or have not responded in the past, it may then be followed up by a phone call or specific visit, 'We want to sit down with you and discuss this.' Would that focus their attention?

Mr Jackson—It could. I should hasten to add, I have gone very quickly over that. The vast bulk of rulings and consultation occurs quite satisfactorily, but we do get occasions, and it is obviously those occasions that gain some notoriety either in the press or through other media commentary.

Mr D'Ascenzo—When people ask, 'Is there a reaction?' I have to say, 'It depends on who you talk to.' In the GST area there is often someone who has to pay GST and someone who gets input tax credits from that process. So often the views are not unanimous about what the right interpretation of the law is.

Senator SHERRY—In respect of , say, property transactions, are there still issues of contention between the stakeholders—

Mr Jackson—I understand there are still areas of contention around property transactions, yes.

Senator SHERRY—Such as?

Mr Jackson—The status of residency—what is residential property. There are a number of issues related to that general area.

Mr D'Ascenzo—We have some schemes rulings that cover what we think are schemes in GST in the property area as well.

Senator SHERRY—In that area, for example, who would be the stakeholders?

Mr Jackson—The Property Council and organisations that represent strata title unit owners. Sometimes holiday unit providers and sometimes hotels that are renting units and holding them as a hotel are stakeholders. There are a number of different groups that could be affected.

Mr D'Ascenzo—And the professional bodies, who have advisers on many of these matters

Senator SHERRY—In respect of financial transactions what are the issues of ongoing contention?

Mr Jackson—There are, of course, some in that area as well, things like apportionment of overheads and expenses. what the GST treatment is and whether it relates to a proportion of the expenses. In a financial transaction there may be a loan so one issue might be whether the GST apportionment is related to the total value of the loan or to the interest on the loan and how that might be divided. Those sorts of things remain under some scrutiny and discussion.

Senator SHERRY—What about the issues with cross-border transactions?

Mr Jackson—There is less contention there that I am aware of. There have been some endeavours to move the point of sale of products across borders and to move the point of lease to manage GST outcomes. We watch those things closely. I do not think that is so much an area of contention in terms of the interpretation of the law. It is more a case of the construction of the facts of a case to try to take advantage of the law.

Mr D'Ascenzo—Our program is on our website. We have asked the National Tax Liaison Group to help us monitor the program to ensure that it has the high priority issues that are needed in the marketplace so that there is reasonable progress in terms of trying to get them resolved.

Senator SHERRY—Do you have data on the length of time taken to conduct GST audits?

Mr Jackson—I do have some information I can give you on that. It does vary, of course. We have all sorts of different audit products ranging from a simple walk-in where we check whether a business is registered for GST. The CVC checks you were talking about earlier are the checks for high-risk refund payments. In large corporate there may be an issue or two that can take quite some time and be quite sophisticated, so at the larger end of the market our normal audit product has a benchmark time of 260 days. I understand that about 80 to 82 per cent of cases are resolved within the 260 days. Where cases are not resolved within that time frame, they are referred to a case leadership group, which is a group of senior officers that assist the auditor and the audit team leader concerned with information—whether it be that

there is a technical issue which is difficult to resolve, a procedural matter that needs to be resolved or whatever else it might be to facilitate the urgent actioning of the case.

At the very small end we have the high-risk refund checks. We undertake to contact any taxpayer affected by those within 48 hours. We virtually contact 100 per cent of people within 48 hours. We then endeavour to finalise the matter, as Ms Crawford mentioned a moment ago, within 14 days. A very high percentage, in excess of 90 per cent I think, are finalised within 14 days. For the micromarket we have the single issue audit. That is increasingly an area of focus for us. We identify a particular problem and we go in and deal with that. Our benchmark for those is 90 days.

Senator SHERRY—Is the benchmark being met?

Mr Jackson—The benchmark is generally met but not always. I do not have a percentage of the ones that are met within that benchmark with me at the moment. I would have to have a look at that.

Senator SHERRY—Could you take that on notice.

Mr Jackson—I will do that.

Senator SHERRY—How does this compare historically to previous years?

Mr Jackson—I am sorry. I do not have a time sequence here. I can have a look for you if that would be helpful.

Senator SHERRY—Could you could take that on notice.

Mr Jackson—I will do that.

Mr D'Ascenzo—Going forward, we talked about the change program and Release 2 of our case management capability, which is a generic case management system across the organisation. Inbuilt into that case management system is a range of project management requirements which will enable the case manager to apply a level of rigour to the way they manage their case and also provide, in terms of a management overview of the cases, a lot more information and transparency about stocks and flows.

Senator SHERRY—Do you have that figure that we were talking about earlier?

Mr Jackson—The debt?

Senator SHERRY—Yes.

Ms Crawford—I am sorry; I do not have it broken down by market segment. I have the overall estimation. Of \$5.94 billion in activity statement debt, we estimate that GST accounts for \$2.32 billion, or 39 per cent.

Senator SHERRY—I think you will need to take this on notice. What is the non GST debt—the principle components of that—in respect of the small business category?

Ms Crawford—The other components on the activity statement are PAYGW and PAYGITI et cetera, but I do not have it broken down.

Senator SHERRY—Could you could take that on notice.

Ms Crawford—It will have to be an estimation because—

Senator SHERRY—Yes. When I ask for figures, I think I have said on previous occasions, I am reasonable about estimates and not holding people to the nearest dollar.

Ms Crawford—This is a more difficult problem in the sense that the running balance account does not actually enable us to—

Senator SHERRY—Make your best efforts. That is all I can ask for. What is the number of bankruptcy actions that the ATO has brought against small business in relation to tax debt—

Mr D'Ascenzo—Excuse me—my estimate is that pay-as-you-go-withholding accounts for 31 per cent and pay-as-you-go-with-instalment accounts for 24 per cent of activity statement debt.

Senator SHERRY—Thank you for that. What is the number of bankruptcy actions in the last financial year?

Ms Crawford—There were 3,776 bankruptcy notices issued. Again, that is not necessarily in a particular segment; it is just overall.

Senator SHERRY—It is overall?

Ms Crawford—Yes.

Senator SHERRY—Could you take on notice the segment breakdown. How does that 3,776 compare to the previous couple of years?

Ms Crawford—It is up on 2004-05. In that financial year there were 1,926. The reason for that is it is really the tail end of the small business assistance initiative. We are really getting to the end of that, where we are getting to, I guess, the serious end.

Senator SHERRY—That is a pretty big jump from the previous year, is it not?

Ms Crawford—It is.

Senator SHERRY—It is almost a doubling—not quite.

Mr D'Ascenzo—When you think about the initiative for 2004, we have been trying to work with those taxpayers for two years to try to get them on to some sort of reasonable payment arrangement. In that context, we have some research done by KPMG, which we have done on a regular basis, that talks—in respect of questions that were discussed yesterday evening—about how fair the ATO is in trying to get people over the line. I have a copy of the independent reports here. They are on our website, by the way.

Senator SHERRY—They are on the website, are they?

Mr D'Ascenzo—Yes, but I will give you that one just to give you a flavour of it. We do them not just once but on a regular basis. We have been doing them since 1 June 2004, and in none of those have they indicated that we have been anything other than very reasonable. I think in the last one there was one case where we could have done it a bit quicker, but that was about the outcome.

The conclusion has always been that the tax office have given people many chances and opportunities to pay their debt in a reasonable way and that we have not been heavy-handed or overly quick in seeking to liquidate. Having said that, we are conscious that where there are

persistent debtors who continue to trade, without paying their tax debt, they get a competitive advantage over their competitors, and therefore it behoves us to try to ensure that we do not delay in our actions once we get to that point.

Senator SHERRY—There are a couple of issues around 457 visa holders. Are you aware that DIMA has made a submission to Treasury to be able to access ATO income tax data to assist with compliance checks in relation to 457 visa holders?

Mr D'Ascenzo—I know what the visas are, but I do not know about DIMA and Treasury.

Senator SHERRY—Have they made you aware they want to access your ATO income tax data?

Mr D'Ascenzo—I am not aware of that, Senator. They may have.

Senator SHERRY—That is, not you personally but any officers. You are not aware of that?

Mr Konza—No.

Senator SHERRY—Please could we have, on notice, the data being sought and what would be proposed for DIMA to apply protections to data and the required standards of secrecy—particularly given DIMA's record in recent times. The sorts of questions I have just referred to would be the types of issues you would be raising in such a request?

Mr D'Ascenzo—I think it is our role to put in the administrative perspective to any legislative change.

Senator SHERRY—Yes, but also there are issues of confidentiality and secrecy, aren't there?

Mr D'Ascenzo—I am comfortable with that.

Senator SHERRY—Has the ATO given consideration to the issues of tax exempt status for the James Hardie compensation fund?

Mr D'Ascenzo—There are many things in the media, and I am not able to talk to you other than what is in that media. I think that the Prime Minister referred to that issue in a statement given to ABC radio 666 Canberra's *AM* program on 14 July. The Prime Minister said:

There's no argument that the contributions made by the company to the fund, to compensate the victims, that those contributions will be tax deductible. Now, as it is currently constituted, and I stress that, as it is currently constituted, it does not, by any stretch of the imagination, meet the definition of a charity.

For example, under its rules as I understand it, if there's any money left over at the end of the compensation period, that money is returned to the company and not distributed to the beneficiaries.

Now, anybody who understands the tax law applicable to charities would know that that of itself disqualifies it for classification as a charity.

Senator SHERRY—Had there been contact with the Treasurer's office, the Assistant Treasurer or staff in relation to this matter?

Mr D'Ascenzo—We are subject to secrecy provisions in all of those respects. Undoubtedly, the company has raised issues and may have raised it with the ministers. I am

not sure of the extent to which that has occurred. We have talked in terms of general progress in how we deal with these sorts of issues, but, at the end of the day, at the administrative side we are dealing with the taxpayer and the taxpayer has to give us the authority to say anything to anybody.

Senator SHERRY—You referred earlier to the Ombudsman's report. I should have raised at that time the issue of complaints to the Ombudsman. The Commonwealth Ombudsman referred 209 complaints to the ATO requesting specific information. How does that compare with previous years?

Mr D'Ascenzo—I have here the Australian Taxation Office complaint trends for 2001-02 to 2005-06. This is in figure 7.3 at page 61 of the Commonwealth Ombudsman's annual report 2005-2006. This was the lowest year for complaints. The Ombudsman says:

There has been a steady decline in the number of tax complaints over the last few years. We have previously attributed this to the bedding down of the new tax system and the resolution of many of the mass-marketed scheme issues that dogged the ATO in the late 1990s and early 2000s. This year, we believe the continuing decline in the number of tax complaints is due to improvements in ATO administration, and particularly to the increasing effectiveness of the ATO's internal complaints process.

Senator SHERRY—Do we have an indication of the number of administrative errors that were found by the Ombudsman?

Mr D'Ascenzo—We have it at page 218 of my report. It says:

While the Ombudsman dealt with the majority of these complaints without referring them to us, he did forward 209 investigations to the Tax Office requesting specific information and actions. From these investigations, the Ombudsman made a finding of administrative deficiency in 15 cases.

Senator SHERRY—The chart on that page shows two superannuation issues actually dominating the numbers.

Mr D'Ascenzo—That is right.

Senator SHERRY—On the super guarantee specifically, would that be a combination of not having the guarantee being paid and/or the inability of the tax office to be able to respond to specific inquiries about actions?

Mr D'Ascenzo—I do not know the details, but my gut reaction would be very much along the lines that you suggest.

Senator SHERRY—In respect of the superannuation surcharge, what would the nature of the complaints be there?

Mr Farr—That I think was as a result of the systems difficulties we had.

Senator SHERRY—The surcharge has been abolished, but the debt that has accrued in respect to DB funds is still accruing.

Mr Farr—Yes, that is right.

Senator SHERRY—When you talk about the systems, does that relate to the hold-up in the issuing of those ongoing debt notifications?

Mr Farr—Yes.

Senator SHERRY—Has that issue now been resolved, by the way?

Mr Farr—Yes, it has.

Senator SHERRY—I got mine—I know that. I think you were here last night when we had a discussion with Mr Ray about the issues around tobacco and excise. Frankly, I thought we got an informed response to the issues I raised. From an ATO point of view is there anything you could add to this area of identification? There was a reasonable discussion about the reasoning and the changes that led to the Audit Office identifying severe issues and problems. Is there anything you could add to the discussion we had last night in this area?

Mr D'Ascenzo—One is that I think Mr Ray referred to the vote by the Victorian growers to take the package, and that was successful. That therefore phases out tobacco growing in that area, because the risks from illicit tobacco were rated by us as high.

Senator SHERRY—Effectively, by production declining in Australia, the risk goes down because we are not producing anymore.

Mr D'Ascenzo—Very significantly—it reduces it. It shifts the risk to importation.

Senator SHERRY—Yes, but presumably there is less risk from imported tobacco as distinct from home-grown in this area of excise collection.

Mr D'Ascenzo—It was a very expensive and difficult exercise to monitor tobacco farms and the ability for it to be siphoned to illegal activities. What we have seen over the years has been an increase in what we think has been crime in those areas. We saw examples of farms being bought up by particular people. We saw yields reduce. So it is a very high-risk exercise.

Senator SHERRY—Stated yields reducing which may not in fact have reduced?

Mr D'Ascenzo—That is right. We moved to things like aerial surveillance and a whole range of other law enforcement activities in that area.

Senator SHERRY—It seems to me not incomparable with surveillance activities for poppy production, but that is confined to Tasmania. It is not a revenue issue but it is a surveillance safety issue. Maybe we should grow tobacco in Tasmania, but I am not sure it can grow there, actually. That might help.

Mr D'Ascenzo—I thought they did have quite a lot of tobacco in the past.

Senator MURRAY—If the climate gets hotter they will be able to grow it.

Senator SHERRY—Hotter and drier.

Mr D'Ascenzo—It was interesting that in 2005-06 we seized 18,000 kilos of cut and leaf tobacco, nine motor vehicles and 22 tobacco cutting machines. Court outcomes resulted in \$1.25 million imposed by way of fines, and reparation was \$156 million. We were very active in that area, but it is a very difficult, resource-intensive exercise.

Senator SHERRY—Yes. It reminds me a bit of trying to oversee abalone. I know it is an unrelated product but there are similar issues. Enforcement in that area is particularly difficult.

Proceedings suspended from 6.30 pm to 8.02 pm

Senator SHERRY—I note in this annual report for the first time, as I understand it, the ATO's settlement register was published. In the previous round the ATO said one case was settled by the tax commissioner. Was that yourself or was it your predecessor Mr Carmody?

Mr D'Ascenzo—My predecessor.

Senator SHERRY—Was this the Gerard Industries matter?

Mr D'Ascenzo—I cannot comment on individual cases.

Senator SHERRY—Can you comment on the amount of settlement?

Mr D'Ascenzo—I do not know any of the details of that and I do not think I have anybody here that does. Let me looking at my briefing. I do not recall it being there, but if it is I will pass it on to you. No, I do not have any details of that matter.

Senator SHERRY—At the previous estimates rounds, the ATO said there were six company cases settled between 2004 and 2006, totalling in excess of \$1 billion, which is obviously a very substantial sum of money. In respect of the settlements involving these cases, is there any oversight as to the transparency settlement procedure?

Mr D'Ascenzo—We have a code of settlement practice that people have to follow. That involves, particularly for cases of this magnitude, a range of different officers from different parts of the organisation, for instance, who would typically have a case manager from large business. We would probably have someone from the Tax Council Network, which is a separate division in the organisation, we may have someone from our legal practice, and we invariably have external counsel. They have to agree to the settlement parameters in accordance with our code of settlement practice. That then has to be documented and put on our register, and it is then subject to QA.

I think in our answers we advised that the majority, if not all, of them were QA'd. The quality assurance process involves external representatives. Those settlements are then available on the register for external scrutineers such as the ANAO, although I do not think they looked at our recent settlement register.

Senator SHERRY—Is the ANAO the only body that has authority to carry out external examinations?

Mr D'Ascenzo—I think it fits neatly in the ANAO arrangements. The inspector-general is intended to look at systemic issues rather than individual cases.

Senator SHERRY—Yes.

Mr D'Ascenzo—The Ombudsman could not have an own motion.

Senator SHERRY—Does the Ombudsman have power to do that?

Mr D'Ascenzo—The Ombudsman has an own motion to look at both systemic issues and individual cases.

Senator SHERRY—I was not suggesting Mr Vos. I was not exploring that option. Can you recall the last time the Audit Office examined this area?

Mr D'Ascenzo—No, I do not have a recollection of that. In fact, I do not think the Audit Office has examined this recently.

Senator SHERRY—No, I note your earlier comments. If the Audit Office were to examine this area, there is no limit on their access to material within the tax office?

Mr D'Ascenzo—That is right.

Senator SHERRY—Would there be a limit on their ability to publish details of their examination?

Mr D'Ascenzo—I am not sure about the Auditor-General's powers. He probably could publish it in his annual report, but he might not be inclined to do so. Twenty-odd years ago we had a review by the ANAO, where they looked at some cases and said that we could document those cases at that time. When they were looking at cases such as that, they found that it was very hard for them to look at the merits of a matter as distinct from the process that had been taking place. So their main review has been from a minutes review.

You might remember there was also a case, which was not a settlement, where the parliamentary committee—and I cannot remember which committee it was—sought access to information in relation to the case where we considered that the law did not apply to the taxpayer.

Senator SHERRY—I do recall that.

Mr D'Ascenzo—So it is under scrutiny in that area.

Senator SHERRY—I referred early to the response in BET155 on the settlements for high-wealth individuals. Is the detail that was provided to me in that answer contained in the annual report in aggregate figures?

Mr D'Ascenzo—I do not recall. We will check that.

Senator SHERRY—In respect of the settlements of high-wealth individuals in the aggregate, are you able to inform the committee as to the reduced penalties and interest that may have flowed as a result of the settlements?

Mr D'Ascenzo—I am not sure what records are kept in that sense. I can take that on notice.

Senator SHERRY—If anyone can find it before 8.30, I would appreciate it, otherwise you can take that on notice.

Mr D'Ascenzo—One of the problems with that side of it is that you only have penalty and interest posted after the assessment period, and some of these are done prior to assessment. In other words, as we go through an audit process, we then talk about the application of what the likely event might be. So sometimes it is hard to determine what the penalty might have been but for the settlement.

Senator SHERRY—Yes—so where it can be identified. In relation to consultant and advertising costs, DBM Consultants undertook six projects with a combined worth of \$725,000. From the statements in appendix 10, it is not totally clear to me what they were doing.

Mr Konza—While we are looking at that, can I confirm that the 35 settlement agreements referred to in BET155 would be included in the table which appears on page 171 of the annual report.

Senator SHERRY—Included in those aggregate numbers?

Mr Konza—Yes. The table that appears on page 171 shows the settlements registered this year. Settlements under the code the commissioner referred to before are required to be registered, so they would be included in those, I think, 211 non-scheme settlements referred to in table 3.50.

Mr D'Ascenzo—In relation to the other question, I have nothing other than what is in the annual report. It comes from our ATO relations area and I will have to take that on notice and provide more detail about what services they provided.

Senator SHERRY—If you could. In one case there it has 'Undertake evaluation research for the super choice campaign', \$319,000. Would that have included some sort of focus group analysis? Do you know?

Mr D'Ascenzo—No, I do not, but I can get specific details of what they did and make that available.

Senator SHERRY—In the response to the questions on notice, could you perhaps indicate in that case and also in the 'Conduct proper testing for the super choice campaign' whether there were any focus group research documents that were produced.

Mr D'Ascenzo—Yes.

Senator SHERRY—The small business debt assistance initiative: could I have an update on where that is currently placed? It was introduced in 2004-05 and was to clear debt under \$25,000. It says:

... we made it clear that firm action would follow for those who failed to take up the opportunity ...
What is happening in this area?

Mr D'Ascenzo—One side of it was the increase in liquidation and bankruptcy.

Senator SHERRY—Yes, we talked about that earlier.

Ms Crawford—There is a report about the SBDAl's current status in the annual report. That project, as you know, commenced back in June 2004. Since that time, around 100,000 payment arrangements have been entered into. More than 128,000 taxpayers have paid in full. Payments totalling approximately \$864 million have been made. That is on the one hand. The follow-on from that is that nearly 27,000 summonses have issued and some 7,800 garnishee notices. 1,760 taxpayers have been prosecuted for nonlodgement and overall there have been about another 100,000 non-responder cases. What we are doing now, as that project has flowed through to that firmer action stage, is building the continuing action against those people into our 'business as usual' activities. Picking up on the nonresponders, that is where we have targeted the pilot projects that we have talked about here previously.

Mr D'Ascenzo—The Ombudsman did look at our debt collection practices and has reported on that in his annual report. He makes the point:

In general, the ATO encourages voluntary compliance. It will help taxpayers who find it difficult to meet their obligations by allowing flexible payment arrangements. Increasing or persistent noncompliance is likely to attract progressive, more severe sanctions.

In relation to the garnishee action:

The ATO had acted reasonably in taking garnishee action. We found that it took such action generally only after other attempts to recover the debt had been unsuccessful, which was in line with the ATO's advice to us and its policy guidelines.

Senator SHERRY—In terms of the level of success, I suppose 100,000 settling is a substantial figure but 100,000 not responding is also a substantial figure. It seems to polarise pretty sharply. How would you describe the success of the initiative?

Ms Crawford—This is just an opinion. It has been a successful initiative. It has enabled us to make new contact with taxpayers who had failed to meet their obligations. Not everyone responded but that has again been able to give us a group of taxpayers to continue to try to engage with through the other forms of initiatives that we are taking. We have selected cases from that group to pursue through alternative arrangements as per the pilot projects that we have discussed here previously: the after-hours pilot referral of debt and the dialler project.

Senator SHERRY—With the 100,000 where settlement was achieved under favourable terms, what sorts of terms are we talking about?

Ms Crawford—Concessional interest rates—I have forgotten the precise amount of reduction on the interest rates—provided the taxpayer paid through a bank debit arrangement. I cannot remember the amount.

Mr Farr—My recollection—we can check this, Senator; it is so long ago—is that we brought it down to the cost of money forgone if the taxpayer involved was prepared to enter into a direct debit arrangement and stuck to their payment arrangement. As Ms Crawford said, the real intention in that program was to bring people back into the system. Some people had actually got behind in the introduction of GST: they got their pricing wrong and a few things like that. This was to get them re-engaged and ongoing compliant and to allow us to target those people who are making a choice not to pay or, conversely, simply do not have a viable business. But it allowed us to make that differentiation.

Senator MURRAY—How did you calculate the cost of money forgone?

Mr Farr—My recollection was that it is the 90-day bill rate.

Senator MURRAY—That would seem reasonable.

Mr Farr—I would need to go back and check that.

Senator SHERRY—Effectively, no penalty provision on top? The 90-day bill rate is the straight cost of money forgone?

Mr Farr—That was my recollection, yes.

Senator SHERRY—What range of sums are we looking at in this settlement area, in the 100,000? Are we talking a few hundred, a few thousand, tens of thousands in some cases?

Ms Crawford—The target population for that initiative was debt under \$25,000.

Senator SHERRY—Under \$25,000?

Ms Crawford—Yes. A number of the taxpayers in that group would have in fact ended up going above that level over time as more debt accrued.

Senator SHERRY—The 100,000 that there was no response from, what are some of the identifiable factors there?

Ms Crawford—I do not know that I have a precise answer to that. Certainly in the follow-up work that we have done, we have been able to make further contact with those taxpayers through initiatives like calling after hours when perhaps they are freer and more able to respond to our inquiry. The referral program focused primarily on small debt—under \$7,500. Again, that would have picked up some of those taxpayers. It is really about us trying different ways to re-contact people. We have also tried to find out more accurately people's addresses, telephone numbers, those sorts of things. Over the last 12 months, we have put a lot of effort into trying to engage people as early as possible. All of those strategies are showing some promising signs.

Senator SHERRY—Were a significant number of those 100,000 nonresponses simply not able to be contacted?

Ms Crawford—The strategy under the SBDAl project was to write to those people and to make the concessional offer. Basically, they were asked to contact us and 100,000 failed to do so.

Mr D'Ascenzo—Those people would have received a range of late payment notices prior to that.

Senator SHERRY—Yes, I understand that. Perhaps you could take on notice for me the approximate number who could be contacted and whether it was by phone or face to face. The three debt collection programs that were trialled during 2006, have those trials been completed?

Ms Crawford—Two of them have been completed; one is ongoing. Of the two that have been completed, the after-hours telephone calls project was run between January 2006 and March 2006, and the referral project, which was referring small levels of debt to Dun and Bradstreet, commenced in April and concluded on 30 June. Our last pilot project was to test dialler technology. That commenced in May. It is only a small project but it is proving to be quite successful and we are still continuing with that one at the moment.

Senator SHERRY—Going to the after-hours project, what is the assessment of that project?

Ms Crawford—We think that it was fairly successful in terms of sending a real message to the community that the tax office was serious and was looking at different ways to re-engage with those taxpayers who had failed to contact us. In monetary terms, we managed to negotiate something like 2,000 promises to pay for a value of \$52 million. That is reasonably good. For me, the better outcome was really just the message that that sent to the community.

Senator SHERRY—On the promises to pay, have you been able to identify what proportion of the \$52 million has actually been received?

Ms Crawford—I do not have that information in front of me. I think we would be able to get that, though.

Senator SHERRY—Thank you.

Mr D'Ascenzo—Many of those are promises to pay by instalments.

Senator SHERRY—Yes, I accept that.

Ms Crawford—Yes, over time.

Mr D'Ascenzo—We had 10 complaints.

Senator SHERRY—This is the after-hours phone?

Mr D'Ascenzo—This was for 5,000 taxpayers. We had 10 complaints and we had many more people saying that it was a more convenient time for them to discuss their affairs.

Senator SHERRY—In terms of the 10 complaints, were they complaints received when people rang or did they formally complain?

Mr D'Ascenzo—They fell into two main categories: one was the time of the call and the other was the existence of the debt—‘I didn't think I owed anything.’

Senator SHERRY—That was not my question. The 10 complaints that you said you received, were they received over the phone when the call was made?

Mr D'Ascenzo—Yes.

Senator SHERRY—Or were they received later?

Mr D'Ascenzo—I understand that they were over the phone.

Ms Crawford—Senator, I think there was a mix. Some expressed concern at the time and in other cases this was followed up with a call or a letter.

Senator SHERRY—The Dun and Bradstreet referral finished on 30 June. What has been the outcome of that?

Ms Crawford—We thought this was a pretty successful project. The key to remember here is that we are talking about quite low sums of debt—under \$7,500. We referred 11,100 cases for collection, with a total value of about \$60 million. Dun and Bradstreet made some 38,000 contacts—a mixture of letters and phone calls—resulting in collections of around \$21 million. That is basically the outcome in monetary terms. In the case of this pilot, there were 36 complaints received and that was mainly seeking clarification of whether it was appropriate for us to be referring debt to an outside agency; concerns regarding privacy et cetera.

Senator SHERRY—I was just going to ask about that. Were there any issues on the secrecy provisions?

Ms Crawford—The way we did this was not to provide access into our systems. We provided selected cases with only limited amounts of information. Dun and Bradstreet were required to meet all of the Commonwealth privacy and security requirements. The staff were subject to the same secrecy and privacy provisions as tax office staff, and before the pilot commenced we had full security inspections of their premises and monitored their activities.

Senator SHERRY—What was the contracted cost of that?

Ms Crawford—The pilot cost \$370,000.

Senator SHERRY—You have completed two of the trials and the other is ongoing. Has there been any decision made to implement these projects?

Ms Crawford—We are completing the business case around the referral project and similarly for the dialler project, which is still ongoing. In the case of after hours, we believe that that should be part of our ongoing strategy. The timing of it really depends on what we are trying to achieve, but it was a useful thing to do. It would not be something that we did all the time.

Mr D'Ascenzo—In terms of the dialler technology, the third project, that is proving to be the most efficient pilot for us so far. We looked at 77,000 contacts and we have got 23,000 promises to pay by instalments or in full, and the value is in the order of \$448 million. That does not guarantee that all of that will be paid, but we have made contact with people and they have made a commitment to seek to pay back something in the order of \$448 million.

Senator SHERRY—What was the cost of that trial?

Mr D'Ascenzo—Two hundred and eighty thousand dollars.

Senator SHERRY—Why do you think that that was such a comparative success?

Mr D'Ascenzo—I think it was the ability to contact 77,000 people. It was more efficient for us. It filtered out busy tones, for example. It made sure that the person was able to operate and relate to the taxpayer straightaway, without having to fiddle around with difficulties in making contact. They are my thoughts.

Ms Crawford—That is exactly right. It enabled us to be quite selective about the target audiences or the particular campaign that we were attempting to do. It is still on a very small scale, though, at this stage.

Senator SHERRY—Yes. When you say that you were able to 'target', in what way did you do that? Was it targeted time or a targeted profile?

Ms Crawford—For example, one of the particular campaigns we used the dialler technology for was to pick up escalating debt—so debt that had just jumped up—or people who had defaulted on payment arrangements. So you are able to pick cases and then run a very specific, tightly focused campaign. Because you are getting more contact with people, the staff then know exactly what they are dealing with and so they can respond more quickly.

Senator SHERRY—That concludes my questions. I have some questions to put on notice.

Senator MURRAY—Commissioner, as you know, the money laundering bills have finally hit the lower house. If they are to have effect, I would expect them to in fact reduce the quantum that is laundered through Australia. That quantum is presently broadly estimated at between \$4.5 billion and \$11 billion a year. I must say I am inclined to a higher rather than a lower figure. But that money, which is sourced from drugs and criminal activity and tax evasion and so on, will still be there, which means it has to go somewhere. Hopefully it will go into legal pots and the Commissioner of Taxation will get his cut. My question to you is: have you been asked to give any estimates or do you have any estimates of what you expect the return to be if the quantum that misses the tax net at present for money laundering lands in your pocket to some extent?

Mr D'Ascenzo—As far as I know we have not been asked this question, Senator.

Senator MURRAY—Do you think the tax office would be equipped—because there may be a Senate inquiry into it—to provide such estimates, or do you think it is such a grey and difficult area that it would be impossible for you to forecast a return from effective money laundering laws?

Mr D'Ascenzo—I do not think I am skilled enough to make that judgment about whether or not we are able to make an estimate. I think it would be difficult. We are often asked to make difficult estimates. I suppose it all comes down to the elasticity of the accuracy of those estimates. I could not say off my—

Senator MURRAY—I suspect I will be on the committee if there is an inquiry. I can think of only two committees that might do it. Maybe I will not be, but can I just forewarn you that, if I am, I might be asking them to write to you for such an estimate.

Mr D'Ascenzo—We will see whether or not we are able to respond. If we cannot, we will explain why we think it is too difficult. I am happy to help, though.

Senator MURRAY—Thank you.

Senator JOYCE—You are aware, obviously, that there is a bill coming forward in regard to capital gains tax on overseas investments. You would be aware of that?

Mr D'Ascenzo—Yes, I am aware of the legislation in broad terms.

Senator JOYCE—And you would be aware of the reduction in the capital gains tax effect for those overseas investors. What would be the actual ramifications on Treasury for the amount of tax take for that change?

Mr D'Ascenzo—I do not have the Treasury estimates available to me in that area, Senator.

Senator JOYCE—Can I get that question on notice, then?

Mr D'Ascenzo—I might have to see whether or not Treasury can provide it, but by all means we will do what we can.

Senator JOYCE—I will refer it straight to Treasury, then, in that case. Secondly, are you aware of differentials between the capital gains tax rates? Obviously it must have in mind differentials between potential investing countries and ourselves. Have we got some major differentials in our capital gains tax rates between ourselves and other countries that require this?

Mr D'Ascenzo—I have not done a study of the differential rates. There are some countries like, I think, the US that do not even have capital gains tax, but I do not know the differentials. Again, Treasury will probably have done some analysis of the international environment.

Senator JOYCE—Finally, with the impact of overseas equity firms that are now taking a major investment role in our country, has the taxation department done any study on that or any impending taxation problems with that process?

Mr D'Ascenzo—We have not done any study, but we have some concerns expressed by the IRS tax commissioner about that activity, and also similar concerns expressed by the UK

inland revenue and customs. In fact, in the annual report in terms of emerging risks and threats we say:

Moreover, future risks may emerge over the coming two to three years that could threaten this relatively benign outlook, including the international dimension. For example, we would have concerns about the potential migration of funds to private equity through tax haven based limited partnerships which have no transparency and high gearing.

Senator JOYCE—Yes, that is what I had envisaged you would say, and I apologise that I had not quite got to that place.

Mr D'Ascenzo—I know, Senator. So it is an area that we are trying to investigate and keep an eye on because it is an area of emerging risk around the world.

Senator JOYCE—Thank you very much for that.

CHAIR—Thank you, Senator Joyce. Mr D'Ascenzo and officers, thank you very much indeed for your attendance. You are excused. We will now invite to the table officers of the Treasury concerned with the fiscal group, output number 2.

[8.40 pm]

Department of the Treasury

CHAIR—Welcome to the table, gentlemen. Thank you for your attendance, Mr Tune and Mr Heferen. Senator Wong.

Senator WONG—Thank you, Chairman. Mr Tune, you might recall after the welfare changes after last year's budget I asked you some questions about the modelling Treasury had done in relation to the number of additional people who would be participating in the labour force as a result—assumed—under those changes. Do you recall that discussion?

Mr Tune—I do, yes.

Senator WONG—And you gave me a range of reasonably detailed figures. There have been a number of policy changes, albeit minor, since that time and I am wondering whether Treasury has revised that modelling.

Mr Tune—No, we have not. We have not done anything since the budget, so nothing has changed in terms of any work done in Treasury since the budget.

Senator WONG—So the assumptions which underpin the forward estimates would be the same as those that you gave me in June 2005?

Mr Tune—In the forward estimates? They would have changed because of those policy changes that you mentioned, but we have not run them through into anything in terms of participation.

Senator WONG—Yes. No, the assumption is regarding participation. I am sure you recall this: you made assumptions which were built into the forward estimates last year about the number of people in each calendar year up to 2008-09.

Mr Tune—Yes, that is right.

Senator WONG—And I just wanted to confirm that is still the basis of the forward estimate assumptions.

Mr Tune—You have two things happening here. You have the forward estimates themselves, which are the dollars, and they change as the policy changes. What I am saying is that we have not done the second piece of analysis which would say what that means in terms of participation.

Senator WONG—Have you been asked to?

Mr Tune—We have not, no. So you would see the direct effects and the costs themselves that are reflected in the forward estimates.

Senator WONG—Yes, of a particular policy measure. I am just trying to work out whether there has been, therefore, an additional participation dividend factored into the costings.

Mr Tune—No, nothing else has been factored in that I am aware of.

Senator WONG—I asked some questions of the Revenue Group yesterday about various tax offsets—mature age pensioner and seniors beneficiary tax offset. There is obviously an assumption that underpins those costings in terms of how people are going to take them up—that is, which is a proxy for participating and earning. Do you do that?

Mr Tune—No, we do not.

Senator WONG—Who does that?

Mr Tune—The Revenue Group does that. If you are talking about SATO and the mature age worker tax offsets et cetera, no.

Senator WONG—There is no necessary correlation between those and any of the modelling that you gave me in 2005?

Mr Tune—No. In fact, I think they are totally separate things. The Revenue Group would have costed these things based on what they saw at the time.

Senator WONG—That is all I need from you, thank you, Mr Tune.

CHAIR—Thank you. Senator Sherry?

Senator SHERRY—I wanted to go to the issue of cyclical and structural tax revenues.

Mr Tune—You might be talking to the wrong group here, but we will have a go.

Senator SHERRY—If not you, who would you suggest?

Mr Tune—If you are talking tax revenue, it would have been the Revenue Group.

Senator SHERRY—The issue I raised—and Mr Ray, I think, did refer it here—goes to some OECD work by Mr David Turner. Are you familiar with that?

Mr Tune—I know the name but I am not familiar with the piece of work you are referring to.

Senator SHERRY—Neither was Mr Ray, but there might be someone here who can assist me. Apparently Treasury did some work with the OECD to estimate structural and cyclical components of revenue.

Mr Tune—I can assure you that it was not done by Fiscal Group.

Senator SHERRY—If it was not done by Revenue—or they do not have any view on it—we shall have to explore that further.

Mr Tune—I am surprised.

Senator SHERRY—We have discussed the commodity boom and the step-down issues relating to that. IMF's recent report on the Australian economy said that the commodity boom had been fattening the government's tax revenue and boosting national income but said:

If export commodity prices stay high in coming years, strong domestic demand may be prolonged, requiring interest rates to be higher than otherwise.

Do you have any response to this analysis?

Mr Tune—The view we are taking is that we have that assumption in the tax revenue forecasts, with the two steps down.

Senator SHERRY—Over two years, wasn't it?

Mr Tune—That is correct, and that just relates to iron ore and coal prices. It is not the whole terms of trade. That is our view that we have built into the budget, and it is quite explicit and transparent. Anybody can speculate about where it all might go in the future.

Senator SHERRY—The Treasurer has certainly been doing that.

Mr Tune—I am not about to say anything separate from what the Treasurer said, but at the moment we have those two steps down. Our view is they have probably topped, so you are not going to see growth in them. We think the prudent assumption we have in the budget is still appropriate.

Senator SHERRY—What about the impact of the drought?

Mr Tune—There is no doubt that the drought will impact on growth, and you might want to explore that a bit further with Dr Parkinson and the macro group when they come in. I do not think there is much doubt that the drought will impact on the farm sector, which will flow through to growth of course.

Senator SHERRY—Certainly on export earnings.

Mr Tune—Yes.

Senator SHERRY—Rural commodities, effectively.

Mr Tune—It could well do, yes.

Senator SHERRY—Have you commenced work on analysis of the impact that this will have on them?

Mr Tune—We would be looking at that in the context of developing MYEFO, which normally comes out around the end of the year, so there is work under way at the moment.

Senator SHERRY—In terms of assessing that, you would presumably be looking at crop forecasts.

Mr Tune—Absolutely, yes.

Senator SHERRY—Now revised crop forecasts.

Mr Tune—We would look at the ABARE work and so forth. Once again, that is done by Dr Parkinson's group.

Senator SHERRY—But that is under way at the moment?

Mr Tune—Absolutely.

Senator SHERRY—Does the IMF's view that I referred to earlier have any bearing on fiscal strategy for MYEFO or for the next budget?

Mr Tune—We will come to our own views about where we see the economy going, and we will obviously be advising the government about that. Once again, if you want to explore that, I suggest you talk to Dr Parkinson. In terms of the fiscal strategy, that gets thought about in the context of looking at the forecasts and projections and then feeding it into MYEFO.

Senator SHERRY—According to the Reserve Bank headline, inflation for the year to September is 3.9 per cent. On the Reserve Bank's measure of core inflation, the weighted median inflation measure is 3.2 per cent, which is above the RBA's target band of two to three per cent. What are the consequences of these inflation numbers for social security and welfare payments?

Mr Tune—Social security and welfare payments are indexed by either CPI or MTAW—male total average weekly earnings—so a slightly higher level of inflation in terms of measured CPI. Other measures are not taken account of. Other things being equal, if our prices went up and the CPI went up, you would have slightly higher impacts on those outlays.

Senator SHERRY—On those that are indexed to CPI?

Mr Tune—Yes.

Senator SHERRY—Indirectly or—

Mr Tune—No, directly.

Senator SHERRY—No, you cut me off. Directly, obviously, on CPI. Indirectly on MTAW?

Mr Tune—It depends on how the increase in CPI translates into the MTAW. There is no necessary relationship. They are two independent measures.

Senator SHERRY—Yes, I understand that, but if inflation is higher it may mean higher MTAW outcomes.

Mr Tune—Absolutely. Under the legislation, that will flow through automatically.

Senator SHERRY—And that would then flow through.

Mr Tune—Yes.

Senator SHERRY—What were the assumptions about inflation for 2007-08 and 2009-10 in the budget papers?

Mr Tune—Two and a half, two and a half, two and a half. They are all projections, by the way, not forecasts.

Senator SHERRY—Have you been examining the issue of oil prices?

Mr Tune—Our Macroeconomic Group colleagues have been looking at that, yes.

Senator SHERRY—An AMP-NATSEM reported titled *Trends in effective marginal tax rates 1996-97 to 2006-07* was recently released. I discussed this with the Revenue Group, but are there staff in the labour market unit in Social Policy Division working on issues of effective marginal tax rates and the relationship between the tax and the benefit system?

Mr Tune—Yes. We are continue to monitor that on an ongoing basis. That is part of our normal day to day work.

Senator SHERRY—How many staff have you got involved in this work?

Mr Tune—In the labour market unit?

Senator SHERRY—Yes.

Mr Heferen—We would have around five to six. Occasionally, if more work needs to be done, we will draw people in. At other times, when there are more pressing issues in other areas, people might move out.

Senator SHERRY—Where does that stand in comparison to this time last year, approximately?

Mr Heferen—About the same.

Senator SHERRY—Is there any plan to employ additional staff over the remainder of this current year?

Mr Heferen—I always hope to gain an extra few. It depends a lot on the other requirements in the department, but I would hope to have one or two more.

Senator SHERRY—Since the budget, has work been done to identify particular groups that face the highest EMTRs?

Mr Heferen—I do not think we have done any particular work. Not that I can recall.

Mr Tune—Obviously the budget had an impact on EMTRs, so it would have got factored in at the time.

Senator SHERRY—No, post the budget.

Mr Tune—Since then there has not been change, so we would not have done any special analysis.

Senator SHERRY—Is there anyone here from the Industry, Environment and Defence Division of Fiscal Group?

Mr Tune—No, there is not. I can try and answer those questions.

Senator SHERRY—Is there any work in that group being carried out on climate change and environment policy?

Mr Tune—Yes, there is.

Senator SHERRY—In what capacity does this area of Fiscal Group advise on issues relating to climate change?

Mr Tune—In broad terms, the same as most other divisions in Fiscal Group, we are providing advice to the Treasurer on issues around climate change and other environmental issues that come before the government, so when cabinet submissions on those issues are

before cabinet we will provide advice to the Treasurer on those things. We would participate in working groups across agencies that are developing proposals and so forth, and, as part of that, we have an ongoing role in monitoring the debate around climate change.

Senator SHERRY—Has Treasury been doing any work on the economic consequences of climate change?

Mr Tune—We have done some work, yes.

Senator SHERRY—You would have heard of the recent Stern review in the UK.

Mr Tune—Yes.

Senator SHERRY—I understand it was conducted by a team of approximately 20 people in the UK equivalent to Treasury. Do you have the approximate number of people in this group at the moment?

Mr Tune—In the environment group?

Senator SHERRY—Yes.

Mr Tune—Five or six, that sort of order.

Senator SHERRY—About the same as this time last year?

Mr Tune—Yes, I think so. It might be one different, something like that, but it is in that order.

Senator SHERRY—And is there any intention to employ additional resources in this area?

Mr Tune—I think we have another one starting next week, but that has just been part of the normal recruiting round, so no major change.

Senator SHERRY—The document *The business case for early action* from the Australian Business Roundtable on Climate Change was published in April 2006. Has this document been examined by the group?

Mr Tune—Yes, I think it has. I seem to recall we provided some advice to the Treasurer on that.

Senator SHERRY—I note that in Dr Henry's speech to The Sydney Institute last year, he spoke about the importance of pricing water correctly to make sure it is allocated where it will contribute to what he referred to as the highest value added. Is it fair to draw an analogy between the pricing of water and the pricing of emissions?

Mr Tune—I think in the case of emissions you are dealing with a global issue, so you need to take account of that, whereas the issue of water in Australia is confined to the island itself. So, yes, you would need to make adjustments for that, but, as Stern points out, pricing is one of your tools in the weaponry that you would want to look at when looking at global action on climate change.

Senator SHERRY—It is a legitimate policy option?

Mr Tune—I do not think anybody says it is not. I think it is accepted that that is one tool that you can use.

Senator SHERRY—Have you examined the issue of pricing emissions?

Mr Tune—We have looked at some of the models that are around. There is the McKibbin model, for example, that was developed a couple of years ago. We have looked at that. We have not done any detailed work on developing an emissions trading system or a carbon tax.

Senator SHERRY—It is examining other models that have been produced?

Mr Tune—Basically, yes.

Senator SHERRY—In August 2006, the National Emissions Trading Taskforce, which reports to the premiers and chief ministers but does not include the Commonwealth, as I understand, released a discussion paper called ‘Possible design for a national greenhouse gas emission trading scheme’. Has Treasury examined the proposals within the discussion paper?

Mr Tune—Yes, I think we have. Once again, when that came out we would have provided advice to the Treasurer on it.

Senator SHERRY—And has Treasury examined the view about state based emission trading systems as distinct from national or Commonwealth?

Mr Tune—I do not know if we have gone into that degree of detail, no.

Senator SHERRY—That is all I have, thanks.

CHAIR—Senator Murray and Senator Joyce, do you have any questions for these officers?

Senator MURRAY—I have none.

Mr Tune—Chair, I have a couple of issues that Mr Ray asked me to pass on that were talked about last night. Senator Sherry asked him a couple of questions.

CHAIR—Please go ahead, Mr Tune.

Mr Tune—He has given me the answers. I am just going to read them out to you.

Senator SHERRY—Are they very lengthy?

Mr Tune—No. They will take about two or three minutes, I think.

Senator SHERRY—Okay.

Mr Tune—The first one is on the indexation arrangements for the superannuation co-contributions. Basically, the Revenue Group have confirmed that from 2007-08 the government co-contribution lower threshold is indexed by growth in full-time adult average weekly ordinary time earnings—AWOTE. For 2007-08 the index factor is calculated by taking the index number for the 12 months ending 31 March 2007, dividing that by the index number for the previous 12-month period. The Commissioner of Taxation will publish the threshold as soon as practicable after the start of the 2007-08 income year, and the upper income threshold will be equal to the lower income threshold for that particular year plus \$30,000. That will apply in each year.

The second one was about a breakdown of estimates of withholding taxes. On investigation, what they have given me is that the ABS publishes estimates of income taxes levied on nonresidents. The latest available data are for 2004-05. They are (1) dividend

withholding tax \$79 million, (2) interest withholding tax \$642 million, (3) other income taxes \$376 million, giving a total of \$1,097 million. The other note here is that the rates of dividend, interest and royalty withholding taxes vary because of various double tax treaty obligations that Australia has with other countries.

Payments from managed funds, trust and custodians are generally taxed according to the nature of the income concerned. The 2006-07 budget included a measure to simplify tax collection arrangements for payments that are not dividends, interest and royalties.

Senator SHERRY—Thank you.

Mr Tune—That is what I have got. I am sorry I cannot amplify that further.

CHAIR—Thank you very much. Mr Tune and Mr Heferen, you are excused. Would those officers concerned in outcome 4 please hurry to the table.

[9.03 pm]

CHAIR—Welcome, Mr Murphy, ladies and gentlemen.

Senator SHERRY—Is this the outcome to deal with some issues in relation to the Understanding Money campaign?

Mr Murphy—Yes.

Senator SHERRY—The total cost of this program to date.

Mr McCray—The program is still running but the budget of \$13 million is fully committed. There are still a few cash flows to occur, but, in terms of commitments, the money has been fully expended, so it is \$13 million—just under, in fact: \$12.97 million.

Senator SHERRY—There are no additional moneys to be added to the \$12.9 million?

Mr McCray—No.

Senator SHERRY—It is my understanding that it was launched by Mr Dutton on Thursday, 27 July?

Mr McCray—That is right.

Senator SHERRY—And it runs through to mid-December?

Mr McCray—That is correct.

Senator SHERRY—As part of the campaign, there are what you would classify as three major calls to action: visiting the website; ordering a booklet; attending a seminar. Is that the broad classification?

Mr McCray—Yes. I think the first two are more prominent than the seminar program; but, yes, certainly they are the three supporting platforms to the campaign itself.

Senator SHERRY—There was a recent article in the *Australian Financial Review* that found that, according to Hitwise, the website ranked at number 324 out of the financial websites visited by Australians. Do you have any comment to make about that, which I think would be best described as a relatively low hit ranking?

Mr McCray—I am not aware of that particular statistic but I do know that for the couple of months after the campaign was launched, the Understanding Money site was one of the

most popular sites, if not the most popular site, that people were accessing through the australia.gov.au portal. We have had over 150,000 unique visits in the period since the website and the campaign were launched, and that is quite a substantial number of hits. We are quite pleased with the success of the website.

Senator SHERRY—Your attention was not drawn to the commentary in the article in the *Australian Financial Review* of 30 August on this issue?

Mr McCray—I recall an article which made some links between people's movements: where they were coming from to the Understanding Money website.

Senator SHERRY—Yes, it was part of that article. I was going to get to those matters in a moment.

Mr McCray—I do recall the article but not that ranking.

Senator SHERRY—I will just double-check to see if that ranking is in here. Yes, it is. It reached a high of 300th earlier this month—that is, the date of the article, the eighth month—and dropped to 324th. You are not aware of those statistics?

Mr McCray—We are not putting a lot of weight on those statistics. We put most weight on the number of hits that have come to the website, the pages that people are visiting and the handbooks that they are ordering.

Senator SHERRY—I understand why you would look at the number of hits, but aren't relative hits useful data to examine as well, compared to the interest of individuals in other websites?

Mr McCray—We have not done a detailed comparison with those on the list. I imagine that many of those sites would be banking and share trading sites that are quite different in character to the Understanding Money website. I think it might be an apples and oranges issue to some degree.

Senator SHERRY—For the \$12.9-odd million, do you have a breakdown of the components such as advertising placement, market research, public relations et cetera?

Mr McCray—In very broad terms, the media by itself was \$10 million. The creative development of the materials for the campaign, the animation and voice-over and so on, was roughly another \$1 million and \$500,000, from memory, on PR.

Senator SHERRY—What about the booklets? Where does that come in?

Mr McCray—That is part of the \$13 million as well. There are printing costs and some distribution costs of the order of \$400,000 to \$500,000. The distribution of the books is being handled through a contractor that does mailing and marketing services.

Senator SHERRY—Do you know the number of books that were printed?

Mr McCray—One million.

Senator SHERRY—In part of the research into the marketing, was there focus group work conducted?

Mr McCray—There was. We did extensive pre-campaign developmental research, both qualitative and quantitative. That guided principally the key messages of the campaign and

information on the sorts of resources that people might be looking for if there were to be a campaign. Then, as the campaign materials began to emerge, some basic themes, scripts and images were tested with people. Through that latter process we refined the content of the handbook and the focus of the website, those sorts of issues.

Senator SHERRY—Do you know who conducted the qualitative and quantitative research?

Mr McCray—It was done by a Melbourne based market research firm called Quantum.

Senator SHERRY—Did you yourself have a look at that research?

Mr McCray—Yes, we did. We worked through the standard MCGC process but that involved, at the beginning of the campaign process, a tender for research services and Quantum emerged from that process.

Senator SHERRY—Was there interaction between yourself, the people that worked on the campaign, and the minister's office on this campaign?

Mr McCray—Yes, there was. For example, we attended through the course of developing the campaign materials a number of meetings of the Ministerial Committee on Government Communications and as a matter of course either the minister or his delegate attends those meetings.

Senator SHERRY—That is, Mr Dutton?

Mr McCray—Yes, that is correct.

Senator SHERRY—Can you table the Quantum research that we were discussing earlier?

Mr McCray—I will take that on notice, if I may. I need to check if I am in a position to do that.

Senator SHERRY—Just going back to the Hitwise ranking, I now understand it is down to 1,138th on the ranking sites. Do you have any response to that? It is ranked next to Dulux Mycolour, apparently. I am a bit concerned, if financial literacy is ranked next to Dulux Mycolour, if we have got the right message through.

Mr McCray—I think it is inevitable that the website hits will relate to the running of the ads. The ads are not running consistently on a daily basis. They ran intensively through August and into the early part of September, and the ranking was the highest on those figures. We are now having an approach where the ads do not run for a couple of weeks and then they run for a week, and that is the strategy that we will have through until December. We tend to see that, in the period when the ads run, the website hits rise again, as you would expect.

Senator SHERRY—Doesn't this seem to indicate that beyond the end of this year, when obviously the campaign finishes—I hope we are not going to have \$13 million campaigns every year—there will be a significant fall-off in interest? Therefore, how do you maintain long-term impetus on financial literacy issues?

Mr McCray—I think that the media campaign has played a useful catalysing role in building interest in financial literacy. At the same time as we launched the campaign, and over the last six months or so, we have also taken initiatives to address the structural barriers to financial literacy. For example, we have been closely involved in an arrangement where

financial literacy will be taught in schools from 2008 and our website hosts a range of resources which schools can use to assist in teaching financial literacy. We will build a website to take on a range of additional functions. It will, in particular, become quite a useful resource for schools looking to assess appropriate resources to use in their curriculum.

The website will continue to grow in other ways, too. We are looking at the possibility of making it a little more interactive than it is; to give people reasons maybe to come back and look at the website on a regular basis to test how their skills might be building, for instance. We are also rolling out resources through a number of other avenues. We are looking at workplace initiatives, for instance. Wherever we take the message—in schools or workplaces or wherever—we are, of course, always promoting the website.

Senator JOYCE—Mr Chairman, are we under outcome 4?

CHAIR—We are.

Senator JOYCE—Under what banner are these questions?

CHAIR—‘Financial system’.

Senator JOYCE—‘Financial system, corporate governance policy’?

Senator SHERRY—It is the right officer. He is here, the one I wanted.

Senator JOYCE—Good. The fascination with websites I think is great.

Senator SHERRY—It is part of the financial literacy.

Senator JOYCE—I must have been missing something.

Senator SHERRY—You obviously have not tuned into the website, Senator.

Senator JOYCE—Not lately. I will, tonight.

Senator Colbeck—We will have to send you a pack, Senator.

Senator SHERRY—www.understandingmoney.com.au.

Mr McCray—.gov.au.

Senator JOYCE—That is where I went wrong.

Senator SHERRY—You should have got a book—I got one—in the parliamentary mail. You are not paying much attention.

Senator JOYCE—I thought it would be under ‘Social and income support policy advice’ in outcome 2.

Senator SHERRY—Pass it on to the minister, will you? It is an obvious financial literacy issue at the other end of the table. I think ANZ is one organisation that does a financial literacy survey on a regular basis.

Mr McCray—Yes, that is correct.

Senator SHERRY—In terms of measuring the impact of any campaigns on financial literacy, however they are constructed, will you be looking at research done before the campaign began and then, for example, the ANZ literacy survey, on an ongoing basis?

Mr McCray—We are. The focus of this particular campaign is awareness raising and promoting engagement. The initial research showed that people were, typically, a little uninterested or a little intimidated by it. We were not running a campaign which was designed to, at the end of six months, make people vastly more competent with their money. That would be unrealistic. But we do want to be able to demonstrate that people are significantly more aware of the benefits of being better with their money and perhaps significantly more interested in engaging with money learning issues. That is specifically what we will be testing.

There are two stages to that. One is that, consistent with every government media campaign, there is an evaluation at the end of the campaign. We will be doing that in December or possibly January. More substantially, we have undertaken a major survey of consumer attitudes to money, with the particular focus on attitudes and behaviours. The sampling was done by, again, a Melbourne market research firm, DBM, on this occasion. They sampled 7½ thousand responds earlier this year and we will be coming back to do that same survey next year. We will be testing awareness, attitudes and behaviours, people's perceptions of barriers, and we will be able to get quite a good read on how those awareness and attitude issues have shifted in the 12 months.

Senator SHERRY—When was the awareness survey conducted?

Mr McCray—The main survey was conducted in the June quarter—April, May, June.

Senator SHERRY—Who conducted that?

Mr McCray—A Melbourne firm called DBM, a market research firm.

Senator SHERRY—So you go back again—

Mr McCray—Middle of next year probably. We will be announcing the results of this first baseline survey before the end of this year. That is a very large sample size, 7½ thousand.

Senator SHERRY—Has that survey been completed?

Mr McCray—The raw data has been completed. The writing—

Senator SHERRY—The analysis.

Mr McCray—of the narrative that surrounds it is still going on.

Senator SHERRY—Will that be released in full?

Mr McCray—Yes, it will.

Senator SHERRY—In terms of my earlier discussion comparing the number of hits—I referred to Dulux Mycolour but I noticed that the High Court is next in the rankings—have you seen the Hitwise analysis?

Mr McCray—No, I have not.

Senator SHERRY—Above that was Vodafone, Jobs.com, Gateway Credit Union, Snap Printing, Australian Accounting Standards Board—that is something that is relatively close. This is in ascending order: the Institute of Engineers, Artog, Freshtel and then Morrison Securities, and Thai Visa is just below. In the context of those sorts of relationships, could this website be considered a success—its relative position compared to those sorts of websites?

Mr McCray—I can only point to the numbers of hits and the orders for handbooks, and the key pages that people are visiting on the website, as indicators that we are achieving objectives. If we are wanting to make people more aware of the importance of basic budgeting and planning and people are coming to a website and going to that budgeting page as the page that they most visit, then we feel that we are at least hitting the target. If funds were unlimited—

Senator SHERRY—I do not deny that it is hitting the target. I guess it is the level of hit. In terms of relative ranking, I notice it was 1,138. At 1,140, which is slightly below, is Moneydirect, which is obviously a commercial financial organisation that I do have some knowledge of. That organisation would not have spent anywhere near the amount of money that has been spent in this area but are pretty close to understandingmoney.gov.au in terms of ranking on website hits. Even the American Psychological Association is not far behind. Those relative rankings do beg the question about the level of hit versus the cost.

Mr McCray—I suppose it is fair to say that the very need for a campaign like this is a traditional lack of interest in the community in managing their money. Certainly the qualitative and quantitative research that I mentioned earlier on showed that there is quite a body of people in the community who find money to be quite a boring issue and something that they tend to put off or not deal with.

Senator SHERRY—I certainly would concur that they are some of the factors. On the same day, the ASIC shadow shopping report was released, which identified significant levels of mis-selling amongst financial planners. I thought the pretty scary figure of 85 per cent of those people that had been mis-sold to had no idea that they had got a bad deal; 85 per cent of those who were, frankly, being ripped off. That seems to indicate that there is a problem—I have no argument with that—in a whole range of areas. Coming back to the one million booklets, how many have been distributed to date?

Mr McCray—We have distributed 550,000 so far. That includes books that have been ordered by individuals or by organisations and books that have been provided to some government offices where people can pick copies up—for example, Medicare and Centrelink offices.

Senator SHERRY—How many specific individual orders have been placed approximately?

Mr McCray—Around 35,000.

Senator SHERRY—So about 50 per cent have been distributed to date?

Mr McCray—Yes.

Senator SHERRY—There is one month to go on the distribution, is there?

Mr McCray—When we say the campaign will run till mid-December, the media buy means that the ads will appear on television and in newspapers and so on until mid-December. But we will be looking to continue to build hits to the website and distribution of the handbook through next year.

Senator SHERRY—For the 35,000 individual distribution, was an estimate made of the likely individual request level as part of the campaign?

Mr McCray—No, we did not have a clear view of what the demand might be. We had from our pre-campaign research a sense that some in the community would be happy to visit a website, others would want a handbook. We are really focusing, in terms of measuring the success of the campaign in the next post-evaluation, on awareness and engagement issues, rather than the actual mechanism by which people might have taken a greater interest in their money.

Senator SHERRY—Is there to be any follow-up with those individuals who requested and received an individual copy of the book—or a representative group, obviously, not the whole 35,000—to examine the specific level of improvement in financial literacy amongst that group to see whether that distribution and access to the book was useful?

Mr McCray—Not as yet. As I say, we plan a long-term annual revisiting of this issue with the focus in the first few years, I should think, more on basic issues of awareness and engagement. Over time you would expect and hope that competence and confidence would increase, too, but it is very much a sequenced process where you need to make people more inclined to be interested and maybe take on some basic skills. But generational change is probably what you are really looking at in terms of a greater competence.

Senator SHERRY—I do not disagree there. The size of the issues and problems in the context of the total Australian population is massive. You would agree with that, wouldn't you?

Mr McCray—I would agree that there is much to be gained from people being more competent with their money, and I think the starting point for that is for people to be more aware of the benefits and perhaps more confident that it is not as complex as they think. A few simple steps can make a significant difference to their effectiveness with money.

Senator SHERRY—I think a recent statistic I saw showed 50 per cent of people found it difficult to spell the word 'superannuation', let alone understand it. It is pretty frightening, isn't it? If a significant group of people have a problem spelling the word, getting into the concept in that area is just an example of the difficulty we have.

Mr McCray—It is no doubt a long-term challenge to bring about improvements in this area.

Senator SHERRY—As part of the campaign did you look at any international work in this area?

Mr McCray—Yes, we have. A few of the major OECD economies are beginning to look at this issue. It is probably fair to say that we are fairly well advanced in that cohort in that we are the first major OECD economy to have run a major media campaign. One or two others are starting to look at what might be done in terms of building literacy into school curricula and we have that locked in now. So we are reasonably well placed when it comes to other jurisdictions, but we are in complete agreement with other international comparators in recognising this is quite a significant issue moving forward.

Senator SHERRY—Yes. You mentioned you have the school curriculum issue locked in. Are there details available of what is locked in in terms of school curricula?

Mr McCray—Yes, it is on our website. There has been some coverage of it in specialist publications and so on.

Senator SHERRY—Turning to the seminars, what is planned in that respect?

Mr McCray—The seminars have been very much demand driven. The research that we did prior to the campaign showed that there was some modest interest in attending seminars—not as substantial as websites or handbooks and the like—and we decided we would provide access or, indeed, more accurately in this case, some publicity for the seminars that were available and people could take advantage of them if they wished. It was very much demand driven.

Senator SHERRY—Let us get to the demand. Firstly, how many seminars have been organised to date?

Mr McCray—I should explain the basis for the seminars.

Senator SHERRY—Yes.

Mr McCray—We decided on an approach whereby we would not develop a package of materials and call it ‘the understanding money seminar’. What we would do is to work through the major financial services sector industry bodies like IFSA and the ABA and so on, such that their members who are already providing seminars in this field, once there had been an appropriate adherence to guidelines locked in, would be in a position where we could simply list their seminars on our website. There might be a seminar on budgeting offered by a particular bank in a particular place at one point, and a seminar on superannuation offered by a different organisation in a different state.

Senator SHERRY—To date how many have been organised within the criteria that you have laid down?

Mr McCray—It is 50-odd seminars. It is not the major element of the support platforms, as I said at the start.

Senator SHERRY—Is there a requirement on the attendance at the seminars?

Mr McCray—No.

Senator SHERRY—Could you take it on notice and inquire about the attendance? I am frankly surprised that there is not. Is there a report-back? These are public moneys here, so presumably in the guidance—

Mr McCray—There are not public moneys on the seminars.

Senator SHERRY—There are no public moneys?

Mr McCray—No.

Senator SHERRY—I thought there was a budget allocation for seminars.

Mr McCray—There is a budget allocation to organise seminars, so we spent staff hours in working with the industry bodies.

Senator SHERRY—Yes, and there is a public allocation of money to seminars.

Mr McCray—But we have not actually funded seminars or funded venues or funded training materials. That has all been done by the industry itself.

Senator SHERRY—But, for obvious reasons, you have issued guidelines for the parameters of the operation because there could be a conflict in terms of information seminar versus propaganda from a particular financial institution.

Mr McCray—That is exactly what we set out in the guidelines, to manage that risk.

Senator SHERRY—You have mentioned the number of approximately 50. Any idea how many more will be organised under the auspices of the campaign?

Mr McCray—The model we have used, as I explained, is one where we are simply giving publicity to seminars that are running out there in the community already, so long as we are satisfied that those seminars and those delivering the seminars meet the guidelines. As long as we continue to be satisfied that seminars are meeting the guidelines, then we will continue to promote seminars that are occurring in the community.

Senator SHERRY—Yes, but you have mentioned an approximate number of just over 50. So you obviously have an idea of the number of seminars as they are being held, haven't you.

Mr McCray—We do, Senator.

Senator SHERRY—Could you take on notice to inquire as to the attendance at those seminars? Frankly, I am surprised that you have not done that, simply to give some idea of the level of interest in the area.

Mr McCray—We have some broad qualitative feel. As you would expect, it varies quite a bit from big city seminars to rural and remote ones.

Senator SHERRY—What does the broad qualitative data indicate?

Mr McCray—It indicates that at some seminars in small places on relatively narrow issues we have only seen half a dozen people attend, which would have been offered regardless of whether we were running the campaign or not. You get a larger number—20 or 30 people—in more populous areas.

Senator SHERRY—Going to the issue of populous areas, are we getting a good geographic spread of seminars on offer?

Mr McCray—It is not too bad. That was something we were quite concerned about. We did not want to simply stick to the large population centres. Through working with a range of financial service industry providers and some community sector providers, and also through the relationship we have with the CPAs, we have quite a reasonable geographic spread. I cannot pretend we have one on in every town in Australia, but it is not a bad regional spread.

Senator SHERRY—Could you give me on notice a breakdown state by state and the numbers in attendance?

Mr McCray—We can certainly take that on notice.

Senator SHERRY—In relation to the handbook, is there a contact phone number for people to ring for information?

Mr McCray—To order the handbook, not to provide advice.

Senator SHERRY—Where does that number go to? Is that within the department?

Mr McCray—No, it goes to the contractor we have employed to do the distribution.

Senator SHERRY—Do you have data on the number of calls received?

Mr McCray—I do not have it to hand. We would have that, yes.

Senator SHERRY—Could you take that on notice.

Mr McCray—Yes.

Senator SHERRY—From an article in the *Fin Review* on 30 August, I understand that the two most popular destinations in terms of websites were the Australian Securities and Investments Commission—and I can understand some logic in that movement—and eBay, which I did find a little puzzling. Have you carried out any analysis of why that would be the case?

Mr McCray—We simply formed the view that eBay was clearly one of the most popular websites in the country, and if people have been motivated by seeing the television ad or catching the print advertisements to have a look at our website, they would probably visit one or two other very popular websites while they were at it.

Senator SHERRY—I notice the minister put a brave face on this by saying, ‘If they’re visiting eBay, I hope they’re going on to sell all their old and unwanted items and putting the proceeds into superannuation funds or term deposits.’ I must say, it was one of the most remarkable spins I had seen on an outcome in a long time. Has there been serious analysis to underpin the claim made that they are getting onto the website, going to eBay, entering into commercial transactions and then reinvesting the money? Has there been any serious analysis of this pathway?

Mr McCray—No, there has not. I think the minister was possibly speculating there. As I say, we looked into that data and we were entirely satisfied that it was simply a behavioural response that people would typically go a very popular website.

Senator SHERRY—Yes, but it is a little worrying that it is eBay, isn’t it?

Mr McCray—No. I do not know whether eBay is ranked 1, 2, 3 or whatever, but it is certainly among the most popular sites that people visit on a daily basis. I do not think it is all that surprising that, if people are motivated by a campaign to log onto the internet and visit our site, they might use the opportunity to visit one or two other popular sites they regularly go to. That was our analysis. There is a correlation, but there is no causal linkage.

Senator SHERRY—I have a couple of issues relating to PI insurance. Who should I be addressing those to?

Mr Murphy—You could start with me and we could take it from there.

Senator SHERRY—I had a discussion earlier with ASIC about the issue of some financial planners not yet having PI insurance, or adequate levels of PI insurance. Are you aware of that conversation?

Mr Murphy—I heard parts thereof, yes.

Senator SHERRY—To put it in context, I raised it given the particular difficulties facing Westpoint victims. Are you aware of the Westpoint financial scandal?

Mr Murphy—Yes.

Senator SHERRY—Approximately 4,000 Australians, most of them elderly, could lose up to \$300 million. I understand it will be pretty close to that figure by the time it is all worked through the system. There is a particular issue with the lack of PI insurance for some of the financial planners involved. I raised the issue that PI insurance was to be a requirement for financial planners, with the introduction of financial services reform in March 2002, which is a long time ago. It was to be March 2002 and then there was a deferral. Can you refresh my memory on what the first deferral date for the introduction of PI insurance was to be?

Mr Love—The first deferral date was to put it off until 10 March 2005.

Senator SHERRY—There has been another deferral date, hasn't there, since then?

Mr Love—Yes. It was deferred until 30 June this year.

Senator SHERRY—Has any analysis been done since 30 June this year of whether financial planners have responded and are now covered by PI insurance?

Mr Love—There have been discussions between the Treasury department, as part of consultations on the implementation of the particular provision of the Corporations Act, and industry players. The indication was that a large majority of the financial planning industry and other persons holding financial services licences were obtaining professional indemnity insurance.

Senator SHERRY—But the deadline was 30 June. 'Were obtaining' or 'had obtained' since 30 June?

Mr Love—This was just part of the normal course of business. The provision that has been put up surrounds the issue of whether or not it is mandated under the law to have professional indemnity insurance in connection with holding a financial services licence.

Senator SHERRY—So it is not yet mandatory?

Mr Love—No, it is not. It has been an issue of ongoing examination on how best to implement this particular provision. In fact, as of today there have been draft regulations put out for public comment, which will provide an indication of how this particular provision can be implemented.

Senator SHERRY—As of today they have been issued? Do they go to mandatory PI insurance? Is that the effect of them?

Mr Love—Yes. The effect of these provisions will be to say that the default position will be to have professional indemnity insurance, with ASIC able to approve alternative arrangements that would provide for equivalent appropriate arrangements.

Senator SHERRY—What would be the operative date?

Mr Murphy—That is going to be an issue of discussion as part of seeking comments on these particular provisions. ASIC has indicated to us that it believes that it is important to have appropriate transitional arrangements put in place.

Senator SHERRY—What does that mean?

Mr Murphy—There are issues regarding, for example, the return of existing security bond deposits in the marketplace. It is one of the matters we want to comments on from the industry.

Senator SHERRY—Given that the draft regs have been issued today, 4½ years on, what is the proposed date for the conclusion of consultation?

Mr Love—At the moment it is set to be 30 November.

Senator SHERRY—Is there any proposed date for the activation of the regulations once they are finalised?

Mr Love—No, there is no formal date at the moment. That is going to depend to some extent on the nature of the comments that we get back on these particular provisions, but it is intended to be in the near future.

Senator SHERRY—Let us say it is in the near future, and it is early next year, which I think is probably realistic. It will be almost five years on from March 2002, won't it?

Mr Love—The reason for the deferrals in the initial stages was in regard to the collapse of the professional indemnity market.

Senator SHERRY—Yes. You have used the term 'in the initial stages'. As I indicated this morning to ASIC, I thought that that was reasonable in the initial stages. However, it looks like it is going to be close to five years. What is your response to these poor people who are victims of Westpoint, where many of the planners had no PI insurance?

Mr Love—I am not clear that the assertion that many of the planners do not have professional indemnity insurance is accurate.

Senator SHERRY—What do you understand the position to be in respect of these planners?

Mr Love—Our understanding is that the large majority of planners, or persons operating with financial services licences, do have professional indemnity insurance as part of the normal course of business.

Senator SHERRY—But that is not what I asked nor the point I was getting to. Before I get into a discussion on this and Westpoint, what is your understanding of the percentage when you say 'a large majority' of planners currently have PI insurance?

Mr Love—It is very hard to get accurate numbers in order to give you a precise percentage. We have tried to seek information from the industry to give us those sorts of indications—from the insurers themselves, the main players in the marketplace—and no-one has been able to give us an estimation that I could give you that would be reliable.

Senator SHERRY—Yes, but how do you come to the conclusion of 'a large majority', then?

Mr Love—The fact that there are over 4,000 persons with financial services licences. The number of persons with professional indemnity insurance is certainly well into the three thousands, of the particular indemnity insurance policies—

Senator SHERRY—Do you know how many financial planners there are?

Mr Love—But financial planners are often operating under a financial service licence, so we are talking about the obligation of the licensees, but then there would be authorised representatives who would work underneath that.

Senator SHERRY—So, on the PI insurance provided through that grouping facility, ASIC was not able to provide figures?

Mr Love—No. We have discussed this with ASIC as well. It is very hard to do it. Part of the reason why we are going out to consultation is that we hope that putting out draft regulations which will say it will be mandatory to have professional indemnity insurance as a default position will actually flush out persons who do not have it, who will come in and explain to us why it is difficult for them to have professional indemnity insurance. What we are doing now is actually a mechanism that will hopefully shed light on this particular issue.

Senator SHERRY—Yes, but the planners have just been through a licensing process. Wouldn't it have been logical if this matter had been dealt with then as part of that process?

Mr Love—One of the things that ASIC has to look at is the planner's financial resources in order to obtain a licence.

Senator SHERRY—Yes, I understand that. The planners have all been through that.

Mr Love—But I think, as ASIC's response has indicated, it was not actually a statutory requirement to have professional indemnity insurance, so they could not impose that.

Senator SHERRY—I accept that, but that is what concerns me. Let us go back a step. You have used the phrase 'in the initial stages'—the HIH impact—and I accept that. But the ASIC licensing regime for planners came in about, what, two years after?

Mr Love—Yes, it came into full force in March 2004.

Senator SHERRY—Yes. It just seems to me it would have been logical—accepting the HIH upheaval—that that would have been the time to have ensured this PI matter was settled.

Mr Love—We were watching the development and the recovery of the market as well. Treasury has issued both issues papers and options papers in relation to this matter as part of the consultations, and it has been part of an ongoing dialogue and policy development, to watch what was happening, yes.

Senator SHERRY—Yes, I understand all the jargon, but the bottom line is that it is going to be close to five years.

Mr Love—Yes.

Senator SHERRY—The bottom line is that, whatever the numbers are, these poor victims of Westpoint, many of them elderly and many of them retired, are going to have to wait till the court cases are over, and that could be a couple of years. At least some of them—whatever the number may be—will then front to the planner, whatever the dispute procedure is, whether it is through the courts or through FICS, or whatever happens, and say, 'You should now be paying me the difference based on your PI insurance,' and the planner says, 'Well, I haven't got any PI insurance.'

Mr Love—In those circumstances the planners still have that liability imposed upon them to pay it out. Whether or not they have the financial resources to pay it out is in issue.

Senator SHERRY—Yes, exactly. That is my concern. That is one of the reasons for having PI insurance in the first place, isn't it?

Mr Love—Yes.

Senator SHERRY—Can you understand why there is a little nervousness amongst some of the Westpoint victims about the lack of PI insurance, amongst a whole range of other worries they have to deal with?

Mr Love—There may be a possibility of certain planners not having PI insurance.

Senator SHERRY—No, it is not 'there may be a possibility'. Let us not use that sort of terminology. There will be some planners who do not have PI insurance in respect to Westpoint.

Mr Love—I accept what you say, Senator.

Senator SHERRY—You do not know the levels? It is not a 'may be a possibility'. There will be some planners. The bottom line is that in a year or two, or even longer, when all this has settled through the courts, whatever moneys are left, for some of the victims the planners will not have had PI insurance. I have spoken to some compliance officers in some organisations about some planners, and a whole range of the activity, and have been told that some of the planners do not have PI insurance. Here we are almost five years on and the matter has not been settled. Do you think this has been good enough, Mr Murphy?

Mr Murphy—I think in the circumstances it is going to happen. These poor people who are involved with making unwise investments in Westpoint have alternative actions. There are remedies in law. There are remedies in class actions. So those may be alternatives for them.

Senator SHERRY—Has your group been examining the implications of the Westpoint case? I am not just talking about the PI insurance.

Mr Murphy—Yes.

Senator SHERRY—What implications have you been examining, of the Westpoint case?

Mr Murphy—In general terms we do not see that at the present time there is any fundamental flaw in the regulatory regime, or in the law as it applies.

Senator SHERRY—You don't?

Mr Murphy—No.

Senator SHERRY—Why not?

Mr Murphy—There are various streams or strands of the Westpoint case, and some of it is still being played out. Some of it is dependent upon appropriate enforcement action playing its course.

Senator SHERRY—Yes, I understand.

Mr Murphy—You had the decision of the WA Supreme Court about what is a promissory note and this and that, but when you work all these things through there do not seem to be problems with the law.

Senator SHERRY—I think you are pretty optimistic. Let us work through some of the issues. The \$50,000 limit in respect to promissory notes: Mr Lucy himself, I think, has made some very perceptive and correct observations about the \$50,000 promissory note issue. Have you examined that issue?

Mr Murphy—Yes, we have examined that.

Senator SHERRY—Is there going to be any action on this issue? Mr Lucy's suggestion was to add one or two noughts to the \$50,000.

Mr Murphy—I do not think we need to.

Mr Love—Westpoint started using these promissory notes, and there were some initial discussions with Westpoint and ASIC, or their solicitors, back in 1999 and 2000. This was before the introduction of the financial services reforms, so you are looking at the state of the law before all the reforms that we did. Part of the effect of the changes that we made was that we increased the class of what was considered to be a financial product. Our analysis of the current law—and it is very important to note that we are talking about the current state of the law—is that promissory notes over \$50,000, regardless of whether they are exempted from the disclosure requirements, are actually a financial product under the definitions.

In addition, the Full Court of the Supreme Court of Western Australia in the Union Brewery case has also characterised certain fundraising by the Westpoint group as managed investment schemes, which in turn makes them a financial product. These types of financial products are not subject to product disclosure statement requirements. The other aspect of it is that any advice given in relation to these products is subject to the full gamut of the financial services regulations. That includes doing statements of advice in relation to these matters and what the obligations are on the financial planners in regard to giving the advice.

Senator SHERRY—So, together with Mr Murphy's earlier comments, you do not believe that Mr Lucy's observations about adding a nought or two—and that was the precise remedy that he proposed on this issue—is necessary?

Mr Love—I do not think that is the view that Mr Lucy reflected today.

Senator SHERRY—No, not today.

Mr Love—That was based on certain comments about the state of the law. These are very complex transitional issues, and ASIC has been grappling with them. I think they reflected in their answers that this is a difficult issue.

Senator SHERRY—Yes, but Mr Lucy—

Mr Murphy—We are not dismissive of Mr Lucy's comments. If he felt that that would remedy what has been previous nefarious conduct, or people had been permitted to do that, we would consider that and we would put that to ministers to consider. This is quite a complex issue.

Senator SHERRY—I know it is a complex issue. I have been following it and I know you have been following it, and I am going to come to some more elements of the complexity. I accept that that in itself is just one element of what is a very complex issue.

Mr Murphy—The danger in this area is knee-jerking to try to fix what you think is the problem and then cause consequential problems elsewhere. It has not been made easy—putting to one side the misfortune and the financial losses of these people.

Senator SHERRY—We are talking, Mr Murphy, about a very major financial scandal. This is certainly in the top four or five in the last 10 years that I can recall. It is very substantial.

Mr Murphy—We are not dismissive of that. I think the point that Mr Love was making was that the government has introduced a comprehensive regime through FSR—and a lot of work was put into a lot of problems and bedding it down again—to provide appropriate protection for everyone investing in things like Westpoint.

Senator SHERRY—Sure, and one element, the PI insurance, is five years late.

Mr Murphy—That is the case, but the general rules which apply under FSR are a substantial upgrade on the rules that applied to people who invested at the time in Westpoint. We are not closing the door on this. My original comments were, ‘At this point in time, we don’t see that we need to move.’ However, if this plays out and we see that there is any flaw or any loophole in the law for people who were investing, especially retail investors, we would recommend to ministers that they consider—

Senator SHERRY—Let us move on to another element of this, which is self-managed superannuation funds. Again, I have raised this with Mr Lucy and the tax office on at least three occasions. We know that a substantial proportion of the investments in Westpoint—I think approximately one-third, but I am not sure of the numbers or the value—were through self-managed superannuation funds. I do not know if you personally have been doing this, but we know that on a basic analysis of the press releases by ASIC there seems to be a substantial proportion relating to self-managed superannuation funds, Westpoint and non-Westpoint. Have you had any discussions with the ATO about their lack of general regulation in this area that they are responsible for?

Mr Murphy—There has been some consideration as to the implications of the growth in self-managed super funds.

Senator SHERRY—Yes, but the issue is the actual hands-on regulation by the ATO, which is legally responsible for regulating current law—current law, never mind any concern about the meaning of the law—of these 300,000 products. There are over 300,000 there.

Mr Murphy—When I say there has been some examination of the implications of that, that carries with it the examination of the current regulatory arrangements.

Senator SHERRY—I am not talking about examining the regulation of SMSFs, I am talking about enforcing the existing regulations of SMSFs. Presumably you had an input into that section of the finally announced budget super plan on self-managed superannuation funds and their regulation and the increase in the levy—that reference. Are you aware of that?

Mr Murphy—Yes.

Senator SHERRY—Was that a response to a growing concern about the regulation of self-managed superannuation funds?

Mr Murphy—There has been a significant uptake of self-managed super funds. The policy underlying it is to give people the choice and the freedom to manage their own affairs. At the same time, the government is concerned to ensure that there is an appropriate minimum level of regulation and that that regulation is enforced.

Senator SHERRY—Sure, but I am not criticising the regulations surrounding self-managed superannuation funds. My criticism, and I have not raised it here before—there has not been perhaps the time or the opportunity—but I have raised it with the ATO on no fewer than three occasions, is the level of enforcement of existing regulation and law surrounding self-managed superannuation funds.

Mr Murphy—I cannot speak for the ATO. They have obviously answered. Treasury would be concerned to ensure that the whole of the regulatory framework across the board for financial services for superannuation managed investments is an appropriate regulatory framework. So we would consider the appropriateness of the regulation and its enforcement in macro terms, because that is our responsibility.

Senator SHERRY—Have you examined the issue of research houses and their recommendations in respect of Westpoint investment products?

Mr Murphy—And the relationship between—

Senator SHERRY—Independent research houses, who provide the recommendation on the buy and the level of risk et cetera. Have you examined that issue?

Mr Love—Not specifically—not work done by us. These are regulatory issues and these are matters that ASIC would consider as part of its regulatory administrative responsibilities.

Senator SHERRY—I accept that, and they have. But we are looking here at the regulatory framework across a whole range of areas—in this case, in respect to Westpoint—and the lessons that can be learnt from this. So there has been no examination, in a general policy context, of research houses?

Mr Love—We are closely monitoring the issues that have come out of Westpoint. We are listening to the advice that comes out of ASIC and the other regulators in relation to this matter. It is a developing story about what exactly happened and who did what in the situation. I do not think there are final conclusions that can be made at this point, but we are certainly monitoring the feedback from the situation.

Senator SHERRY—One of the areas for possible financial restitution is FICS. You are aware of FICS?

Mr Murphy—Yes.

Senator SHERRY—Are you aware there is a \$100,000 limit on the amounts that can be awarded?

Mr Murphy—Yes.

Senator SHERRY—Are you aware that FICS had been carrying out a consultative process to review the operational regulatory framework in respect of FICS?

Mr Murphy—Yes.

Senator SHERRY—But are you aware that unfortunately—and Mr Lucy was not aware of this when I raised it with him this morning—the possible increase of \$100,000, which is important in the context of Westpoint, has been deferred for further consultation? So the \$100,000 is to remain in place.

Mr Murphy—We see FICS and other bodies like that as a very important part of the whole scheme of things in terms of regulation. I was aware that they were looking at this and were possibly giving consideration to increasing the limit. I am not sure how long that is going to be deferred.

Senator SHERRY—Nor am I, but the press release just said the issue had been deferred again and did not indicate for how long.

Mr Murphy—I could find out about that. From discussions I have had with them and other like bodies, they are pretty committed to what they are doing. If they could provide a more appropriate or better service, they would be doing it.

Senator SHERRY—I do not think it is a matter of a better service or a lack of commitment.

Mr Murphy—No, but from the discussions I have had with some of the major players in the industry, they are strongly behind organisations such as FICS. I do not think they are going to be curtailed in terms of compensation that can be paid. It probably will go up, but I can check on that to see where it is at.

Senator SHERRY—If you could, because that is an issue that is highly relevant in the case of the Westpoint matters. It is not just that there are significant numbers of people above the \$100,000. Apparently two separate investments, if one is less than \$100,000, taken together puts you over the cap, which I certainly did not appreciate until I was informed of this last week. You could have a \$60,000 investment and a \$70,000 investment, which unfortunately some people believed was below the cap, but apparently that takes you above the cap.

I am not one who suggests you rush in and do things, but there is a general level of concern about a range of issues—the PI insurance, the \$50,000 promissory note issue, the research houses and the \$100,000 limit for FICS. Indeed, there are some additional complexities about FICS's capacity to fix anything, which I touched on with Mr Lucy, and that goes to the issue of a planner. FICS no longer has jurisdiction to award compensation, and ASIC is aware of that problem. There is a whole mix of policy issues here that require some very thorough examination, I would argue, and I am a bit concerned because I am not getting the impression that there is much of an examination going on.

Mr Murphy—No, that is not the case. There have been a string of major cases—and that has probably been the history of corporate regulation in Australia—which have led to actions by government. The effect has been a major collapse, with the government acting with further regulation. Even though we have a pretty sophisticated and mature regulatory system—and that has been third party endorsed most recently by the IMF—you will have major cases, notwithstanding HIH and all the reforms that were done there.

Now you have Westpoint. I will not mention the others because then we will jump into those, but all of those main ones we would examine and make sure that the regulatory framework that this government has promoted—and, to be candid, the previous government—is an appropriate one and is best practice and covers all the issues that need to be covered. We do not take it lightly. As well as that, we have got to be covering issues such as private equity, hedge funds, all these funds. The government is very committed to this.

Senator SHERRY—There are two other issues in the case of Westpoint. There is the unreadable disclosure documents under FSR. I know there is work in progress, but they are still unreadable.

Mr Murphy—I know.

Senator SHERRY—You do know that?

Mr Murphy—You have raised this with me for a number of years.

Senator SHERRY—Yes, I know, and I am getting a bit tired of raising it, because they are still unreadable and I still get people who say to me, ‘How do I read and understand this document that has been issued under FSR?’ I am not just talking about superannuation, I am talking about a whole range of areas at the moment.

Mr Murphy—We will not go down this path because I think we have gone down it many times.

Senator SHERRY—There are the unreadable disclosure issues relating to Westpoint and there is the further issue, Mr Murphy, of the outrageous commissions that were being charged by some planners. I am not one who puts all the weight of concern in respect of planner activity in relation to Westpoint, because it is much broader, but there is the 10 per cent average commissions that were being charged as well. That is a policy issue. Have you been considering that as a policy issue?

Mr Murphy—You would know as well as I do, because you have been involved in this area for a long time, Senator, that one can do possibly only two things. You either enforce the law or you put in further prescription to mandate certain commission rates and to mandate specific types of disclosure. We do not go down that path. We do not prescribe things. We have principle based law, we have policy based law and we well fund the regulator to enforce the law.

Senator SHERRY—When you talk about regulation and prescription, everyone I talk to and consult with on the issue of FSR disclosure, including the consumer organisations, thinks the current disclosure documentation is just a dud. It is not working. It is not readable and therefore consumers are not being informed. The industry, for a different reason, is concerned about the unreadability but also the cost. We have ended up, I think, with a very complex set of disclosure documents being issued around financial services that is very costly but ironically is just not protecting people. Part of it, if course, is the Westpoint people.

Mr Murphy—The Westpoint people probably did not have the disclosure documents that you get now.

Senator SHERRY—Some of them did.

Mr Murphy—Over time it is going to improve. We started off tonight's session with financial literacy. Although people can say that that is a small step, it is a worldwide trend to try to improve people's understanding. If people want to invest their personal savings, or substantial savings, I cannot see how you can get away from the fact that they should do that on the basis of being informed and on the basis of a substantial amount of information which informs them or puts them in a position of an informed investor.

Alternatively, the government just takes all responsibility for everyone's investments. I do not think anyone wants that. If you have a market based system, there must be some responsibility taken by the individual to read information and make investments which are sound and suitable to their circumstances.

Senator SHERRY—I accept some of what you say, but we do not have a market based system in superannuation, do we? It is not market based, it is compulsory. There is no choice.

Mr Murphy—It is how you talk about markets.

Senator SHERRY—It is compulsory.

Mr Murphy—It is not a government-run system, it is run through the private sector.

Senator SHERRY—Yes, but it is compulsory, so there are important governance issues that are raised in respect of a compulsory system. In relation to the Westpoint victims, some of whom I have met and many of whom I have spoken to on the phone, they tend to be elderly or in retirement and with reasonably significant amounts of money. I certainly do not believe that these people are illiterate or even financially illiterate, which worried me. These are generally what I consider to be reasonably well informed people and thinking people.

Mr Murphy—Correct me if I am wrong, but they were offered very high rates of return—

Senator SHERRY—In some cases, that is true.

Mr Murphy—which would raise a question mark about some of those investments. But this is not to criticise those people. They probably rue the day they met some of these planners.

Senator SHERRY—That's certainly an understatement!

Mr Murphy—We appreciate that it is the loss at that time of life which is terribly bad. A lot of these people were retired.

Senator SHERRY—Yes, and they cannot go back and earn the money. This is incredibly stressful for these people. Do you appreciate the broader implications in terms of the confidence issue on the broader financial sector on planners and on superannuation in the context of that element that was invested through superannuation? It lowers confidence.

Mr Murphy—I think it does, and one would hope that the poorer performers are weeded out.

Senator SHERRY—In the community I generally do not have financial issues raised with me every day on the street. Occasionally a superannuation issue is raised with me, because some people know I have an interest in it, whether it is lost super or whatever. They talk to me about all sorts of things but generally not financial issues. Certainly when HIH occurred, a lot of people raised that with me on the street. 'This is dreadful. Can I rely on my insurance? Will

the system survive?' I have had those comments in the context of Westpoint, so it has had a broad community impact.

Mr Murphy—It is a major collapse. I do not know the tone of the conversation with ASIC but, to put it mildly, it is a tremendous disappointment to a regulator. It is very difficult to prevent, and it would be a disappointment for the regulator for something like Westpoint to collapse.

Senator SHERRY—I have pressed the issues pretty firmly, and you do have an involvement in this analysis and possible change to the regulatory environment. I have been a critic of ASIC as well. Having been warned by the Western Australian government and the Western Australian consumer minister well before they received any complaints on Westpoint activity, whilst they could not ban planners at that stage or take direct action against Westpoint entities—and I am again told this by planners and compliance officers—if ASIC had rung planners and compliance officers at that stage and suggested that they very closely examine Westpoint entities before they made recommendations, a lot of the activity would not have occurred. I think ASIC should have acted earlier along those lines, but that did not happen. I do not blame ASIC for all that has occurred, but I think they have a level of responsibility. There are a whole range of issues here.

Mr Murphy—I think they accept responsibility, because they are the regulator. That responsibility is to ensure that there is a regulatory system.

Senator SHERRY—In relation to the implications of the ASIC shadow shopping exercise and the recent enforceable undertakings from AMP—and Mr Lucy did not name them but referred to three other major financial institutes where there is ongoing activity—has that raised issues of consideration for your division?

Mr Murphy—Yes. We closely monitor ASIC's actions. We do not get involved in any enforcement action—

Senator SHERRY—Yes, I understand that.

Mr Murphy—but we see the results of the enforcement action. I think the shadow shopping exercise does throw up certain information which the market should be aware of and we should be aware of. If you want to have a well-funded regulator, which we have, it has to enforce the law. Those are the clear instructions from the government.

Senator SHERRY—Has there been any examination of the implications concerning the 'AXA 7', if I could refer to it as that—the attempt by APRA under the fit and proper person test. Has there been any examination of legislative implications there?

Mr Murphy—We have started that process. We had representations after Deputy President Forgie's decision in the AAT. We have been provided with a very strong representation from AXA, which not only was highly critical of the whole process but made certain recommendations as to how the law and processes could be improved. We have asked APRA to report back to the minister, but at the same time we are looking very seriously at that. It is a strange outcome, in that everyone seemed to be well intentioned but I am not sure whether it was the process that drove the particular outcome arrived at. I do not mean the exoneration of the trustee, I mean them being initially disqualified.

Senator SHERRY—Yes. Personally, I do not have any criticism of the EU and the action taken by APRA and ASIC in respect of the restitution involved and the correction in respect of the defined benefit fund. I thought that was appropriate, but what concerned me was that ASIC took it no further, beyond the EU and the correction activity, whereas APRA did.

Mr Murphy—Yes.

Senator SHERRY—I am sure it was significant for the individuals affected, but on the scale of scandals in the financial services sector it was down near 1 or 2—and APRA lost the case. A lot of others are up near 10. For the effective banning from your employment on the fit and proper person test, the extension of that—

Mr Murphy—That is right.

Senator SHERRY—I do not know what the cost was, but it must have been enormous, and we will find that out in due course.

Mr Murphy—But APRA's role is to ensure that you have appropriate people—that is, fit and proper people—managing major financial institutions. That is their job. It is a much closer scrutiny and more intense form of regulation than ASIC provides to the general market. Our concern relates to some of the processes that were adopted along the way. I think that is well worth examining, and we are doing that with APRA.

Senator SHERRY—Good, because if we followed the logic of APRA's approach that was taken in respect of the AXA 7, for goodness sake, APRA presumably would be disqualifying the trustees of AMP on the basis of the outcome of shadow shopping.

Mr Murphy—If you read the facts on—

Senator SHERRY—I am not suggesting that should occur, but that is where we could end up every time there is an enforceable undertaking.

Mr Murphy—It is a big step to seek to disqualify a person from their employment, and traditionally courts have been reluctant to do that. That matter was not taken lightly by APRA, and it is worth trying to work why they took that action, what processes they adopted and why we came to a position where they were wrong.

Senator SHERRY—As you obviously know—and we have discussed this before—I am all for tough action but I think it has to be proportionate; also with some evaluation of the likelihood of success and the costs involved.

Mr Murphy—Yes, that is true, but APRA, ASIC and the ACCC are funded and given responsibilities to enforce the law without fear or favour, and they will seek to do that. I am not critical of anyone involved, from my reading of that case. We should look at it to make sure that proper processes are in place.

Senator SHERRY—Good. I am glad you have got the matter under consideration.

Mr Murphy—Yes. Thanks.

Senator SHERRY—I do not have anything else in Fiscal.

CHAIR—Senator Joyce, do you have anything for Fiscal?

Senator JOYCE—Yes, I do.

CHAIR—Thank you.

Senator JOYCE—This is Foreign Investment and Trade Policy?

Mr Murphy—Yes, Senator.

Senator JOYCE—In light of the current questions—and you would have seen it in the media—about income streams and the pay-off of some of our mining assets in Australia, what is the current trade-off between domestic and foreign ownership of our resource sector in income streams, and the effect on our tax revenue?

Mr Murphy—That is quite a complicated question. We will try to give you this information.

Mr Beckett—I think we will have to take that on notice.

Senator JOYCE—With the change of ownership of some of our resource bases, is there an overall long-term loss of revenue capacity for Australia? I am also interested, if you are taking it on notice, in your investigations into transfer pricing in those organisations that acquire an Australian resource base, a mining base, and in our ability to monitor and track whether there is a diminution of the Australian revenue base by the effect of foreign ownership and their transfer pricing mechanisms in our mining sector.

Mr Beckett—That is generally a matter that is handled by Revenue Group, but we will take it on notice for them.

Mr Murphy—We will get you a response, Senator.

Senator JOYCE—With foreign investment, which has become an issue lately, what is the public benefit test that you place on foreign investment? Do you have one? If you do, how do you follow it through?

Mr Beckett—The arrangements that we have in the Foreign Acquisitions and Takeovers Act have been in place since its inception in 1975. They provide that a foreign investment will proceed unless the Treasurer deems it to be contrary to the public interest. That is a policy decision that the Treasurer makes.

Senator JOYCE—There is no standard definition of ‘public benefit’? It is a value judgment by the Treasurer and, as treasurers change, that value judgment will change. Is that a fair statement?

Mr Beckett—Under the act, it is the responsibility of the Treasurer to determine the national interest in relation to particular cases.

Senator JOYCE—I am basing this question around foreign investment. Does that make it rather amorphous as to what ‘public benefit’ actually means?

Mr Beckett—The test in the act is not a positive public benefit test. Foreign investment will be approved, unless the Treasurer determines that it is contrary to the national interest.

Senator JOYCE—So within your own department there is no public benefit test; it is at the discretion of the Treasurer exclusively?

Mr Beckett—That is the role of the Treasurer, yes.

Senator JOYCE—Why is that important? Because of other things like cross-media ownership issues and the like that come into play? In relation to overseas equity funds, how are we going to monitor the related interests of funds that do not have registered ownership records?

Mr Beckett—I am sorry, I do not understand.

Senator JOYCE—Overseas equity funds do not have a registered ownership record, and they are now major players in some of our media acquisitions.

Mr Beckett—My understanding is that the overseas equity fund is captured by the framework, because they are an overseas equity fund, and therefore their investments will be subject to screening under the FATA of the relevant threshold supply.

Senator JOYCE—If there is no register of their ownership, you have got no idea actually of who is behind them.

Mr Beckett—We look at the manager of the fund and say, ‘If you’re a foreign person, then you’re subject to screening by the FATA,’ and then you might look at control relationships—you know, going backwards when you are doing an assessment.

Senator JOYCE—In that case, you would suggest that you would be able to get full access to the \$4.5 billion that is currently being invested in PBL and who is behind it?

Mr Beckett—In terms of PBL, my understanding is that nothing has changed, nothing has taken place yet in relation to the acquisition of the media, because the law has not changed. The Broadcasting Services Act is as it always was, and the Foreign Acquisitions and Takeovers Act, and policy is as it always was. There has not been any change there.

Senator JOYCE—If it is as it always was, then we do not have a way of getting to the bottom of who are the shareholders, because there is no registry of ownership of foreign equity funds. Therefore, it would stand to reason that you have got no idea, if they invest in Australia, who they are, beyond what we would hope is an amiable relationship with such places as the United States so that they may be able to give us more information, if they choose; but they may choose not to.

Mr Beckett—We know who is operating the fund; we know in the application what role a particular person will have in relation to the target company. There are powers under the FATA that would allow you to pursue these issues.

Senator JOYCE—Within your department, is this an area that has been of concern? Are you intending to write any papers on it or give any greater consideration to the issue of overseas equity funds?

Mr Beckett—We have not given any consideration to it at the moment. It is difficult to say what will happen in the future.

Senator JOYCE—With regard to output 4.13, what is your current advice in terms of competition and the relationship to creeping acquisitions?

Mr French—Senator, the ACCC in its evidence yesterday spoke a little about this. The issue of creeping acquisitions was considered in the Dawson review. The conclusion of the

Dawson review was that the act as it stands was sufficient to handle the issue of creeping acquisitions.

Senator JOYCE—How would it do that?

Mr French—That is consistent with what Mr Samuel said yesterday, in that section 50 allows the ACCC to look at markets and define them appropriately. They indicated yesterday that they did not think that there had been any difficulty in handling the issue of creeping acquisitions.

Senator JOYCE—Let us look at that issue, seeing that you have brought up section 50. I will go to section 50 and the issue of a substantial degree of market power being determined by your capacity to raise prices without losing customers. Who are you going to preclude from that? Don't you see that that substantial test is not very substantial at all?

Mr French—Section 50 relates to a substantial lessening of competition, not the issue of market power. That is a separate issue.

Senator JOYCE—The definition of 'substantial lessening of competition' is by reason of your capacity to raise prices without losing customers. That is the definition under section 50.

Mr French—I think we might need the assistance of Mr Chisholm.

Mr Chisholm—It is correct that, to the extent that the act requires the court to consider certain factors in relation to a substantial lessening of competition, market power considerations might come into play. But the test in relation to substantial lessening of competition is exactly that: whether the acquisition will have the effect, or likely effect, of substantially lessening competition in the market as distinct from the test in relation to section 46, which is where it can include—

Senator JOYCE—Predator pricing, isn't it?

Mr Chisholm—Yes.

Senator JOYCE—The point is that the ACCC in their evidence yesterday are hanging their hat strongly on the 'likely lessening' section in that clause, saying that likely lessening gives them a greater arbitrary method of interpretation. Do you see it the same way?

Mr Chisholm—We understand the ACCC's position, as expressed in the committee hearing yesterday, that it has to consider the acquisitions on a case by case basis. Mr Samuel informed the committee that a number of the markets that the ACCC considers, for example, involve limited geographic areas, and as a result they have been able to clear those acquisitions, because of the limited geographic area in relation to those markets, or accept undertakings proffered by the acquiring party to overcome any concerns about lessening of competition.

Senator JOYCE—In the evidence—and I am still referring to your output 4.13—of 272 mergers, 261 went through and the balance were of mitigant forms of approval. Don't you see that as probably a strong suggestion that competition is being reduced by reason of a reduction in the players in the marketplace?

Mr Chisholm—The question of whether competition is being reduced in a marketplace does not necessarily come down to the number of players in the market. We can only look at

those figures in the sense that the commission has applied the test under section 50 and found that those acquisitions did not breach section 50.

Senator JOYCE—That is the clear intention. I am looking for the intentions of your advice. What you said then is the number of players does not indicate a reduction in competition.

Mr Chisholm—Not necessarily. In some circumstances that may be a factor but in other circumstances not. You cannot really generalise, across all the different markets the ACCC has considered in relation to the number of acquisitions referred to, that the number of market players is the key consideration.

Mr French—I think the ACCC was also mentioning yesterday, in relation to those statistics, that it might not pick up situations where a merger proponent has come forward and then decided not to proceed. It is rather difficult to interpret some of those statistics.

Senator JOYCE—There are two sides to competition: there is the competition to the consumer and there is the competition of the person who trades through those entities, such as the supplier or the producer. They also have an effect that should be taken on board by the treasury department as to whether there has been a lessening of competition—that is, a lessening of choice—for the horticultural producer, for instance, and who they can supply in a market and whether the competition is as apparent on the supply side as it is on the consumer side. Do you have any comments on that?

Mr French—I am not sure I was following you, Senator.

Senator JOYCE—If you have two major retailers in a market—and I will not suggest what country that is in—the competition may be apparent on the consumer side—that is, the person walking in to buy themselves a carton of eggs—but it is not as apparent on the supply side, where there are inherent market practices that reduce that competition or that choice—the choice of the person to supply a variant range of traders. You want to say, ‘Where are we going with this?’ My question is, do you consider both sides of the transaction, both the supplier and the consumer? In discussion so far, you have said that competition is apparent even if there is a small number of producers. Do you also consider the people who are supplying that market?

Mr Chisholm—Treasury does not apply the test in section 50. It is the responsibility of the ACCC to apply the test in section 50, and it does encompass some of those considerations.

Ms Holdaway—I think it is fair to say the current law does not prohibit the ACCC from considering all aspects of the market.

Senator JOYCE—Under the definition of section 50.

Mr Murphy—Are you referring to the right to collective bargaining by small business in supplying—

Senator JOYCE—Not extensively. I am referring, in regard to well-functioning markets, to competition and consumer policy advice. Does the advice that goes through the department encompass all sections of a product’s life, being between the producer and the retailer and then the retailer and the consumer? We are accepting, with the retailer and the consumer, that whether there is competition or not it is arguable. You say there is; I believe there is not. But

there is a wealth of argument to say that the competition has certainly been reduced between the producer and the retailer. Does your advice on competition and consumer policy advice flow through? If it does, it starts to affect the whole gamut of where legislation goes, so you have a very important role to play.

Mr Murphy—Yes, but you have to look at the Trade Practices Act as a whole. There are not just monopoly power 46 and lessening competition 50. There are other provisions in there which seek to ensure that there is a proper competitive market operating. The Trade Practices Act is not just written from the point of view of the individual.

Senator JOYCE—But, as we brought up the other day in a comparison of acts, chapter 41 in the UK act is far more encompassing than our act. What I am fleshing out is that, as we go through this process of consideration by the government of these issues in a more substantial form, you will have a key role to play. I am interested in the sort of advice, intentions and ethos that you have in delivering all that advice.

Mr Murphy—Our mission, probably apropos the comments and discussion with Senator Sherry, is to ensure that we have an appropriate regulatory framework which promotes efficient and effective markets. Our job is to ensure that we get the policy advice to government to give them the confidence that they have efficient and effective markets out there operating to the benefit of all Australians—to Australians' wellbeing. Times change and markets change and there are developments. That is why it is an ongoing duty and responsibility. That is why we just had the Dawson bills go through, which we are very pleased about. We have been waiting for that for four years. The government is going to now move a bill with 46, the monopoly power. Then there will be a cartel bill. These are all things that we think would improve the regulatory framework for trade practices.

Senator JOYCE—Mr Murphy, as you are well aware, the mergers and acquisitions amendment went through and the vast majority of the Dawson provisions went through over a year ago.

Mr Murphy—No.

Senator JOYCE—Yes. Schedule 1 of the Trade Practices Legislation Amendment Bill (No. 1) was what had passage the other week, if that is what you are referring to. Schedules 2 to 12 had passage last year.

Mr Murphy—Okay.

Senator JOYCE—In relation to the Fuel Tax Bill, what is your position on the change in the grants scheme? The grants scheme was set up in 2004 and allowed a 38c investment grant for those investing in biodiesel. There was then a 38c grant allowed for those who purchased. This was then changed, apparently on advice that there was a loophole. Can you explain to me what that loophole was.

Mr Murphy—I am not certain I can answer that.

Mr French—This is a question for the Revenue Group under outcome 2.

Senator Colbeck—It was fairly extensively debated in the chamber too, Senator Joyce, and I think we might both remember that debate.

Senator JOYCE—I remember it very well. That is why I am bringing it up. There is still a hole there and I want to pin some of it down.

Senator Colbeck—I think if you go back through the *Hansard* of that, you will get a fairly detailed explanation of where the government sees the loophole.

Senator JOYCE—I can see the loophole, and it is still there, if that is what they intended to close, because the definition of ‘standard diesel’ being five per cent organic, 95 per cent mineral based still allows the grant at both ends. All that has changed is the people who produce it, which is now the major oil companies as opposed to the regionally based biodiesel producers.

In regard to the current mergers, I have been reading that the Australian Stock Exchange has been caught napping in the current flurry of mergers and acquisitions. Do you have close contact with the Australian Stock Exchange in regard to the potential, with the cross-media ownership bill and the mergers and acquisitions bill, implications for the market as regards further mergers and acquisitions being brought on?

Mr Murphy—We have a working relationship with the stock exchange on matters which are of common interest. The operation of the market is their responsibility. With ASIC, they have the responsibility for ensuring that the market operates in a sound way. They seem to be on top of things and they will react appropriately.

Senator JOYCE—Regards output 4.11 again, foreign investment trade policy: with the impending free trade agreement with China, have you given advice as to what the potential tax revenue implications are for Australia with foreign ownership of, especially, resource issues such as mines and transfer pricings into China?

Mr Murphy—No, the negotiations of the free trade agreement with China are still at that stage, and so it is very preliminary.

Mr Beckett—We have not given any of that type of advice, no.

Senator JOYCE—Do you ever intend to give that type of advice: the implications for consolidated revenue of these free trade agreements and the issues of transfer pricing and the internal mechanisms of corporate entities that will be—

Mr Beckett—The Treasury gives advice on all free trade agreements in relation to their impact on tariff revenue and how that affects consolidated revenue. I have not been aware of any particular transfer pricing issues that would arise as a result of FTA negotiations to date of which I have been a part.

Senator JOYCE—I will make the question broader then. Do you believe that in corporate entity structures that operate across boundaries, where any multinational deals in Australia, there is a capacity for the transfer of profits to more appropriate or kinder sections?

Mr Beckett—We can take it on notice and pass it on to Revenue Group for you, Senator.

Senator JOYCE—I think that is concise enough. Thank you very much, Mr Chair.

CHAIR—Thank you, Senator Joyce. Senator Chapman, did you have any questions?

Senator CHAPMAN—No.

CHAIR—Thank you very much indeed, Mr Murphy. Ladies and gentlemen, you are excused. For the last 10 minutes or so we will have the Macroeconomic Group, please. Can they come to the table.

[10.48 pm]

CHAIR—At the table are officers from the Macroeconomic Group of the Treasury. Good to see you again, Dr Parkinson, and you, Senator. Senator Sherry, we obviously have only a few minutes and most of Senator Sherry's questions, as you will anticipate, will no doubt be on notice.

Senator SHERRY—I want to turn first to an examination by Mr David Turner—I have touched on this in two other areas of estimates—who issued a publication in respect of cyclical and structural tax revenue matters. He is with the OECD. It was published on 6 August. Did he liaise with Treasury in respect of this work?

Mr Parker—Yes, we know Mr Turner's work on this quite well. There is a precursor to some of this work in the prior publication of the annual survey that the OECD put out a little earlier this year. We have discussed the issue quite extensively with them. Indeed, some of the foundational material which David Turner used in the study is based on some work that Treasury has done with TRIM—that is the macroeconometric model of the terms of trade results—so, yes, we are familiar with the work.

Senator SHERRY—Thanks for that. It is good to strike someone who obviously has good knowledge of this issue. After adjusting for terms of trade effects, was it observed in the paper that the cyclical or temporary component was worth approximately 1.5 per cent of GDP in 2005-06?

Mr Parker—That is what is in the paper, yes.

Senator SHERRY—Is 1.5 per cent of GDP equivalent to approximately the surplus in that year?

Mr Parker—It is.

Senator SHERRY—Have any further estimates been made of the cyclical component of revenues in the current and future years?

Mr Parker—There is a whole range of estimates of those done by a variety of different organisations. The IMF does it and the OECD does it, but we do not. I think we have been over this territory before.

Senator SHERRY—We have, but I was interested in the new angle of intersection, given the work carried out by Mr Turner.

Mr Parker—There is a range of estimates. If you look at the structural balance that comes out of, say, the IMF estimate for 2005-06, it was two per cent and for the OECD it was 0.5 per cent. Then what David Turner has done is to come in and look at an additional slice of adjustment to pick up the terms of trade story. But there is a quite specific reason why we do not publish this. If you will permit me, I will tell the story because it goes, importantly, to how you interpret the numbers.

The methodology behind any of these estimates is strikingly simple. It can be complicated to any degree of sophistication, but the methodology underlying it is strikingly simple. You effectively have to ask the question of where is the economy's trend level of output—the supply side potential of the economy—and how does that compare with where the economy actually is. That measures the so-called output gap. Then you work out what that output gap is worth in terms of revenue, and then adjust the fiscal surplus as a result of that. So the essential underlying methodological point is that you have to determine what is the economy's underlying level of output; its trend level of output. What David Turner has done, and what can be done through any number of other ways, is effectively to make an assumption about what the underlying trend level of the terms of trade is.

What he has done is basically to crunch through the numbers with an assumption that the terms of trade return to their long-run average—that is, that in effect all of the terms of trade boost that we have seen over the last several years of around 30 per cent is labelled as 'temporary'. Were they to go away, revenue would fall back by the amounts that he has estimated, and then you take that off the underlying measure of the fiscal balance and label the residual as structural. That is the essential nature of the methodology. You can do that on the back of an envelope.

Senator SHERRY—But it is a reasonably impressive envelope, this publication.

Mr Parker—You can do it on the back of an envelope and get a similar sort of result.

Senator SHERRY—Did you advise him of this?

Mr Parker—We have had long, extensive discussions with David over this issue in Paris. Our basic bottom line is that a higher degree of sophistication added to the analysis—and he has got it quite sophisticated by using a TRIM run—does not add to the certainty of the result substantially. Moreover, you cannot actually get past the underlying methodological assumption, which is that you have to say what the permanent or temporary shock to the terms of trade is. All of that figuring is done on the assumption that all of the terms of trade boost we have seen are temporary and go away tomorrow. Beyond that, any amount of more sophisticated analysis is just layering on top of that. We have told you stories in the past about how we have been profoundly sceptical about the usefulness of structural measures of fiscal policy.

Senator SHERRY—You have.

Mr Parker—In particular, in countries which have adopted a formal definition of the structural measure, which then feeds into the decisions on the stance of fiscal policy, what you tend to find is that the debate about fiscal policy deteriorates into a debate about exactly where the economy is in the cycle. This comes back to our profound scepticism about whether that is actually the most productive way to run fiscal policy. The work that David and others have done is informative, but we have a quite substantial degree of scepticism about the point estimate that comes out of any exercise of this sort.

Senator SHERRY—Were you personally involved in the interaction between Treasury and Mr Turner?

Mr Parker—I led the Australian delegation to the OECD at the EDRC.

Senator SHERRY—I got the impression from what you were saying that you did seem to know him.

Mr Parker—Yes, I know David.

Senator SHERRY—I have nothing more on that. I am sure we will come back to it at other stages in other estimates.

CHAIR—Sure. Given that we are almost against time, Senator Sherry, if you have one more quick thing we will do it, but there is not much point on embarking on anything.

Senator SHERRY—I concede the point. I have some questions on the resources issues and impact on budget, but I do think, whilst it would always be interesting, as Dr Parkinson does find these issues sometimes, it is that time of night.

CHAIR—It is a shame we will not have the opportunity to hear more from Dr Parkinson, who is always most informative. You will place those questions on notice, will you, Senator Sherry?

Senator SHERRY—Yes.

CHAIR—That being so, and subject to one qualification, that concludes the supplementary estimates hearings of this committee for 2006. The qualification is this: the committee resolved in private session during the course of its hearings that the questions directed to the ACCC and ASIC concerning Telstra would be postponed to an adjourned hearing of this estimates round at a date to be determined in the next sitting fortnight of parliament so as to put the questions beyond the time of the Telstra float. Subject to that, these proceedings are concluded. Thank you.

Committee adjourned at 10.58 pm