COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

STANDING COMMITTEE ON ECONOMICS

ESTIMATES

(Additional Budget Estimates)

THURSDAY, 15 FEBRUARY 2007

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SENATE STANDING COMMITTEE ON

ECONOMICS

Thursday, 15 February 2007

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

Senators in attendance: Senators Bernardi, Boswell, Conroy, Evans, Joyce, Murray, Parry, Ronaldson, Sherry, Watson and Wong

Committee met at 9.01 am

TREASURY PORTFOLIO

Consideration resumed from 14 February 2007.

In Attendance

Senator Minchin, Minister for Finance and Administration

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

Department of the Treasury
Outcome 1: Sound Macroeconomic Environment
Output Group 1.1: Macroeconomic Group

Mr David Parker, Executive Director
Dr Steven Kennedy, General Manager, Domestic Economy Division
Ms Nghi Luu, Senior Adviser, Domestic Economy Division
Mr Rob Ewing, Senior Adviser Domestic Economy Division
Mr Paul Gardiner, Manager, International Economy Division
Mr Nathan Dal Bon, Manager, International Economy Division
Mr Roger Brake, General Manager, International Finance Division
Mr Gordon de Brouwer, General Manager, G20 and APEC Secretariat
Dr Paul O'Mara, General Manager, Macroeconomic Policy Division
Mr Graeme Davis, Principal Adviser, Macroeconomic Policy Division
Mr Andrew Thomas, Manager, Macroeconomic Policy Division
Mr Greg Coombs, Manager, Macroeconomic Policy Division
Mr David Turvey, Senior Adviser, Macroeconomic Policy Division

Outcome 2: Effective Government Spending Arrangements
Output Group 2.1: Fiscal Group

Mr David Tune, Executive Director
Mr David Martine, General Manager, Budget Policy Division
Mr Jason McDonald, Manager, Budget Policy Division
Mr Rob Heferen, General Manager, Social Policy Division
Mr Peter Robinson, Principal Adviser, Social Policy Division
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

Outcome 3: Effective taxation and retirement income arrangements

Output Group 3.1: Revenue Group

Mr Mike Callaghan, Executive Director
Mr Blair Comley, General Manager, Business Tax Division
Ms Christine Barron, General Manager, Indirect Tax Division
Mr Mark O'Connor, General Manager, Individuals and Exempt Tax Division
Mr Martin Jacobs, Manager, Individuals and Exempt Tax Division
Mr Mike Rawstron, General Manager, International Tax and Treaties Division
Mr John Lonsdale, General Manager, Superannuation, Retirement and Savings Division
Mr Tony Coles, Manager, Superannuation, Retirement and Savings Division
Ms Louise Seeber, Manager, Superannuation, Retirement and Savings Division
Mr Nigel Ray, General Manager, Tax Analysis Division
Mr Damien White, Manager, Tax Analysis Division
Mr Phil Gallagher, Manager, Tax Analysis Division
Mr Colin Brown, Manager, Tax Analysis Division
Mr Paul McCullough, General Manager, Tax System Review 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 Patrick Colmer, General Manager, Foreign Investment and Trade Policy Division
Mr Chris Legg, General Manager, Financial System Division
Ms Vicki Wilkinson, Manager, Financial System Division
Mr Trevor King, Manager, Financial System Division
Ms Kerstin Wijeyewardene, Manager, Financial System Division
Mr David Love, Manager, Financial System Division
Ms Michelle Calder, Senior Adviser, Financial System Division
Mr Geoff Miller, General Manager, Corporations and Financial Services Division
Ms Marian Kljakovic, Manager, Corporations and Financial Services Division
Mr Matt Brine, Manager, Corporations and Financial Services Division
Ms Ruth Smith, Manager, Corporations and Financial Services Division
Mr Bede Fraser, Manager, Corporations and Financial Services Division
Mr Jorge del Busto, Senior Adviser, Corporations and Financial Services Division
Mr Steve French, General Manager, Competition and Consumer Policy Division
Ms HK Holdaway, Manager, Competition and Consumer Policy Division
Mr Glen McCrea, Senior Adviser, Competition and Consumer Policy Division
Mr Aidan Storer, Senior Adviser, Competition and Consumer Policy Division
Mr Brad Archer, Manager, Competition and Consumer Policy Division
Mr John Karatsoreos, Senior Adviser, Competition and Consumer Policy Division
Mr Michael Johnston, Manager, Competition and Consumer Policy Division
Ms Jane Melanie, Senior Adviser, Competition and Consumer Policy Division
Mr Peter McCray, General Manager, Financial Literacy Foundation
Mr Grahame Crough, Manager, Financial Literacy Foundation

Ms Linda Rosser, Manager Financial Literacy Foundation
Mr Peter Martin, Australian Government Actuary

Australian Accounting Standards Board
Professor David Boymal, Chairman
Mr Angus Thomson, Technical Director

Australian Bureau of Statistics
Ms Susan Linacre, Acting Australian Statistician
Mr Peter Harper, Deputy Australian Statistician, Economics Statistics Group
Mr Denis Farrell, Acting Deputy Australian Statistician, Services Group
Mr Garth Bode, Acting First Assistant Statistician, Social and Labour Statistics Division
Mr Mark Whybrow, ABS Chief Financial Officer

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

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 S G (Ramani) Venkatramani, General Manager, Central Region, Specialised Institutions Division

Australian Securities and Investment Commission
Mr Jeremy Cooper, Deputy Chairman
Mr Tony D'Aloisio, Commissioner

Australian Taxation Office
Mr Michael D'Ascenzo, Commissioner
Mr Greg Farr, Second Commissioner
Mr Jim Taylor, Acting 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

Financial Reporting Council

Mr Charles Macek, Chairman

Mr Jorge del Busto, Secretary

CHAIR (Senator Ronaldson)—Today the committee will continue its examination of the Treasury portfolio, and we will then move on to the Industry, Tourism and Resources portfolio later today. I welcome Senator Minchin, representing the Treasurer, and officers of the ACCC. Do we have an opening statement?

[9.01 am]

Australian Competition and Consumer Commission

Mr Samuel—Chair, I could not disappointment you in your inaugural role as chair of an estimates committee! I thought I would address three particular subjects today, keeping in mind of course that we did appear before this committee just a few weeks prior to Christmas to deal with some issues relating to Telstra. One relates to the issue of telecommunications; that would not surprise you. I then want to bring you up to date on some of the positions that we are dealing with at the moment in relation to mergers and then I will provide a summary of our current enforcement processes and what is happening there.

Let me deal first with telecommunications. It is no surprise to note that there is a lot of noise and rhetoric around telecommunications competition and access regulation at the moment. A lot of claims are being put out suggesting that access prices are below cost or that access regulation is deterring investment. We now also have a High Court case between Telstra and the Commonwealth on part XIC of the Trade Practices Act. Furthermore, the failure of carriers to propose reasonable undertakings with access prices that would apply across the board has dramatically increased the ACCC's workload over the last 12 months, since we now have to arbitrate disputes between industry members one by one.

As at 1 February 2007, we are arbitrating 28 individual telecommunications access disputes. This is similar to the level of disputes at the time of estimates in November last year, but the composition has changed. In November the majority of disputes were over mobile access; today the majority are over fixed line access, especially access to the unconditioned local loop service, or ULLS, and the associated line-sharing service, or LSS.

I note that Telstra has commenced litigation in the High Court of Australia to argue that part XIC of the act is beyond the legislative power of the Commonwealth parliament and that the ACCC has no jurisdiction to arbitrate access disputes for ULLS and LSS. The ACCC has decided to reject Telstra's request to suspend further arbitration in ULLS and LSS matters. The ACCC must proceed on the basis that an act of parliament is valid and binding on it unless and until otherwise told by the courts. Further, the ACCC considers that the consequences of suspending further arbitration and access disputes for ULLS and LSS, including the impact delays will be likely to have on end users and on broadband rollout in this country, make it inappropriate not to proceed with the arbitrations as requested by Telstra.

During the period since last estimates, between 1 November and 1 February we finalised arbitrations in nine disputes. We also issued interim determinations in 10 disputes. We have also released arbitration pricing principles for three services since the November estimates

hearings—the PSTN originating and terminating service, the local carriage service and wholesale line rental.

In the context of undertakings, it is clear that carriers are coming to the ACCC with proposals that are not justified by a sound analysis of costs on any approach and are destined to be found unreasonable by both the ACCC and the Australian Competition Tribunal. Two judgements on undertakings have been handed down by the Australian Competition Tribunal since the last estimates hearings. In both cases the tribunal upheld the ACCC's decisions to reject prices proposed by Optus and Vodafone respectively for mobile terminating access to their GSM networks. This now makes three out of three tribunal decisions in the last nine months where the tribunal has agreed with the ACCC that access prices proposed by a carrier are unreasonable. In June 2006 the tribunal agreed with the ACCC's decision that Telstra's line-sharing service prices were unreasonable.

The fourth tribunal matter—this one concerning the ACCC's decision to reject Telstra's proposals on access to ULLS—was heard in December 2006 and is awaiting judgement. In addition, the ACCC found that the charges proposed by Telstra for PSTN and local carriage service in another undertaking were unreasonable. These findings were not appealed by Telstra.

Given that the Australian Competition Tribunal has agreed time after time that the prices proposed by the carriers are unreasonable, the ACCC is getting on with the business of arbitrations despite the distractions of litigation and rhetoric by the parties. In particular, the ACCC is pressing on with its statutory role of providing access to key bottlenecks in Australian telecommunications to spur vigorous competition and efficient investment.

Let me now move to fixed line access. In the absence of an acceptable undertaking from Telstra on access to either ULLS or LSS, the ACCC is now arbitrating numerous access disputes on these two key broadband enabling services. The need to proceed with arbitrations despite the distractions of litigation and rhetoric can be illustrated by the case of the line-sharing service. In June 2006, as I noted, the Australian Competition Tribunal found that Telstra's proposed LSS charge of $9 per month was not reasonable. Despite this ruling from the tribunal, Telstra continued to charge access seekers $9 per month. The ACCC made two interim determinations in relation to the LSS on 21 December 2006. These provided that, for the two access seekers involved in those disputes, the LSS charge payable to Telstra should be $3.20 per LSS per month, or $38.40 per LSS per annum. There are half a dozen LSS disputes still afoot involving other competing carriers. Accordingly, the ACCC continues to press on with those arbitrations to ensure that reasonable charges apply across the market.

Nevertheless, and despite the Australian Competition Tribunal's judgement, we are consistently hearing Telstra's mantra about how the ACCC is requiring it to provide access below cost. Most recently Telstra has made public statements about how the LSS charge of $3.20 per LSS per month means that Telstra's competitors can get wholesale broadband access for the price of a cup of coffee then sell a retail broadband service for the cost of a restaurant meal. This fundamentally misstates the underlying cost that access seekers face in providing broadband services to retail customers. The line-sharing service, LSS, is only one input in the provision of a retail broadband service, which also requires inputs such as DSLAM equipment, building services, transmission, marketing and customer support. All

these inputs mean that the underlying total cost of provision for competitors is likely to be up to 10 times the price of just the LSS input alone. This adds up to quite a lot of coffees—maybe even a decent meal.

Telstra also argues that the line-sharing service charge does not allow it to recover the cost of the line itself. But in fact Telstra already recovers the cost of the line through separate line rental charges. Since 2000, Telstra has significantly increased line rental prices paid by consumers and businesses to recover line costs from line rental revenues. For example, the majority of its retail residential customers have seen line rental charges rise from $11.65 to $27.23, excluding GST, in that period. Allowing a contribution to line costs in the line-sharing service charges as well at this time would permit Telstra to double dip. However, Telstra has long been able to rebalance LSS and wholesale line rental charges should it wish to do so.

The ACCC remains open to considering alternative approaches for setting prospective LSS annual charges in a final determination. While the ACCC is pressing ahead to open up bottleneck inputs that enable broadband competition, we have made it clear that we see no compelling case to regulate more competitive services such as wholesale ADSL2+.

The availability of high-speed fixed line broadband in Australia is increasing. Over the last 18 months or so, providers such as iiNet, Internode and Adam Internet have taken advantage of the ULLS and the LSS to be the first to launch ADSL2+ services and give themselves a distinct speed advantage over their competitors. Since then they have been joined by others such as Optus, PowerTel, NextStep and Agile. This increased competition has spurred other carriers, and finally Telstra, to roll out high-speed ADSL2+ in Australia. Telstra, in response to the high-speed offering of competitors, upgraded its network in late November 2006. This will enable 46 per cent of households to access broadband at speeds of up to—and I use that expression carefully—20 megabits per second. In addition, the G9, or Group of 9, carriers are discussing their proposed fibre to the node network investment with the ACCC. The G9 members have been providing information to the ACCC on their infrastructure model, financing and proposed access arrangements. They have stated a desire to lodge a special undertaking in the second quarter of 2007. I make the more general point that the ACCC remains open to discussing undertaking proposals with all industry parties with a view, ultimately, to public consultation.

I have just a few comments on mobile services. In the mobile sector, regulation targets physical bottleneck inputs such as spectrum, sites and towers, plus transmission and the mobile terminating access service. In recent months the Australian Competition Tribunal has upheld ACCC decisions in two cases about mobile termination pricing brought by Vodafone and Optus, rejecting their proposed target price of 16.5c and 17c per minute respectively. The ACCC has maintained that 12c per minute is the appropriate price for the period up to 30 June 2007. As a result of these Competition Tribunal decisions, the benefits of lower prices can now flow through to consumers.

Despite claims by some parties that reductions in access prices threaten infrastructure investment, four mobile carriers in this country are now investing in 3G mobile broadband rollouts. With Telstra's Next G rollout, terrestrial mobile broadband is now available to 98 per cent of the population. In late January 2007, Optus announced its intention to build a 3G HSDPA network that will cover 96 per cent of the population. Hutchison and Vodafone have

also commenced 3G network upgrades. It is no coincidence that these developments have taken place within a market structure comprising four strongly competing mobile carriers, supported by access regulation for bottlenecks such as sites, towers, transmissions and terminating access which allows these carriers to enter the market and compete.

Telstra has claimed that the key reason that both Telstra and Optus have invested in national 3G networks was because of statements by the ACCC that we saw no compelling case to declare access to wholesale 3G. However, it is worth considering that the commission has made similar statements about ADSL2+. Telstra has only recently deployed ADSL2+ services despite the fact that other providers have been providing these services for some two years, and Telstra has only deployed ADSL2+ to exchanges where it faces high-speed broadband competition from other carriers. In the context of broadband overall, the take-up of fixed broadband services continues to grow very strongly, with an increase over the preceding 12 months—that is, from September 2005—of one million subscribers. As has already happened in many countries in Scandinavia and north Asia that are OECD fixed broadband leaders, increased intensity of competition based on opening up access to the local loop bottleneck is proving a major driver of investment.

In summary, on telecommunications, the ACCC is getting on with business despite the usual distractions of litigation and rhetoric by the parties. The ACCC is pressing on with its statutory role under the Trade Practices Act of maximising the opportunities for vigorous competition and efficient investment in Australian telecommunications by all parties impartially and without fear or favour. Ultimately, this will be to the benefit of all 20 million Australian consumers, not just a smaller number of parties who have vested interests in particular outcomes.

I will move now to the issue of mergers. As has been widely publicised, mergers is facing a substantially increased workload in the current financial year. Just to give you a sense of the statistics, in the three financial years ending June 2005, the average number of mergers considered—and that means cleared and/or opposed or dealt with by the commission—was around 190 per financial year. In the 2005-06 year, the number of mergers considered by the commission was 272. In the year to date—that is, the seven months in the current financial year—the total number of mergers considered by the commission is just on 240, which suggests that, at that pace, we will be considering around 400 mergers in the current financial year—over double that of the average of some of the previous financial years. In addition to that, it is worth noting that the nature of merger proposals being put to the commission involves increased complexity, particularly with some significant restructuring that is occurring in the area of energy, gas and electricity in particular.

We have previously commented, both publicly and elsewhere, about the role of section 87B undertakings. Of course, where it is possible to clear a merger and where parties have provided to the commission an undertaking to deal with some of the anticompetitive impacts of that merger, it is incumbent on the commission to deal with that in an objective fashion. We have been dealing with section 87B undertakings, but have modified quite significantly our approach to dealing with those undertakings over the past 12 months. The reason for that is that mergers are becoming more complex. As a consequence, some of the undertakings being proffered by parties are becoming more complex and the increasing complexity leaves open

the scope for undertakings potentially to be sometimes more honoured in their breach than in their observance through use of some of the complex provisions that are contained in them.

As a consequence, we are now insisting in all undertakings that are provided to us on the inclusion of what is called an interpretation or objectives clause, which is not dissimilar to sections 15A and 15B of the Acts Interpretation Act. It essentially refers to the objective of the undertaking in terms of preventing anticompetitive structures and/or behaviour occurring as a result of a merger, and requiring where there is any doubt as to the interpretation of specific provisions of the undertaking that they be interpreted in accordance with the objectives evidenced by the document itself and by other documents that may be relevant to our consideration of the merger proposal, including statements of issues and other background documents. Where we have doubt about a company's ability to deliver an undertaking, and that becomes a significant consideration to us in whether or not to accept an undertaking that, on its face, may look acceptable, the doubt that we might have as to the ability to deliver the undertaking may well cause us to have a disinclination to accept an undertaking in specific circumstances and instead prefer upfront dealing with competition issues. That may well involve circumstances where, rather than accepting an undertaking for a delayed or deferred sale of a business or of a business division of a merged entity, we require that the business be sold prior to the merger actually taking place.

There are a number of other elements that we are putting into undertakings now, including very rigid dates for assets to be sold where divestiture is required, and if, upon the conclusion of that period of time for sale, sale has not taken place, then we move into what is termed fire sale mode. Fire sale mode means that independent agents will be appointed to sell the assets concerned. They will be given a specified period of time with obviously the objective to sell at a fair price, but if the only bid for those assets is $1 then they will be sold at that price.

In addition, we have been concerned about the ability of companies to hold separate assets during deferred sale periods. Where a merger takes place, there might be a period of up to six or 12 months for a sale of an asset or a business division to take place. In the intervening period or the interim period, it is required that those assets be held separately by independent boards of directors and the like. We are concerned about that process, which is more a behavioural process, and its ability to be monitored and indeed its ability to be implemented in an effective fashion. We are therefore requiring in many cases now that independent managers be appointed to manage assets that are the subject of divestiture in order that there cannot be anticompetitive arrangements, structures or behaviour that might take place until divestiture actually occurs. We are increasingly requiring appointments of independent auditors to audit behaviour under undertakings and to provide reports to us. Business sometimes complains about the cost, but in the context of the multibillion dollar mergers that we are often dealing with at the moment, the cost of appointing an auditor and having an absolutely independent auditor report to us is but a small matter indeed and is essential for us to be able to effectively administer section 50 of the Trade Practices Act.

The Dawson amendments were proclaimed to come into force as at 1 January 2007. It is still early days, but I can say to you that we have had no applications under the Dawson amendments—that is in terms of formal merger clearance, authorisation applications to the tribunal—since they have come into place in the first six or seven weeks of this year. We are

still receiving a large number of applications for informal clearance of mergers and are processing those in the manner that I have described just previously to you now and on previous occasions.

There has been some commentary as to our approach in dealing with the formal process. I want to make clear our position. The formal process is now enshrined in several hundred pages of legislation and regulation. It is highly prescriptive and it demands that the administration of that process be in itself highly prescriptive. It does not provide for flexibility. It does not allow for flexibility and it is not appropriate for the regulator—the administrator of that formal process—to adopt its own arbitrary or discretionary flexible process, which in many senses might be to ignore the prescriptive law that has been provided. Therefore, I have indicated publicly that we will, because of the requirements of the law, be adopting a prescriptive approach to the administration of the formal process. That is not because of any dislike of the formal process. I have to stress that it is not an endeavour to persuade parties that they should use the informal rather than the formal process. It is simply a recognition of the fact that the formal process is highly prescriptive, it contains a number of very serious responsibilities on applicant parties, and we must deal with those in the prescriptive manner required by the several hundred pages of law and regulation that have been provided to us by parliament.

Let me move now to enforcement. The enforcement processes of the commission, if I can say so without any sense of hubris or arrogance, are probably running in the most efficient and effective manner that we have seen for some time. We have changed somewhat, over the past two or three years, part of the nature of enforcement administration, with more centralised control over the many matters that we have coming before us and which come under serious investigation through the year. Sometimes nearly 1,000 issues are under serious investigation across the country. The process of dealing with enforcement varies according to the nature of the matter. I have outlined these on previous occasions, so I will not take the time of the committee now to repeat some of the criteria we use in determining whether or not we will deal with matters on an administrative basis, through the use of section 87B undertakings or through the use of litigation.

The commission has adopted a series of protocols and criteria as to when litigation will be used, when section 87B undertakings will be used, and when administrative settlements will be accepted. They are working very well and they are widely accepted now throughout the whole organisation. The consequence of this process is that we are now managing to process a significant increase in the number of matters that we can resolve for the benefit of consumers. In particular, in relation to consumer protection matters we are now able, with the threat of litigation in our back pocket—but with the on-flowing cooperation of those who have contravened the law, whether through inadvertence or whether through other processes within their organisation—to process resolutions that involve not only corrective advertising and constraints or restraints on continuation of the behaviour but, more importantly, restitution to consumers that have sustained damage as a result of the misconduct on the part of business concerned.

That is really important because under the litigation process, as I have commented on previous occasions, restitution for consumers is, to say the least, an extremely difficult and

complex process and is not one that provides satisfactory results for consumers. The nature of the way that we are resolving matters is moving very much towards the use of section 87B undertakings, but with litigation still running at a fast and significant pace particularly where there is widespread consumer detriment or there is blatant contravention of the law and a lack of cooperation with the ACCC in dealing with the issue and in bringing about a satisfactory resolution of issues of damage that might have been sustained by consumers.

In terms of the nature of the work that we are doing, it is very interesting to observe, through a study of our media releases and the statistics of the issues that we are resolving, that in the last financial year, of the matters that were the subject of litigation commenced or section 87B undertakings accepted, 12 per cent related to part 4 anti-competitive conduct. Eighty-seven per cent of the matters related to part 5 or misleading and deceptive conduct—or consumer protection, as it is known—and one per cent related to part 4A and part 4B matters, which essentially relate to unconscionable conduct.

A similar trend continues in the current year, although we have had in one particular matter involving Showmen's Guild a large number of undertakings and resolutions that have been obtained, which have therefore lifted the percentage relating to part 4. The level of consumer protection work continues at a very significant and high rate, although I would observe, as I think most members of the committee would probably agree, that consumers are protected as much by our dealing with part 4 matters and busting cartels as they are by our dealing with misleading and deceptive conduct.

We have dealt with a number of matters very effectively administratively. I will mention one or two in particular because they indicate our attitude to businesses that are prepared to cooperate with the commission and deal speedily with issues that could be causing substantial damage to consumers. One related to BP Australia, which entered into the petrol discounting schemes that have been adopted by other petrol and supermarket grocery retailers. They entered into that in circumstances where we believed that the headline advertisements that they were providing had the capacity to mislead and deceive. Some very quick contact was made with BP. A very, very quick response came back from the company and they changed the nature of their headline advertisements in response to other queries that were raised by us. That was a strong, quick administrative settlement It was always done publicly and always the subject of a media release but it was very quick indeed.

Another interesting example, which I have used in a number of speeches to business in more recent times, relates to a very big company, Cadbury Schweppes. There was an isolated incident of alleged resale price maintenance. Cadbury Schweppes engaged its lawyers to investigate the conduct and voluntarily reported to the ACCC the nature of the conduct and offered to supplement its trade practice compliance program, which already was very significant indeed, to reduce the risk of repeat. The matter was resolved through an administrative settlement. I think it is perhaps just worth putting into the *Hansard* a paragraph or two that was placed in our media release. The media release quoted me and said:

By making a voluntary report to the ACCC on its issues of concern, Cadbury Schweppes has acted consistently with the principles of good corporate—

Senator CONROY—Did you say you are quoting yourself now?

Mr Samuel—I am putting on the record a media release. I did not want you to think that this was not a quote that was attributed to me. This is out of a media release. I will start again:

"By making a voluntary report to the ACCC on its issues of concern, Cadbury Schweppes has acted consistently with the principles of good corporate governance and it is also encouraging that Cadbury Schweppes lawyers have taken such an active role in the investigation and voluntary reporting process," he said.

"The ACCC continues to look favourably on self reporting of potential contraventions of the Trade Practices Act and depending on the circumstances of the matter a voluntary report may assist the ACCC to resolve the issues of concern on an administrative basis."

A substantial amount of work in the area of consumer protection is taking place through assisting consumers in understanding where problems might arise; in other words, to prevent consumers being misled or deceived rather than having to deal with unfortunate circumstances where they have been misled and deceived and then trying to recover, often from businesses who have since gone through a process of denuding themselves of assets and therefore leaving themselves unable to provide restitution. Therefore, we have done a substantial amount of work not only on our own part but also in conjunction with other regulators such as ASIC, the state consumer affairs bodies and the offices of fair trading, particularly on issues relating to jewellery advertising—

CHAIR—Mr Samuel, sorry to interrupt. It is now half-past, so can you finish up on that.

Mr Samuel—I am just reaching the last page, you will be pleased to know. And we have been dealing with SCAMwatch in relation to online scams, and a range of other areas where we hope that we can help consumers understand some of the issues where they might be otherwise misled and deceived by business. At that, and with your admonition, Chair, I will finish.

Senator CONROY—I am sorry. That was closing him down so that you won.

CHAIR—Thank you, Mr Samuel.

Senator WATSON—It seems to me that introduction by Mr Samuel was far more interesting than his responses to many misguided questions from Senator Conroy.

CHAIR—You would get very short odds on that aspect, Senator Watson. Senator Conroy.

Senator CONROY—It is funny what a preselection challenge does to a man. Are they feeding you meat again, are they? I would like to talk about progress in the prospects for the rollout of FTTN network in Australia. Last year you told the press, and I will quote you now:

"As surely as night follows day, there will be a high speed broadband network built …"

How are things going?

Mr Samuel—I think it is fair to say that we are already seeing evidence of a high-speed broadband network being built. As I indicated to you back in December, when a similar question was asked of me, let us be very careful that what I described there was a high-speed broadband network. It was not to suggest that, as surely as night follows day, a fibre to the node network would be built, but I will come back to that in a moment. In terms of a high-speed broadband network, as I said in my opening comments—

Senator CONROY—What is your definition of a high-speed broadband network?

Mr Samuel—I was just going to deal with that.

Senator CONROY—Is that the headline rate or is that the average rate?

Mr Samuel—Can I deal with that? I will perhaps explain. In terms of a high-speed broadband network, what we are seeing, as I described in my opening comments, is the increasing momentum towards the rollout of ADSL2+. We have seen that first with a number of what are called smaller carriers, and I mentioned some of those before—iiNet, Powertel, Primus—and Optus in more recent times and then, most recently, Telstra announced and have moved towards their own rollout in a limited number of exchanges but covering 46 per cent of the population, as they describe it. It is interesting to note that Telstra's rollout was quite openly and transparently described as being in response to and limited to those exchanges where competitors had already proceeded with their own high-speed broadband rollout—that is, where they had already installed their ADSL2+ DSLAMs; I think, in some 364 exchanges. A number of us have indicated to Telstra publicly and otherwise that there seems to be no good reason why they could not flick the switch, as has been described, and extend that ADSL2+ rollout to other exchanges where it could be done quite easily and, in many cases, through some software programming. But I will not go into that level of detail.

As to what 'high speed' means, we again discussed towards the end of last year the issue of high-speed claims. High speed has very often two riders associated with it in some of the headline advertisements. The first is the words 'up to'. The 'up to' generally relates to a speed claim of 20 megabits a second. But then, increasingly now, and almost universally—I will not say 'universally' but almost universally—advertisements relating to high speed carry riders that indicate that those speeds are subject to impact by a number of factors, including congestion, distance from the exchange, interference and the like. But certainly Telstra and other carriers are claiming that what they are providing now in terms of ADSL2+ is high speed.

Trying to define what is 'high speed' is always a matter of relativity. Many years ago you and I would have been very satisfied to have had a 56-kps card to put into our laptop computers to give us what was then regarded as extraordinarily high speed dial-up broadband. Today a 56-kps card would be regarded as something of a joke in the context of high speed, and thus we look increasingly at higher and higher speeds. For current purposes, 'high speed', I think, is probably—and I do not want to provide this as a technical definition here, because I do not think there is a technical definition of it—regarded as something that starts to move up towards the double-digit megabits per second type speeds that we are becoming more accustomed to in some areas.

'High speed' is also being claimed by Telstra and increasingly by other carriers that are rolling out 3G networks as being available under the 3G mobile networks, particularly with the adoption of HSDPA technology and the prospect that within the next few weeks, not months, we may see speeds of, again, up to 14.4 megabits a second available on mobiles. There are suggestions that within two or three years we could even see speeds of up to 40 megabits a second in terms of mobiles but again subject to issues of constraint relating to capacity and the recognition that wireless bandwidth is like a pipe; it can close up when a

number of users attempt to use it at the one time. I have noted comments by Telstra in recent times that have acknowledged some of the capacity limitations of the 3G network. But its availability is in certain areas where fixed line may not be economic to roll out. As to the fibre to the node, what we are dealing with there—

Senator CONROY—Before you move on to that, can I come back—

Mr Samuel—I thought it was part of your question, but I am happy to do that.

Senator CONROY—It was, but I just want to stop you there to save time. You said high speed was up to double digit. That is, I am presuming, 10 meg plus? Is that—

Mr Samuel—Double digit is 10, yes.

Senator CONROY—I just want to make sure we are on the same page.

Mr Samuel—I did want to make it clear that I do not think there is anyone in the world that will be able to say to you, 'High speed means this, and if it's not that then it's not high speed.' High speed is a matter of relativity. Attitudes as to what high speed is are gradually moving up the speed scale as new technology becomes available.

Senator CONROY—But we wouldn't call 256 high speed, would we?

Mr Samuel—As I say, back many years ago, you and I would have been very glad to have had 56.

Senator CONROY—We are not back many years ago.

Mr Samuel—But today you would not call 256 necessarily high speed, no.

Senator CONROY—If 3G on average delivers 256, would we call 3G high speed?

Mr Samuel—It depends what is available. The claim being made at the moment is that 3G will in some areas offer up to one or two megabits a second. In mobile-wireless terms, that is a significantly higher speed than we have experienced in the past and therefore in relative terms can be regarded as high speed for mobile.

Senator CONROY—I know the ACCC has concerns about this, but I am not interested in what 'up to' is. I am interested in what the average speed is that people can get, which is the truer description. I am just concerned that 3G could possibly be described as high speed in your opening statement. I am interested in ADSL2+ being described as high speed, whereas on average ADSL2+ can give you down around one to two megabits on average—not the 'up to', not the maximum headline rate. So, when I ask you about a high-speed broadband network, I just want to make sure that you yourself are not guilty of the same thing some of the carriers are guilty of—that is, shorthanding it by saying there will be a high-speed broadband network built and then starting to quote technologies that, frankly, do not deliver it.

Mr Samuel—I will repeat that I think there are many in this country that would regard what is offered by ADSL2+ as being high speed, but—and I add these words—relative to what might be available using fibre and fibre to the node, and indeed fibre to the home, it pales, and we all recognise that.

Senator CONROY—When public officials start talking about high-speed networks as including 3G and ADSL2+, that is where I start to get concerned. They are basically relying on the use of 'up to' to justify the words 'high speed'.

Mr Samuel—I think we are trying to put some technical definition on the words 'high speed', which as I have indicated to you is not appropriate. I do not think anyone would put a technical definition to the words 'high speed'. It is always a question of relativity.

Senator CONROY—I interrupted you when you were just moving on to talk about FTTN.

Mr Samuel—Yes, fibre to the node. We have had two proposals exposed—'exposed' is perhaps too significant a word to use, but certainly commented upon—in the public arena. One is from Telstra and the other is from the G9 group. As we are well aware, Telstra suspended—they described it initially as 'terminated'—their discussions on fibre to the node, but I think it became clear through subsequent public comments made by Telstra that the true position was that they suspended their discussions and suspended the issues on fibre to node.

There has been some confusion as to what Telstra's suspension was all about. But I think it has become increasingly clear, certainly from our own analysis of it and from public comments that have been made by Telstra, that the issue in relation to Telstra's fibre to the node and their dealings with the ACCC were much less about our analysis of their costs, our analysis of their rates of return in respect of the fibre to the node proposal and our analysis of the risks associated with that proposal. But they were much more related to the relative price that we were arbitrating in respect of the ULLS.

The truth of the matter is that we actually, in broad principle, did not dispute the proposals that Telstra put to us in respect of the costs associated with their fibre to the node proposal. Our view was that if they were paying third parties to install fibre to the node then it was not appropriate for us to be querying the extent or the nature or the level of those costs, because in the absence of any collusion between those parties—third parties—that would be the way that the market dictated what the cost should be. We had extensive discussions with Telstra over issues of rates of return, and I can confirm Dr Phil Burgess's own comments in terms of the 98 per cent agreement that we had reached on a range of matters relating to fibre to the node—that, in respect of rates of return, broadly we had reached an agreement. We were not debating with them issues of rates of return. We had accepted a number of the risks that they considered were associated with the fibre to the node proposal and, therefore, had accepted, after some negotiation and discussion, a rate of return that might have been appropriate.

I should mention, by the way, that all this is an acceptance not leading to an agreement but, rather, leading to a position where a proposal could be, I think on a reasonable analysis, put forward by Telstra to the public for examination by stakeholders, by potential access seekers that wanted access to the fibre to the node network that Telstra was proposing to roll out in a very formal and prescribed process required through the use of, potentially, a special access undertaking. We had proceeded well along the way towards agreeing to a number of issues there. That is not to say that everything had been dealt with.

As I said on many occasions, it may well have been that any proposal ultimately put forward by Telstra for examination by stakeholders and by the public generally would have contained a number of areas where we would have indicated up front we had some serious

concern. But leaving that aside; Dr Phil Burgess did indicate that in his view the discussions with the ACCC had reached about the 98 per cent level—and they were his words used on many occasions through June and July last year—and we felt that that was the point in time at which these issues ought to be exposed for public examination and brought out into the open so that the public could look at it and so the competitive carriers could have a look and could provide to us and to Telstra their views as to the access arrangements that would apply to the fibre to the node network.

I regret to say that at that point in time Telstra withdrew and suspended discussions. It appeared to be unwilling to put its fibre to the node proposals out into the public arena. But I think coincidentally with that—and it is important to note this—we had provided some indications, by way of draft interim determinations, on what might be our pricing approach with respect to the ULLS. It is becoming increasingly clear now that the relative charges for ULLS were starting raise some questions in Telstra's mind as to whether the fibre to the node proposals that it had could actually work in regard to the price premium that might be associated with a fibre to the node facility or service relative to a ULLS service or facility.

I would normally illustrate this by using my hands, but that of course cannot be pictured in *Hansard* so that makes it difficult. I will put it in these terms for the assistance of senators and we will see how it actually turns out in *Hansard*. We have discussed some of the limitations of a ULLS service in terms of speed, limitations of capacity, congestion, distance from the exchange and the like. That is priced at a particular level, at a wholesale level, and thus with margins at a retail level. Then a fibre to the node service, because of the greater capacity to provide a more satisfactory service, is priced at a premium to the ULLS service. I think Telstra believes that our pricing of the ULLS service, which we maintain was fair and reasonable, was such that it drew down the prospective retail price at which fibre to the node could be sold and thus, in its view, made fibre to the node uneconomic. We will have to see about that. There were some suggestions by Telstra that there ought to be charges built into the ULLS charge that might lift that price to a level that would enable the fibre to the node price to be lifted to a level that it regarded as economic. Our concern with that is that what that would be doing, in our view, was artificially inflating the ULLS price in order to make, according to Telstra's calculations, economically viable a fibre to the node roll-out. I do not think that stands up to any scrutiny in terms of public policy or economics on any basis.

I think one of the real tests that will come in relation to this is if and when the G9 proposal reaches a point of lodging with the ACCC a special access undertaking that might on first blush appear to be reasonable. We have had more recent discussions with them as to their proposal. But I have to say to you that, despite initial scepticism that was reasonably widespread around the marketplace, if the information they are providing to us at the present time stands up to close scrutiny, then it is looking like the G9 proposal might put some of those sceptics to rest. The G9 proposal is starting to look interesting. I do not want to raise expectations about that, because we do not have sufficient information, but we have heard presentations from highly respected senior investment bankers as to their analysis of the proposal.

We have discussed with the G9 group some issues relating to access, some of the difficulties that may need to be dealt with in a regulatory sense, particularly access to the

Telstra duct-work infrastructure, issues about cut-over times relating to cut-overs into the fibre network, the issue of the building of nodes at street corners and the like and the retention of DSLAMs and ADSL technology for what could be described as the central node, which is the telephone exchange and the radius of 1.5 kilometres from that. We have been into quite extensive discussions with the G9 group. I think it has now been widely acknowledged that they are proposing to submit to us in the second quarter of this year, which could be any time from the end of March onwards, a special access undertaking. When we see that I think we will have a far better idea of whether that is real. If it is there and we can deal with the regulatory issues then I do not think it is a surprise to anyone or stating anything but the bleeding obvious, but it provides a very interesting competitive tension to Telstra to actually proceed with the fibre to the node network.

CHAIR—I do not want to interrupt Senator Conroy's flow, but we moved on to the FTTN before I had a chance to ask a question. In what context would you be required to discuss, rule on or whatever it might be the definition of 'high speed', or is this a general discussion?

Mr Samuel—I think it is more a general discussion. That is why on several occasions I repeated the view that I doubted that there is anyone who could definitively describe what 'high speed' meant, because it is a relative description. High speed is relative to low speed. If you compare the high speed that is, say, offered on average under ADSL2 Plus with what might be available under fibre to the node and we have a fibre to the node network roll-out in Australia over the next X number of years, then the ADSL2 Plus speeds that are currently on offer may pale. It is also worth noting that, in the context of the two fibre to the node proposals that we have had an opportunity to examine over the past 12 months—the Telstra and the G9 proposals—it is proposed that the copper wire, the ULL, ADSL2 Plus, will in fact apply to the first 1.5-kilometre radius around the exchanges. It is not as if fibre is going to replace that.

CHAIR—In a legislative responsibility sense, I take it the only context might be in the context of misleading advertising or something? I take it there would be no context in which you would be making rulings on what is or what is not 'high speed'?

Mr Samuel—It would only be in the context of misleading and deceptive conduct and then most, if not all, of the headline advertisements relating to high speed, if you like, broadband, continue to qualify that by describing the rate of the speeds in megabits per second that might be available. Then, as I have indicated, particularly after some warnings we provided towards the latter part of last year, those advertisements have significantly improved so that the use of the words 'up to' is subject to further significant qualification describing some of the limitations on speed that may occur. We have just, only in the past few days, issued a quite detailed guideline booklet to the industry to indicate what we regard as acceptable and what, frankly, would be unacceptable in terms of advertising of high speed and speed ratings for broadband offerings.

CHAIR—Thank you for that clarification of the misleading conduct.

Senator CONROY—Have you read that book, Mr Samuel?

Mr Samuel—Yes, given that we had to issue it. It would be appropriate that I read it.

Senator CONROY—If I were defending myself in front of the ACCC, I would be quoting you from Senate *Hansard*. In terms of the FTTN, even though you were prepared to discuss suggestions put forward by Telstra in your last answer, I am not interested in what Telstra thinks is acceptable or in Telstra's views here; I am interested in the ACCC's view. You indicated that the ACCC had accepted that a number of risks could be incorporated in a cost.

Mr Samuel—Accepted the principles, I think.

Senator CONROY—Yes, the principles behind certain risks being included. You indicated that the ACCC had reached a view on an acceptable rate of return.

Mr Samuel—Sorry, you said 'risks being built into the costs'. Can I just correct that: the risks of course have an impact upon the rate of return, so it is a risk/return equation that we deal with.

Senator CONROY—What I would like to know is what were the risks you find in principle should be included—this is your view, not Telstra's—and I would like to know what rate of return you find acceptable.

Mr Samuel—I just want to deal with the rate of return. I think it would be inappropriate to go into that level of detail.

Senator CONROY—No, I do not think it is inappropriate at all. You are a Commonwealth public servant. You are paid by the taxpayer. You have now indicated to us publicly that you have indicated what you think—not what Telstra thinks, not what G9 thinks but what the ACCC thinks—is an acceptable rate of return. I would like you now to tell the public what that is.

Mr Dimasi—In the discussions with Telstra—the principles that, if you like, we were discussing and had reached some broad agreement on—we accepted there would be a greater degree of risk in a fibre to the node rollouts than there would be in the existing sunk fixed line network. In regulating an existing sunk network, the degree of risk is known; the demand levels are known for the use of its services.

Senator CONROY—What is the risk of someone building an alternative copper network?

Mr Dimasi—No, the risk is not of someone building an alternative copper network. If you mean what risk exists for an existing network, we agree; that is why it attracts a utility type rate of return. With a new fibre to the node network, what is uncertain is the take-up of the new services. There is a greater degree of risk in rolling out that sort of network and a greater degree of risk in the services that will be provided from that investment. We have accepted the principle that there would be greater risk and the principle that that would therefore lead to a higher cost of capital, and hence that would have to be accepted. Was a specific cost of capital number, if you like, accepted? No, no such thing was accepted. There were discussions about the sorts of risks that would be involved and the implication that would have. As I said, we thought that some of those arguments put to us appeared reasonable, that they should be put out and tested. In coming to a view on the cost of capital, we would have to hear from the market and hear expert opinion from investors and the like. We were not in a position to say, 'This is the cost of capital that we would accept', but rather accept the principles and the sorts of ranges that that might apply to.

Senator CONROY—I understand that point, but Mr Samuel has indicated that there were a range of rates of return that you found acceptable.

Mr Dimasi—In terms of the discussion on the rates of return, Telstra was making the point that this would be a higher cost and, therefore, there would be higher rates of return. There were numbers that were discussed, of course. You cannot just discuss these things in the abstract. But we were not in a position where we had agreed on anything at that point in time.

Senator CONROY—I just heard Mr Samuel say that you had reached agreement? I understand that the definition of 'agreement' was not something that was cast-iron, which is why I am happy to step back from the word 'agreement' and not meaning it in the absolute literal, legal sense. You gave an indication that there was now, to borrow Mr Dimasi's words, a range of rates of return that would be acceptable.

Mr Samuel—Let me—

CHAIR—Mr Samuel, do you want to clarify your comment?

Mr Samuel—Yes. And I think Mr Dimasi—

Senator CONROY—How about you let Mr Samuel answer for himself.

CHAIR—He was trying to.

Senator CONROY—No, he was not. He was kindly waiting until I had finished, unlike you.

CHAIR—Thank you very much. Go ahead, Mr Samuel.

Mr Samuel—I think Mr Dimasi has probably provided the clarification, but let me try to clarify it a bit further. When you are dealing with rates of return, you deal with costs of capital. Costs of capital will depend upon the nature of the investment, the parties that are involved in raising the capital, and then of course they will depend upon the risks associated with the business enterprise in which the capital is to be invested. One of the significant factors that Mr Dimasi has just outlined will be the projected take-up rate of the business, because that of course will affect the revenue and cash flows. All of those are factors that will reflect upon the rates of return. What I think we had reached agreement in principle about was the sorts of risk factors that might need to be taken into account, the sorts of take-up issues that might need to be taken into account. They will vary. They will vary and one can contemplate, for example, that between the two proposals we have had a chance to examine over the past 12 months—that is Telstra and G9—they will vary, and the ranges will vary and the rates will vary depending upon a number of those risk factors that we described. I do not think I could give you any specific numbers or any specific rates of return.

What is more important, though, is this: if parties believe that they have a business case and if parties believe that they have an access proposal that they would like to put to us, then in accordance with the requirements under the legislation we will consider those as part of a special access undertaking. We will put them out into the marketplace, and what will be particularly interesting to us is to receive feedback from market participants as to whether some of the proposals that are put forward by either Telstra or G9, as the case may be, are reasonable with regard to the criteria set out in the act.

Senator CONROY—Thank you for changing your testimony, Mr Samuel.

Mr Samuel—I do not think it changed.

Senator CONROY—It did change. You actually said that you did not say something earlier in your presentation, which *Hansard* will show is not the case.

Mr Samuel—Okay.

Senator CONROY—I wrote it down as you said it. That is why I know exactly what you said. Because you indicated that the ACCC found two things acceptable: one in principle is a range of risks, which bear ultimately on the rate of return. Then you went on to indicate that you had reached a view about an acceptable rate of return. You made both of those points. You did not, as you have just attempted to do, indicate you had reached only one. You then dissembled—because you are a merchant banker—and tried to disguise what a rate of return would be—

CHAIR—Senator Conroy—

Senator CONROY—Can I finish?

CHAIR—No, Senator Conroy, you—

Senator CONROY—You are not here to give commentary. If I ask a question you would—

CHAIR—And you are not here to give commentary along those lines, either.

Senator CONROY—You are not here to give commentary on my questions.

CHAIR—I am actually telling you what I am doing.

Senator CONROY—What standing order are you quoting?

CHAIR—I am telling you that you are not making commentary—

Senator CONROY—What standing order are you quoting?

CHAIR—You are not making derogatory comments to witnesses.

Senator CONROY—What standing order are you quoting?

CHAIR—If you have a question, ask it.

Senator CONROY—What standing order are you ruling on?

CHAIR—I am not quoting any standing order, except that you are not going to—

Senator CONROY—Then please be quiet. Your job is to chair the meeting in accordance with the standing orders.

CHAIR—Would you be quiet, please. Thank you. You have asked me a question and I am telling you.

Senator CONROY—No, you are not telling me. Quote the standing order.

CHAIR—The standing order is that you are not going to tackle witnesses in an inappropriate fashion.

Senator CONROY—Which one? Which standing order is that?

Senator BERNARDI—Senator Conroy is interrupting. Could you please just state your position so we can get on with it.

CHAIR—Thank you very much.

Senator Minchin—Whether there is a standing order or not, I would just, through you to Senator Conroy—

Senator CONROY—No, I am sorry. You do not get to decide what questions I ask and how I ask them—whether or not you like them. You actually have to quote a standing order.

Senator JOYCE—It is the fact that you made an ad hominem comment as some sort of garnish with regard to his being a merchant banker. That has nothing to do with the subject, which I am interested in.

Senator CONROY—I am terribly sorry. You all do not get to decide whether you like my commentary. You get to rule on a standing order, according to the Senate standing orders.

CHAIR—If I have formed a view that your commentary is inappropriate towards this witness—

Senator CONROY—Find me in breach of a standing order and rule that.

CHAIR—you are in breach of standing orders about the way witnesses are to be treated.

Senator CONROY—Which one? There is no such standing order.

CHAIR—I have made a decision, Senator Conroy. You are either going to get on with your question or—

Senator CONROY—Quote the standing order.

CHAIR—If you would like to take up your time—

Senator CONROY—If I choose to be discourteous, that is up to me.

CHAIR—Order!

Senator CONROY—I am not in breach of a standing order.

CHAIR—You can come through me, thank you, Senator Conroy. If you want a private meeting to discuss, this I am happy to do so. If not, will you please get on with your questions.

Senator CONROY—So you have quoted which standing order?

CHAIR—If you want a private meeting, I am happy to have one. If you do not want a private meeting, get on with your questions.

Senator CONROY—No, I am simply asking—

CHAIR—We have a busy day ahead of us.

Senator CONROY—I am simply asking—

CHAIR—You have had your fun. Let us get on with it.

Senator BERNARDI—It is very disruptive.

Senator JOYCE—I am actually listening to your line of questioning, Senator Conroy, but we do not need your ad hominem comments. There are things we wish to follows through.

Senator CONROY—I do not need the homilies you are giving me right now. Stop giving—

CHAIR—For goodness sake.

Senator CONROY—Senator Ronaldson is letting you give the homilies.

CHAIR—This is marvellous stuff. Do you want to get on with the questions or do you want a private meeting?

Senator CONROY—I would like to. I would just like you to stop interfering from the chair.

CHAIR—Get on with it or we will have a private meeting. It is your call. What are you asking me for?

Senator CONROY—What I am seeking to establish is what rate of return Mr Samuel finds appropriate. The rate of return is what you work out after you have worked out the risks. I accept that. You have agreed on what the risks were. You have indicated that you agree with Mr Burgess. Now I am asking you to answer the question of not what Telstra thinks is an acceptable rate of return but what you think—what you have decided as part of these discussions—is an acceptable risk.

Mr Samuel—As I said to you, we have not decided on a rate of return at all. We got to a point where we thought it was appropriate for Telstra to put its proposals out into the public arena for public examination, public exposure. Those proposals would have included a whole range of factors which will impact upon rates of return. I have indicated to you—and I hope I have been able to clarify it, as has Mr Dimasi, so there is no confusion on this matter—that there are a whole range of factors that will be taken into account in determining what is an appropriate rate of return, which itself then will impact upon access prices if and when Telstra chooses to, if you like, conclude its suspension of discussions on fibre to the node and put its proposal out to the public arena. Then it will be for the marketplace to provide us with advice and commentary and we will then opine upon whether or not what is proposed by Telstra at that point of time is reasonable in the context of the Trade Practices Act.

Senator CONROY—I will take that as you refusing to answer.

Senator BERNARDI—That was a very clear answer.

Senator CONROY—There is nothing clear about that. He did not answer the question I asked. I appreciate that you want to give commentary on Mr Samuel's answers as well as on my questions and statements.

Senator BERNARDI—I understood what Mr Samuel said.

Senator CONROY—That is awfully good of you, but—

Senator BERNARDI—I can help explain it to you, if you like.

Senator CONROY—Chair, are you going to allow commentary? You told me that I am not allowed any. Cory is allowed some. Barnaby is allowed some.

CHAIR—I think you made commentary on what Mr Samuel had or had not done. Let us get on with it.

Senator JOYCE—I think it is fair to stop you—

CHAIR—Let us get on with it. We have got a long day.

Senator CONROY—You can vote that way in the future, Barnaby.

CHAIR—Let us get on with it.

Senator CONROY—How many meetings have you had with the G9?

Mr Dimasi—We have had several. Off the top of my head, I could not tell you exactly the number, but we have had several.

Senator CONROY—I am happy for you to take this on notice: could you indicate how many there have been, who attended them, and the dates.

Mr Dimasi—We will take that on notice.

Mr Cosgrave—We are happy to do that. The G9 being a collective of individuals, that will reflect that there have been a number of discussions with individual members who have carriage of various issues. So there will be a large number.

Senator CONROY—I want to ask you a few questions. I know you have covered some of these issues in your extensive opening statement, but I want to get into more depth on them. So some of them will be a little repetitive, given what you have already said, but I do want to try and draw some things out from what you said previously. I want to ask you a few questions about your recent interim determination of the access dispute between Chime Communications and Telstra. In layman's terms, this interim determination concerns the ACCC's view on what an access seeker should pay Telstra to use the line-sharing service. Is that correct?

Mr Samuel—That is correct.

Senator CONROY—The decision generated, as you made comment on, a large volume of media comment. I want to get the ACCC's response to some of the commentary. Why did the ACCC wait a month after it made the interim decision before providing public reasons for the decision?

Mr Samuel—We are required to seek comment from the parties as to the reasons before the results of the interim determination can be made public because, as I think I have stated on previous occasions, arbitration disputes that are brought before us are confidential between the parties. Our arbitrations are confidential and therefore we need to seek the views of the parties and then make a determination as to whether it is in the public interest, having regard to the comments of the parties, that the determinations and the reason for the determinations or some part of those should be made public. That takes a period of about two to four weeks, particularly with the Christmas period intervening.

Senator CONROY—Telstra has labelled the ACCC, and you have made comment on this, a rogue regulator over this particular decision. It is stated that for $3.20 a month access seekers can provide broadband anywhere in Australia and, in doing so, will charge a retail price more than 10 times higher than what they pay Telstra. Out of the paltry $3.20 Telstra

receives, it still has to maintain the line, fix any faults and ultimately factor in build and replacement cost. Is it true that as a result of the ACCC's decision Telstra only receives $3.20 a month to maintain the line, fix any faults and factor in a build and replacement cost?

Mr Samuel—In addition to the LSS charge there is a wholesale line and rental charge which has increased significantly—almost threefold—over the past five or six years. The difficulty that we have in the public explanation of this is that if you take a bald number of the LSS charge, that was being charged by Telstra at $9. Despite the fact that the Australian Competition Tribunal in June 2006 had said that charge was 'unreasonable', Telstra continued to charge that to its competitors. Built into that charge—and you have just used the comments in your question—was a charge to cover maintenance of line costs. But of course those issues are covered in the wholesale line rental charges. What Telstra has indicated to us for some time now—for many, many months if not years—is that it has wanted to rebalance its charges so that a fairer and appropriate amount of line rental cost could be built into the LSS. But, of course, that would reflect a differential charge on wholesale line rental.

As late as towards the latter part of last year Telstra indicated that it wanted to yet again consider the issue of rebalancing. When we communicated with the parties in the dispute and ultimately published the reasons for the determination in the dispute, we indicated to the parties and to the public at large, in terms of publishing the reasons for our determination, that Telstra had indicated that it did want to look at a restructuring or a rebalancing of its charges, and we encouraged Telstra and the parties to engage in constructive negotiations as to that rebalancing—that is, the building-in of line rental charges into an LSS. That would have meant a rebalancing of the actual charge for the line rental. We are still awaiting the outcome of that exhortation.

Senator JOYCE—Telstra should have some ability to get some form of averaging in there. I saw earlier that other companies could charge $140 for line rental but Telstra could only retail it out at $40. Obviously, that means that they are not going to put any in.

Mr Samuel—You are into a totally different subject there, the issue of averaging on ULL. It is an entirely different issue than the one that we—

CHAIR—We will come back to that some time.

Mr Samuel—Mr Dimasi might want to add to my last answer.

Mr Dimasi—The only thing I would add is that Telstra fully recover the costs of the line rental in our view and based on the submissions that have been put to us. Telstra recover the specific costs that apply to line sharing, and those specific costs are relatively minor compared to the costs of maintaining the line. When they make the point that they are supposed to recover the cost of maintaining a line or repairing the line from the $3, or whatever charge it is, that is simply not correct.

Mr Samuel—That is why we have described it, and it has been elsewhere described, as a double dip.

Senator CONROY—I get the impression from what you have just been saying that you are inviting Telstra to put in an application to increase their line rental fee.

Mr Samuel—No.

Mr Dimasi—The issue is this, that from the ULL, the unbundling, from the copper line, a number of services are provided, including the line-sharing service. There is no reason why the fixed cost of maintaining a line cannot be recovered in a number of ways which would make perfect economic sense. It would make sense to look at it. There is not just one way of doing it. Recovering the line-specific cost only from the LSS charge is not necessarily the only way of doing it; however, if Telstra wants to have a different approach they need to have a look not just at the LSS, but they need to have a look at the charges across the board. Our invitation to them was if they do want to recover the costs of the line in a different way, put an alternative proposal to us that makes sense not just for LSS but for the other service as well; it would have implications then for the prices charged for other services. It is up to them to come to us with such a proposal and we would then consider it. That is what our invitation was.

Senator CONROY—You have been quoted as saying that both yourselves and others are saying: allowing Telstra to recover the cost of its copper lines from both LSS and line rental—wholesale line rental—would amount to double dipping for these costs.

Mr Dimasi—If they fully recover it at the moment from line rental, seeking to recover it again from LSS would amount to a double dip, yes.

Mr Cosgrave—You were correct in the first instance, when you said 'line rental' rather than 'wholesale line rental', because it is a requirement of the line-sharing service that you take the line rental associated with it. That can be recovered either through Telstra through its retail charges or through Telstra levying a customer of the LSS, if they wish to provide voice as well, a wholesale charge.

Senator CONROY—So Telstra's statement that it is being forced to maintain its lines for $3.20 a month is a bit misleading?

Mr Samuel—I think I would remove the word 'bit'.

Mr Dimasi—We do not accept it.

Senator CONROY—It actually receives the $3.20 for LSS plus $33 a month line rental, if it has retail customers, or $28 if Telstra only provides the wholesale line rental. That is the bottom line that you are arguing.

Mr Dimasi—That is right.

Mr Samuel—That is exactly right.

Senator CONROY—How long has it been ACCC policy to provide for the recovery of line costs from line rental fees rather than LSS charges?

Mr Dimasi—It is not our policy. As I said before, it is up to Telstra to put the proposal to us. As long as it is consistent and in accordance with the criteria that we have to deal with, we will look at other alternatives. It is not our policy to say it must only be recovered from line rentals, it is up to them to come up with alternative proposals. We will look at them.

Mr Cosgrave—The pricing principles for the service, which recognise that the costs are recovered through the line, have been in place since the service was declared, which, from memory, was 2001. So Telstra have been well aware of them for a number of years.

Senator CONROY—As I think you indicated, Mr Samuel, Telstra have, since 2000, increased their line rentals from $11.65 to $27.23, GST excluded.

Mr Samuel—That is correct.

Senator CONROY—So they have been getting, per line, a fair increase over the last few years.

Mr Samuel—Absolutely.

Senator CONROY—So the ACCC has not 'plucked the price out of a hat as you headed off to the beach', as Telstra has suggested.

Mr Samuel—We have made a decision internally that we will not engage in the rhetorical discussions that sometimes occur through the media on the part of Telstra. They are entirely entitled to use whatever description they want. It is appropriate for us to lay the facts out on the table and that is what we have attempted to, particularly at this Senate estimates hearing.

Senator CONROY—Telstra has also suggested that the ACCC has cut the LSS price by 64 per cent, from $9 to $3.20. Why did the ACCC reduce LSS charges in this way?

Mr Dimasi—The reason for the fall of the charges is, if you like, a natural consequence of the approach that was used by Telstra in coming up with the costs. Telstra have basically put to us that there are specific costs that apply to line sharing. Those costs are applied to the take-up of the LSS lines. As the take-up of those lines increases, that fixed cost gets spread over a larger number of lines and the inevitable logical consequence—

Senator CONROY—That is pretty normal economics.

Mr Dimasi—It is straightforward. It is a consequence of the approach and the proposal they put to us.

Senator CONROY—Has there been this take-up to justify this, in your view—an increased use spread over—

Mr Dimasi—Yes. We have based it on the numbers that have been provided to us.

Senator CONROY—Does Telstra dispute that there has been this increase?

Mr Cosgrave—No.

Mr Dimasi—No. The parameters that basically make up the numbers I do not believe are in dispute.

Mr Samuel—And if the charges reduce you might expect that the take-up could increase even more significantly, which might then result in—

Senator CONROY—A further fall.

Mr Samuel—a further reduction in the charge.

Senator CONROY—That sounds like pretty normal, straightforward economics to me.

Mr Samuel—That is straightforward economics, that is right, but probably does not read as well when you take the line rental charge in conjunction with the LSS charge, which, I think, on a broad calculation of maths is something like a 10 per cent to 12 per cent reduction.

It does not read quite as well as the 65 per cent, but it is certainly much more than a cup of coffee.

Senator CONROY—Is that a rhetorical flourish?

Mr Samuel—Yes. I am sorry. I should admonish myself to prevent myself from doing that. I will refrain from doing so in the future.

Senator CONROY—I just wanted to make sure the chair knew.

CHAIR—Now that you mention that, thank you very much for giving me the opportunity by referring to the matter. I have had the opportunity to refer back to *Odgers*, where I knew there was some reference to this matter in the Senate guide to committee procedure and practice, first edition, 2006, which I am sure you have read. *Odgers* at page 60 says that the chair has an obligation to ensure that witnesses are not badgered or treated unfairly as part of the duty of maintaining orderly questioning. I brought the matter to your attention because it is my view that by reflecting adversely on Mr Samuel's past employment you attributed to him some motives that I do not believe were appropriate, and hence I ruled as I did. Let us get on with it.

Senator CONROY—I had better re-read *Hansard* to see what I said. It largely reflected on Mr Samuel's previous occupation—

CHAIR—You deferred to me and gave me an opportunity, so I thought I would take the opportunity as well.

Senator CONROY—What standing order was that?

CHAIR—Read *Odgers*. It does not have to be a standing order.

Senator CONROY—What number is it?

CHAIR—Do you really want to go down this path?

Senator CONROY—While you are looking it up, I will—

CHAIR—I will tell you what I will do. It was *Odgers* page 60, 415/22, so you go off—

Senator CONROY—I just asked you what standing order it was.

CHAIR—It does not have to be a standing order.

Senator CONROY—After concentration on—

CHAIR—You are showing your ignorance of what rules are required to be interpreted by the chair. I am telling you it is in *Odgers* and that is the basis on which I ruled, so let us go.

Senator CONROY—After consultation on the ACCC's interim draft determination on this LSS access dispute, Telstra proposed an alternative approach to LSS and line-rental pricing; is that correct?

Mr Samuel—Yes.

Senator CONROY—What was the ACCC's attitude to this proposal?

Mr Samuel—To invite Telstra to put it to us in more specific terms, but to indicate that we would welcome any proposal by Telstra that might involve a rebalancing of wholesale line rental and LSS charges.

Senator CONROY—It does sound rather odd, but if you assume Telstra's costs for a line with broadband provided over LSS to be in the order of $30 per month, only 10 per cent of those costs are recovered from the LSS charge and 90 per cent from voice charges. Given that we are rapidly moving towards a broadband world, there does seem to be a need for some rebalancing.

Mr Dimasi—The dispute is that you could rebalance the charges in a different way. As we have indicated to you already this morning, we would be happy to look at a proposal, but one that looks at all of the services and is a coherent proposal that would do it differently. We would not argue with that.

Senator CONROY—By the sounds of it the ACCC would be open to subsequent proposals from Telstra along these lines that took into account the ACCC's concerns, especially about the costs of Telstra's lines.

Mr Dimasi—Yes.

Mr Samuel—Yes, but we have also indicated that it is our proposal in respect of the disputes that were the subject of the interim determinations to deal with those in a final determination basis prior to or on 31 March this year. We do not want to allow the current position to continue for an undue length of time.

Senator CONROY—What would the ACCC be looking for to address the concerns which were raised about the impact of a change in LSS pricing to include line costs if introduced immediately? Are you intimating that a phase-in approach or a transitional period is necessary?

Mr Dimasi—We have not considered that, but it is possible you could look at a phased approach. We would need to look at the proposals put to us and would be open to looking at that possibility.

Senator CONROY—When was the last time the ACCC conducted a formal investigation into the cost of Telstra's line rental service? To put it more simply: when was the last time the ACCC formally ascertained whether Telstra was fully recovering the cost of its copper lines from line rental charges?

Mr Cosgrave—We have been doing that almost continuously through the assessment of various undertakings where Telstra proposes charges based upon their view of the recovery of costs, including the cost of the line.

Mr Dimasi—This goes back to our assessment of the originating and terminating costs of the fixed network where we did our own modelling exercise. That was followed by Telstra's development of the so-called PIE and PIE 2 models. So this has been a debate that has been going on for nearly a decade now, I think, in trying to sort out the costs of that fixed network.

Senator CONROY—The ACCC's 2004 review determined that Telstra's copper line costs were probably falling due to common costs between ADSL and voice, a declining WACC and the growing practice of developers bearing many trenching costs in new estates; is that right?

Mr Dimasi—Yes.

Senator CONROY—Do these conditions still hold? Are they having the same impact now as they did in 2004?

Mr Dimasi—You quoted a number of things there, for example, the cost of capital, which of course varies. The cost of capital is a combination of debt and equity costs, and they are based on market conditions, but I think it would be right.

Senator CONROY—Last time you said it was due to lower long-term bond rates.

Mr Dimasi—I just have not got the numbers in front of me to compare. Those things change from time to time, so it could be higher or lower right now. The other issues you mentioned would still probably apply today.

Senator CONROY—You also identified a number of factors that were serving to increase the cost of a copper line in this review, namely falling demand for PSTN lines due to switch from dial-up to ADSL broadband and increasing deployment costs for copper and pillars; is that correct?

Mr Cosgrave—They were identified, yes.

Senator CONROY—Do those conditions still hold?

Mr Cosgrave—The first of those factors certainly still holds. There are declining voice lines. Would you remind me of the second one?

Senator CONROY—Deployment costs for copper and pillars.

Mr Cosgrave—That is likely to still hold. It is not a matter, as far as I am aware, we have examined in the context of the undertakings put before us, so I am not really in a position to comment on that.

Senator CONROY—Telstra claims that the price of copper, labour and fuel have all increased since this time, pushing up the costs of its copper lines. Would this be taken into account in line rental pricing?

Mr Dimasi—The line rental costs that they put to us are based on their PIE 2 model. Their PIE 2 model is a theoretical costing of sunk network. So in a sense you do not have to go and rebuild the thing, it is just a modelling exercise in trying to value the sunk network. In doing that exercise, whenever they turn the handle they would be putting those parameters in there, so a lot of those factors would be taken into account in their model. They are often described as a forward-looking model: if you built it now, what would it cost to build that network? That has the capacity to take into account the sorts of changes in costs that you are talking about.

Senator CONROY—In the 2004 review the ACCC stated that VoIP and mobile substitution were not having a substantial effect on the economics of line rental and did not need to be considered in an investigation of Telstra's costs. Is that accurate?

Mr Cosgrave—It sounds as if you are reading from a report. I do not have any independent recollection of those words in a report, but I am sure if you are reading them they are accurate.

Senator CONROY—Is this still the ACCC's view: that VoIP and mobile substitution do not impact on the economics of line rental?

Mr Cosgrave—I think certainly the rate of substitution, particularly of mobiles, whilst difficult to measure empirically, would be widely accepted as having increased.

Senator CONROY—In a speech to the Communications Alliance on 6 December of last year, Optus CEO Paul O'Sullivan stated:

Optus' research showed that line rental is a key reason why customers are increasingly choosing a mobile phone over a home telephone.

This is the CEO of the second biggest telco in Australia saying that line rental and mobile substitution are directly related. Does the ACCC agree with this view?

Mr Cosgrave—I think I have already said broadly that we would agree that mobile substitution is increasing. I do not know that Mr O'Sullivan shared his data or the basis of those views with us specifically but, broadly, we would accept that the level of mobile substitution is increasing.

Senator CONROY—Has the ACCC undertaken any work to assess the level of investment in telecommunications infrastructure since 2004?

Mr Cosgrave—The ACCC conducted an infrastructure audit, which seeks to measure what infrastructure investment is occurring, at that time. A further infrastructure audit process is planned for this year.

Senator CONROY—What is the ACCC's rationale for having a separate declaration for LSS and ULL? They both allow access seekers to provide the broadband, don't they?

Mr Cosgrave—Yes, they do. A line-sharing service, though, allows particularly ISPs who do not wish to provide voice services separately, to provide broadband services.

Senator CONROY—Wouldn't it be more economically efficient to have a single declaration covering bottleneck infrastructure?

Mr Cosgrave—That is not our view at the moment.

Senator CONROY—Doesn't the dual declaration of ULL and LSS create the prospect of arbitrage between the services? If one service's cost is significantly lower than another, won't there be a flood of access seekers moving to one product? This seems to be the case at present, at least until Telstra can come up with a rebalanced pricing arrangement that would satisfy the ACCC.

Mr Cosgrave—Again, given that a requirement of the LSS is the purchase of a line-rental service, there are other costs associated with the LSS that you do not incur if you purchase your LSS service; in other words, you do not have a line rental with your LLS.

Senator CONROY—Telstra has claimed that demand for ULL 'virtually dried up overnight' after the ACCC's latest interim pricing determination for LSS. Would the ACCC be concerned if this was the case?

Mr Dimasi—We would certainly be happy to examine it, but of course there are a number of reasons. If those figures are in fact true, we would have to see the basis of the claims. There are a number of reasons that that could be possible. We would have to look at those as well. Say, for example, there could be some uncertainty on the future of ULL because of other things happening in the market, so we would need to get to the bottom of it.

Senator CONROY—I was going to ask had you undertaken any investigations or monitoring to ascertain whether this is the case. And you might expect that it could be possible. LSS is currently priced at $3.20 a month whereas ULL could reasonably be as high as $17.70 a month. It is hard for Hansard to pick up hand movements, but there is a huge gap there.

Mr Dimasi—Of course, with ULL you can provide voice as well. You have to compare like with like here. I apologise for my hand movements.

Senator CONROY—But people are not suddenly leaping in to make great revenue out of VoIP.

Mr Dimasi—Sure.

Senator CONROY—People have pretty much given up on that and they expect VoIP to be creating almost a zero charge in future for a voice call. If there is going to be increasingly a problem for you to address—

Mr Dimasi—That would make it logical to present a rebalancing as to what costs one attributes to the various services that the line provides. As I indicated, we are open to doing that.

Senator CONROY—I have just got a few procedural questions about the impact that the recent Telstra High Court challenge will have on the operations of the ACCC. I appreciate it is a court case now and you cannot talk about the substance of it.

Senator CONROY—A recent article by John Durie in the *AFR*, commenting on the High Court challenge, stated:

The truly stunning arrogance of the company is that it obviously expects the ACCC to suspend procedures until the issue is cleared while Telstra itself refuses to proceed with the appeal avenues already provided by law.

Has Telstra expressed that expectation suggested in this article to you?

Mr Samuel—As I said in my opening comments, they have requested us to cease any further work on the arbitration disputes that we are currently dealing with. We have indicated to them, and I have indicated today in my opening comments, that we have rejected that request.

Senator CONROY—So you will not be postponing consideration of access undertakings and arbitrations under the existing regime as a result of a High Court challenge?

Mr Samuel—No.

Senator CONROY—Is the ACCC taking the lead in the legal defence of Telstra's High Court challenge?

Mr Samuel—No. These are a matter for the Commonwealth to deal with. It is a matter where the first respondent I think is the Commonwealth government.

Senator CONROY—You said the Commonwealth government is the lead—is that right?

Mr Samuel—Yes.

Mr Dimasi—Yes. We are the second respondent.

Senator CONROY—How will this impact on your resources? Obviously a High Court challenge like this is going to chew up your available budget. I know you have got a budget that you set aside for genuine enforcements and activities. How is this going to affect you?

Mr Dimasi—We would not expect it to have a significant effect on our operations.

Mr Cassidy—High Court matters for us are generally not all that expensive.

Senator CONROY—You don't think your legal division is going to be tied up too much on this—is that correct? Even though you are a second respondent, you will still have to pay a bit of attention to it.

Mr Samuel—Yes, but it will not be—

Senator CONROY—I am just concerned that it will not gum up your works, that is all.

Mr Samuel—It will not be a significant impact on our legal resources at all.

Senator CONROY—What would be the implications for the telecommunications access regime if Telstra's litigation was successful?

Mr Samuel—I do not think it is appropriate to comment on that, given that this is before the High Court at the moment. I think we need to await the adjudication of the High Court before we deal with that. As I indicated in my opening statement, we treat the current legislation as being valid. We will operate under the current legislation as if it is valid. If it is termed to be invalid then we will deal with that at the time, as no doubt will parliament.

Senator CONROY—You must have a general view about how it would impact on the access regime. Telstra are obviously saying it has got to throw it out. What impact would that have on the regulatory regime?

Mr Samuel—We will have to take that on notice. I do not think we have given it much consideration, which is not to say that we are treating the High Court case lightly, but I think we have more significant matters to deal with in the context of the administration of parts 11B and 11C than the current High Court challenge.

CHAIR—Senator Conroy just raised a matter with me regarding Senator Colbeck's attendance at estimates. Senator Colbeck is able to appear on behalf of a minister in the House of Representatives in the areas where he has portfolio responsibility; he cannot substitute for a minister who is a Senate minister's portfolio.

Proceedings suspended from 10.36 am to 10.56 am

Senator CONROY—I would like to ask a few questions about the competition notice that the ACCC has imposed on Telstra in relation to wholesale line rental. The ACCC has conceded from questions on notice that it took the commission almost six months after first being notified of the conduct in question before the ACCC issued the competition notice. As of today, how many days has this competition notice been in effect?

Mr Cosgrave—It runs for 12 months. It was issued in April.

Senator CONROY—Was that 12 April 2006?

Mr Cosgrave—That sounds right.

Senator CONROY—I would say that is about 309 days. I am happy to be corrected.

Mr Cosgrave—I am unlikely to correct you.

Senator CONROY—Why has the commission not finalised this matter?

Mr Cosgrave—The reason is that we are dealing with a complex misuse of market power investigation, similar to a section 46 case. This matter in particular is proving extremely complex. It is not a price squeeze where you simply compare wholesale and retail prices where you are dealing with a single product market to determine if margins could be made by competitors. What we are dealing with here is whether the setting of those wholesale and retail prices by Telstra allows for positive margins across the entire customer base and not margins to be made across a subset of customers, and whether that is anticompetitive. That involves a range of empirical issues, in terms of gathering evidence, around that subset of customers. It also involves complex legal and economic questions of degree. All of those matters put together mean that the commission continues to investigate the matter.

Senator CONROY—Part 11B in the competition notice regime was supposed to be a quick and efficient mechanism for altering anticompetitive behaviour. Why is the commission not using it in that fashion?

Mr Cosgrave—The commission has used the tools available to it. It has issued a competition notice. The recipient of the notice has the choice, once receiving the notice, to take conduct that would ameliorate the commission's concerns or determine not to change its conduct. In this case it has determined, in the first instance, not to change its conduct. The issue for the commission after that is to look at what further steps, if any, it should take. As you are aware, the issuing of the notice itself also vests rights in private partners that they would not otherwise have. In other words, parties can take actions for damages using the competition rule and they can only do that if the commission issues a competition notice, and Optus have issued proceedings in this instance.

Senator CONROY—Would you agree that the stated intent of 11B was to quickly stop anticompetitive behaviour and provide a quick resolution to the issues?

Mr Cosgrave—The provisions under the act allow for the issuing of a notice. They allow for people to take private action and they allow the commission to consider whether they will institute penalty proceedings.

Senator CONROY—Is this the second time in two years that the ACCC has imposed a competition notice and then allowed it to remain in place for almost a year without enforcement action?

Mr Cosgrave—If there is not conduct that addresses the commission's concern, as I have said to you, we are dealing with a complex investigation akin to a section 46 investigation. Typically, as you would be aware, they take some period of time and I have tried to sketch for you the circumstances around this particular matter that make it a complex one to investigate.

Senator CONROY—My point is that if competition notices are not able to change competitive behaviour over a 12 month period, how is this a more effective regime than the standard section 46 misuse of market power provision? This was introduced to try to speed the process up from 46. It seems to not be having any impact at all.

Mr Cosgrave—As you are aware, the provisions involve different penalty provisions than the provisions under part 4. The commission has issued a number of notices over the years. This is the first instance that we are aware of where the recipient of the notice has determined not to change its conduct. In that case as I have outlined to you, we are put in a position similar to the investigation of a section 46 matter.

Senator CONROY—What is the maximum fine per day in contravention for continuing conduct that is subject to a competition notice?

Senator CONROY—$3 million.

Senator CONROY—If we do the maths, the maximum fine facing Telstra under this competition notice is currently $927 million.

Mr Cosgrave—If your computation of the days that it has been in force is correct, then that sounds right. Of course, that is a maximum penalty.

Senator CONROY—I said 'maximum'. Can you give me a commitment that the ACCC will either take enforcement action or withdraw this competition notice before the contingent liability associated with it reaches $1 billion?

Mr Dimasi—We intend to proceed with the matter as expeditiously as we possibly can. I do not think that we would set that sort of target of withdrawing it before it reaches any of these theoretical figures.

Senator CONROY—That is the maximum penalty.

Mr Dimasi—Indeed, it is the maximum penalty, but this would be a matter for the courts to determine and they would look at all the circumstances involved. I think we have to look past just the numbers themselves.

Senator CONROY—The legislation imposes $3 million a day.

Mr Dimasi—Correct. That is the maximum.

Senator CONROY—The recent will of parliament is to try to give you sufficient deterrent powers/penalty provisions to discourage this sort of behaviour.

Mr Dimasi—Yes, indeed.

Senator CONROY—By my count, you have got 21 days on top of the 309 days that you have already had before the contingent liability of Telstra is $1 billion.

Mr Samuel—I would like to put this in perspective.

Senator CONROY—$1 billion is the perspective.

Mr Samuel—Sorry, if I could just carry on. I am not sure that the calculation is entirely correct. I recall that the first 21 days is subject to a flat penalty and then it proceeds from there. In fact, it may well be that if you wanted to use your magic number of $1 billion, although I suspect that it is a totally irrelevant number, it may not be your 21 days that you describe.

Senator CONROY—Is parliament's maximum fine a totally irrelevant number?

Mr Samuel—I can quote it back to you from *Hansard*, but what I said was that if you take the period of time from the commencement of the notice through to when the $3 million per day penalty applies, you will find that the 21 days is not an accurate statement of the period of time. If I might say, it does not matter because I do not think that it is relevant whether the contingent fine issued, as you put it, or contingent penalty is $1 billion, $1.1 billion or $927 million, to use an earlier number that you gave. What is far more important is to deal with the conduct and to deal with it in accordance with the law. I would like to put this in its context. It is important that we understand how part 11B operates and the way we can deal with part 11B. There are two ways of dealing with a prospective competition notice. One is to fully conduct your investigation into an alleged breach of 11B and to spend several months doing that in getting together various witness statements, affidavits and the like and be prepared to go to court and then to issue your competition notice. As I understand it, that was a practice that had been adopted in previous years. In the two notices that we have issued which have been 2004 and the most recent one, we have tended towards the approach of saying—

Senator CONROY—'Recent' being a relative term.

Mr Samuel—'Recent' referring to the competition notice that is still in place. The practice we have adopted is to accept that the threshold for the issue of a competition notice is one where it is necessary for the commission to have reason to believe, which is a much lower threshold than proving on the balance of probabilities a breach of the relevant provisions, which are almost akin to section 46 of the act. We issue the competition notice. There are three processes or leverages which flow from the issue of the competition notice. Leverage No. 1 is that contingent penalties are building up beyond the initial period at a rate of $3 million a day; that is a contingency that sits there and that has some pressure. That is leverage No. 1. Leverage No. 2 is that, from the date of the issue of the competition notice, the gateway is open, if you like, for third parties to commence damages action, and in this context we have already seen that occur in relation to Optus. Leverage No. 3 is the prospect of a court case to deal with these matters.

The leverages that I have described will normally bring about a change in behaviour by the party concerned—the recipient of the competition notice—to rectify the issue. Indeed, you will recall in the 2004 notice matter, the notice was issued on 19 March, and there was a significant change in behaviour that occurred approximately 10 days after that, just before the end of March, and that significantly dealt with the competition issues. Then there was a period of time that we carried out an investigation leading to a final resolution of the matter in January 2005 or thereabouts. But the primary damage that was done was in that 10-day period following the issue of the notice. That was the period in respect of which we obtained some compensation for competitive carriers in an amount of just in excess of $6 million.

There are a range of factors that will interrelate to competition notices, not the least of which is that there are issues concerning the application of part 11C and the declaration of services that might otherwise have been the subject of a competition notice. They are matters that need to be dealt with as part of our investigation. We are considering these issues but I would have to say to you that we will not be motivated by any specific number, be it $1 billion, $1.05 billion or whatever the case might be. They are, in a sense, irrelevant factors for

us in determining at what point of time we conclude our investigation on the part 11B competition notices currently in place.

Senator CONROY—I am surprised to hear you describe the maximum penalty under the law prescribed by parliament recently as irrelevant.

Mr Samuel—What I said to you was that in terms of completing the investigation, the fact of the contingent penalties suddenly going over the $1 billion mark is not a relevant factor for us, as it should not be. The relevant factor for us ought to be at what point in time we can conclude that it is appropriate to either take the matter to court, seek the imposition of penalties, or cease the investigation. They are matters that will not be influenced by the fact that we suddenly reach $1 billion—whatever $1 billion means—or $927 million or $1.031 billion. Frankly, it is not a relevant factor. It is far more important that we deal with this matter in a rigorous fashion.

Senator CONROY—Part 11B provides that competition notices lapse after 12 months. Is that correct?

Mr Samuel—That is correct.

Senator CONROY—Can I get the ACCC's agreement that allowing this competition notice to lapse would be an extremely disappointing event?

Mr Samuel—I do not think that you will get commitment or agreement to any of those propositions. As I said, we will deal with these competition notices in the appropriate fashion that one deals with the investigation of any alleged breaches of the Trade Practices Act. These are difficult matters. Any matter that involves a breach of the competition provisions of the act are complex to investigate. They are complex in terms of obtaining statements of support from witnesses that might be able to give evidence to support a case that can be put by the commission. They involve economic considerations. I will not go into the factors that are associated with gathering those matters together. We have discussed those on previous occasions in relation to the 2004 notice, but you can be assured that, like all our investigations, these matters are carried out rigorously and diligently, but they will not be impacted by some magical number that is chosen out of the air, which is $1 billion or $927 million, or whatever might be the case.

Senator CONROY—Will you give a commitment that it will not be allowed to lapse?

Mr Samuel—As I said, the commitment that we have given is that the matter will be dealt with diligently and rigorously in accordance with our obligations under the act. Whatever flow-on implications that you want to take from that is a matter for you or for any other observer.

Senator CONROY—These difficulties you refer to in enforcing a competition notice were discussed in the answers to questions on notice from the last round of estimates, and you have raised some of those again just then. In fact, you state in one of your answers that the threshold for enforcing a competition notice is higher than for issuing one. Why would the ACCC impose a competition notice that it could not enforce?

Mr Samuel—As I said, it was the practice perhaps in yesteryear for a complaint about an alleged breach of the competition provisions of part 11B to be subject to extensive

investigation that might itself have taken 12 months or more and then a competition notice might have been issued. The approach that the commission has adopted in respect of the two most recent notices—that is, the one currently in force and the 2004 one—is to recognise that the threshold for the issue of a notice is significantly lower than the threshold for proving a breach of the competition provisions and securing penalties, which of course have to be awarded by the Federal Court.

Why would you issue a notice before you are satisfied that you could actually secure penalties? It is for the reasons that I have mentioned. Firstly, the threshold is lower. Secondly, it does provide some leverage to secure a change of conduct by the alleged offender because of the potential for penalties totalling in the end something in excess of $1 billion. Thirdly, it opens a gateway for third party damages and actions. Those are leverages which can bring about a change of conduct. In this particular case, they have not. The one that was issued in 2004—which was issued something less than three weeks after the conduct had occurred—within a matter of 10 days, the conduct was changed and substantially reduced the impact of the conduct that was the subject of the competition notice and substantially reduced the damage sustained by competitive carriers. It worked very well then. At this point in time, it has not brought about the change of conduct by Telstra. Indeed, as you are aware, Telstra has itself challenged the validity of the notice through ADJR proceedings, which are still the subject of deliberation by the Federal Court.

Senator CONROY—Doesn't an impotent action of this kind destroy the ACCC's credibility as a regulator?

Mr Samuel—Firstly, I do not want to concede that it is an impotent action. That makes some presumptions which are not appropriate at this point in time.

Senator CONROY—People just have to call your bluff. You are basically saying that you are bluffing when you impose one of these.

Mr Samuel—Parties that are the subject of competition notice will make their own assessments based on their own legal and economic advice as to whether or not they believe that they have breached the act. In addition, they recognise that there are some significant evidentiary burdens of proof that are imposed upon us before the matter can be taken to court. These are assessments that every party that will be a potential respondent to enforcement actions by the ACCC will make. In significantly blatant cases of breaches of the competition provisions, parties will reach an assessment and reach a conclusion that they need to change their conduct, otherwise the contingent penalties that are arising may well in fact become actual penalties, and indeed that occurred the first time around.

Mr Dimasi—The threshold that the commission needs satisfy in issuing a notice is that it has got to have a reason to believe. A reason to believe is not the same as the requirement that you have in a court to prove that your concerns are indeed justified. The issuing of a notice allows the parties involved to either change their conduct or provide the evidence to persuade that there is not a problem. You have got to go through that process to establish exactly what is to be done. In a sense, your question implies that we have already established in advance what the outcome should be. We have got to go through the process to establish what the outcome should be.

Mr Cosgrave—I will just add to that one with a bit of legislative history. The original provision in relation to the competition notice actually required the commission to be satisfied as to a contravention before it issued a competition notice. As Mr Samuel indicated, what occurred as a consequence of that is that the investigations of abuse of market power matters took considerable time and there was concern that the threshold in relation to a notice, for the reasons that we have outlined, should be lower. That threshold was lowered in 2001 as a consequence of legislative amendments that, if I recall, had bipartisan support, and therefore do set up a situation where at the time of issuing a notice the commission has a requisite reason to believe that the burden it faces in terms of determining what further steps it will take have a different threshold. It has to be satisfied, as opposed to having a reason to believe.

Senator CONROY—From its experience in the last two competition notices, Telstra now knows that it does not need to change its behaviour or try to settle with the ACCC because, when push comes to shove, the ACCC has indicated, to use Mr Samuel's words again, that they think that it is just too hard to take enforcement action.

Mr Samuel—Are they words that I used today or words I have used on previous occasions?

Senator CONROY—That is just the general tenure of what you are describing.

Mr Samuel—I thought you were quoting my words, which I do not think is entirely accurate.

Senator CONROY—I did not say that I was quoting your words.

Mr Samuel—I stand corrected, as long as you are not quoting my words. That is important, because that is not what I would indicate. What I did say to you, and what Mr Dimasi and Mr Cosgrave have confirmed with similar comments, is that the burden of proof to actually take a competition notice issue to court and to secure penalties is a significantly higher burden than that required to issue the notice. If I can put this in its context, if there was a complaint about an alleged breach of the competition provisions of part 11B and on any analysis we had reason to believe that there may well have been a breach of those provisions, but we did not issue a competition notice, then I suspect that the first, second and third Senate estimates hearing that we attended you would be asking why we haven't done it because on any analysis there would be a reason to believe.

If I was to turn around and say that the reason we are not doing that is because we want to get together the evidence that will satisfy the higher burden of proof of actually securing penalties in the Federal Court, I am sure the question that would be asked at that point of time is that we cannot secure those penalties until we have issued a competition notice and therefore if we are going to spend all that time within 12 months securing the relevant evidence before issuing the competition notice, then we will not have created the circumstances whereby a Federal Court can award penalties of up to $1 billion, or $1.1 billion as the case may be. The process that is set out in part 11B contemplates the issue of a notice at a point at which we have a reason to believe. It contemplates that for a period of up to 12 months we must carry out an investigation and seek to determine whether we can proceed to court to secure penalties. I say 'up to 12 months'; that is, the notice will last for 12 months but the investigation could go well beyond the 12 month period. There is that 12-month period

during which, if it continues for that full 12-month period, the notice has been in place and penalties are contingently accruing at the rate of $3 million a day, subject to that initial period that I referred to earlier.

Those are the steps that are set out in the legislation. The fact that we may or may not take action in respect of all or some of the matters set out in the competition notice does not reveal anything more than that our investigation either has not been able to lead us to satisfy the burden of proof necessary to take the matter to the court or that it has led us to do so in certain circumstances. That will depend upon the extent of the investigation, the results of the investigation and the willingness of witnesses, primarily representing competitors that may or may not have been damaged by the alleged misconduct, to actually provide evidence to us. As you are well aware, sometimes witnesses in those circumstances can for very compelling commercial reasons be unwilling to provide evidence.

Senator CONROY—You have admitted in answers to questions on notice that Telstra continues to engage in the type of behaviour that the ACCC believes is anticompetitive to this day. However, you also say that the ACCC has declared a wholesale line rental service under part 11C and issued indicative prices in relation to the wholesale price for home access. Is this the way that part 11B and part 11C were intended to interrelate?

Mr Samuel—I cannot give you that information. My colleagues might be able to say what they were intended to do, but certainly it is an example of how they can interrelate. In the sense that part 11B is there to deal with breaches of the competition provisions, part 11C is there to deal with arbitrational disputes where we have declared certain services. In the circumstance that we are dealing with here, declarations were made, I think, on 1 August this year, indicative prices were provided some time shortly after that and then the matters that relate to the issues that are the subject of competition notice have in whole or in part been the subject of draft interim determinations that have taken place in the intervening period. They are factors that might impact upon the continuation of the competition notice or the ability to extract penalties in respect of the competition notice. They are the matters that are the subject of the ongoing investigation that we are conducting at the present time.

Senator CONROY—I appreciate that you mentioned that that is how they might interrelate. What I was asking was whether you thought that was the way that it was intended?

Mr Samuel—As I said, I cannot comment. My colleagues might be able to tell me.

Senator CONROY—I would like to add a bit. In the circumstances where the ACCC is unable to prove a part 11B breach, it reaches to part 11C.

Mr Dimasi—Not necessarily. It depends on the service, because it may not necessarily be applicable that a service where you may have an 11B concern might be a service that could be declared. I do not think that you could reach that conclusion as a general point. In this circumstance the 11C provisions we believed were applicable and available and were therefore used and we declared that particular service. I do not think that there is anything that is inconsistent with the intent or the way the law is intended to operate.

Mr Samuel—I would like to correct something. I did say 1 August. I do not want to be accused of misleading the Senate or particularly yourself. In fact it was 28 July 2006 that we

declared the wholesale line rental service under part 11C and on the same day issued draft indicative prices.

Mr Cosgrave—They were finalised in December and an interim arbitral decision made and published recently.

Senator CONROY—I would like to talk about the ACCC's announcement in January that it would not oppose the acquisition of federal publishing company Community Newspapers by News Ltd. In December 2006 the ACCC released a statement of issues on the proposed acquisition. Did you raise some concerns about the impact on competition?

Mr Samuel—Correct.

Senator CONROY—What markets caused concern?

Mr Grimwade—We focused on the overlapping areas in the inner west of Sydney and the north side of Sydney. That is where the overlapping of the community newspapers occurred. The markets that we generally focused on and what we considered to be the critical market was in relation to advertising.

Senator CONROY—I just want to confirm what you said there, that you considered that the critical market was advertising?

Mr Grimwade—Yes. That was for the purpose of assessing the competition concerns that we identified in our statement of issues.

Senator CONROY—Just to confirm that, the ACCC's statement of issues said:

> Market inquiries suggest that competition for advertisers between the Northside Courier and the North Shore Times for non-real-estate advertising has assisted in preventing increases in advertising rates. For example, market inquiries indicate that discounts have been offered on the rates published on ratecards as a result of competition between the two newspapers.
>
> In conclusion the ACCC is concerned that the information currently before it supports a finding that News Ltd's proposed acquisition of the Northside Courier would likely result in a breach of section 59 of the TPA.

That is your document. You did not have enough information about the inner west. I think that was the indication. How did the ACCC define the relevant markets in this case? Was the only one the advertising?

Mr Grimwade—I cannot exactly recall. I would have to go back to the documentation.

Senator CONROY—In both your statement earlier and the actual documentation you basically say that it is the advertising market.

Mr Grimwade—From the statement of issues until our final decision, we focused on where we considered that the concerns were arising and they tended to be in relation to the advertising markets in those geographical areas.

Senator CONROY—Did the ACCC look at whether there was a market for local news?

Mr Grimwade—We had no complaints from all the participants that we spoke to in our market inquiries in relation to content, so far as that content related to local news. The concerns that we were getting from the marketplace tended to be in relation to the ability to substitute advertising.

Senator CONROY—With these investigations, do you only proceed if you receive a complaint?

Mr Grimwade—No, but—

Senator CONROY—Is it that you do not look at any other market unless somebody tells you to?

Mr Grimwade—No. We will examine all the markets within which we think competition concerns can be best made out. Market definition is a purposive instrument in identifying whether or not there is a substantial lessening of competition in any particular market.

Senator CONROY—Then I ask you again: did you look at whether there was a market for local news?

Mr Grimwade—We gave it some internal consideration but in the end—

Senator CONROY—You dismissed it.

Mr Grimwade—We dismissed it in the end because there was no evidence to suggest that there was going to be any substantial lessening of competition in relation to that particular area.

Senator CONROY—In the market for local news?

Mr Grimwade—If there was going to be a market for local news delivery in, say, inner-west Sydney—

Senator CONROY—I did not say 'news delivery'. I am talking about diversity of opinion. At a minimum, you are going from two editorial opinions to one—that is if you want to pick one aspect of opinion.

Mr Grimwade—It is not as simple as that. If you look at the overlapping community newspapers in these areas—

Senator CONROY—Clearly you do not. You dismissed any concept of a market for local news.

Mr Grimwade—We did not think that it was necessary or that we were able to pursue any potential breach in relation to section 50 that related to the supply of news or opinion—however you might phrase it.

Senator CONROY—Why not?

Mr Grimwade—There was no evidence to support that there was any anticompetitive effect that would result from the acquisition by News Ltd of FPC in those particular areas.

Senator CONROY—So you constructed a market in diversity of opinion and then you looked at it and said: 'Two are becoming one, but there is no concerning evidence in that.'

Mr Grimwade—You have to recall that we have a legislative role where we have to establish that there is a likely substantial lessening of competition in a particular market for us to make any decision to oppose that. We have an evidentiary case that we have to prove. That involves us going out to market participants and trying to substantiate a case through getting witness statements, getting economic evidence and so forth. Through those inquiries, we found that there was no evidence to support any finding that there was a substantial lessening

of competition in any other market, except in our statement of issues where the focus started to be on advertising, and that statement of issues was issued to try to prompt people and enable us to get some more information to pursue a line of inquiry that related largely to the advertising.

Senator CONROY—Your statement of issues said, 'Consumers seem likely to read free community newspapers because they provide locally focused news and information and probably locally relevant advertising.' That is what your article said. But you did not go on to examine the market impact on the community 'because they provide locally focused news and information'. You identified that in your statement of issues and then you dismissed it.

Mr Grimwade—In the end, we found that there was no substantial lessening of competition in any market in that case.

Senator CONROY—Two became one, allowing a monopoly to be created in the same area. So in the market of diversity of opinions, that was not a lessening of competition?

Mr Grimwade—The commission found that there was no likely substantial lessening of competition in any market in relation to that acquisition.

Senator CONROY—I am happy for you to take this part on notice. Can you explain the rationale and methodology you used when you designed your market for ideas, opinions and editorials?

Mr Samuel—It would be helpful to take this on notice. You may be assisted in this when the public—

Senator CONROY—I was happy for you to take that on notice.

Mr Samuel—We will be issuing a public competition assessment on this in the next short while. If there are further queries, it may be then appropriate to examine that, because that will give a much more detailed analysis of the process that we undertook there and of the conclusions that we reached. It may be appropriate for you to carry that forward at the next Senate estimates hearing. We will give you that information on notice.

Senator CONROY—What changed the commission's view between 8 December 2006 when the statement of issues came out and 17 January when the ACCC announced that it would not oppose the acquisition?

Mr Samuel—What normally can occur in relation to any issue of a statement of issues. The statement of issues is designed to focus stakeholders' attention on the issues that are of potential concern to us and, indeed, on issues that may not be of concern, and to focus the market inquiries and the market response. The most information that I can give you now, because I do not have the details to hand, is that the market response and the further market inquiries conducted in that period—which was something like five weeks—led us to the conclusion that we reached. If we take those on notice then we can give you—

Senator CONROY—You are on the record saying a couple of things, and I will quote them to you:

> However, following extensive market inquiries, it became apparent that a range of advertising alternatives exist for advertisers in these community newspapers, although individual advertisers may have different ranges of alternatives.

Overall, the ACCC was satisfied that sufficient advertising alternatives exist in this case to provide a competitive constraint to News Ltd.

What are those alternatives?

Mr Samuel—As I said, we will take that on notice, because I do not have all of that detail to hand.

Senator CONROY—I am sure you would not, but the man who made the call is sitting right here. What are the alternatives?

Mr Grimwade—There were a variety of alternatives that were being put to us by the various small businesses that we spoke to. I can take that on notice and give you all the detail, but I recall that among the information that had been provided to us there were some mentioned of businesses that they were developing their own leaflets.

Senator CONROY—Leaflet drops?

Mr Grimwade—This is the information that we got from a variety of different small businesses. Leaflet drops were an option. Some of the councillors that we spoke to considered that the barriers to entry in community newspaper delivery was low and that they could establish their own if they felt that prices would rise or if there was any need to formulate their own local community free newspaper. There were other advertising alternatives. As Mr Samuel said, we will be issuing a public competition assessment which outlines the reasons for our final decision shortly and that should provide the answers to your questions.

Senator CONROY—Your website says that you will issue these statements within five days. What is the delay?

Mr Grimwade—I do not think that the website says that we will issue them in five days.

Senator CONROY—That is my understanding of your website. I will happily give you a quote.

Mr Grimwade—We aim to issue public competition assessments as soon as we can after the findings on a particular matter which warrants a public competition assessment. They take some time to formulate. We have to be scrupulous in ensuring that confidential information is not revealed in any of those documents, so it generally takes some weeks after a decision is made before we issue them.

Mr Samuel—I am prepared to concede that this has probably taken longer than would be usual. But, as I said in my opening statement, you would also appreciate that in the current times there is an enormous volume of merger work that is on and dealing with current mergers that are before us has probably taxed the resources of those within the merger and asset sales branch who would otherwise be involved in putting out public competition assessments.

Senator JOYCE—I have a question to ask on that.

Senator CONROY—I was going to say that Senator Joyce of all people should be horrified by what he is hearing.

Senator JOYCE—With this new merger and acquisition workload that is currently on, how are you going with your resources and time frames? I know that you now have restrictions placed on you for assessment of that process. How is it possible? Are these just

going straight through to the Australian Competition Tribunal or are you getting time to properly assess them on behalf of the Australian consumer?

Mr Samuel—Our resources are proving to be adequate. I have some more detailed analysis here of the time frames that we are operating in. The time frames have not slipped. We have actually put some more resources into the merger and asset sales branch of the commission. We have brought some people in as well from other areas where there is not as much work that would be required as had been originally anticipated. For example, I can now indicate that we have not received any notifications in respect of collective bargaining by small businesses since 1 January.

Senator JOYCE—That was one of my questions.

Senator CONROY—I would like to read from the website:

> The ACCC will endeavour to provide competition assessments within approximately five working days. Where matters are more complex and the competition issues raised are significant additional time may be required to ensure the reasons are in publishable form, taking into account any legal and commercial sensitivities.

That is from your website.

Mr Samuel—I accept that. I thought that the time in publishing this public competition assessment is perhaps longer than would otherwise be desirable but there are some significant mergers that we currently have before us, but the resources are proving to be adequate. The timelines are not stretching out beyond those that have been applicable since we introduced the timeline process, which is back in 2004 and 2005, so I think we are able to handle what is being done.

Senator JOYCE—Since the passage of the mergers and acquisitions legislation—you are aware of the legislation that I am talking about—has there been a marked increase in the number of mergers and acquisitions that have been landing at your door?

Mr Samuel—No. The rate of those that have been coming into the commission for clearance has been increasing over the past couple of years. I do not think that you were here when I gave my opening statement, but the average number of mergers that we are dealing with in terms of the clearance process is about double that which applied perhaps two or three years ago. That is not something that has anything to do with the legislation that has just been passed through parliament. Indeed, as I indicated prior to your coming into the committee, that legislation came into place on 1 January. We have had no formal clearance applications since then under the new legislation, nor have we had any applications to the tribunal for authorisation under that new legislation since then. The processes that we are dealing with in relation to merger clearances are still continuing under the process that has been in place for some time, which is the informal clearance process, which is not part of the legislation that was dealt with in parliament last year.

Senator JOYCE—In the last estimates I asked you the question of whether the $3 million level for collective bargaining could be changed to $10 million just by regulation. Your answer was a bit ambiguous, so I would like to pose that question again.

Mr Cassidy—I can see that it was ambiguous and that was basically my fault. I think the answer that we established is that it can be changed by regulation.

Senator JOYCE—Do you feel that on the size of transactions these days $10 million would probably be a more appropriate level for small business? We have to take a figure. Three million dollars is arbitrary and so is $10 million, but in today's economy $10 million would be a better figure and would have a greater basket of potential applicants.

Mr Cassidy—As you are obviously aware, this is something that the government has under notice at the moment. It really depends on the nature of the industry. For industries that have a high-volume turnover on a low margin the $3 million is probably a bit on the low side.

Senator JOYCE—Such as fuel retailers.

Mr Cassidy—The government has indicated a couple that it has in mind—fuel, certain types of farm machinery and one or two others. It depends on the nature of the industry. As a general proposition, we feel that $3 million is probably a not unreasonable figure, but then there are some industries where $3 million is probably a bit on the low side.

Senator JOYCE—Fuel would be a classic one where you have a margin of a couple of cents. Senator Conroy is leaving.

Mr Cassidy—Is Senator Conroy leaving? Chair, do we still have a quorum? If we do not have a quorum, as I understand it, we are not answering questions with the protection of privilege.

CHAIR—That is a reasonable call. I understand that. We will have a private meeting and then return in due course.

Senator JOYCE—Do we have enough for a quorum for a private meeting?

CHAIR—Thank you for that very helpful intervention.

Proceedings suspended from 11.41 am to 11.48 am

Senator JOYCE—It is a pleasure to welcome back the Labor Party to the deliberations. Are any cases currently being brought before the ACCC on predatory pricing under section 46?

Mr Cassidy—We have 10 section 46 matters under investigation. I may end up taking that one on notice because I do not have the information to tell you whether any of those relate to predatory pricing. Can I take that on notice?

Senator JOYCE—Yes. I would appreciate that. Is section 46 an effective mechanism for predatory pricing or do we have to beef it up?

Mr Cassidy—We have 10 matters under detailed investigation, but I do not know whether any of those relate to predatory pricing.

Senator JOYCE—Have you been approached with a draft of new section 46 changes?

Mr Cassidy—No, we have not. The last draft that we saw was one that was drafted about 12 months ago, which has been sent out for consultation with various groups. We have not seen any further drafts since then.

Senator JOYCE—With respect to section 51AC, have any new cases been brought before you on unconscionable conduct?

Mr Cassidy—Yes. We currently have one unconscionable conduct matter in court. We have one on appeal in court and we have seven detailed investigations under way on unconscionable conduct.

Senator JOYCE—We have 10 section 46 cases, but we do not know whether any of them are on predatory pricing, and one 51AC case before us at the moment?

Mr Cassidy—You are right about 10 section 46 matters. As I said, we will let you know how many of those investigations relate to predatory pricing. In relation to unconscionable conduct, we have two matters currently in court, one still being heard and one on appeal, and we have seven matters under detailed investigation.

Senator JOYCE—For a trillion-dollar economy, do you think that might be a suggestion that we need to bolster those laws somewhat in that they do not seem to be encouraging many people to exercise their protection mechanism as a small business?

Mr Cassidy—It is difficult in a sense just to use the straight numbers to draw those sorts of conclusions. That is partly because the number of matters we have under investigation at any one time will be determined by a number of factors, including the perceived effectiveness of the particular sections.

Senator JOYCE—An issue has been brought up lately by franchisees, which I am sure you are aware of, and some sort of complaint process that they have put forward with regard to the operation of the ACCC. Are you aware of that?

Mr Cassidy—Yes. We have seen the press commentary relating to various franchise matters and suggestions that perhaps we are not as active as we should be. Yes, I am aware of the general point.

Senator JOYCE—With regard to the change in the fuel operators, sites and franchise legislation, have you seen a movement to a greater centralisation of the fuel market as the majors move into the lease operations of former independents?

Mr Cassidy—The repeal to that legislation has only recently occurred and is being replaced by oil code, so I think it would be too early to be able to say one way or the other what impact that is having. Certainly, there has been a more structural shift, which we have discussed in the context of the petrol inquiry, over time to multi-site franchises and multi-site selling, which has probably enhanced the role of the oil majors in petrol retailing. But that is something that has occurred over time and, indeed, some would say has occurred as a result of the existence of the Sites Act. Multi-site franchises and multi-site retailing is a way, if you like, of getting around the restrictions that existed in the sites act.

Senator JOYCE—Initially it was set up to stop vertical integration and now it has been abandoned altogether. Do you feel that the move, which you have acknowledged, towards vertical integration between the major fuel companies and fuel retailing is inherently anticompetitive?

Mr Cassidy—Not necessarily. What that has led to is much larger retail sites than we have had previously. They tend to be more competitive in the sense that they are able to spread their costs over the larger volume of petrol sold and are normally integrated with other retail operations—fast food outlets and so forth. In a sense, we would argue that has been a factor

that has made the market more competitive and resulted in lower margins in the retail petrol industry.

Senator JOYCE—Following the current dip in oil prices, there was a notable lag in response by the major oil retailers. What are your comments on that? Surely it is a sign of an oligopoly where they have the ability to work against the fundamentals of their base price at the expense of the consumer?

Mr Samuel—You might be referring to the first couple of weeks in January when a normal lag occurs. We should make this very clear: this is not a relationship between Australian retail prices and Tapis crude oil—that is, the crude oil price—but the international benchmark or what is known as Singapore Mogas 95 Unleaded, which is refined petrol. We need to focus on that. In the first couple of weeks in January we noticed that the normal lag time that occurs, which can be between seven days and two weeks, in the movements in Singapore Mogas 95 and the average Australian retail price had stretched out beyond that normal seven days to two-week period. As is now well known, I made some comments on that on 14 or 15 January to the effect that we had noticed there was a stretch in the lag time between the international benchmark and the average Australian retail price. Those retail prices moved down fairly quickly after that to bring them more into line with the way that the normal process of petrol retailing pricing has occurred in this country having regard to that international benchmark.

It is often suggested that there is an oligopoly or that there is some collusion occurring. We have no evidence of collusion between the major oil companies or the major retailers in this area. What we do see, particularly with the very volatile weekly price cycles, is that there tends to be a high degree of competition that drives prices down to their low points through the process of the weekly price cycle and then, recognising that at the lowest points there is very little money, if any at all, being made in the retailing of petrol at all levels, the price moves to its high point at particular points in the weekly price cycle.

Senator JOYCE—You have agreed in your statement just then that it had extended beyond the seven- to 14-day lag and, after your comments, the price came down quickly. That was your statement then. That would obviously suggest that it is not an overt collusion—or maybe there is; we can't prove it—but that there is a centralisation of the market that allows that to happen. There are six major suppliers—by default there are four—being Coles, Woolworths and two major oil companies, and that has allowed them the ability to do that. Surely, that position will get exacerbated by the fact that the independents, as you say, are moving out of the market. There is an inherit oligopoly. That is not overt. But obviously from what you just said there is evidence of them exercising their power in the market. They can collude and there is not much that we can do about it unless we have you continually monitoring them.

Mr Samuel—You have raised a whole range of issues, not the least of which is the different levels in the petrol retailing chain. You have talked about the four majors—Shell, Mobil, BP and Caltex—which supply refined petrol to retailers. That is one level. Then there are distributors and of course the retailers, which include many independents as well as those that are now well known—that is, the Woolworths-Caltex joint venture and the Coles-Shell arrangement. They are all relevant factors in looking at petrol pricing and the like, but of course we cannot ignore the fact that petrol pricing includes some relationship to the

wholesale pricing that is charged by the major oil companies and the support systems that they put in place through the week.

Senator JOYCE—More and more they are going to be charging themselves because they are going to be the retailers as well. They have a position that obviously is going to be to the detriment of any independents left in the market. You are competing not only against their retailing arm; you are competing against the retail arm of a major oil company that is supplying you and supplying itself. They are obviously going to look after themselves first. As their position in the market strengthens, they do exactly what they did in January and work in an oligopoly form at the expense of the Australian consumer.

Mr Samuel—That suggests that the major drivers of price discounting are the many independents that you have referred to.

Senator JOYCE—We have just stated that they are going out of the market.

Mr Samuel—I do not think I stated that; I think you stated that. What we have indicated is that the arrangements between the major oil companies and those independents that you talked of have changed. They are changing, in many cases, to franchise arrangements, which involve the ownership of sites by the oil companies and the development of large sites with multipurpose—

Senator JOYCE—The franchising arrangements have very strict statements about what they can sell the price of fuel at, though, don't they?

Mr Cassidy—This is a point that we made previously in the petrol inquiry that this committee had. The independents—in other words, the stand-alone independents—really have not been a competitive force in the petrol market for quite some time. The independent chains play a useful role—the Coles, the Libertys and so forth—and, certainly on our information, they are not going out of business. It is the stand-alone independent service stations that are struggling.

Senator JOYCE—Why are they struggling?

Mr Cassidy—They are struggling partly because of the economics of the petroleum industry these days. As I was saying earlier, there is a move to large integrated sites.

Senator JOYCE—By whom? Who is making that move?

Mr Cassidy—That is just the way the industry is heading.

Senator JOYCE—Who is instigating it?

Mr Cassidy—The people instigating it are the customers who prefer those sites because the petrol is cheaper and because they can purchase other goods and services there at the same time.

Senator JOYCE—Obviously the supply of petrol to the independents is by the oil majors. They are struggling because they are at a competitive disadvantage to the oil companies that supply their own sites.

Mr Cassidy—In some sense I would not deny that. We have said previously that another issue in all of this is the difficulty that both independent chains and the stand-alone independents have had in accessing offshore supplies of fuel since the introduction of our fuel

environmental standards, which do not really match the fuel environmental standards anywhere else in the world. There is an element of that in the problems that stand-alone independents are having, but that is only one of several factors that are contributing to a difficult market for stand-alone independents. I included in that the fact that the customers purchasing fuel prefer the large integrated sites because the fuel is cheaper and they are more convenient.

Senator JOYCE—It is a result of vertical integration but, at the end of the day, we can see where it leads. It leads to the January situation, whereby you have an inherent oligopoly squeezing the Australian consumer. You have made statements regarding their inability to float fuel in because of the change in fuel requirements. That would be a fair statement. The new sulfur content rules and so on are an inherent non-tariff barrier that inhibits people accessing fuel from overseas. Would that be a fair statement?

Mr Cassidy—We have been on the record for some time pointing out that that is a particular outcome. It is not so much that we have tightened fuel standards in Australia; it is the fact that our fuel standards do not actually match the fuel standards of any other country.

Senator JOYCE—In our region?

Mr Cassidy—Certainly in our region, but you could almost say in any other country, full stop.

Senator JOYCE—That is a very convenient position if you are a predominant player in the market—the oil majors. You now have exclusive control of the Australian market and there is no chance of anybody competing against you.

Mr Cassidy—It provides some assistance to those who are refining and producing petrol in Australia. That said, I would not want to point to that as being something which has been a significant inhibitor of competition in the retail petrol market in Australia. It certainly has not helped, but on the other hand we have had other developments that have gone the other way and have been enhancing the competitive nature of the retail petroleum industry.

Senator JOYCE—You might think this discussion is going nowhere, but it is going somewhere. If Australia's capacity to produce fuel from an alternative supplier to the oil majors were compatible with the standards, that would certainly increase competition and increase the likelihood of discounting. Would that be a fair analogy after what you have just said?

Mr Cassidy—If there were additional sources of fuel within Australia, that would add to the competitive pressures.

Senator JOYCE—The advent of the use of ethanol or biorenewables as a component of petrol would make it a more competitive environment, because all of a sudden the oil majors would have something they would have to take into account and compete against.

Mr Cassidy—In one sense that is true. If you look at ethanol, for argument's sake, it is of course blended with unleaded petrol, which basically still comes from the oil majors in Australia.

Senator JOYCE—The more ethanol that you get, if it is coming from an independent source, then the more competition you will get. You are going to reduce the refining capacity

in Australia, which is finely tuned to supply the market. You will have another product coming in as well as excess capacity of the refineries. Both of these two issues are going to put a downward pressure on fuel prices.

Mr Cassidy—I would not argue with that proposition. I would caution a bit about the extent of that downward pressure for the reason that I just mentioned.

Senator JOYCE—More downward pressure at the moment, because of where they are; they are completely quarantined from competition from overseas because of the inability to supply fuel from our region. In fact, we are on European standards. To bring competition into the market, we have to start producing an alternative product here that is somehow blendable in a competitive market with what the oil majors produce?

Mr Samuel—That is assuming that the suppliers of the blended product, let us call it E10 or whatever for the moment, will be different to the current refiners of petrol, which are the four majors, that blend the ethanol into it.

Senator JOYCE—I agree with you entirely. With the oil majors being the producers of the ethanol, you have not got a solution, you have got an exacerbating of the problem.

Mr Samuel—Not so much the producers of the ethanol, but the producers of the blended product, which includes up to 10 per cent ethanol in it, which is currently being produced, as I understand it, by the oil majors in terms of the blended E10 product.

Senator JOYCE—And kicking and screaming, if you read Caltex's release today. That is where I wanted to get to with that issue. I now want to move on to something different. In regard to your assessment of competitive advantage of Australian investors in the market, do you feel that, if there is a capital gains tax exemption given to overseas investors on the purchase and sale of non-real property assets that is not available to Australian investors, there is a competitive disadvantage to Australian investors?

Mr Samuel—That is not something that we have given any consideration to. That is a matter of policy for government.

Senator JOYCE—In terms of private equity firms, which as an organisation you are going to have some involvement with, would it be of assistance to you if private equity firms that were to purchase public companies were to have the same disclosure requirements as the public companies that they purchase?

Mr Samuel—If I understand your question correctly, you are talking about the disclosure requirements post acquisition?

Senator JOYCE—Yes.

Mr Samuel—Again, that is not a matter for us. That is a matter for government and securities regulators and the like. In terms of private equity firms and their dealings with us, they must deal with us in relation to acquisitions that fall within section 50 of the Trade Practices Act. We make rigorous market inquiries not only looking at the prima facie consortium members involved in private equity acquisitions but also looking at who might be behind those private equity firms.

Senator JOYCE—I have one in mind—Qantas. You are probably surprised about that. I think I just read about it the other day.

Mr Samuel—I have written a name down here in anticipation of your questions.

Senator JOYCE—Do you believe that the consortium that is currently in train to purchase Qantas could have a possible conflict of interest because of their involvement in Macquarie Airports?

Mr Samuel—The question is not in the slightest bit surprising and neither will the answer be surprising to you, which is that the matter, as is well known and is shown on our website, is under consideration by us. We are conducting market inquiries dealing with areas that may raise competition concerns, and we expect to provide a determination on this as per our website at the moment. We expect to provide a determination on the competition issues, and they are sole issues that we have to deal with, at least by 1 March this year, which is a couple of weeks off.

Senator JOYCE—Have the other players in the market, such as Virgin, made their feelings well known about what they believe will happen?

Mr Grimwade—Rather than identify who specifically has come and spoken to us, I can just say that we have spoken comprehensively to a range of interested parties.

Mr Samuel—As you would expect, we conduct extensive market inquiries in relation to any merger, be it a small one or one that is as high profile as this particular merger. Our inquiries must be related to the issues of section 50 of the Trade Practices Act and whether there is a likelihood of a substantial lessening of competition in any particular market. In private equity bids often you will see a private equity name, whether it is a consortium bid, such as has occurred in Qantas, or a private equity lead manager that is involved in some of the other private equity transactions that we have seen of recent times. It is incumbent on us not just to deal with those who are at the front line but also to go behind the face of the private equity bidders and to understand who has the influence over the management of it.

Senator JOYCE—The off-paper interests?

Mr Samuel—Yes.

Senator JOYCE—Just because I have a nominal share value, that does not necessarily reflect my influence or otherwise on a company.

Mr Samuel—Because the provisions of section 50 are as wide as they are long, they give us an enormous scope to investigate behind the face of the bid itself and to examine potential conflicts in competition terms, potential ownership issues and potential control issues that may not necessarily be reflected by the specifics of the ownership structures that are set in place, and they are all factors that we take into account. Ultimately, we must deal with issues in regard to whether or not there will be a substantially lessening of competition.

Senator JOYCE—A substantial lessening of competition is obviously by definition where you have the capacity to raise prices without losing customers.

Mr Samuel—That is one of the elements, yes, that we consider.

Senator JOYCE—Isn't that awfully restrictive? That is an extremely narrow definition of a 'substantial lessening of competition'.

Mr Samuel—That is why I said it was only one of the elements. There is a whole range of elements that we consider as to what constitutes lessening of competition. After all, the whole tenor of part 4 of the Trade Practices Act is about anti-competitive conduct or anti-competitive structures, and section 50 is to deal with the issue of competition. Other issues that might raise questions of corporate governance, of foreign takeovers or of public interest issues are for other bodies to deal with.

Senator JOYCE—I am concentrating on the connection between Macquarie Airports and Macquarie's involvement in this consortium, which is either being led by them or led by an overseas company. If it is led by an overseas company, it is a foreign interest issue that you do not have to worry about. But if it is led by Macquarie, we have a competition issue, which I am certain you should be worried about.

CHAIR—I am trying to interrupt. I am just trying to get an idea as to what we are going to do with witnesses.

Senator JOYCE—I will only be three or four minutes. How many collective bargaining notifications have been lodged?

Mr Samuel—None. Since 1 January we have had none lodged under the new provisions for collective bargaining notifications.

Senator JOYCE—The whole premise was that we had to get this through because of the range of people out there banging on the door for collective bargaining. Since it has been through we have not had one?

Mr Samuel—No, not at this point.

Senator JOYCE—That is interesting. What is your view on the unfair contract legislation? Do you have any views, or you cannot give any views?

Mr Samuel—What legislation are you referring to?

Senator JOYCE—The unfair contract legislation.

Senator Colbeck—I am not sure that asking a personal opinion is really what we are about here.

Senator JOYCE—My final question concerns the new timeframe on mergers and acquisitions. For a complex merger position that is coming forward, is it your firm belief that you have the capacity and the timeframe allotted to be able to get to the bottom of that issue?

Mr Samuel—In regard to our experience over the past two or three years, where we have been working within, if I can call it, flexible but pre-defined timeframes in respect of mergers under the informal clearance process, the timeframes that are provided under the formal clearance process would fit within those that we have been, by experience, evidencing as being necessary timeframes to deal with even the most complex of mergers. I can say to you, though, and we said this last year at Senate estimates, that there will be on occasion in very complex mergers a need to go beyond the normal timeframes. Remembering that the time frames under the formal clearance process are prima facie 40 business days but then can be

extended in complex matters to 60 business days. Sometimes we will need to go beyond that. That will most often be the case not where we are going to oppose a merger outright but where parties want to proceed to present us with undertakings to deal with competition concerns that might be able to be dealt with by means of excising the competition concern issues out of the merger and leaving the broad tenor of the merger or the broad totality of the merger to be able to proceed without breaching section 50.

So often we do find that in those matters the process of the submission of undertakings, having to assess those through market consultation, then requiring them to be perhaps modified, redrafted or varied as the case may be, can take us beyond the normal timeframes for consideration of mergers. It is one of the reasons why for some time now we have been saying to merger parties, if you want to present to us undertakings to deal with competition concerns, you would be better advised to present up front what you really ultimately intend to present rather than go through the iterative process of negotiating—

Senator JOYCE—Unless they want to stall you to get to the Australian Competition Tribunal, in which case they will tell you as little as they need to.

Mr Samuel—That is a separate issue. The Competition Tribunal is dealing only with authorisations, which is the public interest test relative to—I beg your pardon, with appeals. But we must also remember that at the expiry for a formal clearance process it will only be the matters that have been brought before us at an expiry date—that is, not necessarily at the end of our consideration but at a predefined or specified date—that will be able to be presented to the tribunal for its consideration. For example, if we have a 40-day consideration of a formal clearance, and day 21 is the cut-off date for the presentation of material to us, and then material is presented to us on day 35, and then we reject the merger because the material put to us was inadequate as at day 21—

Senator JOYCE—They will then head to the tribunal.

Mr Samuel—It will only be the material put to us as at day 21 that will go before the tribunal for consideration of whether or not the merger ought to be cleared. Material put after that date will not be able to be put before the tribunal, and that puts a lot of pressure on merger parties to bring material to us up-front and to try to deal with competition concerns up-front.

Senator JOYCE—This is my final question. Do you have the same access to a private company in doing your deliberations that you do in respect of a public company?

Mr Samuel—Yes, and the same evidentiary gathering powers. It makes no difference whether it is a private or public company.

CHAIR—As there are no further questions, we will excuse the ACCC and thank Mr Samuel and his colleagues for their attendance today. I will now call APRA.

[12.20 pm]

Australian Prudential Regulation Authority

CHAIR—I welcome to the table Dr Laker and officers from the Australian Prudential Regulation Authority. Unless you have an opening statement, I will go straight to questions.

Dr Laker—No, Mr Chairman, other than to congratulate you on your appointment and welcome you to the fascinating world of prudential supervision, which, as you will learn, keeps Senator Sherry awake into the wee hours of the morning. We are happy to take your questions.

Senator SHERRY—It is always fascinating; I totally concur. I have a couple of preliminary matters. Could someone give me an outline of the ongoing wind-up of superannuation funds—a status report—that did not meet or, alternatively, did not seek licensing?

Mr Jones—The process was designed to be finished by 31 December. Some of those funds that decided to wind up but the wind up was not completed by 30 June—that is, those that did not apply for a licence—entered into enforceable undertakings whereby we gave them up to four or five months. The exact numbers as at 30 December I would have to take on notice and give to you. Effectively, almost all of the money has been rolled out. So effectively what we are dealing with now is just wind-ups, and much of it is administrative, in terms of getting closure on the remainder of the funds. There are some funds that we have not ever been able to communicate with—that is, all that we have ever had is a registered address and that address turns out to be inappropriate. We have not been able to contact those. So there is a process that we will probably have to go through to wind them up. I can supply the exact numbers. We are confident enough to have disbanded our superannuation licensing team at 31 December.

Senator SHERRY—I would appreciate if you could take that information on notice. Have there been any difficult issues in terms of the process? I have flagged a few issues on previous occasions. For example, the treatment of the fees payable on an ongoing basis is one issue that we touched on. Have there been any difficult issues, aside from the one that you have already mentioned this morning, in communicating with some of the funds?

Mr Jones—No, not that I am aware of. Most of it has gone reasonably well.

Senator SHERRY—Is a status wind-up report required back to APRA once all the formalities are concluded?

Mr Jones—Yes, there is.

Senator SHERRY—Are they being received?

Mr Jones—They are.

Senator SHERRY—Are they publicly available?

Mr Jones—No, I do not think so, because they will have a lot of confidential information in them.

Senator SHERRY—Where the funds being wound up are defined benefit, has any special attention had to be paid in terms of the value of the defined benefit, meeting the defined benefit promise and the asset backing behind those particular types of funds?

Mr Jones—I am not aware that there have been any particular issues with regard to any particular defined benefit fund. It is a possibility but it is unlikely. Also, most of the funds that were winding up were in fact not defined benefit.

Senator SHERRY—In the case of defined benefit, I do not know what the numbers were or the number of funds that were DB hybrid or the number of members. Where they are DB—and I accept that would be a small number—did you evaluate any change to the rules of the DB on wind-up and transfer into another fund or another entity?

Mr Jones—In each circumstance where you are looking at a wind-up, you are looking at the movement of members over and you are looking at the nature of the benefit promised that is provided in the move over.

Senator SHERRY—Let us assume that the promise is kept ongoing in the new fund. Do you have any method of ensuring that continues?

Mr Jones—Do you mean that they are meeting their obligations?

Senator SHERRY—Yes.

Mr Jones—You would do that by the normal supervision.

Senator SHERRY—Of that new fund ongoing?

Mr Jones—Yes. In some cases, too, they may have established subfunds and tried to maintain a separate entity within a master trust or something.

Senator SHERRY—The evaluation of the asset backing of the defined benefit is just part of the normal evaluation of the recipient fund ongoing?

Mr Jones—Yes.

Senator SHERRY—Do you know if the Audit Office intends to conduct a review of this process?

Mr Jones—I do not know. We have looked at the ANAO forward plan for the next 18 months or so and it is not listed there. We have always worked on the assumption that they would do a review of the superannuation licensing regime, particularly given the way in which the licensing regime was funded, given that it was a separate levy.

Senator SHERRY—That could be part of the broader process?

Mr Jones—It is really up to them in terms of the way in which they want to do it. We would be quite happy for them to do the audit.

Senator SHERRY—That brings me to the issue of the asset backing of defined benefit funds. Again, can you give me a status report on your evaluation of the level of asset backing of defined benefit funds in general?

Mr Jones—We would have to say under the current circumstances that things are going fairly well. Given the way the stock market is currently performing, there is no particular reason why we would not expect that. Most of the difficulties that we had with defined benefit funds occurred a couple of years ago in the market downturn.

Senator SHERRY—I noticed in the UK recently that there is a growing trend for the effective buyout of a DB fund—the purchase of the asset/liabilities by a financial institution unrelated to the trust structure and, in many cases, a closure of the trust structure. The buyer effectively undertakes to maintain the promise and holds the assets. Has that occurred at all in Australia? It seems to be quite widespread now in the United Kingdom.

Mr Jones—I am not aware of examples. I can check for you.

Senator SHERRY—Yes.

Mr Jones—It is certainly not a trend in Australia.

Senator SHERRY—There is not much to have a trend with in terms of DB compared with the UK, but there is a very significant area of activity around DBs and new areas of business for financial service providers.

Mr Jones—The significant thing in our case is that we have just gone through two years of licensing whereby employer sponsors in particular of DB funds have had to make a conscious decision as to whether they wanted to stay or go. My guess is that, having made the decision to stay, they are committed for the longer term We are not really expecting substantial change in DB funds, for example, in the next number of years. We are certainly not expecting a trend towards wind-up, because you would have thought that, if that was the case, it would have occurred during the licensing period.

Senator SHERRY—I would agree with you. In terms of funds having to handle change, I cannot think of much more change than they would ever have to handle and therefore make a decision about whether they want to continue.

Mr Jones—I would like to think that, but you never know.

Senator SHERRY—You never know, after the last 20 years or so. What was one of the areas of interest to me in the UK was obviously the DB system there is being shut down but the actual purchase of the DB promise, liabilities and assets by a financial institution was quite massive. That brings me to another related issue, the international transfer of assets in and out of superannuation funds in Australia and the UK in particular. Has APRA been involved in any work, observations or evaluation of any of the activity in that area?

Mr Jones—Not that I am aware of.

Senator SHERRY—I would not have expected you to be involved, but I just thought—

Mr Venkatramani—With a very large part of international movements, as you know, the underlying issues relate to tax. APRA's focus as a prudential regulator would be to ensure that the operational processes that underpin these transfers are robust enough, and that the trustee, if able to transfer them, allocates them appropriately and, if there are tax liabilities, that those liabilities are met on a timely basis. Other than that we do not seek to look at international transfers. It will be part of the operational process really.

Senator SHERRY—I understand the issue around the tax treatment, and there are some significant issues there. It does raise possible structural issues of transfer from between jurisdictions. In this case, I am thinking in particular of the UK into Australia and vice-versa. Are there no observable issues from APRA's point of view in that area?

Mr Venkatramani—No.

Senator SHERRY—I have touched on this issue on a couple of previous occasions. Over the last month there have been two publications, one by *Choice Magazine* of so-called declared lost superannuation accounts and some, from their perspective, analysis of the treatment of those lost superannuation accounts once they are declared lost. Secondly, I think

it was ASFA on Monday that released an analysis paper from their perspective of what they called unnecessary accounts, by definition in the main lost accounts. In those two papers it raised the issue of the eligible rollover funds—the ERFs. There is a range of issues around ERFs, including the way fees are charged within the ERF, the way in which member notification is handled within the ERF structure, and a multitude of other issues. Can you give me a status report on ERFs within our system at present?

Mr Jones—We look at eligible rollover funds in the same way as we look at other funds. We recognise that there have been issues with eligible rollover funds. I might have mentioned to you at a previous estimates that, once the licensing process was complete, one of our areas for new research and further investigation is some of the eligible rollover funds.

Senator SHERRY—Some of them are quite massive in terms of the asset but also the sheer number of 'members'.

Mr Jones—Large numbers of members with very small balances.

Senator SHERRY—My understanding is that a balance of an ERF is not member protected; the fees can send the account backwards?

Mr Jones—No. There is a variety of protections, but there is also a variety of exemptions available.

Senator SHERRY—I have been informed that an account can go backwards in an ERF. Perhaps you can just clarify in what circumstances that is possible? You mentioned that APRA intends to pay some attention to ERFs. Have you done any work to date in this area?

Mr Venkatramani—Yes. We have support for this project. This will be done across APRA's various divisions, because the number of ERFs is not too many—about 12 or 13. We have assembled a team across APRA, and the scope of the project is being determined now. There is a lot of existing information that we already have, so we do not intend to put too much of a compliance burden on the institutions. We will do a desk review and then we might go to some the ERFs and test out some of the assertions that have been made to us. We also know the kinds of issues that have been complained about openly in the industry. ASIC has done some work on that as well.

Senator SHERRY—There are obviously some important consumer issues around. I have had some complaints about ERF activity. It seems to me that it is an area where the member, because of the nature of the member, is highly vulnerable to excessive fees or dealings with their monies or account without their being aware of what is happening, simply because of the nature of the member being lost. You mentioned the scoping project. Are you gathering together individuals into a team, looking at some sorts of parameters for the project?

Mr Venkatramani—What the projects do is what we are currently determining. We have anecdotal and other information as you suggest, and existing work on ERFs. As Mr Jones points out, ERFs are like any of the super entities in terms of their obligations to report to us. We will use that and minimise the extra burden that you might put on these trustees. If necessary, we will go back to them. Given that these funds are spread, we have a contingent from the Melbourne offices and Sydney offices who would be working together on this project.

Senator SHERRY—What is your timeline for the project?

Mr Venkatramani—We will do it over the next couple of months.

Senator SHERRY—Would it be possible to complete this by the end of this year?

Mr Venkatramani—At this point that has not been determined. It has to go to our members for the project scope to be agreed and the timelines to be agreed.

Senator SHERRY—In terms of an ERF, is there a requirement that they lodge a financial statement that is limited to the ERF as an entity? For example, a number of funds that I know of operate an ERF which is part of a retail life company; it is one element of their operation. I am interested to know whether it is possible to evaluate quite separately the financial performance of the ERF in a number—

Mr Venkatramani—Yes, eligible rollover funds, like other funds, are required to provide information.

Mr Jones—We get information at the fund level.

Senator SHERRY—I have a couple of matters that are relevant in the context of ERF. I have raised the issue of the level of fee, both administration and investment. From the concerns expressed to me from time to time, effectively you can charge whatever fee you can get away with, and that is relatively easy given the member cannot find or has lost their account. That is one concern. There is an interesting issue around the nominated age of the member. My understanding is that in relation to any superannuation account—but in an ERF I think it assumes more importance—if the fund does not have the birth date of a member, which does happen, the ERF can nominate the member's age as being notionally 18, because they do not know their real date of birth. I am told that becomes important for the period of time the member's balance stays in the account within the ERF. I think it is at the age of 65 that, if it is lost, it has to be declared as unclaimed, and then there is a new treatment of whatever is left in the account. You might examine that issue. The reason for this being important is that, if the member is 40 and the fund does not know, and you declare them 18, you can keep them in the ERF as a lost account through to the age of 65 and continue to charge fees. I find that an interesting concept. I do not know how you would solve the problem. But, again, I think it is a potential area of abuse.

Mr Jones—Are you suggesting that you could be charging fees to someone who is dead?

Senator SHERRY—Yes, of course you could. That is perfectly possible with any superannuation account. It seems to me to be in the interests of the operators of an ERF that they keep the member in the ERF for as long as possible—through to the age of 65, when there is a separate treatment and it has to move out of the ERF. Unclaimed monies are now apparently to move to the Commonwealth jurisdiction back from the state jurisdiction. Will your examination of ERFs include an examination of fees that are charged?

Mr Jones—We are still considering the scope of what we are going to do, but given that is an area that has been raised, it is one of the things that we would collect or we would try to get access to some of the information. It is probably premature to try to second-guess, even from our point of view, exactly what the issues are likely to be.

Senator SHERRY—I understand that. Certainly the issues of complaint and focus that I receive from time to time are issues of fee levels and the ability to charge virtually whatever fee they can get away with because of the nature of the member.

Mr Jones—We have also been cooperating with the ACA in terms of the work that they were doing on trying to look at the growth in the number of accounts as well; we collect those statistics.

Senator SHERRY—That was to be another area of suggested attention. When the monies in the account are in the ERF what in fact is the level of attempt to identify the member, where they are, once the account is in the ERF? There are attempts to identify and there are attempts to identify. It would seem to me that some firms would have a commercial vested interest in ensuring monies stay in the ERF and are in fact not identified. There would presumably be a process which the financial entity that operates the ERF would have to go through to ensure maximum identification of the ERF—the person's address and where they are. I am not sure that is happening or happening to the degree that it should. I am not even sure that there are any criteria. Again, that is another area of suggested focus. I had not intended to go through all of these issues, but you are identifying the new research and the scope of the project.

Another issue with ERFs is the issue of former temporary residents in Australia. Again, my assumption would be that a significant proportion of members in an ERF are in fact former temporary entrants and residents who have left the country. Perhaps there should be some attention to the way in which the entities are attempting to identify how they deal with that particular problem, which seems to me to be almost insolvable. I suspect that the operators of ERFs are not putting ads in the paper in London, New York, Germany and all over the world to suggest that people come forward and claim their money. Perhaps you could give that aspect of it some consideration, because my suspicion is that a very sizeable proportion are in fact persons outside the country now.

Mr Jones—Part of it goes back to your earlier point that many of the individuals do not even know that they have money and, secondly, they have no idea where that money is.

Senator SHERRY—Yes. That becomes even more difficult once they have left the country. When you conclude the report will it be published at some point in time?

Mr Jones—We have not given any thought to that, but the general answer would be no, because it usually uses confidential data—so in most circumstances we would be going through and looking at the activities of individual ERFs.

Senator SHERRY—That causes me some concern. Could you consider a publication of your analysis? I understand the issues of commercial-in-confidence and not naming the operators of ERFs unless it is appropriate, but I think it is important in a public policy context to have some informed public evaluation of this sector, even if you have to publicise a much more limited set of information. Given the number of accounts and the billions of dollars in assets being examined, we should see some sort of public document come out of this at the end of the day.

Mr Jones—The objective is to try to reduce the multiplicity of accounts. It makes sense for us to try to do whatever we can to assist in that process.

Dr Laker—Depending on the timing of the study and its results, one vehicle we do have is our annual report, which could provide a broad overview of the work we did and any general findings. I do not think that would cause us any issues on the confidentiality front. We could provide a high-level sketch of what we have found through that vehicle as well.

Proceedings suspended from 12.46 pm to 1.51 pm

Senator MURRAY—Dr Laker, I would like to ask you some questions relative to a joint press release that you put out with ASIC and APRA on 5 February 2007. Before I do, I would like to suggest something to you. I am a member of the committees that are interested in ASIC, particularly the Corporation for Financial Services, but also the Joint Committee of Public Accounts and Audit, the Senate Finance and Public Administration Committee and, of course, this Senate Economics Committee, all of which have an interest in ASIC, and I am on their press release list. I find their press releases terrific in terms of keeping up with their work from a professional point of view. Sometimes it gets a bit much because I might have three or four in a day, but that is just showing that they are busy. I have tried to encourage other regulators to think of the same system for parliamentarians on those committees or with those portfolios which intersect with APRA. I do not recall receiving press releases from APRA, in my function but I presume you send them out.

Dr Laker—I will clarify that.

Senator MURRAY—I would not suggest it for all members and senators, because I doubt that they are all interested. But for those members and senators who have either a portfolio interest, which I do, or a committee interest, which I do, then it is worth while.

Dr Laker—I note your comments.

Senator MURRAY—Your press release covered the working group status report. It is a cooperative venture principally as a result of the government's work following on from the Productivity Commission in trying to reduce the regulatory burden on entities, and it is a very useful progress report. My current concern, which is shared by many, is that, with the election year looming, these sorts of initiatives will not find their legislative outcome in time before the election and therefore will be delayed well into next year. That particular press release stated that you had been negotiating with Treasury and, as a result, a discussion paper has gone out, which closed yesterday for replies. You stated:

Industry will be provided with further guidance about the legislative changes when they are finalised.

With all these things, the financial year is a key point. My question is: do you have any insights for us as to when a legislative consequence might occur and might be capable of being put before the parliament?

Dr Laker—I cannot give you a timetable at this point. Legislative timetables are really outside APRA's prerogatives. It is a matter for the government to determine legislative priorities. What I can say is that, as far as APRA and ASIC are concerned, we have given this particular work high priority and quite important parts of this work do not require a legislative solution. We have the Bunsen burner burning under this particular working group. Industry is very keen that we keep that heat on as well and government has been committed to providing a positive response to the Banks report, which is where much of this work originated. All hands are on deck on this one. As to the specific legislative timetable, we provide input to

government. Industry is providing reactions. The Treasury governs and steers this process from the point of view of legislative drafting. As to the specific timetable, I could not tell you that at this point.

Senator MURRAY—I am a supporter of lifting unnecessary regulatory burdens, particularly where they overlap, conflict or duplicate. I respect your response, but I would ask you to advise your own people that, if they are asked for a response on those legislative changes or have to contribute to it, they be aware of the need for speed. Otherwise, instead of getting legislative changes which would apply for the financial year 2007-08, it will be delayed such that it will only apply for 2008-09 and then what is the point? If everyone has come to a view then let us get on with it.

Dr Laker—One of the things that the working group will be doing is clarifying for industry where there is not underlap or overlap. In some of these areas there is quite a gap between perception and reality. For one thing, we are looking at bringing out a licensing guide which will clarify that, in many areas, there is very little overlap on licensing for the simple reason that those issues were anticipated and dealt with in the past. We can continue with that work in clarifying for industry what are the different obligations and requirements of APRA and ASIC independently of the legislative timetable. So, that work will go on as well.

Senator MURRAY—In your press release there is a remark that ASIC and APRA jointly regulate fewer than 600 entities, which implies that it is a relatively small and manageable group, but of course the scale of those entities makes it far more significant. With my interest in this area, together with other senators and members, I would be interested to know how the entities react to the regulatory improvements that you are making. You have told us about it in your press release from your perspective and ASIC's perspective but not from the user or the entity's prospective. Is there any intention to get qualitative feedback and then to summarise it in the report?

Dr Laker—Yes, there is. If you note the third paragraph in the information release, we talk about our invitation to the Finance Industry Council of Australia to meet with us jointly at the member and commissioner level to go over those issues. In my letter to FICA proposing this idea, I said that we would welcome a public report at the end of any meeting or at the end of any initiative. The Finance Industry Council of Australia is a relatively new umbrella body which covers major industry groups in insurance, banking and beyond, so it provided a natural forum for us to meet as APRA and ASIC jointly to go over issues that industry feels that we need to deal with jointly. We will be as transparent as we can be in explaining more broadly what has come out of that meeting. The members of FICA would likewise report back to their members below the umbrella, as well, so there would be quite good communication there.

Senator MURRAY—With your experience and background, you would appreciate what I am going to say now, and that is that as much as I would value, and it is necessary to have, their response, organisations like yourself often act as filters, and it might be necessary to get a qualitative response from the actual end consumer, if you like—a sample of the 600 entities. If you respect that point, I would ask your organisation to consider that. One of the things that I am concerned about, and I thought you were alluding to it in an earlier remark, is that I gather from some business people that they throw up a lot of noise about regulation, in terms

of duplication-overlap being overdone when there is not that much substance to it. In other words, what they are reacting against is regulation per se, not that it is incoherent or inconsistent. I think a direct sampled response in terms of these initiatives would be insightful in that regard.

Dr Laker—There have been two mechanisms in the last 12 months where these concerns that have been raised—and in some cases quite vociferously raised—by industry have actually been assessed by third parties. One was the Banks report itself. The task force that worked through those concerns weighed up what they thought were the substantiative concerns and produced a series of recommendations, which cut through the rhetoric to what the heart of the problem is and how we should deal with it. The other third-party review of our financial arrangements in Australia was done by the International Monetary Fund as part of what they call their FSAP process. Again, they talked to industry and listened to those concerns but were not able to identify any that were unique to Australia. The concern about regulation and its burden is a universal concern at the moment. They hear those concerns raised elsewhere.

Those two external reviews of our regulatory arrangements have been very helpful in clearing the air. We talk a lot to our regulated institutions and their industry associations, particularly when we are putting forward proposals to enhance the regulatory framework. We get quite a lot of very direct feedback—blunt, frank feedback—and it becomes a very important input into the final reforms that we introduce. That process is underway with initiatives that we have at the moment. Nobody needs to filter the feedback they give to us. We will certainly be talking to our regulated institutions when some of these changes come through.

One simple example is breach reporting in superannuation, where there was a concern that there were two different standards of materiality. There were good reasons why there were two different standards and why we take a different view about a series of small breaches than ASIC might take where there is no one material breach. The proposals by government will reconcile those two points of view, reduce the dual reporting, so any reporting will come to APRA. Industry is commenting on that. That is the process we described in the press release. Assuming those legislative changes go through, we will work with our super people to say, 'Have we resolved this concern?' We will get good feedback on that.

Senator MURRAY—I am not exploring these issues with you out of a kind of ephemeral or academic interest. What I think is occurring here is we almost have a controlled experiment. In other words, it is an extremely focused couple of regulators dealing with a limited number of large and 'impactful' entities. As I understand the government's program and the Productivity Commission's program, they expect to see from this exercise a quantifiable improvement in efficiencies and productivity. They have measured this as effectively producing billions of dollars worth of savings and efficiencies in the market. I forgot the exact figures, but I have seen broad-brush estimates. Because you have been so precise and so active, as I read this press release from the two regulators' point of view, I would think you should be able to not just ascertain, as I mentioned, a qualitative response but also get the entities to tell you what it has physically meant from the perspective of the entity. What has it meant in terms of efficiencies, cost savings and so on? These might be hard to

determine in some cases, but it is a way of verifying the energy put into this by the Productivity Commission, the government and the BCA. Unless these things are able to be reported on on that basis, it makes the initiatives less powerful, shall I say.

Dr Laker—I take your point. As part of the response to the Banks report and to a previous report, the Uhrig report, the government is going to issue a statement of expectations of APRA and ASIC, and we will respond with a statement of intent. I imagine that that statement of expectations will strongly encourage us to develop performance indicators. In prudential regulation that is a very difficult area. It is one we are putting resources into to work on. It is more straightforward to identify the costs of a particular requirement. If we want to require our own institutions to hold more capital for some reason you can measure the opportunity cost of holding that capital.

What is more difficult but has to be in the equation is what the benefit is. The benefit may well be a higher level of protection to the community. That benefit tends to get lost in the debate about regulation. We are working in our policy area to look at a way of quantifying, more than others have been able, the benefit in terms of some level of safety in the financial system. There are no simple or easy answers in this area. Regulators around the globe are wrestling with the same set of issues. How do we assure the community that we deliver a level of protection which is effective and efficient? They are important questions to ask. I cannot promise you overnight that we can press a button and produce a mathematic figure on that.

Senator MURRAY—No.

Dr Laker—What we need to do, firstly, is identify the real costs, not the costs of doing good business and doing prudent business but the deadweight burden of regulation on top of that. We have to set that against what we identify as the benefits that come from it. If we could quantify that equation, it would be great progress. But it is hard work and nobody around the globe has found a simple answer to it.

Senator MURRAY—Thank you. That concludes all I wanted on that issue. I have one other small matter to ask you about. But before I do, in response to what you have just said, as an aside, I recently had an opinion piece in the *Canberra Times* on the private equity issue. Private equity has its place in the market mix. I am not automatically opposed to the entry of that form of enterprise. I did make the point that many seem to think that the virtue of private equity is the ability to avoid listed corporation regulation as if that is an economic bad. I actually see it as an economic good in terms of the way you outlined it. I will leave that issue there.

Senator SHERRY—Senator Murray raised the issue of private equity activity, particularly of international private equity. I have not seen it mentioned but, if you measure it by volume of media commentary, it certainly seems to have increased in the last year. Has the increasing attention on private equity, particularly international private equity activity, led to an examination in any way of this activity by APRA?

Dr Laker—The short answer is yes. As to the long answer—and I know you like bedtime reading—the monetary policy statement by the Reserve Bank, which came out yesterday or the day before, does contain some figures on leveraged buyout activity globally and also in

Australia. I think from memory the figure for calendar 2006 of LBO activity in Australia that has actually taken place or is on the table is about $27 billion, which is almost a 20-fold increase over the previous few years. The graph is quite striking. To put it into context, though, that is only a small percentage of money that has been raised in the listed capital markets. Certainly the phenomenon is one that is growing sharply. It is receiving a fair degree of media attention and regulatory attention.

The Council of Financial Regulators, of which APRA is a member, has a working group looking at this moment at the issues raised by strong growth in private equity and leveraged buyout activity. Some of those issues in international markets were highlighted by the Financial Services Authority in the UK. They are to do with potential conflicts of interest, obscurity of where economic risk ultimately resides and possibilities of excessive leverage. It is that last point that is of most interest to us as a prudential regulator. We have written to our major lenders asking for information from them on their policies with respect to private equity and leverage buy-out activity, the aggregate amount that they have exposed in that area and some more details of the exposures. The material is due by the end of this week. That will become input into the working group under the council looking at the private equity issue. It touches APRA, it touches ASIC and it touches the RBA from a stability point of view, so it is a quite appropriate focus with the Council of Financial Regulators.

Senator SHERRY—You answered most of the questions I was going to ask in your explanation, so thanks for that.

Dr Laker—As I said, that was the long answer.

Senator SHERRY—No, it was an appropriate answer, I think, given the focus this is receiving. Have there been any specific issues? You mentioned writing to financial institutions about amounts and related issues. Are there any specific issues to date that have been raised with APRA about any activity that has occurred within Australia?

Dr Laker—Not to my knowledge, no. I have completed a round of prudential consultations with my colleagues with the major lending institutions where this was clearly a topic of interest, and no specific questions came up. I mean, we certainly talked about their general approach and policies, but no specific questions.

Senator SHERRY—You mentioned the FSA's report in the UK. I have not read the whole thing, but I have read a summary of their identification of issues of concern. Is there cross-jurisdictional international examination of this issue? Obviously the FSA has examined it, and work is underway here in Australia. Presumably this is a matter that will be being examined in other countries. Will there be any interchange between regulators on this matter?

Dr Laker—I am not sure at this stage whether there is specific interchange. Clearly the council would be keen to publish its assessment of what these issues are in some form. We have talked to our regulatory counterparts on these matters. I am not aware, though, that it has risen to the point where it is a specific international policy issue, but APRA is not party to some of those international groupings, anyway.

Senator SHERRY—Yes, but at least at this point in time there is communication—discussion, talk—about this particular issue across international jurisdictions, and you have been involved in that.

Dr Laker—I think in the Australian case this phenomenon has really attracted major media and regulatory attention only in the last few months, because it has only been in the last few months that some very high profile and very large transactions received attention and were underway. But internationally the growth of LBO activity has been quite pronounced. These are international macrostability issues, but we do not sit in those sorts of forums to discuss them. Our focus has been very much on bank involvement in those, rather than the more general market developments or general leverage questions.

Senator SHERRY—Will some sort of analysis of this be published?

Dr Laker—I do not think the council has yet reached a view on how to put this material out. We are in the process of doing the work.

Senator SHERRY—I understand that.

Dr Laker—The Reserve Bank does have a very appropriate vehicle in its *Finance Stability Review*, and the Reserve Bank has signalled on a couple of occasions that there may well be macrostability implications from growth in LBO activity if it were to continue at the same pace. So there is a natural vehicle, but I do not want to run ahead of the other members of the council at this stage. Clearly it is a topic that there is no reason for us to be coy about; if we are able to get down behind the media coverage to the hard facts about what is actually happening in our market and how our institutions are exposed and involved—what the policy implications are—that is the sort of material I think is important to have in the public domain.

Senator MURRAY—I will move to staffing matters. I have been aware, Dr Laker—and we have previously discussed it at estimates hearings—of some commentary in the media about staff turnover, the difficulty of attracting and keeping staff and so on. I understand the general climate you are operating in and why that is an issue. What I would like to get for the committee is an update on that whole front; how you are managing it, how you see that issue and, in particular, whether you think you will need to engage much more in secondments to shore up areas that you might be concerned about.

Dr Laker—The market for financial management and risk management skills is still a very strong market, so there is no relief in the marketplace for us or others who are seeking to engage staff in this area. Our turnover has been high. We were particularly affected in the middle of last year when there seemed to be a real surge in demand for those sorts of skills. We work very hard on bringing our staff in. What I would say about our turnover is that it is very much concentrated in our lower to middle management areas—staff who have perhaps joined APRA from university and staff that have come in at a younger age. On average they stay with us about three years. They look very attractive to industry at that point. They are actually very attractive to APRA at that point, too, so I am very keen to keep them! But that is where we are suffering churn, and that is a problem across industry.

At the level of our more senior ranks, what I take great satisfaction from is that there has not been anywhere near the degree of turnover at middle to senior management level; that runs in the single digits and has for some time. So we are able to maintain that very high quality prudential supervision function because we have experienced ‘hard heads’—as I call them—at the top of that function and stable senior management. But the churn of staff at

younger ages and at lower levels is a major distraction for any organisation. So we put quite a degree of effort into trying to reduce our turnover. It is a major priority for the members.

We have done that on a number of fronts. We are reviewing the way in which APRA conducts its own activities to make sure that the environment is a very attractive one for people to join and to stay. So we are in the process now of going through and looking at a whole range of features of the way APRA operates. We are active in the recruitment market in Australia and overseas. We look for secondments. It is easier for us to arrange secondments out than secondments in, in some cases, to industry; we have some secondments out to industry but they are overseas. That is an easier way to deal with conflict of interest. Within Australia, secondments from the private sector are difficult to achieve because of the conflict of interest question. Somebody from an organisation coming in to join APRA has suddenly available to him or her a range of sensitive information about the people that they may ultimately be competing with when they go back to industry. The inwards secondment programs that we have been working on are generally from prudential regulators offshore.

Senator MURRAY—What about from the public sector itself? It would seem to me that, whilst the Secretary of Treasury may not like it, it would be very good to have Treasury staff, for instance, or Finance and Administration staff rotating through APRA. It would be very good for them in career terms and very useful for you.

Dr Laker—We have had Treasury people with us, not necessarily on secondment. I think some are keen to come to Sydney and to work in a prudential regulator. We have had quite regular exchanges with ASIC, and that is a two-way process, but we find generally that we recruit very few people from the public sector. Our major market is industry and the skills that we want to do our job well are honed in industry. That is our natural recruiting base and, of course, that is a harder base. When we advertise a job, it is advertised widely and we interview anybody with skill; if they come from the public sector we would be delighted to have them.

Senator MURRAY—There are two parts to the same question. Do you consider yourself, in lean times, to have the ability to attract staff in this environment, and, if you do not, do you look forward to lean times if the economy continues the way it is?

Dr Laker—Does a prudential regulator ever look forward to lean times? That is a loaded question.

Senator MURRAY—With respect to staff?

Dr Laker—I would not want to overstate the concern about staff turnover because, through hard work and an active graduate recruitment program, we are only running a small percentage below the target we have set for our staffing for the last few months. Last year we reached the target staffing level that we set and for which we were funded. Over the course of 2005-06, we were at target.

We had a wave of departures in the earlier part of this year, which we are now clawing back to get back to target. I would not overstate the question of whether it is mean times or lean times because we will work our way back to that target level. It just means that the organisation spends a lot of its energies bedding down new staff and dealing with those changes at the lower levels. We want to be equipped in good times so that we have our staff

experienced and well trained if there were to be lean times. I do not want to be recruiting in lean times. I want to be at full complement and have our people already well trained as prudential supervisors because, if there were lean times, they would be very busy.

Senator SHERRY—I would like to follow on with a couple of those issues. I know how you feel because I have lost five staff in the last seven or eight years to the financial services sector.

Dr Laker—Not to us, I am sure.

Senator SHERRY—Exactly; not to APRA or ASIC.

Senator WATSON—Are you a good employer?

Senator SHERRY—If you asked them they would say that I was a very good employer because I trained them so well that they became highly attractive and they got poached.

Dr Laker—One of our general managers said that he is sick of people coming and saying, 'I really enjoy working in APRA but—

Senator SHERRY—More seriously, I think pay has something to do with it, given what I know some of my former staff are being paid now. Did you carry out an assessment of the reasons for the departures at that level? Is it predominantly a pay issue and have you adjusted policy in the areas identified?

Dr Laker—There are exit interviews conducted of all staff who leave, and we see the summary of those exit interviews. There are a range of factors that explain why people leave. Pay, clearly, is one of those factors. People rarely leave for less money but it is not always all-decisive. Some younger staff are looking for broadening of career opportunities. A number want to travel overseas and seek fame and fortune. Some want to strengthen their professional training so, if they are an actuary by training then they want to work for an actuarial firm, rather than for a prudential supervisor, which uses their skills. We see a range of factors that explain why a person goes but in most cases it is a career choice to try something different.

Senator SHERRY—As a matter of interest, do you ever have any people who return have left APRA? I am talking about longer-term, not leaving for a month or two and then having second thoughts, but actually making a decision as a career move to come back to APRA?

Dr Laker—Yes, we have. Some fairly recently, after trying life outside, and some who have had a reasonable career experience outside who have decided that their interests were much more aligned with what APRA is doing.

Mr Jones—I might add that we get in touch with some of our staff who leave, ask them how they are going and suggest to them that, if they are not particularly happy, we would welcome them back in those circumstances. When you have very high turnover, it is one of the many things that you do.

Senator SHERRY—In terms of the future of the organisation, a hollowing out, effectively, of people whom you recruit and train must be a cause of long-term concern, because they will presumably become the senior managers of tomorrow.

Dr Laker—I think the words 'hollowing out', with respect, is too strong a term. As I said, we are close to our staffing complement. We are bringing in very good people from industry

at all levels. I would be very worried if the movement was all one way, but the fact is that we are able to get back close to our full complement, not just from our graduate program but from industry. They are the future prudential regulators of Australia and we have got some very good higher to middle career people and some even further advanced in their careers have decided that they really want to see life from our point of view. I am confident in looking ahead that we are going continue to develop a very strong cadre of prudential supervisors. The question of churn at lower levels is one that the whole of industry is dealing with.

Senator SHERRY—I am not just concerned about it from a personal perspective but I have seen it in action right across the industry in the last year and it is amazing to watch the new people coming in. I have commented, 'Compliance officers, compliance officers everywhere!'

Dr Laker—Yes.

Senator SHERRY—I want to go on to a new area. I have a couple of issues on the regulation of banks. The banks have a dispute mechanism—the banking ombudsman—and they also have a code of practice. In licensing a bank entity, does APRA have any abilities to ensure that the bank is compliant and signed up to the disputes resolution procedure, or is that something that is left to the individual decision of the bank?

Dr Laker—The latter would be the case. We would not intrude in those customer-facing areas and processes that are not related to prudential supervision.

Senator SHERRY—In terms of bank stability more generally, I note that there have been a number of media releases and media reports, not necessarily based on the releases, about aspects of banking stability, particularly loans. What are your general observations about banking loans at the present time?

Dr Laker—What we said in the annual report, which was released in October, stands today. I will just recap what we said. We have a very strong, well-capitalised banking system. I use the term 'banks' in the broad sense—banks, building societies and credit unions. It is very well capitalised and very profitable. At the time that we wrote the annual report, the level of impaired assets was at record lows historically and internationally. When I present these figures at any international gathering it is a very strong and persuasive story. But, we have also signalled, and the evidence is still supporting it, that the level of impaired assets is edging up. It is edging up from a very low base and edging up mainly in mortgage lending. In corporate lending it is actually continuing to edge down, so the overall outcome is still a picture of very high asset quality.

We have been focused on standards of credit assessment and lending for some time, as you know. It has been a theme that we have pushed very hard with our lenders. We are doing even more research into this area, which we will make public very soon, where we have taken what Mr Littrell calls 'a slice of life'. We have had a look at every mortgage written in the month of September by the bulk of our mortgage lenders. We have not been going through and reassessing the credit assessment, but having a look at the structure of lending, its characteristics, loan-to-evaluation ratios and the use of mortgage brokers.

We took a slice of life because we wanted to look more closely at the banks' approach to debt serviceability, lending to customers with high income servicing requirements. Our focus

remains on that area. The signs are there, as we all expected, that as interest rates rise, and because petrol prices were high for a time, if there is any pressure on household finances, we would expect to start to see signs of stress in lending—and there are early signs, but from a low base.

Senator SHERRY—One specific aspect of this is the activity of mortgage brokers, who are major players now in the market compared to say 10 or 15 years ago. My understanding is that this area is to be regulated by states through an agreed legislative framework but at state level. My latter understanding is that has not yet come to fruition and there are still some differences about the regulation that is to take place. Do you believe that it is appropriate that this matter should be finalised in terms of the national regulation of mortgage brokers?

Dr Laker—The way we approach this issue is to ask our lenders a simple question: if a loan comes to you through your branch or a loan comes to you introduced by a broker, do you apply different lending standards? If the answer were yes, we would be on their doorstep because what we have said and what we require in our prudential standards is that they apply the same rigour of assessment, however a loan is introduced to them. We move one step away from the introduction process, so that is why we have not been engaged in the debate about the regulation of the mortgage sector.

Senator SHERRY—I understand that you are not directly involved but, in a sense, mortgage brokers are a gatekeeper of consumers in their evaluation of consumers and it certainly does concern me that as yet we do not have an agreed, effectively national set of regulations for mortgage brokers. At what point we actually get to that it would be useful to know.

Dr Laker—Whether or not there was an agreed regulatory framework for mortgage brokers, we would still require our lenders to undertake the lending process. If they were to outsource that to a third party, it would have to be under very strict outsourcing arrangements and it would have to be very carefully audited, because we do not want our lenders to outsource credit judgements to a third party.

Senator SHERRY—I understand your approach but I think there has been sufficient concern about the activity of at least some mortgage brokers in recent times and sufficient difficulty with a number for there still to be an issue of public concern. There is the level to which that could in turn cause difficulty for any particular financial institution lending money through them. The appropriate state government ministers in council have been involved in attempting to oversee the regulatory framework in this area. Has APRA had any input into that?

Dr Laker—I am not aware that we have been actively involved in that. Certainly, I have not been involved in that.

Mr Littrell—There are two regulatory issues with mortgage brokers. One is that they may provide an inappropriate service to a borrower: they put them into the wrong sort of home loan or into too big a home loan or something like that. The other is that they somehow pull the wool over the eyes of the lender and induce the lender to make an unsafe loan. The former of those risks is the one that is getting 98-plus per cent of the focus in the state legislation process and is something of an issue for ASIC as well. From our point of view, that is not

really in our purview to worry about. The process that you are seeing now is mainly about borrower protection and not about lender protection. On the lender protection side, as Dr Laker said, we do not wish the lenders to rely unduly on the broker to do their work for them, and we have rules and supervisory practices in place to ensure that does not happen. From our point of view, what is happening now on the regulatory side is very much more about consumer protection and is not terribly relevant to what we do.

Senator SHERRY—I noticed, in terms of activity, there were some recent media reports about a focus on regional banks. Has that been a particular focus recently or has that just been part of a general, ongoing focus not just on banks but on lending institutions generally?

Dr Laker—It is part of a general focus. Sometimes the media focus is really determined by the cycle of reporting and when annual meetings are held, so suddenly you will think that there is a focus on a regional bank but it may well be that they had their annual meeting the day before. From APRA's point of view, we have looked at this question of credit standards as being across industry, because they are all exposed to housing in substantial ways.

Senator SHERRY—I noticed that there was a flurry of media reports in early December last year allegedly—I am always cautious about media reports—about regional banks coming under pressure from the banking regulator. It was reported as 'regional banks' by a couple of the media outlets, and I was wondering whether they had been given any particular additional attention of late?

Dr Laker—No.

Senator SHERRY—With the issue of so-called low-doc loans, do you have any observations to make as to that area?

Dr Laker—We have discussed our view on low-doc loans quite a bit. We are not a product regulator, so APRA does not say that a lender cannot provide a loan in a particular form. We have acknowledged that both overseas and in Australia the low-doc market has had a natural customer base of tradespeople or the self-employed who may not have had the documentation that was necessary, but we have also observed that increasingly loans have been provided to a range of people who fell outside that category. The two points that we have made are, firstly, that the amount of capital that has to be held against low-doc lending as a non-standard loan is, generally speaking, higher, unless they have much more borrower equity in it or lenders mortgage insurance. Secondly, the point that I have been labouring with our lenders is that we would expect to see an appropriate premium for risk on low-doc lending. But the competition in the marketplace is such that the margin between a low-doc loan and a standard variable mortgage has been almost reduced by half over the last few years. We are not fortune tellers. Whether that is the appropriate level of risk premium remains to be determined in the marketplace, but it certainly has been squeezed by competition. That is something that we highlight to our lenders all the time: price for risk.

Senator SHERRY—I was going to ask about some issues that were raised in submission to the Joint Committee on Corporations and Financial Services but I think APRA is appearing at one of its hearings in a couple of weeks so I will leave that until then.

Mr Jones—I think it is in the first week of March.

Senator SHERRY—I noticed an email earlier about a change in date. I recalled you were on the witness list. I would like to go to the issue of switches from one superannuation fund to another. I was a little puzzled as to whether it was your remit. There was an article in the *Financial Review* recently about barriers to switching, the time being taken and levels of proof. Is that an issue that APRA has been involved in?

Mr Jones—It is an issue that we have had some peripheral involvement with. Our primary concern is to ensure that there is adequate documentation so that the money goes to where it is supposed to go. There are always issues with regard to making certain that the member has made a conscious decision. Given that there have been some isolated circumstances where there has been some shifting really designed to get early access under inappropriate circumstances, it is necessary to make sure that there is appropriate documentation.

Senator SHERRY—So that is your area of focus?

Mr Jones—Yes.

Senator MURRAY—There is the reverse problem that some of the funds involved are aware that they can use that as an excuse to essentially delay or hold up the transfer of funds. Now, there is a cash flow and earnings benefit from that, as you would appreciate. My own belief is that regulators of all stripes—the ATO, yourselves and ASIC—need to be more alert on that front and to ask more questions about exactly what is needed and why and how long their processes take. A couple of very big names, in my direct understanding, are using that device, and it is no different from a late payment strategy by a major corporation to enhance its cash flow and earn extra interest income. That is what they are doing. The question arising out of those remarks is: are you alert to that and are you asking those sorts of questions?

Mr Jones—And we are aware that there is a ruse, as well. The other thing that we do—

Senator MURRAY—Sorry, did you say yes, you are alert to it and you are asking those sorts of questions?

Mr Jones—Yes. Further, we also have a contact centre and our contact centre supplies us with information that comes in via complaints as well. Most of it is related to early release of benefits but, nevertheless, we also get concerns and so we do have a mechanism to some degree whereby, if there are a substantial number of complaints coming through our contact centre with regard to a particular institution, for example, we would pick that up.

Senator MURRAY—If I may add something, I am not sure that goes far enough, and I will tell you why. I have the impression that many people do not make a complaint because they think, 'Well, that is just how it is.' This is a kind of bureaucracy and it is annoying, but it is not annoying enough for them to think, 'Well, actually, this is a strategy and I am a victim.' My question would be: do you think it would be possible for you to sample test a number of people who have switched funds by in some way getting their names or a follow-up done—I am not sure how that could be done—just to see what the consumer viewpoint is? I think there is a far higher level of irritation out there but a low level of complaints because people—

Mr Venkatramani—Could I explain the processes which we follow, particularly after the completion of the superannuation licensing? Our frontline supervisory staff have been very

busy going and checking with the various trustees whom we have recently licensed that what they put to us in terms of their risk management processes—much of it had to be taken at face value during the licensing period given the tight deadlines—is actually being implemented robustly. One of the indicators would be the robustness of the operation processes in dealing with requests for transfers, rollovers, et cetera. APRA needs to run a fine line here to make sure that they are robust enough so that there is no fraud or, as Ross indicated, illegal access. On the other hand, they are not being used as a ruse for keeping somebody else's money so that they can get more fees out of the same customer by keeping them longer. Those operational integrity processes are things which we look at. It is also linked to the exercise we continually do on unit pricing issues, the operational aspect as opposed to the financial aspect of unit pricing errors. We will not simply act on complaints alone, even though complaints are very valuable input to frontline operations.

Senator SHERRY—Just two quick issues related to that. Has APRA observed an increasing need for funds to have greater liquidity as a consequence of, for example, fund choice where in theory at least you can transfer in and out when you like, or most people can? Has that had an impact on the need for liquidity?

Mr Jones—Certainly that is an issue that we have had to give some consideration to, particularly during the licensing process, to ensure that the funds themselves have that ability. In terms of the actual movements, the evidence that we have is there has not been a huge amount of switching at this stage, less than I think the industry expected.

Senator SHERRY—Yes. Conversely, to come back to the earlier point, it is not just the issue of retaining money perhaps on the basis of a subterfuge to hold the money to keep fees; we have the other problem of attempts to convince people to move money out also to gain fees. I know that is not your area, it is ASIC's area, and I note today's announcement by AMP in regard to their enforceable undertaking, which I will be pursuing with ASIC. A standard form is to be developed, is there not, for transfer? I assume APRA is involved in that development.

Mr Jones—Yes.

Senator SHERRY—Whilst it is fine to have a standard form, what about level of proof of identity? Is a standard identity procedure going to be developed as part of that?

Mr Jones—There is an attempt to suddenly standardise all of this across all of the institutions, yes. There is still the development of a proposal for what is notionally known as the 30-day rule.

Senator SHERRY—It is fine having a 30-day rule, it is fine having a standard form, but what is the standard of proof of identity to be? Is that an issue being considered?

Mr Jones—As far as I am aware, that is part of the same arrangement in that there will be standardisation in terms of what is required across all movements. That will also involve identity.

Senator SHERRY—Is that being considered in the context of anti-money laundering legislation at all? Is that going to become an issue?

Mr Jones—Anti-money laundering is a little bit outside APRA's scope.

Senator SHERRY—I accept that. In the context of standard of proof for transfer identity, will anti money laundering ultimately cut across the work that is being done in this area?

Mr Jones—I am just guessing but I would imagine it would.

Senator SHERRY—I understand, and I have not looked at the precise proposals for superannuation, but the level of anti money laundering surveillance in that area will be commensurate with the parameters around superannuation. Time and time again, and I think recently, we have seen—again, it is an ASIC issues—frankly outright, illegal, attempts setting up instruments to effectively transfer monies out of superannuation entities. Frankly, they are illegal, and there have been quite a number of actions by ASIC in this area in the last year or two.

Mr Jones—I think that is one of the reasons we have concerns to ensure that the funds make sure that they have appropriate mechanisms themselves.

Senator SHERRY—The identity issue must be difficult to resolve, I would have thought. What identity could you obtain, for example, if it is to be done over the phone or electronically?

Mr Venkatramani—In terms of electronic transfers, I think funds are required to have robust processes so that, firstly, the money does not get fraudulently transferred. There have been some court cases, as you might know, as a result of financial advisers taking money on behalf of members and then converting them. We have issued guidelines to the industry as to the type of the identities they can provide. For example, if there are transfers between two funds, we have said look at the product number, the fund number, and transfer it fund to fund, instead of issuing a cheque, and if they are cheques then make sure that the money goes to the right intended party. As you have identified, we need to walk a fine line here. We do need operational process integrity. The ever-present risk of fraud, which we can only seek to reduce but not completely eliminate, means that we not only ask trustees to do this swiftly but not so swiftly that the risk of loss gets magnified.

Senator SHERRY—This is an area where you do not have regulation. What about a transfer from a fund regulated by APRA to a fund not regulated by APRA, obviously self-managed superannuation funds?

Mr Venkatramani—Sorry. If it has to go from a fund regulated by APRA to an unregulated fund, it has to leave the system.

Senator SHERRY—Yes.

Mr Venkatramani—It will become an ineligible termination payment. Once it leaves the system then we are really not concerned.

Senator SHERRY—I meant into a self-managed superannuation fund, which APRA does not regulate, which is a huge area.

Mr Venkatramani—That is right. That is where some of the greatest instances of illegal access have occurred, and our cover funds, with the help of industry lobby bodies, have provided additional guidance to the industry as to how to prevent that. As you know, some of the convictions have been from APRA-regulated funds to self-managed super funds which then lose the money.

Senator SHERRY—It is pretty striking that most of the outright theft and fraud activity effectively has been from self-managed superannuation funds transferred from an APRA-regulated entity. It must be very difficult in the context of a self-managed superannuation fund. There are just so many of them. I suspect that the verification procedures in those areas are not as robust as APRA's applying to the non-SMSF sector.

Senator MURRAY—The question that arises of course is whether you should have two systems—namely, for an APRA-regulated fund to another APRA-regulated fund the transfer can be swifter and less onerous perhaps than from an APRA-regulated fund to a self-managed fund. You may require a higher level of integrity because the risk is commensurately greater.

Mr Jones—The whole purpose of the self-managed arrangement is that the members are the trustees.

Senator MURRAY—Yes. I am just thinking of transfers. If there are going to be standard forms, I can see that there would be a standard form between major regulated entities and between major regulated entities and non-regulated entities. That is all.

Mr Jones—Yes.

Mr Venkatramani—In practice, my experience is that, if they are between two APRA-regulated entities, the process is swifter. If it is a self-managed super fund, you will find a natural amount of reluctance and a little more robustness about the process. That is what actually happens in the market.

Senator MURRAY—I beg to differ. There are APRA-regulated entities that are deliberately constructing paperwork systems so that they delay payments for sound business reasons—to ensure they maximise the retention of cash flow and moneys. So instead of transferring within three weeks, it is six weeks—double the money.

CHAIR—What is the order of procedures with SMSFs?

Mr Jones—It is entirely up to the tax office. They are regulated by the tax office.

CHAIR—There is no auditing or another form by you at all?

Mr Jones—We have nothing to do with self-managed superannuation funds. It is entirely the responsibility of the tax office. Every member of a self-managed super fund is a trustee of that fund, and our purpose in prudential regulation is effectively to protect the members. I think the justification is that, in a self-managed fund, you are the trustee. The need for protection is considerably different.

CHAIR—Do you provide any directives to industry for them to give some directions to funds that have been transferred out?

Mr Venkatramani—Our focus is on the trustees, in terms of our legislative remit. We ask the trustees what their processes are. In terms of communications to members, it falls under ASIC responsibility.

Senator SHERRY—Just a couple of other issues. I saw on the web a notification of the disqualification of an actuary in the last week.

Mr Jones—That is correct.

Senator SHERRY—Is that the first time an actuary has been disqualified in recent years? I could not recall an incidence of that before.

Mr Jones—I think it was.

Dr Laker—Can I clarify that. There was a disqualification of an actuary in the HIH case. Mr David Slee, was it?

Senator MURRAY—My memory is that there are fewer than 200, perhaps fewer than 150, actuaries in Australia—very few.

Mr Trowbridge—The numbers are better than that. There would be more than a thousand qualified actuaries today—

Senator MURRAY—Really?

Mr Trowbridge—probably 1,200 or 1,300, something like that. There would be another couple of thousand who are partially qualified, some of whom have stopped studying but have partial qualifications and some of whom are in the process of continuing. The profession has grown quite strongly. In fact, APRA has relied on them, quite substantially. It has given them a lot of work, in effect, in the general insurance industry, especially since the HIH failure, and they are relied on heavily in the defined benefits super funds and in the life industry.

Senator MURRAY—Just to get the numbers clear in my head, you are saying that all up, both practising and semi-practising, there are nearly 2,000?

Mr Trowbridge—Yes, and probably more. If you count the ones who are partially qualified, it would be more than 2,000.

Senator SHERRY—Is there a register of actuaries? Is there a licensing requirement? I am trying to refresh my memory; it is not an area I have gone to.

Mr Trowbridge—The Institute of Actuaries of Australia is the professional body.

Senator SHERRY—Yes, I know that.

Mr Trowbridge—It is effectively self-regulation in the sense that it is the body that grants the qualification of actuary, which is recognised by APRA where APRA uses actuaries and is recognised in other areas as well. It also has disciplinary processes of its own. In the situations you are talking about now, there are some cases afoot where the institute itself is carrying out disciplinary procedures, and then APRA is also in a position to consider whether or not it is satisfied with the behaviour of individuals.

Senator SHERRY—As I say, it was the first I recollected. I am sure you are right, Dr Laker, about the HIH case. I would think an actuary has one of the more difficult professional qualifications to obtain in terms of effort and standards.

Senator MURRAY—I always thought them rare birds, but it turns out they are not as rare as I thought.

Dr Laker—They are breeding in APRA.

Senator SHERRY—I have a couple of issues relating to answers that I received on notice. I have raised before, in a general sense, the issue of the default fund under choice of fund and

the establishment of superannuation entities. Has there been any recent increase in new superannuation entities established?

Mr Jones—In terms of the number of new licences?

Senator SHERRY—Yes, after the licensing period.

Mr Jones—After the licensing period? I think we have at least two at the moment. We are getting a couple, but in some circumstances they are not necessarily new entrants to the industry; they are rearrangements of existing entities which have led to the need for a new licence.

Senator SHERRY—At the last estimates, I raised the issue of some of the investigations that were carried out as part of the licensing process. I raised some examples of the level of examination of operating expenses. In the answer that came back it says, 'Questions such as those referred to'—that is, by me—'would not be routinely asked when assessing licence applications, and in fact the licence application form did not seek this level of detail.' There is some further commentary. It does not tell me whether or not those questions were asked. And I am not referring to the licensing form.

Mr Jones—Those questions are asked under certain circumstances. Those questions have been asked and are usually asked because there are some concerns. They are not necessarily part of the licensing process. They may also be asked through an investigation under an enforcement process. In fact, that is more common.

Senator SHERRY—I accept that. In the cases referred to me, they were raised as part of the licensing process and might have been picked up in that licensing process. In what circumstances would they be asked? What business is it of APRA to examine the hotel accommodation, the air travel and the class of travel of employees and trustees of a superannuation fund? If you want to make it your business in terms of asking every superannuation fund, including the directors of AMP and AXA, where they stay, what class of travel and whether it is appropriate or not, I could understand, but where do you draw the distinction between one fund and another?

Mr Venkatramani—As a frontline supervisor, perhaps I can offer an answer. We are a risk-based regulator and, like the other entity, we are also constrained by available resources. The kind of questions my frontline team or I, as their leader, would ask would often be governed or conditioned by the information that we have. As Mr Jones pointed out, we will not ask those kinds of intrusive questions routinely, but if there is an issue relating to the appropriateness of expenses, the operational controls that are referenced to them or the role of a particular person—is that person a trustee or is he or she an officer?—it would be appropriate for us to cross-check that with whatever information we may have from internal audit as part of our examination. That is the why we do not go around routinely asking every fund, but our staff are not precluded from asking those questions. If they are asked routinely, the trustees have an ability to answer them or not and, depending upon how serious our operational concerns are, we have the ability to escalate them to more formal processes should we choose to do so.

Senator SHERRY—Your answer says at the end that there may be circumstances in which it would be appropriate for APRA to satisfy itself that the resources were being appropriately

used and controlled. Do you accept that there is a degree of subjectivity in that examination in relation to 'appropriately used and controlled'?

Mr Jones—There is going to be some degree of subjectivity in some of these things and that is always going to be the case when you are dealing with risk-based supervision. If the supervisors walk in and they have particular concerns, they are going to continue with an investigation. They may go into more depth and they will subsequently ask more questions.

Senator SHERRY—Let me give you another example, which may become relevant. If a fund or trustees were to make a donation to a political party, would you regard that as an appropriate use of resources?

Mr Venkatramani—Immediately, sole purpose test considerations would come in and we would have a legal handle to ask for more information. I think that is a serious SPT issue for that to happen.

Senator SHERRY—As a question mark, it would be an issue that, if it ever became a matter of public attention—I notice that it has not to date—I think it would be a legitimate question to ask all superannuation entities and not just some. There have been some allegations in the past, which have been largely or totally incorrect, as I understand.

Mr Jones—I am getting confused. There have been some allegations that APRA has ignored—

Senator SHERRY—No. There have been allegations of donations from superannuation funds to political parties. I recall one most serious allegation which turned out to be absolute nonsense, but I am not going to be too provocative by going into the details here today—and it would not be provocative of APRA. Has the issue of political donations to parties by superannuation entities been examined by APRA at all?

Mr Venkatramani—Not directly, but we would have thought, as part of our internal audit examination and external audit examination sole purpose test, which as you would understand is a very serious issue, we would pick that up if it were to become an issue. From my frontline experience, that has not featured heavily on our radar yet. If you believe it is a big issue then maybe we should ask those questions.

Senator SHERRY—No, I do not believe that it is a big issue. I am just thinking that, if it were to occur and if it is to become issue, it is an issue that should be applied equally across the superannuation industry, not with any particular focus on one type of entity or the other. A further issue that flowed through from an answer to a question on notice is clearing houses. Are you able to give me an update on any activity regarding the regulation of clearing houses? Are there any identified issues that have come to your attention?

Mr Jones—No more than what we gave you in the answer to the question, which was that we do not regulate them.

Senator MURRAY—I want to ask you about external auditors. As you might recall, the corporations law has increased the onus on external auditors to identify issues which we could broadly call integrity issues. Has APRA had any discussions with the various auditing bodies to ensure that their members are alert to your requirements and your needs, in view of the

enhanced role that external auditors are required to have, particularly with respect to large corporations?

Mr Venkatramani—Even though we are an integrated regulator and regulate the entire spectrum of prudential regulated industry, in relation to audit liaison we try to deal with it on an industry basis. For example, I know that in relation to superannuation we have a half-yearly meeting with all the professional accounting bodies—and with ASIC and the ATO attending, together with the auditing and accounting standards boards—where we raise a whole range of issues. Similar kinds of meetings take place with authorised deposit takers, life insurers and general insurers.

Senator MURRAY—I am particularly asking with reference to what I would regard as the enhanced requirements of external auditors, again with respect to improprieties, potential fraud, potential criminality and potential tax avoidance. Those are not spelt out in the corporations law, but the intention of the corporations law changes is for external auditors to be more diligent in a number of areas. I would expect, given the sorts of issues raised by Senator Sherry, that where there is a broad issue that you have not attended to specifically, it is probably best raised with the external auditing association so that they are alert to it, rather than issues of improper expenses, excessive expenses and political donations—you can run the list.

Mr Trowbridge—We tend to deal with this on an industry-by-industry basis, and also an across-APRA basis. For example, last week there was a significant meeting between the Auditing and Assurance Standards Board—AUASB—which now has oversight of the auditing standards across all industries. In attending this meeting today, I was precluded from attending a meeting in Sydney between the auditor liaison committee for general insurance. That is an auditing committee that the auditing profession established.

Senator MURRAY—I am sure you have enjoyed this much more.

Mr Trowbridge—So there has been a lot of attention. One of the important issues that APRA have been dealing with is the degree of assurance that we seek from auditors, because the degree of assurance that we seek is not always identical to the degree of assurance sought for public accounting purposes. Our needs in some respects are greater, in some respects lesser. We continue to examine where we can rely on auditors and where we think we should rely more on our own frontline staff. I am not sure if that is a good answer to your question, but there is certainly a fair bit of attention paid to these issues.

Senator MURRAY—Sometimes, as in the discussion that we have just had, but also outside forums like this, you get early warning of a potential problem and, rather than go hunting after every fund and asking questions of every fund, it is sometimes best to discuss that in the broad with external auditor bodies who themselves will then be alert to looking after those things. I am not trying to teach granny to suck eggs, because I am sure that you have thought of that yourselves, but the reason that I have raised it is because the bar has been raised by the parliament with respect to external auditor expectations.

Mr Trowbridge—One of the other steps taken is that we do not accept anybody as an auditor. We approve auditors for friendly societies, life offices and general insurance companies. An auditor without experience is not likely to satisfy APRA.

Senator MURRAY—Let me use that one example of political donations. I would think in some circumstances for a superannuation fund to make a political donation might be inappropriate for that particular fund. It is not necessarily something that would occur to an external auditor as being a problem, but you might see it as a problem. That is all that I am suggesting, and I will leave it at that.

Senator SHERRY—I appreciate the answers I received to questions on notice about the Wall and Ceiling Superannuation Fund, which was a real dodgy operation. This goes back to the 2001 and we are now in the 2007. It seems to me to be a long time, given the indication in the answer that the matter has still not been wound up and resolved.

Mr Jones—That is correct.

Senator SHERRY—Why is that the case? It does seem a long time to have dealt with this matter.

Mr Jones—When you say the matter is not completely wound up, there are a set of issues. There is a series of cases going on against the trustees and there are sets of disqualification appeals going before the AAT, and so on. There is also the issue that, so far, APRA is not aware as to whether or not the trustee plans to make an application under part 23 for compensation.

Senator SHERRY—Have the trustees of the fund been removed?

Mr Jones—The original trustees have been.

Senator SHERRY—Did APRA put trustees in their place?

Mr Jones—What happens is that you apply through the process and put in replacement trustees.

Senator SHERRY—Were they APRA-placed trustees?

Mr Jones—Yes. They are not APRA employees.

Senator MURRAY—APRA approved?

Mr Jones—Yes.

Senator SHERRY—Are they still operating this entity at the present time?

Mr Jones—Yes, as far as I am aware.

Senator SHERRY—It seems to me to be a long time. I refer to the issue of collection of fee data, but particularly commissions. How is that going? Are you still on track? You said next year, 2008.

Mr Littrell—I will have to go back and read the transcript on that. I think there was a real good start on it about then. I will not go through the conversation that we have had before.

Senator SHERRY—No. I am seeking verification of the date that you gave me in a previous couple of hearings.

Mr Littrell—The work that we are doing now in our research area, which is coming out over the next few months, will give us a strong sense of how we should do an appropriate collection that will better break down the difference between gross earnings, fees,

commissions and all the other components of a super fund's performance. The deeper we dig into this, the more complicated it gets, so my issue is that, when we do reform the collections, we want to end up with something that generates highly comparable and robust numbers. I have to sit here today and say that I do not quite know how we will do that, but in the next few months we will be in a position to say how that will be done. At that point, APRA will need to consider whether we want to revise the collections and on what basis we would do so, and that would then trigger a process over the ensuing year of updating systems, issuing reporting standards and starting that collection. We are making progress, but it is not the sort of thing that you can do on a casual Thursday afternoon.

Senator SHERRY—I know that and I am not suggesting that. What you are saying causes me a little concern. You went through a consultation process with the industry that ran for about a nine-month period prior to the attempted introduction of the last data series. I think it was you who made the point yourself that the industry had the opportunity to point out any particular difficulties or flaws, and you got a minimal response at that time. Here we are a couple of years on, and you seem to be hinting to me that it may not be possible to do this at all, which really does worry me. If fees are being collected, they should be reported in the aggregate, as well as the individual, which is an ASIC responsibility. I do not see why that cannot be achieved. I understand that there are significant technical issues and definition issues. Frankly, I get all these feeble excuses from some in the industry about how hard it is to do, but it must be possible to do.

Mr Littrell—It is less difficult to collect superannuation fee data than it is to land a person on the moon.

Senator SHERRY—I will remember that.

Mr Littrell—How can one phrase this without seeming to take sides? The multiplicity of fee arrangements that are out there makes it very hard to do a standard industry collection. It is not something that you give to our statistics department and say, 'Do this.' We have a very substantial research effort running where we have gone to all the large funds and collected five years of data. One of the purposes of that research is that we will be able to extract how we would do a regular statistical collection. That data has been collected and it is in the process of being analysed. I would expect that over the next few months we will be in a position to say something more definitive about how we proceed. To your original question of whether this is proceeding: yes, it is. It is not as fast as we would like and somewhat more frustrating than we would like, but I would hazard a guess that we are further along than anyone else is who has tried this task.

Senator SHERRY—I share your frustration. The fact is that we have some sectors of industry that design fee products that are almost as complex as landing a man on the moon.

Mr Littrell—I want to reiterate that we are collecting the net returns—

Senator SHERRY—Yes, I know that.

Mr Littrell—and we are collecting the volatility of returns.

Senator SHERRY—I know that.

Mr Littrell—From a perspective of 'Is a trustee doing a good job?' it is like: I would rather know the total price of a house than how much of that was paid to the real estate agent for the commission. The same applies here. In terms of assessing the trustee's performance, the net return, within a fairly broad range, is more important to us than the composition of that return. In terms of us getting what we need for supervisory purposes we are not badly placed. In terms of the more general public interest of 'What is the composition of who is getting what share of the pie?'—which is what the whole fee and commission issue is—that is a much more complicated question which is taking us longer than we would like to figure out how we would go about doing it.

Senator SHERRY—I appreciate that. I know that there are some private research firms who do this but, at the end of the day, they are private organisations. Given the impartiality of APRA as an independent government authority at arms-length from the independent research houses—as much as they do a good job—APRA being able to produce similar type data is very important.

Mr Littrell—We are on that track, but remember that the APRA standard is comprehensive, statutory, audited and comparable. We respect those research authors a lot, and we talk to them fairly often, but what they are doing is not necessarily any of those things.

Senator SHERRY—I know.

Mr Littrell—It is valuable.

Senator SHERRY—That is why it is so important for APRA to do it.

Mr Littrell—Yes, okay. But for us to do it to our standards it takes a long time to design it and to get it to work properly. As we now know, it is a complicated area that is fraught with the potential not to get it all done, so we want to make sure that we do the rework appropriately.

Senator SHERRY—But ultimately get it done.

CHAIR—Speaking of being on the move, we need to rocket it up and get moving.

Mr Jones—If I may, Senator, in the next few months we will be publishing 10 years of super stats. It is some very comprehensive material, which I think you will find quite interesting.

Senator SHERRY—Thank you for that. Ten years! That will be a long bedtime read by the sound of it!

Mr Littrell—Our statistical team will send you a personalised copy.

Senator SHERRY—Thanks! I have one final question. You have concluded the licensing process, haven't you?

Mr Jones—Yes.

Senator SHERRY—That would have meant a significant allocation of resources and staff for that period. What will happen with that resourcing and staffing? In asking this, I assume that you have got plenty of work to go on with, having finished that licensing process?

Mr Jones—We do. We annually publish our levies paper, which indicates all the information about the allocation, and what is visible is that, in the past year or two, we have devoted more resources to superannuation than we have historically. Some of those resources were taken on specifically for superannuation licensing, and so that will come down. In terms of the actual number of people, given our high turnover we tried to hang on to as many of the additional people that we took on for super licensing as we could and just integrate them back into our system.

Senator SHERRY—In terms of the allocation for that program, it does not involve having to dismiss staff?

Mr Jones—Absolutely not.

Senator SHERRY—They were just kept on and absorbed into the organisation.

Mr Jones—We would have loved to have kept every one of them. It is just unfortunate that some of them signed on for the two-year superannuation licensing period. We found jobs for all those who wanted to stay fairly easily. What we expect over the next couple of years, however, is that the total number of staff allocated to superannuation is likely to fall slightly, given the consolidation in the industry.

Senator SHERRY—There is plenty of work for them to do over there at the tax office, given the staffing stats that I was given last night for the super area!

Mr Jones—We do not want to lose staff to anyone—not the tax office or anyone else.

Senator SHERRY—Thank you.

CHAIR—Thank you most sincerely. That was very interesting.

Senator SHERRY—Told you it was fascinating!

CHAIR—It was.

Senator SHERRY—A convert, you see!

Senator MURRAY—I was thinking, Dr Laker, that Mr Littrell's task cannot be any harder than your task of attacking ATM fees. That was hard!

CHAIR—We will have a break and then resume with ASIC.

Proceedings suspended from 3.25 pm to 3.40 pm

Australian Securities and Investment Commission

ACTING CHAIR (Senator Bernadi)—I call the committee to order and I welcome the officers from ASIC. Mr Cooper, do you wish to make an opening statement?

Mr Cooper—I have just a few very short remarks, if I may. Firstly, in his absence, I congratulate the chairman on his recent appointment to this committee, and reflect on the very positive relationship we used to have with the last chairman, Senator George Brandis. We look forward to having a similar constructive and productive relationship with this chairman.

I need to explain that our chairman, Mr Lucy, is at the moment still in Sydney dealing with a major enforcement matter that is currently upon us. Also, he has just returned from the UK and has a rather severe head cold, and has been advised not to fly. We pass on Mr Lucy's

apologies to the committee for his inability to attend this afternoon's hearing. All the questions concerning ASIC will be dealt with by me as deputy chairman and by our newly appointed commissioner, Tony D'Aloisio. This is Mr D'Aloisio's first appearance for ASIC before the Senate economics committee, and I am particularly pleased to introduce him to the committee. As you probably all well know, Commissioner D'Aloisio brings a business and legal background to the committee. He was a former chief managing partner at the law firm Mallesons Stephen Jaques and was most recently managing director and CEO of the Australian Stock Exchange, now the Australian Securities Exchange. Beyond that I do not want to make any further opening statements.

ACTING CHAIR—Thank you.

Senator SHERRY—Just before we start, could I just record my congratulations, Mr D'Aloisio.

Mr D'Aloisio—Thank you.

Senator SHERRY—You will find there are not just three estimates appearances; there will also be at least two Corporations and Financial Services appearances. That is five a year.

Mr Cooper—It is more than that. I think it is nearly seven or eight, is it not?

Senator SHERRY—Yes.

Mr D'Aloisio—I look forward to all of them.

ACTING CHAIR—That welcome is on behalf of the committee. Thank you for that.

Senator SHERRY—Mr Lucy's absence is understood.

Mr Cooper—Thank you.

Senator WATSON—Does ASIC perceive a potential conflict of interest arising out payments made to Qantas directors in the event that that takeover is successful by Airline Partners?

Mr Cooper—Payments of that nature do prima facie create a conflict of interest. The question is how it is managed, how that is disclosed and how that is dealt with in regard to the many aspects of commercial life. We are outside the financial services context here, so that it is not actually a licensing matter but more a matter of the proper discharge of duties of either directors or executives of a corporation to deal with conflicts as and when they arise in the appropriate manner.

Senator WATSON—How well do you believe Qantas directors have handled their responsibilities under what we term the material conflicts of interest obligations under Corporations Law?

Mr Cooper—I should make it clear that I do not have direct knowledge of this—in other words, I have not been directly privy to those arrangements—but I have followed the transaction through the media and so on. From that distance it appears to me that, faced with the sorts of challenges that Qantas is faced with when a proposal like that arrived on its doorstep, the way that the non-executive directors, management and so on have conducted themselves appears to be responsive to the issues and an appropriate means of dealing with what is obviously a potential conflict. Quite clearly they have then been alive to that conflict.

As I understand it, the executive directors, who may or may not be in receipt of the sorts of payments that you have been discussing, have been quarantined and isolated from key decisions concerning the bid, and that the non-executive directors led by the chairman have handled those sorts of matters. When a corporation finds itself in that situation, that is how it gets dealt with.

Mr D'Aloisio—At the end of the day, the directors' actions of course are still subject to shareholder approval in terms of the bid. A bidder's statement has gone in and ultimately the shareholders will vote on that proposal, and in doing that they will no doubt also look at the disclosure issues and how they were handled to enable them to decide whether they would accept the bid.

Senator WATSON—You said that ASIC is taking a fairly minimal sort of interest in this; it is usually a matter of national interest—is it not?

Mr D'Aloisio—No, that is not right. ASIC's role in relation to this area really arises in relation to the work it does on the bidder's statement and on the target company statement. ASIC is involved in that and working with the company, and seeing that the regulatory framework that we have on disclosure to enable shareholders to make an informed decision is being looked after.

Mr Cooper—The national interest point that you just referred to is not under jurisdiction but is now with the Foreign Investment Review Board, which is a part of the Treasury, and the Treasurer sees, as he will have read in the press—

Senator WATSON—But they are only looking at nation interest issues?

Mr Cooper—Correct.

Senator WATSON—You are responsible, are you not, for actions and responsibilities of directors?

Mr Cooper—In a secondary sense. The duties of directors are a matter of private law in the sense that it is a combination of Corporations Act provisions and common law duties that the directors have to the company. In day-to-day commerce in boardrooms all over Australia directors handle their duties adequately under the law. ASIC is not always in every boardroom supervising how they discharge those duties. I think ASIC so far has been satisfied with the manner in which the conflicts and duties have been dealt with in this case.

Senator WATSON—I will ask my next question, because I am still a bit disappointed with your response. Has ASIC conducted any analysis in this case of directors' responsibilities, or is it merely monitoring the situation?

Mr Cooper—I think it is monitoring the situation. ASIC has received certain queries from people about this transaction. There has been a great deal of discussion in the press. There have been letters to the editor. There have been all sorts of inputs from a wide range of people in the business and wider community about this particular matter. If you wanted me to characterise which of the two, intervention or monitoring, I think monitoring is closer to what we have been doing. There is a very formal process that Commissioner D'Aloisio was talking about for the lodgement of a bidder statement and all the procedural steps that we go through,

and we are certainly dealing with all of those. Ultimately, as Mr D'Aloisio said, it is the shareholders who will decide whether they accept the transaction.

Senator WATSON—I am just a bit surprised that our Corporations Law does not have a more rigorous regularly back-up to it.

Mr Cooper—That surprises me; we hear so often that it has too much rigour and too much regulation, and that no-one wants to be a public company director anymore.

Senator WATSON—Maybe that is so in the financial services industry. What about in terms of general law?

Senator SHERRY—Mr Cooper, you seem to imply that it is not your role to be checking in every boardroom and every decision. This is a matter of significant public interest. Similarly to Senator Watson, I am surprised that you have not indicated more direct checking of the obligations of directors and conflict of interest in this case. It is not an ordinary everyday case.

Mr Cooper—In a pure ASIC sense it possibly is, in the sense that the whole way the share market works is that there are a set of rules around when control of a company can take place. They are well known, quite detailed and quite complex, and the wider issues are just really off our radar screen.

Senator SHERRY—I am not suggesting for one moment that the wider issues of national interest and overseas ownership are issues you should be attending to, because they are not. The conflict of interest question is part of the case. It is an element of the case.

Mr Cooper—It is, and, as Senator Watson said in opening, there is a potential or even an actual conflict. But there is nothing that we have seen that would suggest to us that Qantas was not aware of the issue and that the arrangements they put in place were not appropriate in the circumstances.

Senator JOYCE—Surely the $300 million that is anticipated to head towards the directors would hardly make them impartial advocates. That would certainly have to call into question their partiality once that sort of money is on the table for them to pick up.

Mr Cooper—Let us accept for the purposes of this discussion that that is right.

Senator JOYCE—I would not trust my vote if there was $300 million on the table.

Mr Cooper—We might all be in that category. But let us accept that that is so. I think the arrangements that Qantas has entered into have meant that those people who are receiving those payments are not participating in the decision making. That is the whole point.

Senator JOYCE—Surely they are in a position where they have some influence—quite obviously they are jumping over bindi-eyes to try to make it happen.

Mr Cooper—I would not speculate on that. I think from what ASIC sees, the non-executive directors have been well aware of those issues and have dealt with them as best they can. What has to be remembered about Qantas is that this is a bid that has turned up on its doorstep. This is not something that has been designed internally or what have you. It has to be remembered that this bid has come from an external party. Qantas, as far as we can see, has done the best it can to deal with what is obviously potential or actual conflict.

Senator WATSON—Given the way ASIC is distancing itself from corporation-type activities and the responsibilities of directors, where do we look to for oversight or enforcement? Do we look to the stock exchange, which you were formally with, Mr D'Aloisio?

Mr D'Aloisio—To say that we are distancing ourselves is simply not correct. ASIC is not distancing itself. Through the processes that it has in place to look at the bidder's statement, the issues of conflict will be examined. There is no question that the current law and the approach on conflicts would be applied quite rigorously to make sure that the shareholders that ultimately vote are given all the information. If, in the process of doing that, there is some issue in relation to directors' duties then that would be something that ASIC would look at, as it has in cases. Indeed, in the enforcement matter that Mr Cooper referred to earlier today, part of the actions that have been taken by ASIC in that case are in relation to breach of directors' duties. It is not correct that ASIC would not look at that.

As this case has been proceeding, the facts and the information is in the market. It is known by the market and there is a process to be completed in relation to whether shareholders accept or not the bid that is being made. In a sense, this is work in progress in relation to this bid. It has a way still to go. ASIC's role in working on the bidder's statement, the target's statement, expert reports and so on is to make sure that the market is fully aware of all the facts so that an informed decision can be made by the shareholders in relation to that bid.

Senator WATSON—So you have done some analysis?

Mr D'Aloisio—Me, personally, no. But our team has in the work that it has been doing.

Senator WATSON—Earlier we were told it was more a monitoring rather than an analysis role?

Mr Cooper—It is less intrusive; there is a spectrum of intrusion.

Senator WATSON—We need to know what you are doing.

Mr Cooper—There is a spectrum of intrusion and, as I said before, this is more in the line of monitoring because the inputs that ASIC has received—and we talked about those, including the commentary, the complaints and so on—have not led it, in the light of other information about separate committees of directors and so on, to think that anything inappropriate is going on. Does this test the boundaries of the system and the way directors conduct themselves? Yes. The amounts of money are very large. These are global things that are happening. We need to be very careful not to be so intrusive in this country that we deny shareholders the ability to dispose of their shares in this way because we are out of kilter with what is happening in the rest of the world. It is a very difficult balancing act. Certainly transactions like this do test the system.

Senator JOYCE—$300 million would be the market capitalisation of the bottom third of the stock market, and this has been offered to the directors.

Mr Cooper—To some of management. We need to not say it has been offered to the directors; that is not right.

Senator JOYCE—It has been offered to directors and other people—sorry. It includes the directors.

Senator WATSON—This leads into my next question. Although the directors perceive their main responsibility is to increase wealth—and I do not deny that—does ASIC interpret this concept to be in the very short term and in relation to some unusual circumstances, or does ASIC perceive it to be in the longer term where, for example, a restructured Qantas will be saddled with a 70 per cent debt exposure, operating in an environment where external factors such as terrorism and SARS can have a dramatic effect on passenger loadings. What is your interpretation? Is it the short term, where you can take advantage of a particular set of circumstances—artificially, maybe contrived for a number of reasons—or do you take a longer view of the stability of the airline and directors' responsibility for the long term? Directors obviously have accepted a situation where they are prepared to allow Qantas to move into a situation of a 70 per cent debt exposure. That is making it a far more fragile operation compared with what it is now. Are the directors under those circumstances, in your view, exercising their responsibility correctly and in accordance with what we understand the law to be?

Senator JOYCE—Stewardship.

Mr D'Aloisio—The market and companies operate in different ways, and it is not ASIC's role to be setting prescriptive debt-equity levels for companies. While we work within a regulatory framework that pushes disclosure and transparency and makes sure that the directors comply with their duties, it is not our role to dictate to the market how they structure bids and how bids occur, unless we can see some real regulatory issue. The issues you are raising are policy matters for government.

Senator WATSON—No.

Senator MURRAY—Is there any consequent potential legal liability later on if, for example, this high debt exposure and an exogenous shock coincided to cause bankruptcy? Could shareholders who lost their money sue both the directors and ASIC for not attending to the directors' duties as understood under the law? Is there any contingent liability that might extend to ASIC?

Mr D'Aloisio—I would have to take that on notice. I do not think there would be. There is not an obligation on ASIC to ensure that companies are not negligent in the way that they run their affairs. I am a new commissioner, but that would be quite a concept. I want to take that on notice and have a look at, because—

Senator SHERRY—It might cause you concern to have become a commissioner if that happened.

Mr D'Aloisio—Company directors do carry that obligation in relation to their directors' duties—due diligence and so on. They definitely carry it. I was not seeking to shirk it in that sense. But coming back to the question: is there a possibility that the directors in this case may be in breach of their duties looked at in hindsight in two or three years time? There must be, but that is a matter for the shareholders at the time. That is a matter for the company and ASIC at that point in time. It is not an issue on which we would act today.

Senator MURRAY—I suspect you are right about ASIC. I suspect you would not be liable, but I raise the point because when you have been advised by, for instance, Senator

Watson, you are no longer in a position of ignorance. I just wonder if it one of those things you would actually ask an internal question about?

Mr Cooper—That is Senator Watson's opinion about the gearing, but of course there is a group of banks who obviously do not have a problem with the level of gearing because they are prepared to lend. These matters are not black and white.

Senator MURRAY—But they are secured; the shareholder is not.

ACTING CHAIR—The current directors have an obligation to the current shareholders. Their responsibility is to get the maximum price they possibly can if subject to a bid. Correct?

Mr D'Aloisio—Yes.

Mr Cooper—There is a unique overlay of duties. When a company is subject to a takeover bid, in effect it enlivens an auction and special duties on the directors in relation to the share price, which are not normally there. Normally the directors have duties that range over a much wider range of matters, some of which Senator Watson mentioned before. But when the company is subject to a takeover bid there is an overlay and so the focus on getting the maximum share price for shareholders is a very important duty. That is where the current directors are.

ACTING CHAIR—In the absence of a compulsory acquisition, which is subject to a particular takeover threshold, it is every individual shareholder's right as an owner of that business to determine whether they sell their shares or not, irrespective of the directors' decisions.

Mr Cooper—That is correct. That is absolutely right.

ACTING CHAIR—It is not simply a director's choice. They cannot nominate and force people to sell their shares. It is an unpopular stance, I guess, but it is one that I fully support—this is in the hands of the shareholders of Qantas and those with the greatest incentive.

Senator JOYCE—This is related to an article I read by Senator Murray: can you clearly spell out how your investigative powers will change once this company becomes privatised, as opposed to a public company?

Mr Cooper—There would be absolutely no change to our investigative powers. The entity will remain a corporation. If we suspect a contravention of any of the laws that we administer, our powers are exactly the same.

Senator JOYCE—It would stand to reason that, as the public, we are not going to be able to observe share changes. Is it possible that behind the scenes, the day after it is privatised, for someone to say to what I call 'off-paper interests', 'I'll tell you what, Texas Pacific, I'll let you run the show. My interest in this company will be nominal. You drive it and we can work out some agreement at some point in time that you will relieve me of my shares at this price'? How would you know about that? It would be done over a cup of coffee. It would have nothing to do with you.

Mr Cooper—There are many private businesses where the intrusion of the change of control provisions in the Corporations Act, which I think is where you are heading—

Senator JOYCE—What I am saying is, firstly, you cannot get away from it because you have a publicly traded share; you have to go to a public market for it to be traded. But in this instance it is not a publicly traded share, it is a share that is traded on an agreement between you and me at a certain point in time.

Mr Cooper—Whatever structure is adopted in relation to Qantas it remains the fact that it operates in a highly regulated industry. It remains subject to the Qantas Sale Act, which restricts the level of foreign ownership.

Senator JOYCE—That is on the nominal share. It does not talk about inferences that go off shares. We know in every company that all the time there are inferences off shares. In my experience, you could be talking to the 10 per cent shareholder, but he actually runs the show. Other people are passive and it is an agreement that they have worked out that the direction of the company comes from this particular person.

Mr D'Aloisio—But how does that differ between public and private?

Senator JOYCE—Because in a private company I just come to an agreement with you that I am going to buy your shares at a certain price. There is no market participation or verification of what I am doing. I am reliant on you, because it is a very closed market, to buy my shares. You have a position of weight over me, because you know that you are the buyer; I can actually exclude you from taking the company public again. I have you over a barrel. You want to sell your shares, I am the buyer, and that is it. We are not a public company anymore. Therefore, we come to an agreement, I agree on a price. But with that comes the quid pro quo of an understanding, and the understanding is that I exercise direction if you want that guarantee of my buying those private shares. It is just like my buying your car off you at a time in the future.

Mr D'Aloisio—You are going into a policy issue of some significance. When you look at companies regulated in Australia, some 1,800 or 1,900 are listed and some other 90,000 companies are recently incorporated and working and a number of them run very sizeable businesses. It is the outworking of publicly listed and non-listed that may produce the sort of results you have. But they are policy issues I think again for government.

Senator JOYCE—It would not be of concern if this was not a company that had a virtual monopoly on airline transport in Australia. If it was Mr and Mrs McGillicutty's fish shop I really would not care, but we are not talking about that.

Mr D'Aloisio—That is why I was saying it is a much broader policy issue than the role that ASIC plays in the regulatory framework that it administers. Just in relation to this public and private, it should be borne in mind that, as I said earlier, we have a lot of private companies. One of the things about the changes with becoming private is the need not to lodge certain documents in a public forum. We would need to work through what the impact of that is and we will give it more thought. At a business level the notion of companies going private is also to do with the fact that they feel that they can take much longer term positions in the way that they invest and conduct their affairs, and are not subject to analysts and media in relation to what they do in the short term and the short-term pressures for profit that exist. There are differing views in the market, but whatever the right view is it is a policy matter, not an ASIC issue, as I would understand the role of ASIC.

Senator JOYCE—There is a differentiation on the lodgement of documents. I know there is; I was just trying to get it on the record. There is a differentiation in the lodgement of documents between private and public companies, is there not?

Senator MURRAY—And reporting.

Mr D'Aloisio—And reporting, yes.

Senator JOYCE—Your investigative powers remain the same, but your source documentation is different.

Mr Cooper—Yes, that is a fair summary.

Senator WATSON—The current literature in the *Director* magazine of late has been dominated by the topic 'good corporate governance'. What other regulatory authority is now monitoring directors' responsibilities for managing what I term the long-term risk?

Mr D'Aloisio—The long-term risk being?

Senator WATSON—In Qantas's case the 70 per cent exposure, which it does not now have, to debt.

Mr D'Aloisio—The framework of corporate governance in Australia is both statutory with directors' duties and also the ASX Corporate Governance Council guidelines. I think what you are probably referring to in the *Director* magazines is the discussion around the ASX corporate governance principles. Those principles, to my mind, do not turn their attention to the issue of what the debt to equity ratio long term for a company has to be. Directors do have to look at risk, and one of the risks that the directors would need to weigh up in running a company is that they actually do not over gear it in the sense that if it gets into difficulties those difficulties could lead to a breach of directors' duties and so on.

Senator WATSON—That is the point I am making.

Mr D'Aloisio—But subject to that, there is not a framework that focuses specifically on the debt-equity ratio.

Senator WATSON—We are now talking on common ground. I make the observation that I hope the slowness of ASIC in this case is not going to be similar—although different outcomes—to Westpoint. I was fairly critical about the slowness of ASIC in relation to that problem. I have finished my questions in relation to Qantas, but I do have other questions in relation to primary health care.

Senator SHERRY—I have nothing more on Qantas. That is an area I was not going to, so I am relaxed about Senator Watson continuing.

ACTING CHAIR—Does anyone have any further questions on Qantas?

Senator MURRAY—I have a question on Alinta in the same area.

ACTING CHAIR—Let us go to that.

Senator MURRAY—I was just seeking from you, Mr Cooper, without getting into any kind of operational insights, whether you have your eye on the Alinta matter and whether you have been making inquiries. I noticed on your website a notice saying ASIC was making

inquiries about Qantas. I wonder if you have a stronger message about Alinta, because I feel more strongly about Alinta, I must say.

Mr Cooper—Yes, I think that relatively neatly summarises our views on that subject. We are making a number of inquiries of a number of the participants in relation to that matter. I suppose it is a bit difficult for me to go into too much detail, other than to say there are aspects of that transaction that do cause us concern. If you look at how many transactions are taking place in the financial markets at the moment, one aberrance, if I can put it that way, does not necessarily mean the system is not working.

Senator MURRAY—I agree with that.

Mr Cooper—There are important aspects of Alinta that suggest the system is working very well. When the matters became public, it was not just the well-briefed journalists who were making the inputs. We had institutions coming in and a very broad range of people in the business community spotted the issue and were right on the money as to how it needed to be dealt with. That said to us that in fact the system was probably working a lot better than you might have otherwise thought, because you get one aberrant situation and the market wrought, at least as far as the market could, an on-the-run solution to the situation. From an overall health check point of view on the broader system and how it understands conflicts and how these transactions are done, I think it is pretty good. I think we were able to feel quite comfortable in that respect.

Alinta is the subject of ongoing inquiries from us. It is on us to progress those quickly, because there is no doubt there is pressure in the marketplace for some answers. The whole law of directors' duties and conflicts is very principles based. In other words, you do not consult large rulebooks on how these things work. There is certainly pressure in the market for a little more guidance on this. The AICD came along very helpfully in January with a 12-page paper on directors' duties during heightened mergers and acquisitions activity, which was useful. We are well seized of the need to deal with this matter quickly and to get some messages to the market.

Senator MURRAY—In this case there are problems of conflict, both internal and external. There are allegations of impropriety with respect to the adviser, as you are aware, and with respect to management and directors, and non-executive directors at that. One of the things on which I wanted clarity from you, if you are able to give it—and not predicating any charges or administrative penalties that may arise from this; let us accept that you are merely in the inquiry stage at present—if hypothetically something similar to this were to arise it should, in my view, bring the deal undone, and yet the deal might have progressed before you were able to conclude your inquiries. How do you think the law, the market and the regulator should interact in those circumstances? Plainly, there is a set of interested parties who want the deal to progress. That can happen and I do not think you are in any position to stop it, are you?

Mr Cooper—In taking regulatory actions there is a standard set of things you look at: how much it is going to cost, what purpose it will serve and so on. We are always mindful of taking actions that damage the innocent parties. In this case, of course, preventing a transaction that might benefit the shareholders is the obvious action that you would want to avoid. It is a little bit hard for me to speak specifically because we are talking about a live

situation, but I suppose it would be in the interests of the shareholders and the system in that, if there is a transaction to go forward or the creation of an austion, that would be beneficial and that whatever conduct had happened might not necessarily be capable of being cured, anyway, and that the appropriate regulatory response might be a mixture of some form of clarification. So what are the rules in the specific situation? Then, for want of a better word, there would be a punishment of certain of the players if we were to find that they had breached the relevant directors' duties provisions.

Senator MURRAY—Sometimes those of us addicted to public affairs kind of assume that other people are as well immersed in topical events as we are. There may well be many shareholders who just are not tuned in to this situation. Is it possible for you to require the company in its communications with its shareholders concerning this matter to advise the shareholders that aspects of this matter are under inquiry by ASIC? I ask you this deliberately, because I think from a consumer or shareholder point of view, if they are left in a situation of insufficient information where something material might be brewing—it might not, of course—that would be profoundly unfair in a circumstance such as this.

Mr Cooper—It is a bit difficult, because we are commenting on a live listed company here. Merely telling the shareholders that there was some sort of problem, but not what the solution was, might not be terribly helpful, either. I think that is why in introducing this discussion I mentioned ASIC's awareness that some form of clarity needs to be reached with haste or with due speed. Regulators do not move with haste, but with proper speed so that the situation can be clarified and, if there is a transaction to go forward, then it goes forward.

Senator MURRAY—It could be almost like an official warning or an official alert. The stock market, for instance, has that wonderful mechanism whereby, when there is a matter of concern, the company is required to immediately notify their shareholders and the stock market itself of this matter. That is a great mechanism. I would hope that ASIC would have a similar ability.

Mr Cooper—I think we are in the information-gathering part of the program at the moment to find out exactly what happened. As I say, we are mindful of the need to get some clarity and certainty on it quickly.

Senator MURRAY—I am not a fan of the wild west, so I hope you clamp down on it.

Senator WATSON—Just coming back to Qantas, according to my knowledge of the financial services industry there is a policy statement No. 181 that relates, in that particular segment of the industry, to conflicts of interest. I ask: do we have a similar statement for other corporations, such as Qantas, that are listed on the stock exchange?

Mr Cooper—No, not as such, because outside the financial services landscape dealing with conflicts is a specific directors' duty, but that is not codified. You cannot go to the Corporations Act and see what the rules are in any particular case. It is a matter of being aware of how conflicts can arise and how you need to either avoid them or manage them. There really is not a codification of each and every conflict that a director might come up with. The Institute of Company Directors has some very useful guidance on it, but it is just part of a director's responsibility to understand what their duties are. Of course, the case law

each time director's duties comes up is about more and more clarification in each individual circumstance as to how it works.

Senator WATSON—I now move to another question, and that concerns the publicly listed company called Primary Health Care. Does ASIC intend to take action against Primary Health Care's sell-down of its investment in the pharmaceutical company Symbion at a time when the market and the shareholders were of the view that Primary Health Care was bringing the two companies together? I think there is a clear breach there.

Mr Cooper—We will have to take that question on notice. This is a current transaction that is on foot at the moment. It is not something on which either myself or Mr D'Aloisio is specifically briefed, so we will just have to take that on notice.

Senator WATSON—But would you not agree that there is a clear breach there, if that is the case?

Mr Cooper—I really cannot speculate on live matters where we do not have a specific knowledge, so we really have to take that one on notice.

Senator WATSON—Obviously, as I perceive it, there is a breach there, and I would hope that ASIC is going to take pretty quick action.

Mr Cooper—We will look into it.

Senator WATSON—Thank you.

CHAIR—Senator, I am not uncomfortable with you making some commentary in the guise of a question, but I think I will respect Mr Cooper's view that he wants to take it on notice.

Senator WATSON—Yes, I am quite happy for him to take it on notice. I just hope that quick action is going to be taken.

CHAIR—It could not have been any easier, but that is all right.

Senator SHERRY—There is always a certain degree of commentary.

CHAIR—I was trying to do the right thing.

Mr Cooper—That is what makes it interesting.

Senator SHERRY—It does, yes. Talking of interest, I went back from the hearings this morning to have a cup of tea and I sat down in my chair and looked at the *Money Management* special bulletin that is up on the web, which informed me that the number of cases now being checked by AMP has increased from 7,000—that was a consequence of the enforceable undertaking we have discussed on previous occasions—to 35,000. I was a little taken aback at this. There was no further detail provided, but what can you tell us of this, Mr Cooper? Can you offer some explanation of what is occurring here?

Mr Cooper—This is obviously very recent news. This release must have come out today, did it?

Senator SHERRY—Yes, it was this morning. I have not seen a press release from AMP. I had not checked the ASIC website to see if they had issued a press release around it, but I must say I had assumed that ASIC would have some knowledge of this.

Mr Cooper—We did know that the 7,000 figure was to be increased as part of the work that is being done pursuant to the enforceable undertaking and the external advisers and so on. The work that AMP has done there has taken longer than was expected, and as a result of looking into exactly how many files and advices were involved, the number has gone up from 7,000. I have not read the release, but I had understood that it was in that sort of dimension.

Senator SHERRY—Just to be clear on this, has AMP informed ASIC about this number?

Mr Cooper—There certainly were, as you would expect, a number of discussions going back and forth between the two organisations, but I was not aware that it had been released.

Senator SHERRY—As I say, it was in the *Money Management* special bulletin this morning—35,000. That seemed to me to be an extraordinary jump. Putting aside that figure of 35,000, which is very significant, what is the explanation for the increase in the number, whatever that is that you are finally informed about?

Mr Cooper—I must admit that I would have to take that one on notice. It was to do with some part of the methodology; they had originally identified the number as 7,000, but it turned out to be, on a closer examination, 35,000. But I would have to take on notice precisely what was the cause of that.

Senator SHERRY—I could understand a thousand or a couple of thousand or some reasonable variation of 7,000, but for it to suddenly go to 35,000 just seemed an extraordinary number. I think initially it represented about one per cent. It has now jumped to five per cent.

Senator WATSON—And are there more to come?

Mr Cooper—Of people wanting a review?

Senator SHERRY—Yes. I am not so sure it is the individuals who have gone to AMP wanting a review, or whether that is the number of individuals identified as part of the enforceable undertaking process as needing now to be reviewed. Anyway, we will see what the response is. I am sure you will be issuing some press releases in the next day or two about this once you are more familiar with the information.

That brings me to the issue that we have discussed on previous occasions—the other activity that was being undertaken against other, as yet unidentified, firms in the financial services industry as a consequence of the shadow shopping and some of the identified misbehaviour. What point are we at with concluding those investigations and any action against other institutions?

Mr Cooper—With all of the other things we have on the go at the moment, I must admit I am not across exactly where that work is right at the minute, so we can take that on notice and give you an update.

Senator SHERRY—The last time I discussed this with Mr Lucy a number of firms—four or five, I think—were outstanding. To be fair to AMP, they were not the only firm with a major set of issues to deal with. From time to time I get questions and commentary, 'If it's AMP, who else is involved?' We just do not know yet whether that has all been finalised?

Mr Cooper—Yes.

Senator SHERRY—I wanted to turn to another issue that I raised in part on the last occasion. It goes to Rabobank. You will recall we had a brief conversation on the previous occasion. It is in the context of the report of the PJSC, of which Senator Chapman was chair in 2000. There was a conclusion reached about the need for accurate financial details and bank statements to be provided by financial institutions to customers. At the last ASIC hearings I raised concerns about a farmer who had not been provided with sufficient transaction details to enable him to complete his tax returns to the satisfaction of his accountant. The accountant could not lodge the tax returns because there were insufficient transaction details from Rabobank to complete the tax returns. Related to that there was a dispute over repayment of loans, and that is related and ongoing, as I understand it. I raised with you at the committee hearing that there appeared to be a breach of section 12DA of the ASIC Act in respect of the issuing of the banking statements and appropriate financial information to the customer. I am advised that ASIC has received a complaint. However, the issue of the provision of the transaction details has not been satisfactorily concluded in terms of the needs of the customer and his accountant. Do you have any information you can give me on this matter?

Mr Cooper—It may not specifically relate to this particular constituent, but I can tell you that there is an express Corporations Act obligation under 1017D, where a deposit product issuer has to give a statement at least every 12 months, which you might think is not a very onerous obligation, but that has to include an opening balance, the transactions and a closing balance every 12 months. Since January 2004 we have received nine complaints in this area. I have the stats here about what happened. Three were resolved. That may well have been a statement that satisfied the customer. Two were closed because other activities—in one case, court proceedings—had been taken. Two did not amount to anything. One we referred to the Banking Industry Ombudsman, and one, for one reason or another, was outside our jurisdiction. It is an issue that comes up. That is the obligation. It is an obligation every 12 months. But you can imagine that in some cases for a tax return it might not actually satisfy a customer. Nonetheless, that is what the law says. There is the history of complaints that we have had about it over that period.

Senator SHERRY—Yes, but on the specific Rabobank issue, I am trying to think whether I provided you with the name of the customer—not you personally, but ASIC—on the previous occasion. I will not name him now, but I will pass the name of the customer on. If you could ascertain whether in fact a complaint was laid with ASIC about the non-provision of transaction details—

Mr Cooper—We would be happy to do that.

Senator SHERRY—and whether this matter can be resolved. I appreciate that the dispute over the loans, interest and those sorts of issues will have to be resolved in some other way, but it is the lack of transaction details to complete tax returns which is the other area of dispute causing the individual concern. I know it is the transaction details necessary to require him to be able to complete his tax returns on the advice of his accountant.

Mr Cooper—Yes.

Senator SHERRY—This does seem to me to be an unsatisfactory treatment of an individual, so I will pass on the name of that individual and you can follow that through for me. The other issue relating to this—and I touched on it with APRA—is the banking code of practice. APRA does not have an involvement in this in terms of the licensing process, but does have ASIC have any formal requirement that a bank must adopt the banking code of practice, or is it purely a voluntary requirement under the auspices of the ABA?

Mr Cooper—I believe the latter.

Senator SHERRY—It is the latter?

Mr Cooper—Yes.

Senator SHERRY—I am informed that, as of the middle of last year, Rabobank was not a signatory to the updated banking code of practice. It may have changed since then. Do you have any way of checking that?

Mr Cooper—Not that I am aware of, no.

Senator SHERRY—So it is purely an issue within the remit of the ABA?

Mr Cooper—Yes.

Senator SHERRY—Do you believe that all banks should sign in accordance with the banking code of practice given the consumer safeguards that are contained therein?

Mr Cooper—It is not really for me to speculate on that. There may be some quite legitimate reason why Rabobank has not yet signed up to the amendments. It really would be speculative, because an answer to your question would read like it is commenting on Rabobank. Rabobank is not like a main street trading bank. It has a particular sector that it operates in and there may well be some quite sensible reason why it has not adopted the code of conduct.

Senator SHERRY—I do not think in this case the customer I have been referring to earlier particularly sees Rabobank as any different from any other bank when it comes to collecting money, et cetera, on the loan. Perhaps you could take on notice to request a list from the ABA of banks that are licensed in Australia that have not signed up to the banking code of practice; adherence is another matter. There was one other issue I raised with APRA. They had taken action against an actuary, and the nature of the conversation was that I thought this was relatively unusual. In terms of the role of ASIC in licensing actuaries, could you explain to me at what point that is reached?

Mr Cooper—I must admit I do not have an immediate answer on that one. I am not aware of that having been recently discussed, so we would have to take that one on notice.

Senator SHERRY—Are actuaries required to be licensed?

Mr Cooper—I would not have thought as a matter of course, no.

Senator SHERRY—Would that depend on the particular role they have in the financial services sector?

Mr Cooper—It could, yes.

Senator SHERRY—Could you take that on notice? That particular action of APRA had prompted me to inquire as to the status of actuaries within the licensing regime. I want to move to a couple of Westpoint related issues. Are you able to give the committee an update from the last occasion when we met about the Westpoint action?

Mr Cooper—I am afraid Mr Lucy's absence fairly and squarely stymies us in relation to Westpoint, because as you recall I previously told this committee I am conflicted owing to my previous life as a corporate law partner. In fairness to Mr D'Aloisio, the Westpoint story goes back some six or seven years and quite a number of years and so on in relation to our activities in it. Really, for those three reasons, we are really not in a position to deal with Westpoint here other than to say that there is a lot going on. I do not think it causes any particular harm for me to sort of go through some of the high-level facts. We have significant resources committed to Westpoint in a variety of areas, and you know that because you are constantly reading about our proceedings in the newspaper and so on. We have 34 investigations on foot, 17 of which relate to licensed financial planners. There are ongoing matters in relation to Mr Carey and other Westpoint directors in relation to seizing assets and so on. In answer to your question, we are really into the work phase in relation to Westpoint. We filed in court in Western Australia recently—just before Christmas—an affidavit of one our staff members giving a pretty comprehensive explanation as to the work particularly in relation to the freezing of assets and so on amongst the executives of Westpoint.

Senator SHERRY—That is a bit frustrating and, I must say, having read the front page of the *Australian*—I do not know whether you have seen it today—there is another jurisdiction that is—

Mr Cooper—Yes, we have very wide jurisdiction, but I am not sure that it—

Senator SHERRY—I am not going to suggest that you have reach to the jurisdiction now being entertained in the case of one person involved in Westpoint.

Mr Cooper—If you did an actuarial projection of the expansion of our jurisdiction, I suppose at some point in the graph we might get into that territory. In answer, to the extent to which we are conducting serious investigations and launching court proceedings and so on, they are not things we can really talk about, anyway.

Senator SHERRY—In terms of resource allocation, are you able to indicate the approximate staffing allocation you have on this matter at the moment?

Mr Cooper—I could not go into the numbers, but I can say that Westpoint has caused us to take over new premises. We took over one of Westpoint's premises in central Perth where many thousands of documents are located and a good number of our staff. The precise numbers I do not think I could give you at this stage. We could take that on notice.

Senator SHERRY—Is it fair to say it is taking up a significant proportion of your time and staff at present?

Mr Cooper—Yes, a significant proportion. It is obviously a major matter. It has involved transporting appropriately skilled staff, in some cases, to Western Australia. I think it is fair to say that that in itself has been positive for the organisation because it has enabled people in our Perth office to work closely with other officers from elsewhere in the organisation.

Senator MURRAY—You have had a few wins, which helps.

Mr Cooper—We have indeed. It is a significant matter but I would not say that our resources are stretched or that we are not handling it in an appropriate manner.

Senator SHERRY—No, I was not suggesting that. It was just indicating the significance of this case and the resources that it must be utilising.

CHAIR—Mr Cooper, I do not think that the committee would want you to telegraph your punches in relation to this matter.

Mr Cooper—Thanks, Chair.

Senator SHERRY—No, I was not seeking that.

Senator MURRAY—Just before you do, I have noted without having a legal interest, if I can put it that way, that both in the Wickenby case and in the Westpoint case the judiciary seem to be more responsive to obstructive behaviour than they have been in past cases, and I would name the dreadful Bond saga. They are less tolerant, in my view. Is that a correct impression? Has the judicial ground moved at all in terms of being less tolerant, or is it just peculiar to these cases?

Mr Cooper—That is a difficult question. I suppose over the years there have been many improvements to the processes that courts undertake in terms of the handling of paperwork and efficiencies, and so on, but I guess for me to comment on whether judicially attitudes have changed is a pretty difficult call.

Senator MURRAY—I am thinking jurisprudentially, not attitudinally. It seemed to me that deliberatively obstructive behaviour preventing the proper investigation of material matters was more permitted in the past—and I use the Bond saga deliberately. In reading summaries of the Wickenby-type judgements rebutting the attempts of individuals to allow proper discovery and investigation, and the same sequence with different judges in the Westpoint matter, it seems to me as a non-legal person to signal what I would regard as a more just approach.

Mr Cooper—If I could answer it this way. I think we have been very happy with the results that we have had so far in the various Westpoint proceedings that we have initiated.

Senator MURRAY—Do these judgements in fact advance the cause in a general sense by establishing precedents which are capable of being used elsewhere, or are they peculiar to the cases concerned?

Mr Cooper—I think both. Without wanting to comment too much on Westpoint, but just for the general community to see that the judicial system will prevent people fleeing the jurisdiction, prevent them dissipating assets, and so on, it is a very powerful message to both the business and the wider community. To the extent that that is a precedent, then yes it definitely is beneficial.

Senator MURRAY—Thank you.

Senator SHERRY—Again, I think you will recall on one or perhaps two previous occasions we discussed the treatment of the files of a Mr Bristow and there was an

explanation given by Mr Lucy about this matter. Are you able to add anything or provide an update in respect to Mr Bristow's files?

Senator MURRAY—And his clients.

Mr Cooper—I think that Mr D'Aloisio is not in a position to answer that and that really gets me into talking about core Westpoint issues.

Senator SHERRY—Yes, I thought that might be the case.

Mr Cooper—I am just not across it. I have received all of Mr Bristow's emails, I should say.

Senator SHERRY—Yes, so has everyone else.

Mr Cooper—I have seen you on the list, but I do not get involved in how it plays out.

Senator SHERRY—I want to go to the issue of the FICS limit, the $100,000 limit—in general terms, not in respect to the specific impact it has had on some Westpoint victims. When we discussed this on the previous occasion, I am not sure that Mr Lucy was actually aware of the $100,000 limit. I think it was the day after FICS had issued a press release notifying it was updating some of its operational parameters but the $100,000 had been deferred for further consideration. I do not think, to be fair to Mr Lucy, he was aware at that point in time of the deferral of the consideration of the $100,000 limit. Are you able to give us any status update about ASIC's involvement, if any, in the review of the $100,000 limit?

Mr Cooper—Not really, in the sense that I suppose the limit is really for FICS and its members to determine. If you wanted ASIC's opinion, I think given other monetary limits in external dispute resolution then ASIC would favour the limit being increased, but we cannot mandate that. I think it is a matter, as I say, of FICS and its members resolving to—well, I think the situation is that they are still considering it.

Senator SHERRY—I know they are still considering it, and I do understand that you cannot change any part of the FICS internal disputes, but you licence or indirectly allow the operation of the FICS as a dispute—

Mr Cooper—Yes, we approve it.

Senator SHERRY—So really you have approved it, and I am not even sure what date or year FICS was approved. You have observed that the $100,000 limit should be increased. It begs the question, if it is not to increase, at what point do you consider that this scheme should no longer continue to operate and receive ASIC approval?

Mr Cooper—I am reminded that we took a question on notice about this at PJC. I do not think that, even if we were to have a strong view that it ought to be more than $100,000, that in itself would cause us to reconsider the status of FICS because, after all, it is a member—it is consensual. When you look at the design of how these things work, there is no point ASIC imposing rules that see members flee and people not being prepared to submit and participate in the system, I suppose. There is that element of voluntariness and compromise in making something like FICS work.

Senator SHERRY—I accept that, but it does highlight the difficulty of a FICS money limit that is now believed, I think, justifiably and quite widespread, including by yourself and

Mr Lucy, to be too low given the circumstances. That is not much solace to the individual who cannot go to that dispute process because of the limit, effectively excluding him, is it?

Mr Cooper—I understand the issue and I suppose when you look at the jurisdictional limits, the limit in relation to life insurance, as I recollect, is actually considerably higher than $100,000 and income protection is lower. It is a matter of judgement and trying to reach some consensus as to what the general financial products limit is. There is a range of views.

Senator SHERRY—But can you appreciate, from a consumer's point of view, the difficulty for a consumer? To have different limits, and in this case a limit that has remained fixed by FICS for some time, is now viewed generally as being out of date. I frankly do not think any consumer, before they actually go to FICS, would even be aware of FICS—

Mr Cooper—Probably not.

Senator SHERRY—or indeed those limits. You think that would be a reasonable thing to say?

Mr Cooper—Across the broad landscape of consumers, yes, that is probably right.

Senator SHERRY—Yes. I go to another consumer protection issue, the issue of professional indemnity insurance. Has ASIC had any involvement? If so, could you outline that involvement in the development of the professional indemnity insurance regime for financial planners that is currently under consideration?

Mr Cooper—I will let Mr D'Aloisio answer that question.

Mr D'Aloisio—As you know, the requirement for AFS licensees is to have compensation arrangements in place. That requirement has been pushed out to 1 July 2007 so that the government can consult and finalise the regulation. That draft regulation was put out for consultation by Treasury on 2 November 2006. It looks at requiring licensees to hold adequate PI insurance, leaving it to them and the industry to work out what is adequate. Treasury, we understand, has received submissions on the draft regulation and is considering those submissions with a view to making a decision on that regulation in time for it to come into effect. Our role has been to work with the industry and to assist Treasury in analysing the PI insurance market and looking at the workability of those arrangements.

Senator SHERRY—Just to go back to the issue of the licensing, planners have been through the licensing process, and we have discussed that on previous occasions. Some have no PI insurance or some do not have sufficient PI insurance. How do you propose to deal with this matter, having already licensed the planners?

Mr D'Aloisio—The requirement is that they have compensation arrangements in place, so it is part of the licence condition. They need to be in place and ASIC really needs to determine what 'adequate' is. The regulation actually says: if you have adequate PI cover, that is adequate compensation arrangement, so you meet the term of your license. The issues are really very much around what the PI cover will cover, and is that cover adequate for the sort of bad advice or problems that a financial planner could get into? How would it work? Would it cover things like fraud and other misconduct? They are the issues Treasury is assessing and consulting on. We ourselves are looking at that issue because at the end of the day we

administer the regulation that says whether or not we are satisfied that adequate compensation arrangements are in place by the particular licensee.

CHAIR—Why are those sorts of generalities not clarified at the point of licensing? I take it that what you are saying is that the argument was about the quantum, not the fact that there has to be some insurance. Are there any guidelines given as to what sort of things are going to be deemed to be adequate?

Mr D'Aloisio—At the moment, as I understand it, we are working on adequate compensation arrangements. The current adequate compensation arrangements enable ASIC to look not only at PI but to look at other things that licensees have in place.

Senator SHERRY—I think the difficulty was that it was anticipated that by the time you had the licensing process of planners completed there would be a PI insurance regime of some description, and it was not in place. That was not ASIC's fault. The problem is that this matter, certainly from my perspective, is now almost six years in the finalisation. The process effectively overtook your licensing process, didn't it, Mr Cooper?

Mr Cooper—It did, but I think it is well recorded that really it was in effect a market failure problem brought about by the collapse of HIH and other factors at the time that the legislation was passed into law. It did not take effect until 2004, but in 2002 when the FSR changes were legislated there really was no properly functioning PI market out there to which the licensed planners could be sent in order to get appropriate insurance. That situation has pertained for some time. Now here we are in 2007 and the view is that there would be products out there that would go some of the way to providing a solution.

Mr D'Aloisio—I wish to clarify my previous answer. In fact, I gave a wrong answer in the sense of the operation of the existing regime. The existing regime was in fact granted relief from the condition to have adequate compensation arrangements in place to the licensees until such time as this regulation comes into effect. I think what I had said was that we were looking at whether they had existing arrangements in place. That is not correct. The licensees do not.

CHAIR—Senator Sherry, do you want to follow that up or are you happy with that?

Senator SHERRY—Yes. Developing this issue, when there is a conclusion to the PI insurance issue, you have taken the approach of 'adequate compensation regime in place', and I am sure this will be resolved at some point in time. Would it then require ASIC to examine the actual level of PI insurance, given the circumstances of a planner or a dealer group, if it were compulsory? Because it is not just having PI insurance. I would contend it is actually the level of PI insurance which is just as important.

Mr D'Aloisio—That is right. You have to look at adequate compensation, so it would have to be an adequate cover. I think that is part of the consultation process that is going on. If you look at other industries—and PI insurance is something that is common in other sectors such as accounting, law and so on—one of the things that you could look at is whether or not some form of industry policy or industry approach to it could develop where levels are set at an industry level to make that issue a bit easier to administer. But you are right: at the end, we as ASIC would have to take a view on whether the particular PI policy for the particular planner

is adequate in terms of level. We would hope that there would be some industry practices that would assist that.

Senator SHERRY—We have discussed the position of accountants giving tax advice in the space of self-managed superannuation funds. Has ASIC given any consideration to the form type level of compensation in respect of accountants, where they are dealing with self-managed superannuation funds, who will not be covered by this regime, whatever it may be?

Mr Cooper—If they are operating in the so-called accountants exemption, no, we have not. I suppose that is because there is already a whole regime of regulation in relation to being an accountant and having insurance, much like there is in relation to solicitors. Therefore it would seem futile. Firstly, we do not have any power; and, secondly, it is doubling up on insurance policies that are already in place.

Senator SHERRY—The point of my question is that, for a person who establishes a self-managed superannuation fund—and I understand it can be on the advice of either a planner or an accountant—

Mr Cooper—Or off their own bat.

Senator SHERRY—Sure. But where advice is provided, accountants and planners are very active in that space. To resolve finally the PI insurance issue for the planning sector and for the same financial instrument not to be clear about self-managed superannuation funds—which are very, very significant, as I am sure you know, in terms of number and asset size—

Senator MURRAY—And they will double the assets.

Senator SHERRY—That is right. But to not have it clearly understood what the compensation regime is in terms of accountants who operate in that space, it will become quite difficult for a consumer if for some reason something goes wrong.

Mr Cooper—You are working under the assumption that the accountants would not necessarily have PI cover.

Senator SHERRY—Adequate PI cover, perhaps, in some cases or some may not have PI cover.

Mr D'Aloisio—Certainly the practice in the accounting industry is to carry PI cover, so I guess we would want to look at the magnitude of that risk because if there is a gap there we should have a look at it and see if it is between the accounting bodies or ASIC to see how to handle it. With the experience of accountants having PI cover and bringing this regime in, I guess probably we would be working on the assumption that there would not be a gap, but I think what you identified is something to have a look at, and we will do that.

Senator SHERRY—I think the difficulty is, as Mr Cooper has alluded to, that accountants have a carve-out, as he has referred to it. That is another policy issue. But for a consumer where something goes wrong, having entered an SMSF through a planner or through an accountant, I do not think they are going to draw the distinction of lack of or no PI cover where it may exist in the accounting area. I do not know but I suspect it will become an issue.

Senator MURRAY—Particularly since the quantum of assets is likely to double because of the simplified super system that is coming through. It is not just an increase in the numbers

of SMSFs—which is very high, I understand: 20,000 to 25,000 a month happening right now—but it is the huge lift in asset quantum which will occur.

Senator SHERRY—We can watch that space. There are a couple of matters I have not raised before that are fresh areas that have come across my desk. The issue of time share is not something that we have discussed. My understanding is that ASIC do have regulatory authority in the issue of time share.

Mr Cooper—We do.

Senator SHERRY—You issued a media release, I note, on 8 February, last Thursday. Could you just indicate to me the ramifications of and the reasoning behind the amended policy statement that was issued on 8 February?

Mr Cooper—I am aware that we have been engaged in lengthy consultation. We put out a consultation paper in May 2006. The sorts of issues that we have been consulting about relate to two main areas: cooling-off period that ought to apply to a time share product, for want of a better word, and the appointment or anointment, if you like, of a supervising or dispute resolution body.

Senator MURRAY—There is a third issue in there and that is the sale of shares in a time share.

Mr Cooper—Yes. I must admit I do not have the specific—the release was last week exactly; I did not notice the release being made, but those are the three issues. I understand that we have decided to increase the cooling-off period that applies in relation to timeshare interests but I am not across what decisions we have made in relation to the other issues.

Senator SHERRY—Is there an external dispute resolution where the internal dispute resolution does not work?

Mr Cooper—That is a tricky question.

Senator SHERRY—It was not meant to be a tricky question. I am just interested.

Mr Cooper—When there is a particular party that wants to provide the external dispute resolution scheme and no other, you get yourself into a difficult loop, and that has been the issue in relation to time share. The sort of industry body, if you like, which is ATHOC, has always seen itself as the kind of supervisory/dispute resolution body.

Senator SHERRY—In the case I referred to earlier, in the banking community—I know banks all have their own internal disputes processes—there is an external dispute process if, at the end of the day, the parties are unhappy. That is something to keep an eye on.

CHAIR—There is no one mechanism to transfer that from an internal to an external, I take it?

Mr Cooper—Not in the absence of a party that is prepared to take on the role. I suppose the science of external dispute resolution has an element of voluntariness and consensus, and we do not have a hard-edged legislative solution to external dispute resolution like you might have in the UK, where there is a statutory body that takes up the jurisdiction, it makes the decisions and so on. We are in a sort of voluntary position, which in most industries, although

it is an evolving thing, works quite well. In the timeshare industry, it is less substantial obviously than the banking sector and so the number or—

Senator SHERRY—Or probably any other sector.

Mr Cooper—the availability of willing organisations that are prepared to do this is slender.

Senator SHERRY—But in terms of dispute resolution, conceptually isn't it best practice to have an internal disputes process within an operator, an attempt to resolve disputes at that level, and if that does not work there is an external disputes process—no matter how that is organised—to which an individual can then go.

Mr Cooper—That is the model as it works in most sectors of the industry. I suppose in this case the landscape is that there are only 30 operators, and the data we have shows in 2006 there were no complaints whatsoever made to ATHOC. In previous years I think there were two complaints relating to very small amounts of money. A timeshare interest, when you think of the financial services landscape and all the interesting things that are in it, is effectively an interest that gives you time at a holiday destination. It is at the far end, if you like, of the financial products spectrum. It is not like having a deposit in a bank account or what have you.

Senator SHERRY—Yes.

Mr Cooper—Disputes about those products really do not sit comfortably when you are talking about disputes we were talking about a minute ago about bank statements and those kind of routine things. So we really are at the fringe, and I suppose the view that ASIC has taken is that in this instance it is not necessary to have an external dispute resolution body.

Senator SHERRY—I have another area I have not raised with you before: pistachio growers.

CHAIR—Senator Murray might go nuts if we change topics! We might go to questions from Senator Murray first.

Senator MURRAY—I want to go briefly to James Hardie. On news.com.au on 2 February 2007 there was a story by Ean Higgins headed 'Hardie vote will beat ASIC deadline'. I will quote the second paragraph:

> The Australian Securities and Investment Commission has until February 15—

that is today—

> to start criminal prosecutions or civil suits against the company over the creation of its underfunded asbestos compensation trust six years ago.

That predicates that you would want to or might. The simple question is: have you, will you, or is that game over?

Mr Cooper—The answer to that question is that we have commenced proceedings. This commenced yesterday evening with the formal filing and serving of process out of the Supreme Court of New South Wales and the service of the various defendants in the proceedings. That was within the time limit that you mentioned. James Hardie Industries NV made a market announcement to the ASX this morning in relation to the proceedings.

I should clarify that they are entirely civil penalty proceedings and that the range of matters and the range of defendants is complex. If it would assist members of the committee we could hand up copies of our media release that explains in general terms what we have done but also maps out the issues that the proceedings relate to. Then, perhaps somewhat helpfully, via a tabular explanation it explains what relief we have sought against the various parties, and then looks at the various matters that we say are breaches of the law and against whom we have taken the proceedings. So we have sought to explain.

The statement of claim itself is more than a hundred pages long. It is a very difficult document to get across so perhaps we will just hand up that media release. If members would permit me, I will perhaps go through what the case is about. Principally, it relates to the manner in which, in 2001, James Hardie Industries Ltd explained the creation of the Medical Research and Compensation Foundation to the market and certain events that followed on from that initial announcement. It divides into a series of events that happened over the life of the company.

As I said, after that initial announcement and a subsequent failure we were led to disclose the existence of a document that related to the establishment of that foundation and the ultimate separation of the James Hardie business from that foundation. There is a subsequent information memorandum that related to a scheme of arrangements—again, a very complex scheme of arrangements for the restructure of the James Hardie Group—the ultimate effect of which was to move the substantial operations of the company to the Netherlands. We also allege that a series of presentations that were made by one of the senior executives to institutional investors in 2002 were misleading. Lastly, we allege that certain partly-paid shares that were intended to be in place to meet liabilities of James Hardie Industries Ltd were cancelled in a manner that failed to meet the appropriate standards of care and diligence, and also was not properly disclosed to the ASX.

I should say that one of the most important aspects of the proceedings we have taken is that it is ASIC's intention that it not in any way affect the compensation arrangements that have been only very recently voted upon by shareholders. In no way are our proceedings intended to upset that very important development, but we are looking at the conduct of various members of the group—executives and directors—going back some years now to February 2001 and beyond.

I should make a couple of observations about the investigation, which obviously has been a very intensive investigation following on from the special commission of inquiry—the Jackson inquiry—that occurred in 2004. Late in that year we started our investigations following the issue of the report in October 2004. The investigation has involved complex corporate arrangements in three separate countries: the US, the United Kingdom and Australia. Believe it or not, we have searched through 348 billion documents—that is not a typographical error—largely company emails, through a complicated searching and scanning system. We have conducted 72 examinations of people involved in these matters and issued some 284 notices to obtain evidence.

If members of the committee want to move on or deal with other matters, please stop me, but I thought I could explain on the record the various events and actions of the various parties involved, and also the likely penalties and so on involved in the proceedings. I will

make one very important point about one aspect of this issue. This is complicated, but we have sought, as part of the proceedings, a mandatory injunction that James Hardie Industries NV—that is the Netherlands company—enter into a deed of indemnity in favour of the old James Hardie Industries Ltd, which is now called ABN 60, for a substantial amount of $1.9 billion to cover the liabilities of James Hardie Industries Ltd, and to ensure that that company remains solvent, but only until all of the conditions precedent to the complex compensation arrangements that have just been voted on fall into place. So it is really just a protective part of the proceedings. As I said, we have no intention of directly or indirectly upsetting those compensation arrangements but as part of our proceedings we have sought that indemnity. We will not pursue it in the event that all of the conditions precedent to the funding are met.

Senator MURRAY—It is a safety net?

Mr Cooper—It is a safety net.

Senator MURRAY—I must say I thought your timing—it was no doubt deliberate—was very clever, to lay charges after the shareholders' vote, because it might have confused matters somewhat if that had come before.

Mr Cooper—Certainly, it was very important to make sure that we saw that vote occur before we did anything. The other reason was obviously that there was still an enormous amount of work going on, and we wanted to ensure that all civil proceedings were brought at the same time. Those were the reasons.

Senator MURRAY—Mr Cooper, you mentioned that 100 pages constitute the initial 'brief'—I suppose that is how you would describe it. I have heard it said elsewhere that size does not matter but I suspect that 100 pages means a lot of cost ahead of you in terms of prosecuting this matter. Does it imply that you will need more funds from the government to pursue this to its conclusion, or are you adequately resourced, both in terms of staff and litigation funds for this?

Mr Cooper—Just in general response to that question, we do currently have adequate funding and adequate funding going forward, we believe. So far we have spent, in the course of the investigation since late 2004, some $9.8 million, and we received total funding over a three-year period of some $12.7 million. That is sort of going backwards and going forwards. In addition to that, we have, of course, our contingency fund to dip into in the event that that is insufficient.

Senator MURRAY—Without being too specific about individuals, but talking about a class of individuals, because this is a multinational, do you have any fears that individuals might skip the country and would need some kind of restraint on their movements?

Mr Cooper—Some of the defendants are in fact already out of the jurisdiction, being in places like the United States and, in one case, Hong Kong, but I think it is a bit early in the proceedings to talk about that. We have been at pains, of course, to make sure that some of the individuals involved are properly served before they read in the newspapers or read transcripts of Senate estimates about these proceedings. Certainly it does involve individuals in a range of jurisdictions.

Senator MURRAY—I referred to the Wild West earlier and, being a Western Australian, I would prefer it to be tamer. You will recall that over the time of those corporate scandals of the 1980s, which were prosecuted in the late 1980s and 1990s, numbers of people from the west and, indeed, from the east ended up permanently overseas. A lot of them would have been subject to civil not criminal action. It was a monetary issue rather than an incarceration issue for them. I would assume, when you are talking these kinds of numbers, that those same circumstances might pertain. That is why I asked the question.

Mr Cooper—It is very hard to speculate on that and I would not want to.

Senator MURRAY—The question is whether or not you are being prudential. You are not going to let them slip out of your fingers if there is a danger of that, surely?

Mr Cooper—I suppose it is really worth stressing that these are civil penalty proceedings.

Senator MURRAY—Yes.

Mr Cooper—We are seeking a range of declarations about conduct. The civil penalties are, in effect, a fine from the government. In relation to compensation, because of the complexities of the compensation for the asbestos victims, we are not seeking normal civil monetary compensation against the directors, but in a number of the cases we are seeking for the court to disqualify the directors from managing a corporation. It will be up to the court to decide whether or not it seeks to do that and for what duration. It really is not so much a normal civil monetary matter—if I am making myself clear.

Senator MURRAY—Except it would be open for the company or the corporation to join an individual to the action if the corporation decided that that individual officer should be jointly liable. I will not pursue any more questions because otherwise it will get into detail. That is all I have on James Hardie.

Senator WONG—I apologise, Mr Cooper, if, because I was in another hearing, I cover areas that you have already dealt with. I am interested in knowing ASIC's view of the legal position in relation to companies or related body corporates for indemnifying officers and directors in relation to proceedings such as those in James Hardie.

Mr Cooper—Are you asking a specific question about Hardie or a wider question?

Senator WONG—Yes. Can Hardies indemnify under the law its officers in terms of the proceedings against them?

Mr Cooper—I think the company has made a statement about indemnification. In a release this morning by James Hardie Industries NV, which is the Netherlands company which is listed on ASX, it does say:

> The Company has historically granted indemnities to certain of its directors and officers as is common practice for publicly listed companies. The Company's articles of association also contain an indemnity for directors and officers. In addition, the Company has granted indemnities to certain of its former related bodies corporate (including ABN 60 Pty Limited)—

which is the old James Hardie Industries Ltd—

> which, among other things, may require the Company to indemnify those entities against indemnities they in turn have historically granted their directors and officers.

That is the company's position in relation to indemnities.

Senator WONG—Can you give me ASIC's view as to the effect of section 199A and whether that section prohibits the sort of indemnity that is being described?

Mr Cooper—I would be speculating, because I do not have the details. That is expressed in very general language.

Senator WONG—What does that section prohibit?

Mr Cooper—Effectively, the company cannot indemnify you for breaches of your duties to the company and other matters like acting in bad faith, and so on. In layman's terms, you can have the protections from normal negligence and other liabilities that you are subjected to in corporate life, but, if you have done the wrong thing vis-a-vis the company, you cannot be indemnified.

Mr D'Aloisio—It is a good faith indemnity. Could I add that the remedies in relation to the directors are in relation to disqualification and pecuniary penalties. While there might be some argument about indemnity in relation to pecuniary penalties, there could not be in relation to disqualification.

Senator WONG—There could not be which way?

Mr D'Aloisio—Well, you cannot be indemnified against disqualification.

Senator WONG—No; correct.

Mr D'Aloisio—I am sorry if I was not clear.

Senator WONG—At this stage is it unclear whether the current Corporations Law would prevent Hardies from indemnifying these officers?

Mr Cooper—Yes, I suppose because the entity we are talking about is a Netherlands entity.

Senator WONG—So if there were a view that no indemnity should be permitted, would there need to be an amendment to the terms of 199A?

Mr Cooper—That is entirely a policy matter.

Senator WONG—I am not asking whether there should be; I am asking whether there needs to be in terms of the scope of the section currently. The scope of the section, as I understand your evidence, does not extend to a Dutch-registered corporate entity.

Mr Cooper—That is on the one hand. That is a jurisdictional matter.

Senator WONG—Correct.

Mr Cooper—What we are alleging against the individuals is that they have breached their duties to the company, so they cannot be indemnified for that by the company.

Senator WONG—Even if the Dutch entity sought to do that?

Mr Cooper—That is the jurisdictional side, yes.

Senator WONG—Correct. Let us get to that point.

Mr Cooper—I do not want to get into a whole lot of international law stuff, but I think that what 199A says at the moment is right. That does not need changing, because it will not allow you to use the company's money to protect you when you have done the wrong thing to the company. But we cannot pass a law that binds Netherlands companies.

Senator WONG—The fact that Hardies is a Netherlands company may mean that they can, in effect, indemnify their officers in relation to these actions?

Mr Cooper—It may, but that is completely speculative. I do not know the answer to that.

Senator WONG—What about the payment of legal costs associated with defending these actions? Is that prohibited? If Hardies were registered in Australia, would this section prohibit them from paying legal costs for the defence of these actions for officers and past officers?

Mr Cooper—I will take that one on notice. I do not believe it would prevent it, but I think we should take that one on notice.

Senator WONG—Then you have the added problem that it is a Netherlands-registered company.

Mr Cooper—Of course, insurance plays a part. We are talking about indemnification here, but the chances are that there will be numerous directors' and officers' insurance policies as well.

Senator WONG—I note that, in your press release today, you made reference to the potential impact of these proceedings on compensation agreements. I note that ASIC has indicated that it does not believe that the proceedings would impact upon the quantum available to asbestos victims and that, in the event that it did, you would consider amending the proceedings—a position which I think is the appropriate one. Obviously the important issue here in many ways is to ensure that the compensation and justice for asbestos victims and their families is not undermined. If the company did seek to pay legal fees to cover costs associated with defending this action or to indemnify these officers or past officers in any other way, that potentially could impact upon the compensation arrangements, could it not?

Mr Cooper—I suppose potentially it could.

Senator WONG—Has ASIC considered or will you consider what action you might be able to take to ensure that did not happen?

Mr Cooper—This is a very large and complicated case. Breaches of the Corporations Act by the various entities and their officers are our field, and that is exactly what the proceedings are about. Of course, we have been mindful about the collateral issues relating to compensation. The issue you have raised is collateral to that but nonetheless potentially relevant.

CHAIR—One way of addressing that is to refer to the media release. Perhaps it might be useful to Senator Wong: 'However, should it emerge that any aspect of the action in relation to JHIL does adversely impact the compensation, the regulator will consider amending this aspect of the proceedings.'

Senator WONG—Yes, I just referred to that.

CHAIR—Yes, but I do not think we have had an explanation yet as to how that may address it.

Mr Cooper—Quite.

Mr D'Aloisio—We have that as a broad proposition. What we are saying is that we now have to look at the detail of how that would play out and the issue you have raised is something we will look at further.

Senator WONG—In terms of the international law issues, if there is no way the Australian jurisdiction can actually prevent the Dutch company from doing this, that would be a matter that would need to be dealt with in the Netherlands jurisdiction; is that right?

Mr Cooper—We are speculating about matters that really are not—

Senator WONG—I am just trying to clarify. It is a very clear position, certainly from where I sit, and I suspect that all senators would agree. It would be most unjustifiable for the company to impact on the compensation arrangements in any way by seeking to indemnify or pay the legal costs of the officers or past officers which are the subject of ASIC proceedings. I am trying to clarify exactly what the position is in respect to Australian law, and you have given some answers on that. If this issue needed to be dealt with in terms of the Netherlands company, are you indicating to the committee that we would actually have to look at what legal action or remedies could be taken in the Netherlands jurisdiction to prevent that from happening?

Mr Cooper—Yes, but without saying that we would necessarily do that.

Senator WONG—I appreciate that.

Senator MURRAY—How would you know—that is my question.

Mr Cooper—Well, indeed.

Senator MURRAY—If the company concerned does it privately—I do not know what the Netherlands rules are in terms of disclosure of such matters in its reporting requirements—you might not know that they have given an indemnity. That is correct, is not it?

Mr Cooper—If it is perfectly proper under Netherlands law then that may well be the end of the story. I think we are speculating.

CHAIR—We are speculating.

Senator WONG—Sorry, Mr D'Aloisio, did you want to say anything else?

Mr D'Aloisio—No, I have nothing to add.

Senator WONG—Senator Murray does make a good point, though. Would any current Australian law require disclosure of that fact, if the Netherlands company chose to provide such indemnity?

Mr Cooper—Certainly Australian companies disclose in their accounts whether directors are indemnified. In relation to a Netherlands company, we would have to take that on notice. The company has already made a market disclosure relating to the various indemnity relationships.

Senator WONG—The document you were reading off was the market disclosure?

Mr D'Aloisio—Yes, it was.

Senator WONG—Are you able to provide that to us?

Mr D'Aloisio—This was taken off the ASIC website. This is James Hardie.

Senator WONG—I would not mind having it tabled, if that is possible.

Mr Cooper—I will just make sure I have a full copy.

Senator WONG—Which entity made the disclosure?

Mr Cooper—The Netherlands entity, which is the listed entity, James Hardie International NV.

Mr D'Aloisio—It is the listed entity here, as it is a foreign company in Australia, with ASX. I think the thrust of what you are putting is something we will look at more closely. I think we understand what you want us to look at.

Senator WONG—Thank you very much.

Senator MURRAY—I have one quick question for you, Mr Cooper, before I leave this session. You would be familiar with what is known as the practice of shorting in share market dealings. It is also apparent that there are rumours or stories that brokers in shares have been known to lend their shares for voting. Are you aware of those stories?

Mr Cooper—Yes.

Senator MURRAY—Are they illegal or does ASIC have any issue with such practices?

Mr Cooper—There are rules about short selling. I suppose the history goes back to the nickel boom.

Senator MURRAY—I am not talking about short selling, because short selling is selling a share which you might or might not have. Lending your shares means giving your shares to someone else to exercise the vote without going through a proxy system or anything of that sort.

Mr Cooper—Share lending is generally to do with market trading, so the practice of lending people shares for voting purposes is not something that I am aware of from a regulatory point of view that has ever been a concern.

Senator MURRAY—Can I alert you to it? The allegations reaching my ears are that some brokers lend shares for voting purposes once or multiple times to corporate raiders and/or target directors to manipulate voting in situations where there is an acquisition target underway, and in return they earn a commission once it is satisfactorily done. I do not have enough specifics, but the source is a good one, and I would suggest to you that, if that results in the manipulation in the market in a way which is not public in the way we understand a good functioning market operates, it would be a worry, especially if it was a widespread practice.

Mr Cooper—We will talk to ASX, as well, and we will have a look at it.

Senator MURRAY—Thank you.

Senator WONG—Mr Cooper, I suppose one of the questions I did want to ask about Hardie concerns what you said in your statement—that you would consider amending the proceedings in circumstances where the proceedings impacted upon the compensation arrangements. Are you able to give us any more information about what that means?

Mr Cooper—Yes. I think it is important. It really relates to the claim that we have that the Netherlands company indemnify the former Australian listed company. In other words, it is a means of replacing the partly paid shares that were cancelled, and that is in place purely pending the finalisation of the conditions precedent to the compensation arrangements. At that point, we would amend the proceedings by not pursuing that part of the action.

Senator WONG—If you had to choose between getting a successful outcome in the proceedings and impacting on the compensation arrangements for asbestos victims, you would prefer the latter, preserving the compensation arrangements?

Mr Cooper—It is just too early. I really do not want to—

Senator WONG—I am trying to get a sense of to what extent it is a priority to preserve the compensation arrangements.

Mr Cooper—I think it is far too early to be speculating about the likely quantum of the—

Senator WONG—I did not ask a question about that.

Mr Cooper—No, but where you are taking me is that a large indemnification bill will be somewhere in the system, and if we continue doing what we are doing, that bill will land in the Netherlands in a way that impacts on the ability of that company to meet the compensation arrangements.

Senator WONG—Sorry, I was not actually referring just to indemnities. I understood that this is a broader proposition.

Mr Cooper—I think it is important to note it is civil penalty proceedings, so in relation to the individuals we are seeking the civil penalty regime pecuniary penalties, which are a maximum of $200,000 per breach for each of those individuals. Because of the compensation matrix, we are not seeking unspecified general damages because the compensation arrangements are there. Yes, there will be an expense in conducting the proceedings. There may be, if the court decides, pecuniary penalties. That will all cost money, but there is not a vast amount of general damages in compensating the company involved.

Mr D'Aloisio—I will put it another way. Our concern was that, if the compensation arrangement for some reason had fallen over, we had a fallback action whereby we could see if we could establish the $1.9 billion back so that James Hardie would have the funds. We said that it would be dangerous to leave that claim running if the compensation arrangements become unconditional. In relation to that, we said we would drop that action. We would not have dropped it if the agreement had not become unconditional. As to whether there are other things that might impact on the compensation arrangements in this case, from our consideration to date, subject to the indemnity issue, we are not seeing that. But what we have said is that we want to look at that. What you would be inferring from that is that having the continued compensation arrangements working and providing relief to asbestos sufferers is of paramount importance.

Senator WONG—Asbestos victims can have confidence in ASIC having their compensation arrangements' preservation front and centre?

Mr Cooper—It is too early to be making commitments like that. I think we have sought to articulate the principle involved here in the media release.

Senator WONG—What confidence can asbestos victims have?

CHAIR—Senator Wong, it is a bit hard for this officer to speculate.

Senator WONG—That is true. I was reasonably comfortable with the response Mr D'Aloisio gave. Mr Cooper, with respect, I think you took a more conservative position—a more guarded position, some might say.

Mr Cooper—I would not like anyone to be—

Senator WONG—Are the compensation arrangements of paramount importance or not?

Mr Cooper—That is a very difficult question. We have sought to do everything that is within our mandate and our jurisdiction to protect and preserve the compensation arrangements, including delaying the proceedings beyond the shareholder vote, specifically building in the ability to withdraw from the $1.9 billion proceedings. If you are asking me to commit the agency to withdraw major parts of the action or—

Senator WONG—I did not use the word 'withdraw'.

Mr Cooper—It is a very complex matter that is going to go over a number of years. We have our regulatory job to do. We are acutely mindful of the value of the compensation agreements. I think that is where we would like to leave it.

Senator WONG—That is fine. That was a straw-man answer, with respect. I did not suggest 'withdraw'. I asked in terms of how you approached this action whether or not Mr D'Aloisio's words 'paramount importance' were indicative of ASIC's view—that the compensation arrangements were of paramount importance.

Mr Cooper—It depends what you interpret 'paramount importance' to mean. In every respect we have sought to preserve those arrangements.

CHAIR—Mr Cooper, in your press release, both implicitly and explicitly, I take it that you have made it clear that you will be taking action to maximise the potential of the lack of diminution of potential compensation funds. I assume that is implicit in the last paragraph of your letter. You will be doing whatever you can to maximise the chances of having the fullest compensation package available?

Mr Cooper—Absolutely. That is quite so. But, Senator Wong, in typical fashion, has cleverly raised the question of indemnification. At the moment—

CHAIR—I am sure Senator Wong is not going to be hurt by that, but I do not think it is appropriate.

Mr Cooper—Let me go back—

Senator WONG—I am not sure what motives you are attributing to me.

Mr Cooper—No, you are wanting to know what the effect of what we are doing is. The point I am making is that we are not seeking monetary compensation against the fund. We are

not seeking general damages. We are in every way running these proceedings in a way that does not affect the compensation at all. You asked us initially who is indemnifying all of these directors and where will that bill end up. It is just a natural consequence of our taking proceedings against the directors that legal costs and potential indemnification will result. If you are asking me whether it is paramount that no dollar is taken out of the ability to pay compensation, and whether that is paramount over our taking these proceedings, I do not think I can commit the agency to say that compensation is paramount, if that is what you are asking me.

Senator WONG—In terms of the risk to the compensation arrangement, or the potential risk, you have indicated your position in relation to the partly paid shares, I think. That was one aspect, so can we set that to one side.

Mr Cooper—We can.

Senator WONG—Is it not the case that, at this point, you would assess the largest financial risk to the compensation arrangements to be an indemnity being granted?

Mr Cooper—We are not in a position to know the intimate financial affairs of the Netherlands company. We just cannot speculate as to ultimately—

Senator WONG—In relation to these proceedings.

Mr Cooper—Yes.

Senator WONG—In relation to these proceedings, you have dealt with a risk associated with partly paid shares in the manner that you have described. I accept that. In terms of these proceedings, would the greatest potential risk to the compensation arrangements be any indemnity the company might offer to these officers or past officers?

Mr Cooper—As a by-product of these proceedings—

CHAIR—I do not know whether the witness can speculate on this. There might be some other factors that we simply are not aware of at the moment.

Mr Cooper—I think we have conceded to you—and the company itself has talked about indemnification—that that will result in a monetary amount of an unknown sum. You put to us whether that will potentially affect the ability of the company that is paying that amount to fund the compensation. I think we have conceded that the answer to that is 'yes'. Beyond that, I do not think we can say anymore.

Senator WONG—Mr Cooper, I do not think anybody would disagree—maybe some people would but most people would not—that it is absolutely appropriate for these officers to be held to account for whatever their actions meant. Would you not agree with this: shouldn't Hardie's victims come first?

Mr Cooper—In an overall social context the answer to that is: absolutely so. We are a corporate regulator. We are charged with administering the Corporations Act, which does not relate to compensating asbestos victims. I think—

Senator WONG—I am sorry. Could you say that again?

Mr Cooper—No. The Corporations Act—

Senator WONG—I actually just did not hear what you said.

Mr Cooper—We are a corporate regulator.

Senator WONG—Yes.

Mr Cooper—We are charged with administering the Corporations Act. The compensation of asbestos victims does not flow out of the Corporations Act. Of course we are aware of the benefits. You will see from these materials that we have done everything we can within our powers to preserve the compensation arrangements. Nonetheless we have to do our job.

CHAIR—I think it is very hard, Senator Wong, for Mr Cooper to speculate about what might unfold.

Senator WONG—I am not asking him to speculate about what might unfold. I am just trying to ascertain whether in terms of the approach that ASIC is taking the interests of asbestos victims are paramount.

Senator Minchin—I sympathise with your line of questioning, Senator Wong, but this is tending to put on the witnesses a demand for a value judgement. Their job is to enforce the law. If you are suggesting that somehow corporate law should be taking account of compensation payments et cetera, that is a matter for public policy debate. ASIC is there to enforce the corporate law. I think in your line of questioning you are asking them to make value judgements.

Senator WONG—Surely the government's position would be that the preservation of the compensation arrangements, which have been so hard-fought, is paramount?

Senator Minchin—That would be the general government view, but ASIC is the regulator required to enforce the corporate law. As a matter of public policy debate, it can be theoretically asserted that somehow we should step in or change the law or do something if there was a suggestion that the enforcement of corporate law was putting at risk the compensation. That is a public policy judgement and an appropriate subject for public policy debate. ASIC is the regulator required to enforce the law as set down by the parliament.

Mr Cooper—If it is any comfort, I can say on behalf of the agency that we have done everything, based on what we know now and based on what our duties are, to preserve those compensation arrangements.

Senator WONG—The ASX statement that you tabled from the company states:

The Company has historically granted indemnities to certain of its directors and officers as is common practice for publicly listed companies.

Do you agree that it is common practice?

Mr Cooper—Indemnification?

Senator WONG—Yes.

Mr Cooper—Yes, I would.

Senator WONG—In relation to proceedings such as those which have been initiated by ASIC?

Mr Cooper—Certainly in relation to legal proceedings that flow out of being a director or officer of the company, yes. We have discussed previously how section 199A works. In the context of an Australian company, there would be quite a big gap in relation to these sorts of proceedings, because the core allegation is a breach of duties to the company.

Senator WONG—That is my point. The company asserts it is common practice, but in Australia we have a section that prohibits it in certain circumstances.

Mr Cooper—I think the media release is put in very general terms. It cannot be determined from that exactly how far the indemnifications go.

CHAIR—It is a very general description of the practice.

Senator Minchin—Clearly they would be indemnities within the law. That is implicit.

Senator WONG—Is the government intending to do anything to ensure that these indemnities are not provided by the Dutch company?

Senator Minchin—I could not comment on that. I am happy to—

Senator WONG—Your point is that it is within the law, and our point is—

Senator Minchin—A statement like that by a company about what indemnity is provided I think you can assume would be implicitly within the law.

Senator WONG—The context is James Hardie.

Senator Minchin—Yes.

Senator WONG—Is the government intending to ensure that James Hardie, the Dutch company, cannot provide an indemnity to the officers who are currently under ASIC proceedings?

Senator Minchin—Mr Cooper has taken that issue on notice in relation to—

Senator WONG—No, I am asking the minister.

Senator Minchin—I am not the minister responsible. ASIC has taken that question on notice. I am happy to have a look at their answer and come back to you.

CHAIR—This is a jurisdictional issue potentially as much as anything else, and I do not whether Mr Cooper can—

Senator WONG—But that is—

Senator Minchin—Mr Cooper took the previous question on notice about the issue of that section and its implication or otherwise to a Dutch registered company.

CHAIR—Yes, that has been taken on notice.

Senator WONG—I am not asking the question as to whether it is possible et cetera. I am asking whether it is the government's intention to do all that it can to ensure that the Dutch registered James Hardie corporate entity does not provide an indemnity to those persons who are the subject of these ASIC proceedings.

Senator Minchin—I would not want to give an answer to that on the run. I am happy to get you an answer.

Senator WONG—Can I turn to working capital. There was a survey in *CFO* magazine by Ernst & Young showing that a quarter of the companies in the ASX200 have increased working capital levels over the last two years without an increase in earnings. To what extent does ASIC scope, consider or identify the increase in working capital levels without a corresponding or concomitant increase in revenue? Is that an issue you are addressing in any event?

Mr Cooper—We have an annual program where we have monitored in very close detail roughly a third of the annual reports of each listed company in Australia. We do not tell people who falls into that third and who does not, but we do that work from year to year. As part of that, obviously, we would be looking at issues around solvency and working capital in some cases. We also have an ongoing insolvency coordination project, which again, using data like the one that you have talked about, we would go and call on companies where we had reason to believe that they had solvency problems.

Senator WONG—This is not only in the context of insolvency, though.

Mr Cooper—Not having enough working capital—

Senator WONG—No, it is the other way around. The *AFR*, for example, reported this particular survey with the headline 'Slack working capital a red flag to private equity'. That is a good headline. The issue is where you have an increase in working capital but there is no corresponding increase in earnings. Is that an issue you are aware of and, if so, what activity is ASIC undertaking in respect of that?

Mr Cooper—I am certainly aware of that issue right across the world. In the US, the statistic is that their top companies have 20 per cent of every dollar of market capitalisation sitting in cash in the bank. This is not a uniquely Australian issue. It is a market condition. It possibly opens the door for private equity. That is how markets work.

Senator WONG—That is not an issue that ASIC is engaged with?

Mr D'Aloisio—We have resources, I think, as Mr Cooper said, in relation to issues of solvency. Clearly that is of particular concern. The actual return on capital and fair return on capital is really for the market. I would have thought there were enough analysts out there of the listed companies and enough public pressure that probably ASIC's resources would be better directed to the insolvency issues and the Westpoint type issues. It would be dangerous for regulators to try to prescribe what is a fair return on capital in a broad sense.

Senator WONG—I was not suggesting that it be prescribed. I was just wondering whether there was in engagement with the issue.

Mr Cooper—Not specifically, no.

Senator WONG—There is one other issue, and this is simply to clarify exactly what the position is. You might recall in December the front page of the *AFR* read 'ASIC to monitor market for insider trading', and there was a suggestion:

The Australian Securities and Investments Commission will spend $30 million to build a massive new share-trading surveillance system to detect insider trading and market manipulation, undercutting the Australian Stock Exchange's markets supervisory role.

I understand from my discussions subsequent to that that was not quite the case. I was just wondering if you can perhaps clarify that issue.

Mr Cooper—Yes, I think it was correct other than the fact that the amount had been inflated by some 30 times. But otherwise—

CHAIR—It is all accurate?

Mr Cooper—Yes, indeed, and a good story as well.

Senator WONG—Presumably you are not seeking to undercut the ASX?

Mr Cooper—Certainly not. There would be very no sense in our doing that. That is not our desire. It was merely a story about us purchasing some surveillance software that got very muddied in the Christmas festivities or something.

Senator WONG—You purchased some surveillance software and the purpose is correct—monitoring of insider trading et cetera?

Mr Cooper—Indeed.

Senator WONG—How much was spent on that?

Mr Cooper—I believe the figure was less than $1 million.

Senator WONG—How was that interacting with the monitoring processes within the ASX?

Mr Cooper—I suppose, and quite contrary to what the article was conveying—that we were competing over the same space or lacked coordination—the idea is obviously that we work in harmony with what the ASX does.

Senator WONG—So is it duplicating the ASX's internal monitoring systems?

Mr Cooper—No, it is not doing that. It is perhaps looking at it from a slightly different direction. I suppose we would look at a lot less in number. As I understand it, the ASX would look at a relatively high volume of activities in any particular day because it is the primary market regulator, whereas we would carry out quite different work, sometimes thematically looking at a particular sector and just in a different way from the ASX but not in a way where we would suddenly emerge as the new surveillance regulator at the expense of the ASX, which was I think part of the gist of that story.

Senator WONG—Will there be any further expenditure in relation to this program or this activity?

Mr Cooper—Not that specifically.

Senator WONG—Well, market monitoring?

Mr Cooper—We were funded in relation to broader intelligence. I suppose a considerable amount of our business is about what we call surveillance—looking at things. ASX market activity is one of those things. The general collection of use of intelligence across a wider landscape is another. Specific surveillance of industries such as financial planning and so on is another. This is just one part of a series of things that we do.

Senator WONG—Are there any additional software purchases planned or have any been undertaken since that $1million worth?

Mr Cooper—No, not that I am aware of.

Senator WONG—I have a question in relation to disqualification of directors pursuant to 206D, which is the section that enables you to apply to a court in circumstances where someone has been an officer of two or more corporations that have failed.

Mr Cooper—Yes.

Senator WONG—Some complaints about the operation of this section and the extent to which it was effective and acted upon was an issue raised in the insolvency inquiry that the parliamentary joint committee undertook a couple of years ago. I do not want to name the particular person involved, but I have certainly been approached by some people who have identified a particular director of a cleaning company who has been associated with two or three failed companies with a significant number of entitlements owed to employees and also to other creditors. I understand the investigation into this individual is still active within ASIC. Can you clarify for us what guidelines, procedures and protocols are associated with ASIC's investigation of the matter and its determination on whether or not it seeks to apply to disqualify under 206D(1)(a), which is the two corporations or more provision.

Mr Cooper—That is a pretty specific and detailed question, so I will have to take that on notice. I will point out that that is not our only banning avenue. In fact, in the 2006 year we banned some 40 directors for a total of 144 years specifically in that area. I will certainly take that question on notice.

Senator WONG—Are you able to provide us with an indication of which guidelines, policies, criteria et cetera you associate with your decision-making with your discretion under sections 206D and 206F?

Mr Cooper—We would be delighted to cooperate as fully as we could there. I will say, though, that if that disclosure gives people who might be habitual participants in that a free kick because they know all of our procedures, what we look at and what we do not look at, then I would be not so keen on that.

Senator WONG—There is always the option in those circumstances for you to seek to have that evidence provided in camera to the committee.

Mr Cooper—Sure. I am not prefacing that it is necessarily—

Senator WONG—I think that is a reasonable proposition.

Mr Cooper—I am not saying that the guide would necessarily be like that. I am just cautioning that that could be an issue for us. I will take both limbs of that question on notice.

CHAIR—We do not have the ability to do that in estimates, I gather.

Senator WONG—No. We would have to do it through the statutory committee.

CHAIR—Yes.

Senator WONG—The chair raising a very good point, Mr Cooper, which is that, if you sought to give that evidence in camera, I would probably have to ask the question in the statutory oversight context.

Mr Cooper—All right. Let us have a look at what materials we have and we will see whether it is an issue.

Senator WONG—Senator Sherry has some questions, but I want to raise with you the issue of the Audit Office report No. 18. I do not know whether Senator Sherry has already dealt with this.

Senator SHERRY—No.

Senator WONG—It is on the proportion of complaints by external administrators that you investigate, which has reduced, according to the Auditor-General, from 7½ per cent to one per cent. I appreciate that there has been an increased number of administrators' reports but what ASIC is actually investigating has reduced. Obviously, that is concerning. I want to also remind you, Mr Cooper, that this issue was again raised before the joint statutory committee in the insolvency inquiry as an issue to be dealt with. Can you explain to us why there has been such a reduction in the proportion investigated.

Mr Cooper—I can. It is a complicated story because there is a lot of data. When you look at the ANAO work, it is all about data. We are perfectly happy to do that, but it does become complicated. I suppose I should open the discussion by saying that the commission and the organisation are aware of these figures. An audit by its nature looks at a particular issue. In this case, the ANAO looked at a sample of our statutory reports in the area of insolvency and found that we had a very low follow-up rate on those reports.

Senator WONG—Do you accept the findings or not?

Mr Cooper—I do.

Senator WONG—You do?

Mr Cooper—Yes. I am explaining that we have applied resources in a completely different way. I am just saying that it is a complicated story and I am starting it off by saying that we are aware of it and we accept the findings, but we deal with the following up of insolvency matters in a completely different way. Let me explain what these statutory reports are and why we apply so few—

Senator WONG—I think we are aware of what they are.

Mr Cooper—It is important. A company goes broke—

Senator WONG—Are you comfortable with the one per cent rate of investigation?

Mr Cooper—Yes, and I will explain why. These reports follow the insolvency and liquidation of a company. They come at the end. After the event has happened, liquidators get appointed, they go through their processes and they file a notice with the regulator. The notice will generally say that the directors breached their duties and the company traded while insolvent. If you put yourself in a liquidator's shoes, you are not going to give the company a clean bill of health and you will generally make some sort of assertion along those lines. That gets filed with the regulator and, as shown in the ANAO material, we get 416 of these in a

year, sometimes relating to insolvencies that have happened some years in the past. I suppose that was the traditional way that a regulator worked—things happened, you filed a notice, and then sometimes reactively we would follow that up. Often what we find is that all assets have gone and there is very limited evidence backing up the assertions of the liquidators. The directors will have gone off and so on.

Over the years, we have completely changed the way we deal with insolvency issues. Two things have happened. The Assetless Administration Fund was created. It funds the proper investigation of matters by liquidators. Instead of getting to the very end of their insolvencies when there is no money left, and just writing out a little report and giving it to ASIC—which appears on the face of it to talk about a regulatory breach but in many cases there will be nothing there—the Assetless Administration Fund allows us, by interactions with liquidators, to fund proper examinations where we think the risk rating of the matter deserves attention and to go after them. Again, it is data rich, but I can take you through that already successful avenue.

Secondly, I can take you through what we call the NICU—National Insolvency Coordination Unit. This does not look at it three years after the event but actually looks at companies that are currently in the zone of damaging their creditors and other people who deal with them. Amazingly, our statistics of success in that area more than adequately balance up the apparent failure of ASIC to follow up the statutory reports. What would you rather have? A follow up three or four years later of a dead company or—

Senator WONG—Does the Auditor-General accept that?

Mr Cooper—The Auditor-General audits—

Senator WONG—Functions.

Mr Cooper—statistics. It does not look at our entire organisation and so on.

Senator WONG—No, but the point is there is a legal obligation on you in relation to these reports. Frankly, Mr Cooper, I have great difficulty with your saying you are comfortable with only one per cent of the statutory reports being investigated. Most people would think having 99 per cent of these reports not investigated is not acceptable, particularly given the historical trend. You can give us a whole explanation about all of these other things you are doing, but the fact is that there has been a massive decline in the extent to which you investigate these matters.

Mr Cooper—We accept that. The figures show that. We do not shirk from that. I am trying to explain—

Senator WONG—There is a potential prejudice, is there not, for creditors who are involved in these insolvencies? Potentially, there could be rights that were not followed up as a result of the failure to investigate?

Mr Cooper—In our regulatory experience, because of the way these reports come about at the tail end of the matter and the likelihood that there will be very little funding left in the administration left when they come in because of the whole way they work, there is a very low regulatory purpose in following them up. In many cases there is nothing there, because they are merely assertions that conduct—

Senator WONG—But not all cases.

Mr Cooper—Not all cases.

Senator WONG—I have not said you have to do 90 per cent of them. I have suggested that perhaps going from 7.5 per cent to one per cent is an unacceptable decline.

Mr Cooper—I am really putting to you that we believe that the proper funding of the assetless administration regime was one part of the solution, but, equally importantly, the live company interactions that we have are much more effective.

Senator WONG—I will flag with you that it will certainly be an issue that I will be raising in the statutory committee.

Senator SHERRY—May I just confirm a couple of budget matters. In the 2006-07 budget measure there were two separate ASIC allocations, for broadening surveillance and the enforcement funding. Can I have an approximate figure of the current uncommitted and unobligated forward estimates for each year to 2009-10?

Mr Cooper—I would have to take that on notice. I do not have those.

Senator SHERRY—Do you know how much has been spent in 2006-07 for each of these measures?

Mr Cooper—Not with the data we have with us, no.

Senator SHERRY—Would you take that on notice?

Mr Cooper—Yes, we certainly can.

Senator SHERRY—I raised with the tax office a superannuation guarantee enforcement issue, so obviously it is not your area. It concerned a business by the name of Affordable Cairns Pty Ltd where the company apparently has basically no assets but net debts of approximately $180,000, of which $100,000 relates to superannuation guarantee contributions. That is an issue that the tax office will pursue. It does raise the issue that I would request ASIC to examine and investigate, and that is the duties of the directors in relation to compulsory super contributions. There was the notification on pay slips that moneys were paid but actually failed to remit. I would like to know whether that constitutes a fraud and whether employees have any avenues of redress against the directors for possible breach of their duties and obligations. Prima facie at least, given the size of the debt and the withholding of the superannuation guarantee contributions over a long period of time, there is the issue of possibly trading while insolvent. There are some aspects here, I think, for ASIC to examine.

Mr Cooper—We will take that on notice.

Senator SHERRY—I know you attended the ASFA conference last November. I saw you there, but I missed your speech. It was reported by Barry Dunstan in the *Financial Review* that you had revealed in that speech that since the end of 2005 no-one had used a short-term PDS. Are you able to give us an update on the take-up of short-term PDSs to date?

Mr Cooper—I think the story remains pretty much the same as it was while we were in Perth, other than to say, of course, that the answer is in the current set of proposals that have been put forward at the November 2006 corporate and financial services regulation review

proposals, which include a proposed measure which will allow, we think, much more take-up of this because there is an incorporation by reference proposal, which is the kind of—

Senator SHERRY—We are yet to see what the impact will be obviously in terms of short-term PDSs.

Mr Cooper—Sure. It is up to the market, but we are hopeful with some encouragement from us and this new ability to incorporate by reference that those two things should see much more take-up.

Senator SHERRY—We live in hope. We will examine this issue of further occasions, I am sure.

Mr Cooper—Yes.

Senator SHERRY—I raised some issues relating to Sovereign Capital at a previous hearing, and I got some answers back on notice with respect to that. Has ASIC continued in its oversight of Sovereign Capital? I understand from feedback I have received that, despite the company continuing to charge management fees to investors and recover expenses, Sovereign Capital does not possess an AFS licence or professional indemnity insurance. Has ASIC investigated that aspect of this matter?

Mr Cooper—The history of Sovereign is a relatively lengthy one. We did cancel their licence and in early December we also intervened in some proceedings in the Supreme Court of Queensland where Sovereign was effectively wanting to wind itself up. Our objection was that we thought if this process was to be undertaken it should be done by an independent liquidator. The ultimate outcome was that the court ordered the fund be wound up under the supervision of a Queensland accountant who was supervising the activities. The state of play then was that the fund had about $54 million invested and 700 investors on hand. I am not aware that they are continuing to raise funds. Obviously that would be an issue, having taken away their licence. We will take that on notice and look at it.

Senator SHERRY—There will be a couple of other questions I will put on notice on that issue. We had an earlier conversation with APRA regarding the level of risk in terms of transfer of moneys from one superannuation fund entity to another. There was some general exchange about self-managed superannuation funds and the level of risk in transfer from a non-SMSF structure to an SMSF structure and this level of activity as a conduit for theft, fraud, breaches of the SI(S) Act et cetera. From my examination of your press releases—I am not complaining about this—I note the ongoing regularity of ASIC's activity in respect of directors and planners and their activity around self-managed superannuation fund operators. My question is: your enforced activity in this area just seems to be ongoing. It is not a criticism, but it just seems to me to be that self-managed superannuation funds just continue to be an ongoing area of risk in this regard as a conduit for extracting moneys that are not in accordance with the purposes of the SI(S) Act and could be for the purposes of theft and fraud.

Mr Cooper—I agree. However, you have to look at the scale and significance of self-managed funds in the overall landscape. As we sit here now, I think the current figures show the government's changes in this area have probably increased the inflows at least leading up to 30 June. In a $220-odd billion industry, just as a matter of pure maths, you are always

going to get some level of misconduct and defalcation of moneys and all the rest of it. I suppose self-managed funds being less regulated than other superannuation savings mechanisms, it is by its nature a relatively attractive format for scammers and people who are wanting to break the law. As you say, we are there; we do follow-up these people. We take the actions we can against them. While I agree with you that there does seem to be a relatively frequent flow of these matters, you have to remember that, depending on how you slice the cake, it is anything from a quarter to a third of the entire superannuation system.

Senator SHERRY—I accept that observation. If you take theft and fraud and compensation payable as a proportion of total moneys in the system, it is minute. Take also the number of victims in the system, of which there are probably 10 or 11 active members at any one time. That is not much solace to the people who have their money defrauded, stolen or whatever. It is catastrophic for those individuals affected. It is not catastrophic for the system as a whole, but it is for the individuals affected. My general observation is that there does not seem to be any lessening in your outcomes in this area.

Mr Cooper—I suppose that applies to the non-superannuation area. There are always going to be a certain number of people behaving like that in a system.

Senator SHERRY—I have a final area of discussion, and then I will put some other questions on notice. As I said to you, I do read your press releases and I am forgiving as to attempts to find innovative ways to attract public attention to financial service matters, but I have to say I particularly noted the press release of Tuesday, 13 February: 'Forget champagne. Pop a financial question this Valentine's Day.' You know my enthusiasm—and I know the officer concerned and I hope she does not take this as a personal criticism—but I have to say that, as enthusiastic as I am in terms of financial services and examining every possible aspect of financial services including topping up super, taking out travel insurance on the planning of a holiday and planning a family, I really did hesitate to raise any of these issues with my wife on Valentine's Day. I note that a similar but perhaps not quite as dramatic an approach was taken in the pre-Christmas press release of Thursday, 14 December, from Mr Tanzer, who urged us in a variety of ways to consider approaches to superannuation as part of the pre-Christmas effort. Again, I admire the publicity angle but I am not so sure it was particularly effective.

Senator WONG—Through you, Chair, I have a question as to one issue for Mr Cooper, and I am conscious that our next witness, Mr Macek, is here. There was an article in the *Sydney Morning Herald* on 8 January regarding a company called Firepower Technology Ltd. Are you aware of that article?

Mr Cooper—I am aware of the article and the issues.

Senator WONG—Did that article prompt any activity by ASIC?

Mr Cooper—Not that I am aware of, but that may not be conclusive as to whether we are doing something. Can we take that one on notice?

Senator WONG—I am happy for you to.

Mr Cooper—I am not briefed on it. I am not otherwise aware of it.

Senator WONG—I am conscious of details of any individual companies—

Mr Cooper—We will take that one on notice. It is certainly a colourful story, nonetheless.

Senator WONG—Yes. Thank you, Mr Cooper.

CHAIR—As there are no further questions, you are excused, Mr Cooper and Mr D'Aloisio. I note Mr Cooper that you have come in at very short notice. We do very much appreciate the way you have handled Mr Lucy's absence.

Mr Cooper—Thank you.

CHAIR—You may have done yourself a great disservice by getting the job permanently, I suspect! We thank you most sincerely.

[6.25 pm]

Financial Reporting Council

CHAIR—I welcome officers from the Financial Reporting Council. Mr Macek, unless you have an opening statement, which I presume you probably do not have, I will pass you straight on to Senator Wong for questions.

Senator WONG—Mr Macek, because of the time I will put this question on notice. I want an update on the Simpkins report on a sector-neutral approach for accounting standards for the for-profit and for the public, government not-for-profit sectors. Where are you at with that? You gave me some detail subsequent to our last hearing about that. I did ask some questions yesterday, of which you are probably aware, of the AASB on this issue.

Mr Macek—With regard to the ongoing review of the Simpkins report—

Senator WONG—For time purposes I was actually asking if you could take that on notice.

Mr Macek—Right, but I could give you a 30-second update. We have a meeting of the FRC scheduled for next Monday with a special agenda, and this will be the main topic that we will be considering.

Senator WONG—We look forward to further activity. The second question is in relation to non-audit services provided by auditors. There was some press about that last year. Can you tell us if the FRC is considering any further restrictions on non-audit services and, if so, what they are.

Mr Macek—We did make reference in our audit oversight report this year that there are some variations between Australia and some other jurisdictions. This was an area that we were going to investigate as part of our work program in the current financial year.

Senator WONG—Would it be accurate to say that the US and the UK in particular have more restrictive provisions?

Mr Macek—Yes. There are a couple of jurisdictions such as those that you have named in which there are one or two additional services that are prohibited that are not specifically prohibited in Australia.

Senator WONG—When you say you are considering it in terms of this financial year's work program, what are you actually doing?

Mr Macek—The first thing is to consider the range of differences between jurisdictions that we would regard with some credibility, which typically are the Anglo countries, to liaise

closely with ASIC where we do have a memorandum of an understanding given the significant responsibilities that ASIC has with regard to audit oversight.

Senator WONG—Did the FRC form a view as to whether the, one might say, slightly less onerous provisions or less restrictive provisions in relation to non-audit services in Australia were potentially compromising auditor independence?

Mr Macek—No. We have no indications at all that there are any issues in Australia with regard to the independence of auditors either for the reasons you are outlining or for any other reasons.

Senator WONG—Would you say that, given the status of a number of other comparable jurisdictions, best practice regulation in relation to non-audit services would be to adopt a greater level of restriction on the ability to engage in those services by auditors?

Mr Macek—I am not sure that best practice is the ideal goal because it is hard to define it. I think a more sensible goal is one of good practice, and certainly we want to ensure that Australia has very high standards. If we find that there are compelling reasons for services that are not prohibited in Australia to be prohibited because of the nature of those services, then we would certainly consider it. As I indicated in my earlier response, there are no indications that the independence of auditors in Australia are being compromised at all by the current—

Senator WONG—Although provisional non-audit services was an issue that arose in the context of CLERP 9 and also in the HIH royal commission, I am not sure it is correct to say there is no indication that there is no issue when there is a non-audit service provided.

Mr Macek—Certainly some people feel quite strongly on this issue. It is fair to say that it has received a great deal more prominence and scrutiny around company boards and, as a result, there is undoubtedly in boardrooms much closer scrutiny of the quantum of non-audit services as a proportion of the audit fees, for example, and of obviously ensuring that there are no prohibited non-audit services that are given to the audit firm.

Senator WONG—I will move on in relation to some financial issues arising out of your 18 December bulletin. I noticed you increased your sitting fees.

Mr Macek—Yes, there was a very modest increase.

Senator WONG—Was it because of CPI? What was the basis of the increase?

Mr Macek—I think it was just in line with market movement and in line with increases that similar bodies have enjoyed.

Senator WONG—I note here that the ASX is providing annual funding of a $100,000 for a further three years. What is your current government funding?

Mr Macek—We have a number of sources of funding. In terms of Commonwealth government funding, some $4.8 million comes in effectively directly through the Treasury. Then there is an additional $1.6 million that comes directly from ASIC to the AASB. That is total quantum of Commonwealth government funding. There is also an additional half a million dollars per annum from the states and territories, and there are further amounts that come from the three professional accounting bodies which last year aggregated to $1.75

million, but they will be reducing in the coming years, and there is a modest amount from the ASX itself.

Senator WONG—On notice could you give me the details over the last couple of financial years for the non-government sector? Why are they reducing over the next three years? Why is that contribution reducing?

Mr Macek—There are two principal reasons. They both reflect the changing structure for standard setting. You may recall that prior to the establishment of the AASB and the FRC with oversight and then the subsequent changes where the FRC was given oversight of the AUASB, the accounting profession itself had responsibility for making standards. They now are taking the view that the standards are effectively law and that the making of law is the responsibility of government. Largely because of that diminution of control, they feel that the burden that they have been shouldering should be reduced.

Senator WONG—I think you talked about the accounting bodies. Is that the only component that you anticipate reducing?

Mr Macek—The other reason I think they gave us is that they have significant responsibilities to maintain their services to members and, like any member-based organisation, there are constraints.

Senator WONG—Yes. You misunderstood my question. Is it only the accounting bodies' contribution which you are anticipating will reduce?

Mr Macek—Yes, it is only the aggregate of the three professional accounting bodies.

Senator WONG—You are aware of the extent to which it will reduce over the next financial year?

Mr Macek—Yes. There is an agreed reduction over the next three years.

Senator WONG—Could you provide that on notice?

Mr Macek—Yes.

Senator WONG—Of the $4.8 million, how much is funding to the AASB? How is it divvied out between FRC and AASB? You might want to take this on notice. Is this $4.8 million only for the FRC, or does it include the AASB?

Mr Macek—No. The $4.8 million is for the FRC, the AASB and the AUASB.

Senator WONG—Do you disaggregate that? Can you provide that on notice?

Mr Macek—Yes.

Senator WONG—If you could provide that on notice, I would appreciate that.

Mr Macek—I can give you a breakdown, yes.

Senator WONG—Finally, do we know who the speaker is for the Ken Spencer memorial lecture in 2007?

Mr Macek—Yes. It will be Sir David Tweedie and he will be speaking on the evening of Monday, 5 March, in Melbourne.

Senator WONG—I notice you provided $25,000 towards that.

Mr Macek—We—

Senator WONG—The 18 December bulletins say 'agreeing that funding of up to $25,000 should be provided to assist with the staging of that lecture'.

Mr Macek—We will not require all of that, because the accounting bodies themselves have agreed to jointly sponsor the event and the University of Melbourne is providing the lecture theatre.

Senator WONG—How much are you going to contribute?

Mr Macek—It will be negligible. It will basically be the quantum of the mail-out in terms of the invitations. That will be a saving to our budget this year.

CHAIR—Thank you. No further questions, Senator Parry?

Senator PARRY—No, thank you.

CHAIR—That finishes Treasury. Minister, thank you.

Proceedings suspended from 6.36 pm to 7.39 pm

INDUSTRY, TOURISM AND RESOURCES PORTFOLIO

In Attendance

Senator Minchin, Minister for Finance and Administration

Department of Industry, Tourism and Resources

Executive

Mr Mark Paterson, Secretary
Ms Patricia Kelly, Deputy Secretary
Mr Tim Mackey, Deputy Secretary
Mr John Ryan, Deputy Secretary

Outcomes and Outputs

Mr Jansson Antmann, Manager, Marketing and Communications, Strategy and Communications Branch, Corporate Division
Ms Naomi Ashurst, Manager, Alternative Fuels and Fuel Supply Section, Minerals and Fuels Branch, Resources Division
Ms Carolyn Barton, Manager, Uranium Industry Section, Resources Development Branch, Resources Division
Ms Tricia Berman, General Manager, Innovation Policy Branch, Innovation Division
Mr Chris Birch, General Manager, Research, Development and Commercialisation, AusIndustry Division
Mr Mike Balch, Deputy General Manager, Australian Building Codes Board, Manufacturing, Engineering and Construction Division
Mr Jamie Bound, Executive Officer, Manufacturing, Engineering and Construction Division
Dr Don Brunker, General Manager, Industry Analysis Branch, Industry Policy Division
Mr Richard Byron, General Manager, Human Resource Management Branch, Corporate Division
Ms Chris Butler, General Manager, Strategy and Communications Branch, Corporate Division
Mr Wayne Calder, General Manager, Business Development Group, Tourism Division
Mr Peter Chesworth, General Manager, Office of Small Business
Ms Nancy Choy, Assistant Manager, Budget Estimates Team, Corporate Finance Branch, Corporate Division
Mr Drew Clarke, Head of Division, Energy and Environment Division
Mr Peter Clarke, General Manager, Automotive, TFC and Engineering Branch, Manufacturing, Engineering and Construction Division
Ms Sarah Clough, General Manager, Energy Futures Division, Energy and Environment Division
Mr Alan Coleman, Manager, TCF Group, Manufacturing, Engineering and Construction Division
Miss Megan Collins, Assistant Manager, Assistant Manager, Budget Estimates Team, Corporate Finance Branch, Corporate Division
Ms Jen Cooper, Assistant Manager, Business Development Branch, AusIndustry Division

Ms Debbie Costanzo, Assistant Executive Officer, Strategic Coordination and Support Section, Resources Division
Ms Helen Cox, General Manager, Market Access Group, Tourism Division
Mr John Dicer, General Manager and Chief Legal Counsel, Legal and Procurement Branch, Corporate Division
Ms Robyn Foster, General Manager, Business Development Branch, AusIndustry Division
Ms Ruth Gallagher, Manager, Trade and International Branch, Industry Policy Division
Dr Michael Green, General Manager, Advanced Manufacturing, Action Agendas and Building Branch, Manufacturing, Engineering and Construction Division
Mr Tony Greenwell, General Manager, Office of Small Business
Mr Paul Griffin, General Manager, Online eBusiness Services and VANguard Advisor, eBusiness Division
Mr John Griffiths, General Manager, International Branch, Energy and Environment Division
Ms Lisa Hind, Manager, Business Development Branch, AusIndustry Division
Ms Melissa Jonas, Executive Officer, Strategic Coordination and Support Section, Resources Division
Mr Barry Jones, Chief Executive Officer, Invest Australia
Mr John Karas, Acting General Manager Resources Development Branch, Resources Division
Mr Neil Kinsella, General Manager, ICT Services, eBusiness Division
Mr Mike Lawson, General Manager, Aerospace, Defence and Industry Participation Branch, Manufacturing, Engineering and Construction Division
Mr Terry Lowndes, Head of Division, Industry Policy Division
Ms Melissa McClusky, General Manager, Corporate Finance Branch and Chief Financial Officer, Corporate Division
Mr Darren McDonald, Corporate Finance Branch, Corporate Division
Ms Tess McDonald, Executive Manager, Biotechnology Australia, Innovation Division
Ms Mimi Mastrolembo, Manager, Business Development Branch, AusIndustry Division
Mr Brad Medland, Manager, Budget Estimates Team, Corporate Finance Branch, Corporate Division
Mr Ken Miley, General Manager, Trade and International Branch, Industry Policy Division
Mr Brendan Morling, General Manager, Industry Policy Branch, Industry Policy Division
Ms Janet Murphy, Head of Division, Corporate Division
Mr Philip Noonan, Head of Division, Tourism Division
Mr Kevin O'Brien, General Manager/Special Adviser, Industry Policy Division
Mr Bill Peel, Executive General Manager, AusIndustry Division
Mr Bob Pegler, General Manager, Safety, Taxation and Projects Branch, Resources Division
Mr Ken Pettifer, Head of Division, eBusiness Division
Mr Craig Pennifold, Head of Division, Innovation Division
Ms Christine Pitt, General Manager, ICT Infrastructure, eBusiness Division
Ms Trish Porter, General Manager, VANguard, eBusiness Division
Mr Steve Payne, Head of Division, Manufacturing, Engineering and Construction Division

Ms Margaret Rule, Business Manager, Energy and Environment Division
Mr Michael Schwager, General Manager, Pharmaceuticals and Biotechnology Branch, Innovation Division
Ms Margaret Sewell, General Manager, Safety, Taxation and Projects Branch, Resources Division
Mr Paul Sexton, General Manager, Customer Services, AusIndustry Division
Mr Sam Skrzypek, General Manager, Small Business and Tourism Branch, AusIndustry Division
Mr Martin Squire, Acting General Manager, Minerals and Fuels Branch, Resources Division
Ms Marie Taylor, General Manager, Energy Reform Implementation Group, Energy and Environment Division
Dr Peter Tucker, General Manager, Industry Sustainability Group, Tourism Division
Ms Clare Walsh, General Manager, Environment Branch, Energy and Environment Division
Ms Sue Weston, Head of Division, Office of Small Business
Ms Judi Zielke, General Manager, Innovation and Collaboration Branch, AusIndustry Division

IP Australia

Dr Ian Heath, Director-General
Ms Yvonne Laird, Acting Chief Financial Officer

Tourism Australia

Mr Geoff Buckley, Managing Director
Mr John Hopwood, Director, Corporate Services
Ms Sally Lee, Government Relations Manager

CHAIR—This evening the committee will begin its examination of the Industry, Tourism and Resources portfolio, starting with resources and energy. For the benefit of officers, I advise that the committee is due to report to the Senate on 21 March 2007 and has fixed Thursday, 5 April 2007 as the date for the return of answers to questions taken on notice. Under standing order 26, the committee must take all evidence in public session. This includes answers to questions on notice. I remind all witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee.

The Senate, by resolution in 1999, endorsed the following test of relevance of questions at estimates hearings: any questions going to the operations or financial positions of the departments and agencies which are seeking funds in the estimates are relevant questions for the purposes of estimates hearings. I remind officers that the Senate has resolved that there are no areas in connection with the expenditure of public funds where any person has a discretion to withhold details or explanations from the parliament or its committees unless the parliament has expressly provided. The Senate has also resolved that an officer of a department of the Commonwealth or of a state should not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the

officer to superior officers or to a minister. This resolution prohibits any questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies are adopted. If a witness objects to answering a question, the witness shall state the ground upon which the objection is taken, and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. Any claim that it would be contrary to the public interest to answer a question must be made by the minister and should be accompanied by a statement setting out the basis for the claim. We will shortly be joined by Senator Minchin, representing the Minister for Industry, Tourism and Resources. Mr Paterson, do you have any comment to make?

Mr Paterson—Could I observe up front that some senior officers from the resources division are absent this evening. The first APEC ministerial meeting on mining was held in Perth this week, and some of those officers are still in Perth, while some are travelling back this evening. We will endeavour to respond to all questions that are put to us tonight.

CHAIR—Had the committee been advised of that, Mr Paterson?

Mr Paterson—I am not conscious of it. We have a range of officers from the resources division here, but there are a couple of key people who would normally appear, such as the division head, whom Senator Evans spoke with last week, I think. He is one of the people who will not be here tonight.

CHAIR—I make a request that, in the future, if we have that situation, someone communicates with the secretary so that I can then advise the shadow minister of that and they can make some judgements about their feelings on the presence or otherwise. Do you have an opening statement to make, Mr Paterson?

Mr Paterson—No, Mr Chairman.

Senator CHRIS EVANS—Mr Paterson, I appreciated your making senior officers available for a briefing the other day. That hopefully will reduce the amount of time we are here tonight, but I do not guarantee it. I am new to the area, so if I am way off track or going around in circles, I would appreciate someone telling me, rather than wasting everyone's time. First, what is the department's involvement with the emissions trading task group? I know that it is chaired by PM&C, but there are departmental officers in the group.

Mr Paterson—I am a member of the task group, along with five other secretaries. It is chaired by the Secretary of the Department of the Prime Minister and Cabinet, and there are six private sector representatives on it. Various departments have seconded officers to the secretariat of the task group. The secretariat of the task group is headed by Martin Parkinson, a deputy secretary from the Treasury, and one of my branch heads from the energy and environment division is a member of that task group, plus some other officers.

Senator CHRIS EVANS—So you have two or more actually over on the task group, or are they still working inside the department?

Mr Paterson—They are on the task group and, in terms of providing space, we are hosting the task group within my department.

Senator CHRIS EVANS—I know that sometimes they work within their departments, but they have actually come together as a group?

Mr Paterson—We have been able to put the task group together in a common location to enable them to effectively undertake the tasks that they have.

Senator CHRIS EVANS—There was mention in the original press release about bringing some business people into the secretariat as well. Has that happened? I know that there are business people on the group?

Mr Paterson—There are some private sector people working with the secretariat. They are not permanently located in the secretariat but they are coming in for periods of time to work with the secretariat and then doing work outside.

Senator CHRIS EVANS—What sort of people are we talking about?

Mr Paterson—Officers from companies that are represented on the task group.

Senator CHRIS EVANS—Bringing in particular skills?

Mr Paterson—Yes.

Senator CHRIS EVANS—How is it operating? I saw the interim report but are people preparing papers to be considered by the committee?

Mr Paterson—I do not want to correct you, Senator, but rather than being an interim report, it is an issues paper. It is designed to try to articulate for a broad group of people issues associated with emissions trading. Some people are well briefed on the issue; others are less so. It is to try to at least paint the picture of what emissions trading is about, what the issues are that the task group is being asked to look at, consistent with the terms of reference. The issues paper asks a series of questions, and we expect that there will be a variety of people in the community who have perspectives in relation to those questions that they will want to put to the task group. It was released on 7 February, and submissions are invited from all interested parties by 7 March.

Senator CHRIS EVANS—I appreciate that. I am sure you have identified the questions, but identifying the questions was the easy bit, and we could have done that already. What has happened in terms of identifying the answers and how will you progress that?

Mr Paterson—If the task group had started with the first piece of paper that it put out with all the answers to the questions, I think it would have been rightly criticised by a variety of different interests that may wish to express a point of view. So the task group's process was to look at the terms of reference, identify the issues on which it wanted to get submissions from a variety of parties, and then put those questions out. It is not starting this process having prejudged the exercise. What it is trying to do is to get a sense from a broad range of perspectives on the key questions. I do not think in the commentary that I have seen that there is any debate that the questions that have been asked are not the key questions. I think there is agreement that they are.

Senator CHRIS EVANS—No doubt everyone is hoping that you come up with the right answers. What is your time frame from here on?

Mr Paterson—The task group is required to report to the Prime Minister by 31 May.

Senator CHRIS EVANS—That does not give you much time.

Mr Paterson—No.

Senator CHRIS EVANS—It is a very tight time frame?

Mr Paterson—It is a tight time frame.

Senator CHRIS EVANS—How are you progressing the work?

Mr Paterson—Some officers are travelling internationally during this month, consulting with a variety of parties offshore to get a perspective from them in relation to emissions trading, because one of the perspectives from the terms of reference is looking at the nature of a global emissions trading system in which Australia might participate. The task group is getting a sense from a variety of people, some of whom have participated in initial emissions trading regimes, and at least getting the perspective of others who may be contemplating it. That will be brought in to the task group's deliberations, along with the submissions that we receive from the issues paper.

Senator CHRIS EVANS—Are you commissioning the secretariat to prepare papers? Is that the sort of process? It is quite a large task. You say you are receiving submissions?

Mr Paterson—As to all the desktop research that you would expect a group like that to do to bring together any relevant papers that might need to be considered by the task group, the task group has already in its early stages read and digested a variety of articles that have been published on the issue. It is an iterative task. The task group is not sitting there just twiddling its thumbs and waiting for the submissions to come in. The research that is being done, identification of where the core issues are and how we might start to prepare a report to go to government, is in hand.

Senator CHRIS EVANS—How often are you meeting?

Mr Paterson—We are aiming to have the task group meet about once a month. It will probably meet a couple of times in the last month as the first draft of the report is considered by the task group, and then it can consider the final report before it goes ahead. It has met twice to date.

Senator CHRIS EVANS—Was that twice before the issues paper was released?

Mr Paterson—Yes.

Senator CHRIS EVANS—How are you funding it? Is that coming out of your department now, or is each department funding its own officers?

Mr Paterson—Because it is a task group chaired and run by the Department of the Prime Minister and Cabinet, the operational costs associated with it and the costs to the extent that they need to be borne for the private sector representatives are borne by the Department of the Prime Minister and Cabinet. We are meeting our costs associated with our representation on it, and we are providing the accommodation and computer facilities as part of our contribution.

Senator CHRIS EVANS—An ideal outcome: you have captured them and the PM&C is paying for it.

Mr Paterson—I would hardly describe us as capturing—merely hosting.

Senator CHRIS EVANS—We will see that when we read the report. Thank you.

Senator BOSWELL—With respect to ethanol and the Prime Minister's task force, what is the status of each of the grants announced by DITR on the biofuels package and the Renewable Energy Development Initiative?

Mr Peel—Under the Renewable Energy Development Initiative, we have so far had three rounds of the program and have awarded 24 grants valued at $47.1 million.

Senator BOSWELL—To whom have those grants been awarded?

Mr Peel—There are quite a few of them, so if you will bear with me, I will read them. Innamincka Hot Fractured Rock Power Plant, Geodynamics Ltd—

Senator BOSWELL—I am only referring to ethanol and biodiesel.

Mr Peel—You asked about the renewable energy—

Senator BOSWELL—I am sorry, ethanol and biodiesel, if you can?

Mr Peel—Is it the Biofuels Capital Grants program to which you are referring?

Senator BOSWELL—Yes.

Senator CHRIS EVANS—You have an ethanol distribution scheme as well?

Senator BOSWELL—Yes, I will get to that.

Mr Sexton—Under the Biofuels Capital Grants program, seven companies were awarded grants. Four of them were to do with biodiesel and three of them were to do with ethanol production.

Senator BOSWELL—Could you nominate who they are, please?

Mr Sexton—The four biodiesel companies were Australian Renewable Fuels, Biodiesel Industries Australia, Biodiesel Producers Ltd and Riverina Pty Ltd. The three ethanol companies were CSR Distillery Operations Pty Ltd, Rocky Point Distillery—which is actually owned by a company called Schumer Pty Ltd—and Lemon Tree Ethanol.

Senator BOSWELL—What about Manildra? Did they get a grant?

Mr Sexton—They did not get a grant under this program.

Senator BOSWELL—Why were they not successful in obtaining a grant? They obviously had take-off agreements?

Mr Sexton—AusIndustry was not responsible for the assessment process, so I am not even sure they were an applicant under that program.

Senator BOSWELL—How many grants have been withdrawn because of lack of ability to start on the plant?

Mr Sexton—All grants are currently—

Senator BOSWELL—There is one, I can tell you. But you say that all grants are still out there waiting for the projects to start?

Mr Sexton—All contracts are still in place, and those projects are at various stages of development.

Senator BOSWELL—Where is Lemon Tree?

Mr Sexton—Lemon Tree is yet to receive any money under the program.

Senator BOSWELL—But the money is still there?

Mr Sexton—The money is still there.

Senator BOSWELL—How many new plants have been completed? How many projects have been completed?

Mr Sexton—There is only one plant at the moment that is completely through our process, and that is Biodiesel Industries Australia. They have a plant near Maitland in New South Wales.

Senator BOSWELL—And that has been completed and is running?

Mr Sexton—That is now in the final phase of actually producing for the domestic transport market.

Senator BOSWELL—Have any new ethanol plants actually begun production as a result of the grants or independently?

Mr Sexton—Not as yet, although two are under construction.

Senator BOSWELL—Which ones are they?

Mr Sexton—CSR Distilleries and Rocky Point Distillery.

Senator BOSWELL—Rocky Point has been there for 100 years.

Mr Sexton—Yes, but their plant grant is for an extension of that plant.

Senator BOSWELL—In other words, CSR has been producing ethanol for as long as I know; Rocky Point has been there for 100 years—so no new ethanol plants have come on stream because of the grants?

Mr Sexton—I am only talking in respect of this program; that is true.

Senator BOSWELL—How much additional biofuel by volume has been made available to the Australian market as a result of these grants?

Mr Sexton—If you like, Senator, I could go through the agreed annual productions that are required under each of these.

Senator BOSWELL—I would like that, yes.

Mr Sexton—I can make that information public. Australian Renewable Fuels have signed up to an agreed annual production of 44,667,000 litres per year; Biodiesel Industries, eight million litres per year; Biodiesel Producers, 60 million litres per year; and Riverina, 44,700,000 litres per year. They are the biodiesel producers. With respect to ethanol, CSR Distilleries, 26 million litres per year; Rocky Point, 15 million litres per year; and Lemon Tree, 33,600,000 litres per year.

Senator BOSWELL—CSR and Rocky Point are in production, and Lemon Tree is not. How much ethanol was actually sold in December?

Mr Sexton—I do not have that figure for month-by-month. That is something I might be able to get for you on notice.

Senator BOSWELL—Could I have that, please. How much biodiesel was sold in December?

Mr Peel—Senator, could I just clarify this? You are talking about ethanol sold by whom in December? One of the grantees?

Senator BOSWELL—No, the total amount of ethanol. You must know these figures, because you are paying a production subsidy on them.

Mr Peel—Okay, so that is a different question.

Mr Sexton—But we do not have them on a monthly basis.

Senator BOSWELL—All right; give them to me on a six-monthly basis.

CHAIR—For the sake of clarity, Mr Peel, you said that is a different question. Can you just inform the committee what you meant by that?

Mr Peel—I think the senator is now asking how much ethanol has been produced by those companies that are accessing the Ethanol Production Grants program.

Senator BOSWELL—And I am also asking how much ethanol has been produced in total. For instance, Manildra is producing ethanol.

Mr Peel—In relation to the Ethanol Production Grants program, the total production in 2006-07, year to date, is 43,848,055 litres.

Senator BOSWELL—That is ethanol?

Mr Peel—That is correct.

Senator BOSWELL—What about biodiesel? Is that up to December 2006?

Mr Peel—It is up to 31 January 2007.

Senator BOSWELL—That is fair enough. You have given me the ethanol figure; could you give me the biodiesel figure?

Mr Peel—We do not have that; we do not have a biodiesel program as such.

Senator BOSWELL—Don't you pay a production subsidy on biodiesel as well as ethanol?

Mr Peel—Not through AusIndustry.

Mr Sexton—I think that is currently handled through Treasury.

Senator BOSWELL—So you only pay the production subsidy on ethanol?

Mr Peel—On ethanol.

Senator BOSWELL—How much ethanol has been sold in the year 2006?

Mr Peel—I can give you the production figure for the ethanol production grants for 2005-06. Is that satisfactory?

Senator BOSWELL—When you say 'grants', do you mean the production subsidy you paid? I want to know the total amount of ethanol that has been sold in the year 2006.

Mr Sexton—Our figures are on a financial year basis.

Senator BOSWELL—That does not matter.

Mr Sexton—For 2005-06, our production figure was 40,324,589 litres, and for the first seven months of 2006-07 is the figure that Mr Peel gave you previously.

Senator BOSWELL—Has the subsidy been claimed by any new biofuel producers in the last six months—new ones?

Mr Peel—Not in the last six months.

Senator BOSWELL—At any time? My point is that you have had Manildra, CSR and Rocky Point—they have been there for years.

Mr Peel—There was a new one called Tarac which executed a contract in June 2006, so that is a new entrant.

Senator BOSWELL—A new one? Where is that situated?

Mr Peel—They are in South Australia.

Senator BOSWELL—What have they produced?

Mr Sexton—They source their supply from grape waste—grape skins, in other words.

Senator BOSWELL—Is that right? I never even knew that existed.

Senator Minchin—You should come to South Australia.

Senator BOSWELL—Yes, and I consider myself an expert on ethanol. How many litres have they done?

Mr Peel—In the 2006-07 year to date—that is, to 31 January—291,098 litres.

Senator BOSWELL—In comparison with Rocky Point's 15 million. It is only a little one.

Mr Sexton—It is small.

Mr Peel—Yes.

Senator BOSWELL—Apart from that little niche market one—there is only a little tiny one.

Mr Peel—No new ones in the program.

Mr Paterson—It is worth noting that the grants program was for new entrants and for extensions for existing operators, so CSR and Rocky Point got grants for extensions to existing plants.

Senator BOSWELL—I understand that. My point is that, apart from that little niche market one that must be very small, no new players have come into the market—is that correct?

Mr Paterson—They are not in the market at the present time. Grants have been awarded to some potential new entrants, but they are not yet on stream.

Senator BOSWELL—What percentage of new car manufacturers are putting E10-compatible labels on their vehicles? Would you have that information?

Mr Peel—No, that is not something we can answer.

Senator BOSWELL—Yes, I do not even know whether you could even find that out, could you?

Mr Paterson—We can attempt to answer that question for you tomorrow. My understanding is that the four domestic manufacturers have committed to the government to include E10-compatible stickers on those vehicles. So the four domestic manufacturers do have E10-compatible stickers on their vehicles, and my recollection is that they committed to do that from about January 2006. There is a very broad range of importers, some of whom have committed to do it; others have not. The people from the Manufacturing, Engineering and Construction Division may be able to provide us with an answer on that. We do not have them here tonight.

Senator BOSWELL—What applications have been received from fuel retailers to upgrade their fuel delivery service for biofuels?

Mr Peel—I think we have received one application to date.

Senator BOSWELL—Only one?

Mr Peel—Yes.

Senator BOSWELL—Who was that from?

Mr Peel—I do not have the name of the applicant here.

Senator BOSWELL—Mr Peel, I would like to have that.

Mr Peel—I can take that on notice.

Senator BOSWELL—How many people have applied?

Mr Peel—One has applied.

Senator BOSWELL—So only one has applied?

Mr Peel—One has applied to date. They apply for the grant after they have done the work in the service station. Our intelligence with industry is that we can expect to receive about 100 in the next short period of time, but we have received only one to date.

Mr Sexton—The program started only in October, and we never expected to get any of the applications, or most of the applications, until early in calendar year 2007. That is proving to be the case.

Senator BOSWELL—Okay. So you have to do the work first and then apply?

Mr Sexton—Yes.

Senator BOSWELL—You have given us the figures for ethanol. What percentage of the ethanol sold has gone to the four major oil companies?

Mr Sexton—We do not have that information here.

Senator BOSWELL—Would you be able to get that information for us?

Mr Sexton—It is something we could check, but I cannot be sure that we do have that information.

Senator BOSWELL—You must have the information if you are paying a production subsidy?

Mr Sexton—That is right. We may have that information, but I am not absolutely sure.

Senator BOSWELL—If someone said they had sold one million litres or whatever, you must ask, 'Who have you sold it to?'

Mr Sexton—That would probably be reasonable, but I am not sure. What we are doing is reimbursing the sale excise tax on these things.

Senator BOSWELL—Yes, but obviously you just do not accept the word, I would imagine, of CSR saying, 'We have sold 100 million litres; please send a cheque.'

Mr Peel—No, they have to give us evidence that they have paid the excise, and we reimburse them now. Whether they also give us details of to whom they have sold the fuel, we are not sure, but we will check that.

Senator BOSWELL—I would like to know the breakdown of the ethanol sales between the independents and the four major oil companies. How do I get those figures?

Mr Peel—If you allow us to take it on notice, we will see if we can provide it. If we cannot, we will let you know.

Senator BOSWELL—That is not quite the question. I know that you will provide it, if you can. I am asking: by what mechanism are those figures obtainable?

Mr Peel—I think you would have to ask the companies directly to whom they are selling their ethanol.

Senator BOSWELL—They would probably tell me to go to buggery.

Mr Peel—They may well do that.

Senator BOSWELL—You said that we have produced 43 million litres in 12 months?

Mr Peel—Yes, under the program for 2006-07 to date, which is to 31 January, there has been 43,848,055 litres.

Senator BOSWELL—Under the industry's action plan, the four majors committed to 89 million litres in 12 months at the minimum and 124 million litres at the maximum. Now, 43 million litres of ethanol has been sold.

Mr Peel—Has been produced.

Mr Sexton—In seven months—that is, 1 July to 31 January—43 million litres.

Senator BOSWELL—Can you give me the figure for 12 months?

Mr Sexton—The figure that was given to you earlier was for the 2005-06 financial year, a total of 40,300,000-odd litres, and for the seven months since 1 July 2006 to 31 January 2007 it was 43,848,000 litres.

Senator BOSWELL—So you have done as much in seven months as you did in 12 months—is that correct?

Mr Sexton—More in seven months than we did in the previous 12 months.

Mr Peel—We have actually done more than last year.

Senator BOSWELL—How do I obtain the biodiesel comparisons? Do I have to obtain them from Treasury? You do not have the biodiesel figures?

Ms Ashurst—We do not do the biodiesel figures. That comes from the ATO through its cleaner fuels grants program. My understanding is that the biodiesel is a much smaller component. However, it is increasing rapidly.

Senator BOSWELL—So I would have to put that on notice for the Treasury?

Ms Ashurst—In reference to the industry action plans, that is both ethanol and biodiesel contributing towards those milestone figures, and it encompasses the oil majors, the independents and the major retailers as well.

Senator BOSWELL—No. The four majors gave that commitment of 89 million; the independents or smaller companies did not.

Ms Ashurst—I am sorry, Senator—it did include the independent petroleum group and the major retailers. They were all included in that.

Senator BOSWELL—That is not my understanding. I understood it was only the major oil companies that gave that 89 million—

Mr Paterson—If you want us to take that on notice, I will provide you with the evidence.

Senator BOSWELL—Yes, if you would not mind. CSR Distilleries received an ethanol grant and that is completed; Rocky Point received one and that is completed; Biodiesel Industries Australia, Rutherford—

Mr Sexton—With respect to Rocky Point, no payments have actually been made to Rocky Point yet.

Senator BOSWELL—So they received a $2.4 million grant—

Mr Sexton—They received a $2.4 million grant awarded to them, but I understand we are very close to the first payment on that.

Senator BOSWELL—Okay. They are underway, so they will get that. Biodiesel Industries Australia, Rutherford, New South Wales, received a grant for $1.28 million. Where is that?

Mr Peel—Final payments have been made to Biodiesel Industries.

Senator BOSWELL—So that has been completed?

Mr Peel—Yes. That is in post-commissioning phase.

Senator BOSWELL—Biodiesel Producers, Barnawartha, Victoria: $9.6 million?

Mr Sexton—They have a plant under construction.

Senator BOSWELL—But they have not received any money yet?

Mr Peel—They have received their first payment under the program.

Senator BOSWELL—Australian Renewable Fuels Ltd, Port Adelaide: $7.15 million?

Mr Sexton—They have a plant that is in the process of being commissioned.

Senator BOSWELL—What do you mean commissioned. Is it being built?

Mr Sexton—It is being constructed—

Senator BOSWELL—It is under construction?

Mr Sexton—Construction is finished, and they are at the stage where they are running production through to try to make sure that it is satisfactory.

Senator BOSWELL—Riverina Biofuels Pty Ltd, Deniliquin, New South Wales?

Mr Sexton—Again, their plant is under construction.

Senator BOSWELL—Lemon Tree Ethanol Pty Ltd: $5.85 million?

Mr Sexton—No payments have been made to them as yet.

Senator BOSWELL—But the money is still there?

Mr Sexton—The money is still there.

Senator BOSWELL—Bundaberg Sugar applied for $11 million and then said they did not want it. Is that correct? I believe that the new ethanol production facility was going up on the Atherton Tablelands?

Mr Peel—They are not one of the grantees under the program.

Senator BOSWELL—Australian Renewable Fuels, South Australia?

Mr Sexton—Yes, that plant is under construction and is actually in the commissioning stage.

CHAIR—Mr Paterson, do you have something there that you want photocopied or distributed?

Mr Paterson—Yes, Mr Chairman. I have a document to table that is a copy of a media release from the Prime Minister, dated 22 December 2005, concerning the biofuels target. It confirms that the collective company action plans submitted by major oil companies, members of the independent petroleum group and major retailers reveal a major commitment to Australia's biofuels industry, and the table attached to that is the 89 million to 124 million litre range that Senator Boswell raised. I am happy to table that. We would say that meets our—

CHAIR—We will have that distributed.

Senator BOSWELL—CSR: $5 million. Has that been paid?

Mr Sexton—The extension to that plant is still under construction.

Senator BOSWELL—You paid one earlier, that molecular sieve, and there is another one for $5 million—is that right?

Mr Sexton—The CSR Distillery grant amount was $4.16 million.

Senator BOSWELL—And the CSR Renewable Energy Development initiative, round 2, increase ethanol energy through SugarBooster technology: $5 million?

Mr Sexton—No, that is not part of this program.

Senator BOSWELL—What program is that?

Mr Paterson—Did you say the Renewable Energy Development Initiative?

Senator BOSWELL—It says: increase ethanol energy through SugarBooster technology. Renewable Energy Development Initiative, round 2.

Mr Peel—Round 2, CSR: $5 million; a grant was awarded for $5 million.

Senator BOSWELL—Where is that?

Mr Peel—The grant was announced on 20 July 2006. The grants are payable dependent upon milestones reached by the companies through their projects. I am not sure how much has been paid to that company to date, but I am happy to take it on notice and get back to you with an answer.

Senator BOSWELL—Okay, that would be good. All I have to do is ask the Treasury to give me the figures on biodiesel.

CHAIR—Mr Sexton or Mr Peel, just for clarification, I presume that this money was not provided for an extension for a smoko room and a billiard room; I presume it was given with a view to increase production?

Mr Peel—Yes. I do not think we give any grants for smoko rooms or billiard rooms.

CHAIR—Yes, that is right, but there were requirements for increased production associated with the granting of these monies?

Mr Sexton—There were, indeed.

CHAIR—For extension to existing premises—is that correct?

Mr Peel—That is right.

Senator CHRIS EVANS—We started a few minutes ago on the REDI scheme, but then I got a little lost as we went around the country, so I am probably more confused than I was at the start. There seem to be an awful lot of grant programs. Regarding the Renewable Energy Development Initiative program, you have had three rounds of grants. I think you said you had allocated $46 million?

Mr Peel—A total of $47.1 million.

Senator CHRIS EVANS—How much of that has actually been paid out?

Mr Peel—I will just check.

Ms Zielke—Payments for this financial year, to date, have been $4.84 million. I have only that figure with me. I have future commitments, but I have only the paid figure for this financial year to date.

Senator CHRIS EVANS—That is $4.8 million to date?

Ms Zielke—Yes.

Senator CHRIS EVANS—Can you tell roughly how much had been actually expended in the previous two years?

Ms Zielke—No, I do not have that figure with me.

Senator CHRIS EVANS—I will not hold you to it. Are we talking $10 million?

Ms Zielke—It would be about $8 million or $9 million, yes.

Senator CHRIS EVANS—Maybe you could take that on notice for me?

Ms Zielke—Certainly.

Senator CHRIS EVANS—I just want to get a sense of it. We have probably expended about $15 million of the $47 million granted. Does the rest flow out as they come on stream?

Ms Zielke—Projects run for a maximum of three years upon application. Companies can request an extension of time of up to six months after that period. We do not have any projects that have been completed to date, and the program was actually launched in June 2005.

Senator CHRIS EVANS—What are the typical milestones they have to meet for these payments?

Ms Zielke—Milestones equate to project progress. The projects are actually funded for research and development activities, proof of concept activities or early stage commercialisation activities towards the development of a renewable energy source. They are project milestones. Generally there are technical issues where the company needs to achieve certain milestones in achieving the overall project. That can involve earlier stage commercialisation activities as well as technical.

Senator CHRIS EVANS—Is it a sort of dollar-for-dollar matching of funds system? What is the basis on which you allocate?

Ms Zielke—Yes, it is dollar-for-dollar matching for eligible expenditure. Obviously there are limitations on what is eligible under the program.

Senator CHRIS EVANS—You have had three rounds, the last of which was in December. You have allocated $47 million. I think you had up to $100 million in the kitty. Is it intended that there be a series of further rounds?

Ms Zielke—In November last year, Minister Macfarlane and Minister Campbell announced that the program would move to allow for applicants to lodge applications at any time rather than only allowing two rounds per year. Currently we are looking at applications as they are actually received. They can be considered every six to eight weeks, for example.

Senator CHRIS EVANS—As I understood it, it was a sort of competitive grant process. How do you do that if they are coming in in dribs and drabs?

Ms Zielke—The committee is aware of what the standard is in relation to considering applications, having already considered three rounds. It continues to consider those applications against the level of merit that has already been achieved in the program.

Senator CHRIS EVANS—So this is the committee of the Industry Research and Development Board?

Ms Zielke—Yes, it is the renewable energy committee.

Senator CHRIS EVANS—Do you have a sense of the rate at which the money will be going out in future? Do you deal with a lot of applications coming in, or are they coming in slowly? They obviously feel like they can develop projects to quite an extent?

Mr Peel—Some $100 million is available for the program over seven years, and the program started in June 2005, and we have already committed $47.1 million. To date it is travelling pretty well. It is probably ahead of pro rata, if you like.

Senator CHRIS EVANS—What is the final assessment benchmark? How do we work out at the end of the day whether the money has been well spent? I am not talking about the milestones. How will you assess and measure the program at the end of each project?

Ms Zielke—At the end of each project applicants are required to actually provide a final report along with an audited financial statement. That is, I suppose, the outcomes from the specific project. Then companies continue to report for up to five years after the project, generally at years one, two and five. Requests can also be put in for them to report at years three and four as well. That is how we monitor the commercial outcomes in relation to each project and use that to evaluate the program.

Senator BOSWELL—Are you talking about the biofuel grants?

Ms Zielke—No, these are in relation to the Renewable Energy Development Initiative.

Senator BOSWELL—As to these people that have actually produced ethanol, one or two of them have not obtained a grant, but they are actually producing ethanol. Can they apply for a grant?

Ms Zielke—They can apply for a grant if they are producing something innovative in relation to a renewable energy source.

Senator BOSWELL—Grants have been issued to CSR and Rocky Point. Can someone who comes online now apply for a grant?

Mr Peel—They can apply for an ethanol production grant.

Senator BOSWELL—I understand that. That is a back payment of excise?

Mr Peel—They cannot apply for a biofuels capital grant. That was available for a limited period.

Senator CHRIS EVANS—Given that my colleague, Senator Boswell, keeps taking us back to ethanol, I had better ask my ethanol questions now, because we will end up talking about ethanol whatever we do tonight. Senator Boswell probably knows all about the ethanol distribution program—this was a new initiative post budget, was it?

Mr Peel—It was announced in August last year by the Prime Minister after the budget.

Senator CHRIS EVANS—It will cost about $6,300,000; is that right?

Mr Peel—A total of $4.7 million in 2006-07; $7 million in 2007-08; and $2.3 million in 2008-09.

Senator CHRIS EVANS—I was throwing in the departmental outputs. How is that going?

Mr Peel—Senator Boswell raised this earlier. This program provides grants to service stations to upgrade so they can either sell ethanol or sell more ethanol than they currently do. As I mentioned, there has been one grant to date, but the intelligence that we have from industry is that about 100 applications are probably in the pipeline. As I mentioned previously, they actually have to do the work before they claim the benefit under this program.

Senator CHRIS EVANS—I must admit I got lost in that round, so forgive me if I made you go over the same ground. You have only made one grant. What was that worth?

Mr Sexton—The maximum grant is $10,000, and I think it was a $10,000 grant.

Senator CHRIS EVANS—Was that to a service station owner?

Mr Sexton—My understanding is that it was for one site.

Senator CHRIS EVANS—So it might be to a larger company?

Mr Sexton—The owner or operator of that site. Who that is, I do not know.

Senator CHRIS EVANS—What state was it in?

Mr Sexton—Again, I do not have that information.

Senator CHRIS EVANS—Perhaps you could take on notice providing some information about the one you have granted?

Mr Sexton—Yes.

Senator CHRIS EVANS—You think you have about 100 applications in the pipeline. There is no time restraint on that, other than January 2009, from what I have read in this document?

Mr Sexton—The way the program works is that we require them to complete any upgrades by the end of September 2007—basically 12 months since the beginning of the program. Then they have an opportunity to increase their grant from $10,000 to $20,000 if they achieve a sales target. They will have a further period, up until the end of September 2008, to achieve that sales target—a further 12 months.

Senator CHRIS EVANS—The information I have was that you keep accepting applications up to January 2009; that is not right?

Mr Sexton—The last of the applications needs to be in by 31 January 2009; you are correct. They will, in the main, relate to sales targets.

Senator CHRIS EVANS—So how can you meet a milestone of September 2007 if you can still apply in 2009?

Mr Sexton—There are two grants. One covers the construction of the upgrade, and the second grant, if they elect to obtain that as well, relates to achieving a sales target over the 12 months following the upgrade.

Senator CHRIS EVANS—But if I wanted to start on the construction, when must I have my application in?

Mr Sexton—You do not have to have the application in until 31 January 2009.

Mr Paterson—But you must have completed the construction by September 2007.

Senator CHRIS EVANS—Is it just me or does that not make sense?

Mr Paterson—You apply for the grant after you have completed construction. To get the grant, you must have completed construction by September 2007. To get a subsequent grant in relation to sales, you must have made that sales target between 2007 and 2008, or 12 months after you receive the original grant. Then all grants, because they are claimed after the event, have to be in by 2009.

Senator CHRIS EVANS—So is this an uncapped scheme, potentially?

Mr Sexton—No, it is a capped scheme.

Senator CHRIS EVANS—It does not seem like a capped scheme in the way you have described it.

Ms Ashurst—It is an entitlement if they meet the criteria for the upgrade that they do. We have an estimate in place as to how many we think it is likely to be.

Senator CHRIS EVANS—But, effectively, because you do not take the application until after they have constructed, you do not formally know. Somebody could be putting in 500 of these things and you will have to meet the cost if that comes in, basically—

Mr Sexton—That is right.

Senator CHRIS EVANS—as long as they meet the other criteria. I am not suggesting that they are.

Mr Sexton—That is right.

Senator CHRIS EVANS—That is why I could not understand that you could apply up until January, but you had to finish construction by 2007. Now I understand. Thank you for that. What is the nature of the sales target? What is the basis for it?

Ms Ashurst—There are two elements to it. One is for new entrants into the ethanol market, so new sellers of ethanol. There needs to be more than a certain volume. There is a minimum volume of ethanol that they need to sell. It is a proportion of their overall petrol sales on that site. The other element is for existing ethanol sellers who have improved their site in other ways—perhaps increased the number of bowsers, that sort of thing. They must have a proportion increase above what their sales had been in the previous 12 months, and again there is a minimum volume of ethanol that needs to be sold.

Senator CHRIS EVANS—So do the costings of $4.7 million tell us the number of expected grants is 4.7 divided by 10,000? What is the assumption underlying the costing for the scheme?

Ms Ashurst—There are two levels for the sales target that people could achieve: either a $5,000 or a $10,000 grant. If you are a new entrant, you could get a sales target that is only relatively small and get $5,000; if you do better than that, you can get the $10,000. So there is

a split between them. We have assumed that there were about 700 sites that would achieve both the upgrade and the $10,000. That was the basis of our costing.

Senator CHRIS EVANS—So that is not 700 new sites.

Ms Ashurst—They could be new or upgraded.

Senator CHRIS EVANS—Can you give a break-up of the number of new sites versus upgraded sites?

Ms Ashurst—We did not do that. We just assumed 700 grantees.

Senator CHRIS EVANS—What was the rationale behind choosing that figure?

Ms Ashurst—There are about 6,600 retail petrol sites across Australia. Although some already exist, we felt it was probably of the sort of order that would be taking up this program.

Senator CHRIS EVANS—Is there any restriction on ownership of these sites in terms of eligibility?

Ms Ashurst—No, there is no restriction, but the money does go to the organisation that is able to set the prices at the site.

Senator CHRIS EVANS—Sorry, to the organisation—

Ms Ashurst—The organisation that incurs the cost of the upgrade. So whoever incurs the cost of the upgrade receives the grant.

Senator CHRIS EVANS—So that could be Caltex or other stations or it could be an independent operator.

Ms Ashurst—That is correct.

Senator BOSWELL—In truth, we are selling less ethanol now than we did a couple of years ago. I think we actually sold 55 million litres a couple of years ago, and we are down to about 43 million. Admittedly it has gone up a bit, but we have not caught up to where we were a couple of years ago.

Senator CHRIS EVANS—How is the LPG conversion rebate scheme going?

Mr Peel—As at 9 February we had received 32,441 claims for the LPG payment. Some 28,341 had been granted, and the total value of the claims granted was $56,344,000.

Senator CHRIS EVANS—When do you pay the rebate—only after they have had the work done or in advance?

Mr Peel—They have to produce evidence that they have had the work done before it is paid.

Senator CHRIS EVANS—You have budgeted $126 million in this financial year. Is that right?

Mr Peel—The original budget was less than that. It was $64.8 million, but in the additional estimates papers that has now been increased to $126 million based on the level of activity and demand that we are getting for the program.

Senator CHRIS EVANS—I had the additional estimates figure, but basically that is double the original figure?

Mr Peel—That is right. We are bringing money forward from later years to cover this initial rush, if you like.

Senator CHRIS EVANS—So, you have actually pulled back. I was going to ask you about the out years, because it seems to tail away to a base of $97 million-odd. Is that because you have rearranged the original estimates?

Mr Peel—We have reprofiled the money, so there is the same amount there, but it is important to note that this program is not capped. If there were more claims than we had budgeted for, they would be paid.

Senator CHRIS EVANS—When you say 'reprofiled the money', you have not increased the envelope over the out years?

Mr Peel—No, it is still a total of $766 million.

Senator CHRIS EVANS—Does that mean now you are expecting the take-up rate to slow in the out years or the government would not give you any extra money, so that is the best you could do in reprofiling?

Mr Peel—I think our view at this stage is there has been an initial rush, and we will wait and see how it goes in the future. It is one of those things that are very hard to estimate, as I think you would appreciate. We will just have to wait and see how it goes and adjust the budgets as required from year to year.

Senator CHRIS EVANS—I know there was a lot of commentary early on that people were queuing up and could not get them done et cetera. Is that still a big issue?

Mr Peel—Not as much as it was. The information we have at the moment is that the industry is addressing the demand. When the program first started, there was quite a long waiting time to get a conversion. The latest advice that we have is that it is down to about one to two months. So the industry is starting to address that issue.

Senator CHRIS EVANS—Is there any sign that the subsidy is actually supporting an increase in price for the conversions?

Mr Peel—Not that we are aware of. Prices have increased slightly, but that is really due to the increase in costs of materials.

Senator CHRIS EVANS—It will be interesting to see whether that feeds into the system as it often does. Can people apply more than once—not on the same vehicle?

Mr Peel—No.

Senator CHRIS EVANS—It is limited to one per person?

Mr Sexton—Once every three years.

Senator CHRIS EVANS—But I could not come in and have two of my vehicles done at the same time?

Mr Peel—No.

Senator CHRIS EVANS—What is happening in terms of the monthly figures? You say there was an initial rush. Are you starting to see the monthly figures peak or come down?

Mr Sexton—We are currently paying grants at about 300 to 400 per day. There has been a slight dip in January, but you would expect that with the closure of installer shops and so on. That has held up.

Senator CHRIS EVANS—What was it at its peak?

Mr Sexton—No, it has basically held up right through that period.

Senator CHRIS EVANS—So it did not get to a higher level earlier?

Mr Sexton—No.

Senator CHRIS EVANS—I suppose, if you say there is a two-month waiting list, they are operating at full capacity on the conversions, so you would expect it to be steady for a while.

Mr Sexton—Indeed.

Senator CHRIS EVANS—So we will not know for a while whether demand will drop off after the initial rush?

Mr Sexton—That is right.

Senator BOSWELL—I would like to ask just one more question on ethanol. Do you have in a yearly figure the maximum amount of ethanol that was sold? Going back a couple of years, I understand that it was 55 million litres.

Ms Ashurst—We do not have a maximum figure. We just know that, over the last couple of years, it has been trending upward.

Senator BOSWELL—You have no figures before that?

Ms Ashurst—Not with me.

Senator BOSWELL—I am not saying that you would have them with you, but do you have the figures?

Ms Ashurst—We would only have a basis to collect—

Senator BOSWELL—You would only have the figures when the grants cut in, would you not?

Ms Ashurst—Yes—we would only have figures from the ethanol production grant program.

Senator BOSWELL—And there would be no other figures?

Ms Ashurst—I do not think so.

Mr Sexton—I do have some figures in relation to the ethanol production grants program, the first year being 2002-03. The figure for that year was 56,847,446 litres.

Senator BOSWELL—So 56 million litres—

Mr Sexton—In 2002-03, but then in 2003-04 it dropped to 28,532,250 litres.

Senator BOSWELL—How much in 2004-05?

Mr Sexton—A total of 22,667,297 litres.

Senator BOSWELL—Can you upgrade the figures as they roll by?

Mr Sexton—There was a substantial jump between the years 2004-05 and 2005-06.

Senator BOSWELL—Would you give me the 2006-07 figures again?

Mr Sexton—In 2005-06, it was 40,324,589, and again for the seven months of 2006-07 it was 43,848,000.

Senator BOSWELL—And in 2002-03 it was 56 million?

Mr Sexton—That is correct.

Senator CHRIS EVANS—With respect to the Low Emissions Technology Demonstration Fund, I gather applications closed in April last year with, I think, 30 applications having been received. From what I can see, five projects have been announced. Can someone confirm for me whether those figures are right or whether I have missed something?

Mr Peel—It closed on 31 March 2006. We did receive 30 applications, as you mentioned. Five grants have been announced.

Senator CHRIS EVANS—Does that mean there are not to be anymore? Are they rounds of announcements?

Mr Peel—It is likely that one further grant will be announced.

Senator CHRIS EVANS—And that will be it?

Mr Peel—Yes.

Senator CHRIS EVANS—So there will be six in total. What is the total money already allocated?

Mr Peel—Some $310 million.

Senator CHRIS EVANS—So you have a maximum of $190 million left to spend?

Mr Peel—Yes, there is $190 million remaining. That is correct.

Senator CHRIS EVANS—We will have to wait and see whether the lucky winner gets the full $190 million? I presume you do not want to tell me who the next one is?

Mr Peel—I will leave that to ministers to announce.

Senator CHRIS EVANS—I look forward to the press release. Who assesses them? It was done by you and the Department of Environment, was it?

Mr Peel—An expert panel was established to assess the applications. I can give you the details of the panel if you would like. There is Mr Paul McClintock, who is the chairman of the panel, Mr Nobby Clark, Mr Ken Humphreys, Mr John Ralph, Dr Ziggy Switkowski, and two Commonwealth officers—one from the Department of Environment and Heritage as it was at that time and one from the Department of Industry, Tourism and Resources.

Senator CHRIS EVANS—That committee made recommendations to the two ministers?

Mr Peel—That is right.

Senator CHRIS EVANS—And they signed off on those?

Mr Peel—That is right.

Senator CHRIS EVANS—In terms of the money allocated, has the money actually been paid out?

Mr Peel—No.

Senator CHRIS EVANS—You are trying to leverage this money up, are you not?

Mr Peel—That is right. It was to be a minimum of one government dollar to two private sector dollars. No money has yet been paid out. We are currently in the process of finalising contracts with the successful grantees.

Senator CHRIS EVANS—As part of that they have to show you that they have other funds available?

Mr Peel—Yes, they have to demonstrate that they have the financial resources to cover the whole project.

Senator CHRIS EVANS—They are all fairly close?

Mr Birch—They are quite complex negotiations in terms of the projects. At the moment they are running a little bit slower than we expected. We are currently well progressed on one and we are expecting that to be completed around May. The other ones would be extending beyond that, perhaps to June next financial year.

Senator CHRIS EVANS—I actually went out to have a look at the Gorgon project. As part of that they talked to me about their plans, but they are not close to starting, I would not have thought. We will know in a couple of weeks.

Mr Birch—That is right.

Senator CHRIS EVANS—It is not a criticism, but they still have a way to go.

Mr Peel—Some of the projects are not planning to actually start until future years. They will not all necessarily start straightaway.

Senator CHRIS EVANS—That is my point. I am just trying to understand how it is going to work in the sense of the lead times that you are thinking about.

Mr Birch—In relation to the Gorgon project you mentioned, we are currently looking at around August this year to have the funding deed arranged. They had an expected start date of 2008.

Senator CHRIS EVANS—So using that one as the example, when do you front up with the money?

Mr Birch—Again, it will be an issue where the payments are made essentially in relation to expenses that are incurred against milestones, so it would depend on the commencement date of that project. There may well be conditions precedent and so on in the funding deed that would affect that. Without having the details of the deed in place, it would be difficult to answer a question.

Senator CHRIS EVANS—This is not a sort of success fee; this is you contributing to the cost of their establishing this, and then we see if it works—is that fair?

Mr Birch—That is right. They are demonstration projects, so the information around those projects will be disseminated to the industry to ensure that the knowledge gained can be used by others.

Senator CHRIS EVANS—I was going to ask you about the intellectual property issues. As part of the deed of agreement, is it a requirement that they share this intellectual property?

Mr Birch—We have not actually signed the deed at the present time. The intention is to have a number of provisions in the deed for information to be disseminated, and that would be either by the applicant themselves or through reports and other material that the Commonwealth may commission. Also things such as site visits and so forth would be catered for. But the details of those things have not yet been settled.

Senator CHRIS EVANS—Thanks for that. I now turn to coal and clean coal technology and the work that the department is supporting in those areas.

Mr Peel—If I could just mention, in relation to the low emissions program we were just discussing, that I understand that three of those projects relate to clean coal technology.

Senator CHRIS EVANS—I realise that you have activity across a range of programs that go to clean coal technology. I have a few issues that I want to raise with you, but I thought we would talk about coal and see if I could cover them in that way. Firstly, what are you funding in terms of this geosequestration? What work is the department supporting in that area?

Mr Ryan—The geosequestration work actually covers a full range of activities, some of which includes coal. You just mentioned the Gorgon project, which actually has a geosequestration component to it. Work is being done through the CO_2CRC in a pilot project down in Cape Otway. There are a number of projects, some of which have been associated with that low-emissions technology fund, which have the capacity to do geosequestration work with them. In addition to that, projects outside these programs will look at this activity.

Senator CHRIS EVANS—You have the Asia Pacific Partnership on Clean Development and Climate Change?

Mr Ryan—That is correct.

Senator CHRIS EVANS—Is anything going on in the sequestration area there?

Mr Ryan—I would need to check the details, but my understanding is that the work we are doing there is mainly associated with more of the mapping of possible sites in areas such as China. That can happen through the Asia Pacific partnership, our bilateral arrangements with China or multilateral arrangements that we have, including what is called the Carbon Sequestration Leadership Forum that has membership of 20 countries and a big technical program. That technical program is looking at a whole range of sequestration projects around the globe.

Senator CHRIS EVANS—Whose auspices is that under?

Mr Ryan—The Carbon Sequestration Leadership Forum was established some four or five years ago. It was an initiative out of the US, but its membership covers countries including India, China, the European Union, Australia and Japan. It is a pretty comprehensive list of some 20-odd countries, I think.

Senator CHRIS EVANS—Is it attached to another body meeting or is it just independent?

Mr Ryan—It is independent.

Senator CHRIS EVANS—As you said, you support the CRC, and we have the LEP funds projects. Have you done any work on the identification of potential sites for CO_2 storage?

Mr Ryan—A significant program has been done through Geoscience Australia. This was called the GEODISC program. That looked at all of the potential sites in Australia and more or less rated them as to which had the best technical arrangements. That mapping could be lined up with where the emission sources are currently, if you like. You would look at it, say, in the Gippsland area; as you go down into Bass Strait, there are some strong sites, and you would also see that it is a big brown coal area.

Senator CHRIS EVANS—So you are saying that they focused on the sites next to the source of the fuel?

Mr Ryan—No, I think they were done independently, but you can overlay the two.

Senator CHRIS EVANS—Is this suggestion that the Hunter region is no good for this purpose supported by that study?

Mr Ryan—In a minute, I will pass to you a map that will help. It will show you that there are sites at the Hunter, but their rating is not as high as some of the other sites.

Senator CHRIS EVANS—A visual aid is always a help.

Mr Ryan—That is right.

Senator CHRIS EVANS—I see. How exact a science is this now? How much confidence do we have in this sort of assessment? I know that people want to debate safety and capability.

Mr Ryan—Around the globe there are some commercial sites currently operating. One of the most famous is in the North Sea, as part of a Norway operation, called Sleipner. The other commercial activities associated with geosequestration relate to enhanced oil recovery. The capacity of extraction of a number of declining oil wells has improved by putting CO_2 into the mix and pushing the oil up to a higher extraction rate. In terms of electricity generation, we are just now in the phase of trying to establish demonstration plants, and that is what happens in Australia looking at the low-emissions technology fund. Similar activities are happening in the US and Europe, looking at how we might do it with power generation.

Senator CHRIS EVANS—Is the CRC doing work on this storage sites issue as well?

Mr Ryan—The CO2CRC has a site down at Cape Otway in Victoria. It will be doing some monitoring work, putting CO_2 down, testing how well the storage works and how that geology work compares with their expectations.

Senator CHRIS EVANS—Does this work, as well as looking at the potential sites, also take into account local population impacts?

Mr Ryan—Would you like to elaborate a little bit further?

Senator CHRIS EVANS—If there is a great site under my backyard, is it classified as a great site, or do you think I might give you a problem about it?

Mr Ryan—At the moment I think the sites are based on their technical capability rather than community acceptability.

Senator Chris Evans—I was wondering if you have gone to the next level of sophistication?

Mr Ryan—No.

Senator CHRIS EVANS—So it basically goes to prospectivity. The other issue that has been raised with me is this competing usage between mining and CO_2 storage. Is that a big issue?

Mr Ryan—It is for some areas like the Bass Strait. There is competition between whether a piece of acreage would be allocated for oil and gas exploration or whether it would allocated for CO_2 storage. We have been able to work with the industry to develop a process whereby the rights of each can be managed in a way that we think now we can proceed.

Senator CHRIS EVANS—How is that done, as a regulation?

Mr Ryan—It will be done through legislation. I think it will be done through the Petroleum (Submerged Lands) Act. Technically, it is likely in Bass Strait that they actually will not compete because the CO_2 will be stored at much lower levels in aquifers than from where the extraction for oil and gas is occurring. The way that the allocation or property right will be allocated is that the primary allocation actually occurs for oil and gas, and the allocation is actually for the CO_2.

Senator CHRIS EVANS—When are we likely to see that legislation?

Mr Ryan—This year.

Senator CHRIS EVANS—That is a very brave prediction.

Mr Ryan—Maybe.

Senator CHRIS EVANS—You have told the parliamentary draftsman this, have you?

Mr Ryan—Yes.

Senator CHRIS EVANS—It seems to me that it will not be simple—but, anyway, I look forward to that. Can someone tell me what we are supporting as part of this Asia-Pacific Partnership on Clean Development and Climate?

Mr D Clarke—The Asia-Pacific partnership is organised into eight task forces that are sectoral based. Each of those task forces has proposed a number of projects varying from research, development, demonstration, pilot plant, capacity building, training et cetera. It is a very wide range of projects. Around 100 projects have been collectively signed off within the partnership and a subset of those has been identified by the Australian government to receive initial Australian government funding.

Senator CHRIS EVANS—Are we looking to pick up an area of expertise or are we cherry picking programs across a range of options?

Mr D Clarke—When the Prime Minister announced the $100 million funding that Australia would use to seed, or initiate, many of these projects—because there is a lot of industry and other government co-funding—he identified that 25 per cent of that $100 million

funding would be allocated to support renewable energy technologies and a proportion, which I will get for you in a moment, to support capacity-building type activities. It should also be said that Australia has taken on the role of chair of two of those eight task forces, which reflects our own special interests, one of those being cleaner fossil energy and the other being aluminium.

Senator CHRIS EVANS—Who is driving those? Who is the chair? Is it a public servant?

Mr D Clarke—It is my colleague John Hartwell, who heads the resources division in this department.

Senator CHRIS EVANS—Is it being driven by government rather than by industry?

Mr D Clarke—The government people have taken on the administrative chairing roles. Each of the task forces has very strong industry engagement. That is a critical feature of these projects. Each has industry people at the table at all of the meetings, and each has an extensive network behind them into those sectors in each of the six countries involved.

Senator CHRIS EVANS—Is there a public list of the projects?

Mr D Clarke—Yes. The total portfolio that was signed off by the partnership as a whole is accessible through a website supported by the US government. The particular details of the Australian funding are through the Australian government AP6 website. I can pass you the URLs of those offline.

Senator CHRIS EVANS—That will help, particularly the American one. If you could give me those on notice, that would be helpful. Can someone help me with what is happening under the uranium industry framework?

Ms Barton—The uranium industry framework report was released by Minister Macfarlane in November last year. An implementation group has been established and an implementation plan agreed as of January this year. The implementation phase is now beginning.

Senator CHRIS EVANS—What are you implementing?

Ms Barton—There were 20 recommendations made under the plan. They cover a broad range of areas including skills, training, Indigenous issues, regulation and transport. They are looking at removing impediments to development of the uranium mining and exploration sector in principle.

Senator CHRIS EVANS—I had a look at the stuff. It seemed very broad. Have you set clear priorities? It seems to be a very big agenda. I want to get a sense of how you are setting about it, what your priorities are and how I would test whether you are making any progress in six months time.

Ms Barton—A number of working groups have been set up under the implementation group. That is only just beginning, given the plan was signed off last month. There was a plan. They will report back periodically through the implementation group to Minister Macfarlane against milestones.

Senator CHRIS EVANS—Are those milestones public?

Ms Barton—They are currently resolving the detail and the milestones of the plan.

Senator CHRIS EVANS—Will the milestones be made public?

Ms Barton—That is yet to be decided by the implementation group.

Senator CHRIS EVANS—Is it their decision or is it the minister's decision?

Ms Barton—The chair of the implementation group will make that recommendation to Minister Macfarlane.

Senator CHRIS EVANS—Can you tell me how you facilitated the Indigenous engagement in the group?

Ms Barton—That is one of the four working groups that are being established under the implementation group. That working group will include members of Indigenous groups, in particular the Northern Land Council. It will also include the Northern Territory government, a number of the mining companies and relevant Australian government agencies.

Senator CHRIS EVANS—Only the Northern Land Council? Is there a representative of the Indigenous people?

Ms Barton—At this stage the focus of that group is in the Northern Territory.

Senator CHRIS EVANS—Yes, they have an area set by statute; a lot of the uranium prospectivity and existing lines are well outside that area of responsibility of the NLC. Are they the only group you have got engaged?

Ms Barton—At this stage, yes.

Senator CHRIS EVANS—Has the department been required to respond to the Switkowski report on nuclear power? Are there issues coming out for the department in terms of a response or work that flows from the report?

Mr Paterson—The report was a report to government. The government has not yet formally responded to that report. You would expect our portfolio to be actively involved in the development of at least recommendations to government as to how it might consider that. That has not yet taken place.

Senator CHRIS EVANS—That is why I asked. I thought you would have to be at the centre of it somewhere. Has there been an IDC formed or some group to propose something to government?

Mr Ryan—Yes.

Senator CHRIS EVANS—What is that? What is its terms of reference and who is on it?

Mr Ryan—The IDC has met a couple of times. It has quite a large representation of departments. It will be looking to complete its work pretty quickly, partly because it is bringing together the uranium industry framework—the Switkowski report, as you describe it—and the House of Representative's report into uranium mining which was released at the end of last year.

Senator CHRIS EVANS—You say they are bringing it together. What are their terms of reference? What have they been tasked to do?

Mr Ryan—They were tasked to bring the three together and make recommendations to government on how they might respond to them.

Senator CHRIS EVANS—I assume that it would be more than a document merge task.

Mr Ryan—Yes. They are difficult documents because some have recommendations, whereas the uranium mining nuclear energy report only had findings; it had no recommendations in it.

Senator CHRIS EVANS—That is why I am having difficulty getting a sense of what it is you are doing. I know the House of Representatives report contained recommendations, but that is a much smaller subset of the issues than in the Switkowski report. Traditionally, the government does not take a lot of notice of House of Representatives or Senate committee reports. It does not respond to them very quickly. I suspect that is not the main impetus for your work. Are you providing options for the government arising out of the Switkowski report?

Mr Paterson—The nature of the advice that we might provide to the government is, as you are aware, something we are not in a position to comment on. We have indicated that we are taking the lead in terms of pulling together the IDC and preparing recommendations to government, but we cannot comment on the nature of that advice to government.

Senator CHRIS EVANS—I am not asking you to tell me what you are advising; I am trying to understand what you have been tasked to do.

Mr Paterson—We cannot indicate even the nature of the advice that we provide. We are bringing forward those three—

CHAIR—That is internal advice for the purposes of policy. You are not obligated to—

Senator CHRIS EVANS—With respect, Chair, traditionally in estimates committees the advice provided is not subject to questioning, but people have informed committee members on the question of process. I am trying to work out what the IDC is supposed to be doing.

Mr Paterson—It is bringing forward on a whole-of-government basis a series of recommendations to government as to how it might deal with those issues. What might form the nature of those recommendations and how they might be framed is not something we can comment on.

Senator CHRIS EVANS—Are we talking about the options for nuclear energy and uranium mining, or just uranium mining?

Mr Paterson—It is the three. It is the uranium industry framework, which has been mentioned; it is what we affectionately call the UMPNE report, which is the report of the task force that Ziggy Switkowski chaired; and it is the House of Representatives report.

Senator CHRIS EVANS—Do I take it that your department is chairing the IDC?

Mr Paterson—Correct.

Senator CHRIS EVANS—Who is that?

Mr Ryan—Me.

Senator CHRIS EVANS—The buck stops with you? I will make a note of that for future reference! You say there are a lot of departments represented. Do you mind taking on notice the departments that are represented on the IDC?

Mr Ryan—I will.

Senator CHRIS EVANS—Have you got a deadline for reporting? You said you had to work quickly.

Mr Ryan—Yes, we have a time frame to work in.

Senator CHRIS EVANS—What is that?

Mr Ryan—We are working towards the first quarter of this year.

Senator CHRIS EVANS—With respect to the secretariat and the work of the IDC, is that being done by your department or have you pulled together a task force?

Mr Ryan—No. The normal way the process runs is that the department that chairs does most of the legwork but other departments make their contributions. That is how you build the response.

Senator CHRIS EVANS—Is your department engaged in the work of the Nuclear Suppliers Group or is it done by DFAT alone?

Ms Barton—DFAT have the carriage of going to that group and representing Australia, although they do consult with us occasionally.

Senator CHRIS EVANS—The policy work is basically done by DFAT?

Ms Barton—Yes.

Senator CHRIS EVANS—Do you have an underpinning IDC or something providing advice?

Ms Barton—No, it is only if there is an issue that affects uranium supply that they consult with ITR.

Senator CHRIS EVANS—What is happening on the energy demand management side?

Mr D Clarke—Can I ask you to give me a hint as to which direction you want to go in? It is a very broad area. I do not want to interpret it too literally or too broadly.

Senator CHRIS EVANS—That is why I asked the leading question, so you will tell me all you know. If the minister starts getting twitchy, you will know if you have gone too far. We are barely keeping Senator Minchin awake at the moment. The tip is to keep it short and punchy. I wanted to get a sense of the breadth of what you are doing. I do not want a description of everything you are doing; I will follow that through. What in short and broad terms is the department doing on the demand management side?

Mr D Clarke—I need one more point of clarification. Are you including energy efficiency under that heading?

Senator CHRIS EVANS—No, I am talking more about consumer type demand.

Mr D Clarke—Programs in that area are being progressed through the Ministerial Council on Energy within our energy market reform program. There are several initiatives. The first is looking at how large energy users, manufacturers and upwards, can participate in the short-term energy market. How can they play into the market and bid to switch off their electricity demand in response to peak or critical events? That is a market development function. Are

there regulatory impediments to that happening and, if so, can we address them? It is a very early stage market that we would like to see grow. The second initiative is looking at the regulatory structure around network companies to look at whether we can put incentives in play with network distribution companies. They are regulated monopolies and the regulatory structure essentially rewards them for shipping more electricity. There are good policy reasons why you would want to create an incentive for them to reduce the amount of electricity they shift while still satisfying demand. We are looking closely at the regulatory structures around that. The third and final area relates to metering. We are looking at the application of so-called smart meters as a technology that can be deployed right down to the household level that enables household response and direct load control—that is, household response to price signals, critical events and also direct load control. That means you can contract to your electricity company the capacity to turn on and off equipment in a way that enhances management of the network without disadvantaging you as a consumer. It is a very broad agenda. It is being addressed through the MCE jointly by the Commonwealth, states and territories.

Senator CHRIS EVANS—Are the meters the only aspect of work with individual consumers? I know the state government and others are doing various things. Is that the sort of limit of the Commonwealth's engagement?

Mr D Clarke—In terms of demand management, yes. We are in the process of transferring the regulatory regime under which the retail sector of the electricity and gas market is operated from the individual state structures to the new national structure. In regard to demand management, the smart meters are the principal initiative that impacts at the consumer level.

Senator CHRIS EVANS—Can I also ask about the mandatory energy efficiency opportunity assessments. I know the amendment bill is going through the parliament at the moment. It was supposed to be dealt with last week but in the end it was not.

Mr D Clarke—Correct.

Senator CHRIS EVANS—This is obviously the first stage. Some people say that it is a fairly tentative step in the sense that it is not so much about actual targets. What does the department see as the next stage of the developments in these areas?

Mr D Clarke—Energy efficiency, which is a related but separate issue to demand management per se. The Energy Efficiency Opportunities Bill was passed last year, and there are currently some technical amendments in the parliament. Under that law, companies that use more than 0.5 of a petajoule, which is a lot of energy, are caught by the provisions of that law. The first milestone in that program is that they must register with the department by the end of March this year—that is, they must self-identify as a company that uses more than the threshold level of energy. There is then a series of obligations that they incur over a five-year cycle. The essence of it is that they must go looking inside their companies for cost-effective, energy-efficient opportunities. They must report the findings when they go looking and they must tell us what decisions they made with regard to what they found. They are not required to implement anything they find; they are, however, required to advise us of what decisions they took.

By setting the threshold at 0.5 of a petajoule, we believe that around 250 to 300 companies will be in scope. That relatively small number of very large companies account for 60 per cent of Australia's business energy use. There is no intent to go beyond EEO at this stage. It is a very powerful mechanism for talking to a large part of energy use through a small number of companies. The details of that program were worked up in close consultation with industry. There is no beyond EEO. EEO will run for five years in its first cycle. One presumes in good practice the government will look at the results after five years and consider what next, but the way the legislation is structured it would be a continuous, five-year rolling program.

Senator CHRIS EVANS—There is no intention to do anything more radical or strong in the next five years, or to look at consumers of energy who use less than a lot?

Mr D Clarke—No. There is no intent at all to extend EEO or to lower the threshold to drive it deeper into the economy. I emphasise that this 250 to 300 companies for 60 per cent is a very powerful ratio. Because of the compliance burden, the number of companies that would be caught to get another large tranche is way beyond the potential benefits.

Senator CHRIS EVANS—What has our experience been since the first piece of the legislation went through?

Mr D Clarke—Noting that we are only just reaching the end of the registration program, our early experience is based on the handful of companies that volunteered to test our procedures and go through a trial stage. These are companies that, by definition, volunteered to be active participants early. You have to be cautious about extrapolating from that into the whole population of companies.

Senator CHRIS EVANS—They are likely to be the good students.

Mr D Clarke—They are the willing participants. What we find is that those companies who embrace the program as an opportunity, which is very much the spirit in which we are promoting it, are finding very significant energy efficiency savings that are economic and significant. We have not yet published those findings. I do have quite hard numbers, but we are waiting for permission from those trial companies to release those results. We are keen to release them because they are a good story to the other companies that have not yet commenced their participation.

Senator CHRIS EVANS—With the Mandatory Renewable Energy Target scheme, can you give me an update on what is happening there and what the plans are?

Mr D Clarke—That program is administered by the environment department, so I am not in a position to give you any detail on that program.

Senator CHRIS EVANS—You are not engaged at all as a department?

Mr D Clarke—We are consulted at the margins, but it is not our legislation and we do not administer the program.

Senator CHRIS EVANS—There is a trap for new players. I have a couple of other things. The first is the issue of mine safety. I understand this is on the COAG agenda, and the federal government has been keen to talk about standardisation. Concerns have been raised with me about some of the state legislation, liability on mine managers and concerns about what that might mean for people who are prepared to seek employment as mine managers et cetera. I

am not telling you the issues; I just want to get a sense of what is happening in that regard, what the Commonwealth view is and what the Commonwealth is seeking to achieve in that area?

Ms Sewell—The issue of mine safety is certainly on the COAG agenda through the Ministerial Council on Mineral and Petroleum Resources. That council is implementing a National Mine Safety Framework, which it agreed to in 2002. The framework has seven different strategies under it, one of which—and probably the most important—is the development of nationally consistent legislation. That is probably the highest priority for the implementation process. Once there is agreement across all jurisdictions on the frameworks of the nationally consistent legislation, work will start to commence on some of the other more specific strategies which will pick up in particular the different approaches across jurisdictions in relation to the instruments through which mine safety is legislated currently. That is the broad framework. Would you like me to go into the detail?

Senator CHRIS EVANS—I would like to understand whether you think you are going to make any progress on it. Those sorts of things are fine and people always agree to the broad. You are asking certain states to change their mines regulations, are you?

Ms Sewell—This process started in 2002 with agreement by the ministerial council to the need for a safety framework. It was not until 2004 that the ministerial council agreed to a process by which that framework could be implemented.

Senator CHRIS EVANS—They agreed to meet.

Ms Sewell—Yes. Late in 2005 the council did express some concern at the slow rate of progress on the whole initiative and did agree to establish a steering committee to bring together representatives of regulators, the workforce and industry to set up a more independent process and a better resource process to get some momentum behind that process.

Senator CHRIS EVANS—Is there any sign of things moving along now?

Ms Sewell—From the Australian government perspective we are very pleased with progress so far. The steering group was established mid last year. They are coming up to their third meeting. They decided to prioritise three of the seven strategies, so work is moving in a parallel fashion on development of nationally consistent legislation, on the development of a national consultation strategy and on the development of a nationally consistent database.

Senator CHRIS EVANS—What does that mean for people who tell me they cannot get mine managers?

Ms Sewell—The issue of who holds strict or ultimate liability for incidents at mines is certainly dealt with in a fairly ad hoc way across Australia at the moment. Some states have specific mining health and safety legislation; some states simply rely on their general OH&S legislation; and some states use a mixture of both. The two states in which there appear to be the greatest potential to move towards a more nationally consistent approach are New South Wales and Queensland. Both of those states are signed on to the National Mine Safety Framework. We have had no indication that there is going to be a problem in terms of bringing in that specific issue when we get down to the level of detail of going through

different pieces of legislation and identifying which legislation does not meet the overarching principles that the ministerial council will sign onto.

Senator CHRIS EVANS—This is always pretty emotive stuff. When do you expect to be getting down to that sort of level—to the kernel of it?

Ms Sewell—In the last six or seven months we are fairly close to reaching agreement on the overarching legislative principles. That does include signing on to those principles by the unions as well as the industry. We have engaged an independent researcher to review relevant legislation across Australia. The purpose of that work is to highlight areas of critical difference. That is when the really hard work starts in terms of states and territories who have signed on to principles. The degree of difficulty in then getting people to make major amendments to legislation if necessary will become apparent once that process has been resolved.

Senator CHRIS EVANS—What is the form of consultation or engagement with industry and the trade unions?

Ms Sewell—The steering group that is driving the process at the moment has representatives of the three major unions involved in the mining industry. It has representatives from the Minerals Council and from the state chambers of mines that are most affected by mine safety issues.

Senator CHRIS EVANS—I want to ask a couple of questions about geothermal energy and what work has been going on in that sphere. I could use the excuse that the outputs in this department are unusual and do not flow through, but, when I deal with departments that do have them, I never follow the order, either. I want to get a sense of what work is going on. A lot of people try and tell me what a great prospect this is and those sorts of things. What are the potential sites in Australia, what are the impediments to development and what are the current issues?

Mr D Clarke—Certainly. You are right. Geothermal appears a very interesting low-emission technology for electricity generation. It would appear to be a renewable technology capable of operating 24 hours a day, seven days a week and hence potentially contributing to the base-load demand, unlike several other renewable technologies that are essentially intermittent. We do not have surface geothermal energy in this country. It is not a volcanic landscape, so it is deep—maybe five kilometres deep—with very hot, dry rocks. The technology in a nutshell is injecting water down to that level which comes back up as steam and the steam is used to drive turbines to make electricity. There have been about four grants that have been given through AusIndustry programs to companies that are doing research development and demonstration in this area. The most advanced project at the moment is the one by Geodynamics in the Cooper Basin. That has also received grant support from the Commonwealth.

There are about a dozen companies that are active in this field in Australia, most at the research and development stage, many just taking out prospecting licences. So hot, dry rocks are now a resource that has an economic value like any other resource, except that, rather than digging it up and using it, you exploit it by this transfer of water to steam in a cycle. The industry is therefore still at an early stage in this country and indeed in most places around the

world. The interest in geothermal is not just in Australia; it is also in the US and elsewhere. We appear to have quite high quality resources, including some that are a lot closer to load than the Cooper basin.

Senator CHRIS EVANS—Who maps them? How do you know that?

Mr D Clarke—Geoscience Australia receive funding in the Alternative Fuels Program that was announced by the Prime Minister last year to extend their mapping of this geothermal resource. The initial identification of it, as I understand it, is as a by-product of oil and gas exploration.

Senator CHRIS EVANS—We have a reasonable knowledge of the resource?

Mr D Clarke—It is an early stage knowledge, but it was not necessarily targeted at seeking out this resource, hence the Geoscience Australia funding into where you would go looking if this is what you wanted to find.

Senator CHRIS EVANS—What is the department's best estimation of how far away a commercial application is?

Mr D Clarke—We would not have made that estimate. We would note that the most advanced project domestically, Geodynamics, successfully proved the site. That is, they drilled the exploratory well to inject the water down into the resource. They drilled a sample recovery well. They got steam coming up. They were very pleased by the temperature and the other technical details. They are now working up to the next stage. We would still call that predemonstration stage. That is really only a proving stage. It would be guesswork to predict beyond that.

Senator CHRIS EVANS—Is the major barrier still technological knowledge or is it in large part the economics?

Mr D Clarke—It is all of it. There are a lot of aspects of it. It is the identification and characterisation of the resource, because the drilling is very expensive—the more you know about it before you go to that stage, the better; it is management and control of the cycle; and it is the efficient use of this native steam—the actual turbine at the top. As we understand it at present there are challenges right across the supply chain from discovery, exploitation and production.

Senator CHRIS EVANS—The water would be a big issue as well.

Mr D Clarke—Not necessarily, because it can actually be a closed cycle. It is not necessarily a large consumer of water, per se. Inject the water; back it comes as steam; cools to water; and back down again. It is not necessarily a large consumer of water.

Senator CHRIS EVANS—You would be recycling the water?

Mr D Clarke—Yes.

Senator WATSON—Is there a problem that the rock might disintegrate when you put cold water on hot rocks?

Mr D Clarke—I wonder about that too. These are massive resources at near 300 degrees centigrade. What the long-term behaviour of the hot, dry rock resource is perhaps one of the many unknowns in this process. It could be a question that your initial production wells get to

a point where they are no longer economic and further production wells need to be produced further down in the field. The analogy to a gas or oil field might be useful.

Senator CHRIS EVANS—I will finish with a broader question which goes to this technology and to others in this whole area. It is the question about intellectual property and sharing of research. We are a resource-rich country but a small economy internationally. I know there are other people doing research in similar areas. I am trying to understand the level of exchange sharing that is occurring, given that these technologies and developments have large commercial value. We are obviously investing taxpayers' funds into various demonstration projects in Australia. I am trying to get a sense of how all that fits in, what happens with the intellectual property and whether we are duplicating what has been done elsewhere.

Mr D Clarke—There are two observations to make. There is certainly the case that there is a competition in business to capture the intellectual property and commercialise it. A lot of the intellectual property, or the core expertise, is actually drilling. You asked Mr Ryan before about geosequestration and where do we have competitive advantages. Australia has a lot of good drillers and good experience in that. That gives us a bit of an edge on some other countries in both geosequestration and geothermal exploitation. With regard to the international collaboration in this field, the principal vehicle is under the auspices of the International Energy Agency, the IEA, based in Paris. They have a program where countries join—it is called an implementing agreement—to collaborate on research, development and information sharing in geothermal. Australia is an active participant in the IEA geothermal program.

CHAIR—That finishes resources and energy. You will be excused from any further hearing. I will suspend the hearings until tomorrow morning at 8.30 am, when we will start with industry.

Committee adjourned at 9.40 pm