

COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

Parliamentary Joint Committee on Corporations and Financial Services

Oversight of the Australian Securities and Investments Commission and the Takeovers Panel

Friday, 28 March 2014

Canberra

BY AUTHORITY OF THE SENATE

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Parliamentary Joint Committee on Corporations and Financial Services

Friday, 28 March 2014

**Members in attendance:** Senators Dastyari, Fawcett and Mr Coleman, Ms Owens.

**Terms of Reference for the Inquiry:**

To inquire into and report on:

Oversight of the Australian Securities and Investments Commission

**BULMAN, Mr Allan John, Director, Takeovers Panel 1**

**SHAW, Mr Alan Joseph, Counsel, Takeovers Panel 1**

**ARMOUR, Ms Cathie, Commissioner, Australian Securities and Investments Commission 13**

**DAY, Mr Warren, Senior Executive Leader, Australian Securities and Investments Commission 13**

**KELL, Mr Peter, Deputy Chairman, Australian Securities and Investments Commission 13**

**KIRK, Mr Greg, Senior Executive Leader, Australian Securities and Investments Commission 13**

**MEDCRAFT, Mr Greg, Chairman, Australian Securities and Investments Commission 13**

**PRICE, Mr John, Commissioner, Australian Securities and Investments Commission 13**

**SAVUNDRA, Mr Chris, Senior Executive Leader, Australian Securities and Investments Commission 13**

**TANZER, Mr Greg, Commissioner, Australian Securities and Investments Commission 13**

BULMAN, Mr Allan John, Director, Takeovers Panel

SHAW, Mr Alan Joseph, Counsel, Takeovers Panel

**Committee met at 13:40.**

CHAIR (Senator Fawcett): I declare open this public hearing of the Parliamentary Joint Committee on Corporations and Financial Services. Today the committee is taking evidence from the Takeovers Panel and later the Australian Securities and Investments Commission, ASIC. This hearing is part of the committee's ongoing oversight of ASIC, the Takeovers Panel and the corporations legislation.

I remind everyone that witnesses giving evidence to the committee are protected by parliamentary privilege. Any act which may disadvantage a witness on account of their evidence is a breach of privilege and may be treated by the parliament as a contempt. It is also a contempt to give false and misleading evidence to a committee.

Witnesses should be aware that, if in the giving of their evidence they make adverse comment about another individual or organisation, that individual or organisation will be made aware of the comment and given a reasonable opportunity to respond to the committee. If a witness objects to answering a question, the witness should 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 claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. A request to give a particular answer in camera may also be made at any other time. The committee prefers to hear evidence in public, but it may agree to take evidence confidentially if the committee believes it to be relevant to the committee's inquiry. The committee may still publish confidential evidence at a later date, but we would endeavour to consult with the witnesses concerned before doing this.

I remind committee members that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall 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 indeed to a minister. This resolution prohibits only 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 were adopted.

This does not really apply to you gentlemen, but officers of departments are also reminded that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for the claim.

The committee welcomes officers from the Takeovers Panel. Thank you for attending today's hearing. Would you like to make a short opening statement before the committee begins questions?

Mr Bulman: No.

CHAIR: In that case, I call Ms Owens.

Ms OWENS: I notice there is a trend in the number of applications to the Takeovers Panel that have been dismissed since 2001, from a few per cent initially to about 50 per cent this year. I am just wondering if you can outline what the cause of that trend might be and whether it is continuing to grow.

Mr Bulman: I have a couple of comments in response to that. The first is that, as you will be aware, we are talking about reasonably low numbers, so it is difficult to work out how statistically relevant it might be. Last year, for over 50 per cent of matters, the panel decided to conduct proceedings. On the last matter of last calendar year, the panel conducted proceedings and got undertakings. It is true that this year so far there have been considerably more matters where the panel has declined to conduct proceedings. It should be noted that around that time mergers and acquisitions activity has been relatively low, and that might be a factor that goes to it. The other thing I would also say is that the panel, with the executive, meets a couple of times a year to discuss things such as trends, and certainly this trend will be discussed and debated at length. It is hard to really know whether you can read a lot into why it has occurred.

Ms OWENS: We wondered at some stage whether it was in part a maturity of the Takeovers Panel. It is now 10 or 12 years old. The experience might have been brought to bear.

Mr Bulman: I think that is true to some degree. In the early years of the panel, there was more of a tendency to conduct. We have done quite a lot of work on our statistics over the last 12 months. Between 2000 and 2007, the panel decided not to conduct only 23 per cent of matters. In the period from 2008 to 2013, that percentage went up to 37 per cent. To look at another statistic: the times when the panel conducted proceedings but did not make a declaration of unacceptable circumstances went down from 45 per cent in 2000 to 2007 to 26 per cent in 2008 to 2013. So certainly there may be an increasing confidence in the panel and the panel members in their decision making and ability to see from the application that there might not be anything to inquire further about.

Ms OWENS: In terms of the size of the pool that you are looking at, you dealt with 20 applications in 2012-13?

Mr Bulman: That is correct.

Ms OWENS: So the number that you did not deal with would have been what?

Mr Bulman: I have calendar-year statistics here; my apologies for that.

Ms OWENS: It does not matter, because it will be the same.

Mr Bulman: In the 2013 calendar year, we did 20 matters. Six matters we declined to conduct. For six matters we conducted proceedings but did not make a declaration. For six matters we made a declaration and orders, and two matters were withdrawn.

Ms OWENS: They are very small numbers—

Mr Bulman: They are very small numbers.

Ms OWENS: so the margin of error is very large.

Mr Bulman: That is right. The average number of matters is around 30. That can be as low as in one year where we had 16. In another year we had 49. So there is some variation, but the average is around 30.

Ms OWENS: There have been a number of submissions and suggestions about additional things, if you like, that the Takeovers Panel could do. I would like your views on some of those. There seem to be quite a few organisations out there that believe there are more things you could do. Whether that is a good idea or not, I guess, is what I am after. FINSIA, for example, proposed that the Takeovers Panel could provide 'truth in takeovers' guidance and that the panel's powers to award costs be 'broadened to improve the process for vetting obstructive applications'. I am just wondering about your views on those.

Mr Bulman: I will start with the last one first, which is the costs issue. There has been some discussion, and in fact we had discussions with Treasury last year and the year before, about the possibility of changing the law to make costs in more cases. At the moment, the panel can only award costs if it has made a declaration. FINSIA raises an issue around the fact that, if an application is unmeritorious, maybe the panel should have the power to make costs in that situation.

The other issue where, from our perspective, a broader cost power would have some use would be in a couple of cases where an applicant actually has had a good case and the respondent has done something that is clearly unacceptable and has dragged the process along. Then, right at the end, when the panel has said it is minded to make a declaration of unacceptable circumstances, the respondent decides, 'Well, I'll cancel the transaction,' which means that there is nothing for the panel to do, and there is nothing the panel can do about the fact that the applicant has expended a lot of costs bringing the matter to the panel.

Of course, issues of amendments to the act are matters of government policy. There are also downsides of broadening the panel's costs power in terms of the fact that you might end up with more debates over costs than there are currently, but there are potentially some advantages in broadening the costs power. As I said, Treasury did consult on that issue in late 2012.

Ms OWENS: Are circumstances like the one you described when one party is either trying it on or being vexatious, one or the other, common?

Mr Bulman: They are not uncommon. That would be the way I would put it. Alan?

Mr Shaw: By and large, applications are not vexatious or merely a try-on, but we do see it from time to time.

Ms OWENS: There were also a number of recommendations from the Treasury, I think, back in 2013, including areas like creeping acquisitions, for example. Do you have a view on that one?

Mr Bulman: Again I will repeat that these are matters for the government.

Ms OWENS: I understand. I know that.

Mr Bulman: I should also mention, of course, that the panel is in a little bit of a different situation to other regulatory bodies, in the sense that we are made up of a number of panel members—at the moment between 30 and 45 panel members at any given time. Therefore you get that many views, or occasionally even more. So some of these issues can be debated within the panel but there is not actually a settled panel view in any event.

In terms of the creeping acquisitions issue, it has been a part of the landscape in the Corporations Act for some time to have the 20 per cent threshold with a number of exceptions, including this three per cent creep exception. It was originally put there approximately 30 years ago to allow for some flexibility in the market for stockbrokers and others, and it was also felt that it gave some flexibility generally for people in making decisions. Other jurisdictions have reduced their creep exception. It still exists in Hong Kong, but it is a more limited exception in Hong Kong. It has actually been removed altogether in the United Kingdom. As with a lot of things, there are pros and cons as to whether you keep a three per cent creep exception or not. Certainly there has been a view expressed by many that the creep exception has some benefits, particularly where shareholders might, in a rights issue, want to increase their interest and not have to sell down or not participate. There is also a feeling or a debate about whether or not there is a problem that needs to be fixed.

Ms OWENS: I have an overview question. I read the annual report, and the Takeovers Panel clearly has a really important role in a relatively small number of circumstances. You have now been going for 12 or 13 years. Have we got the balance right, or are there trends that are raising costs, for business or for you, that we need to address?

Mr Bulman: I will hark back to the fact that Treasury in 2012 actually had a look at these issues such as creeping acquisitions, and they went to every major business location in Australia. We were there as well, as were ASIC and a number of other stakeholders. There was generally a feeling expressed there that the system is working reasonably well and there are no overly concerning trends that are occurring in the Australian market. That is not to say there may not be issues in the future that we might have to deal with, but I think the strength of the panel is that it is a principles-based body that can deal with developing issues when they arise. From time to time we will issue guidance on new issues. Approximately six years ago there was an issue around management buyouts, and we put some guidance out on insider participation and conflicts around that, for example. It is the same for equity derivatives: there was an issue around equity derivatives and we also provided some guidance in relation to that about six years ago. So when issues arise we will, through the panel days and discussions with panel members, consider whether there needs to be some form of guidance.

Ms OWENS: This is my last question. In your processes, do you find repeat offenders—I will use those words—very often?

Mr Bulman: Sometimes. I think that, as with everything in life, there are some people who push the boundaries, and some people push the boundaries more than once. So, yes, there are sometimes repeat offenders.

Ms OWENS: Is there any requirement or need to address that, or is it a rare occasion?

Mr Bulman: It is relatively rare, but we should note that from time to time we refer matters to ASIC for further consideration. Sometimes, where somebody has arisen more than once, we will have a chat with ASIC, and we have an ongoing dialogue with ASIC on those issues.

CHAIR: Mr Bulman, I will just take you to your annual report, which said that as at 30 June you had 48 members on the panel.

Mr Bulman: Yes.

CHAIR: Could you give the committee a sense of how variable that is and what the turnover rate of the panel members is, either collectively or, particularly, state by state.

Mr Bulman: Sure. During the panel's history—and this was, I think, settled by our first president after the panel was revitalised, Simon McKeon—there was a decision that it was important to try to keep turning over panel members. Simon used to use the term, 'We shouldn't get old together.' Panel members are appointed for three-year terms usually and it was felt that if everything is going well—if they are happy, the government is happy and we are happy—then they can get reappointed twice. So it is a nine-year period. Usually, every year a third of the panel members are up for reappointment. A third of them have served more than nine years and would not be reappointed.

Having said all that, panel appointments are a decision of the government. We have a process with MINCO, with the states, where the states provide nominations. The president of the panel also provides nominations. In the end the government makes a decision. I think it has worked very well in the 12 years since we have been revitalised, to have a system whereby panel members usually get reappointed twice and serve for nine years.

You can see within the panel that those that have been around for the six- to nine-year period have experience and the runs on the board to provide guidance and assistance to us in the executive, and also to the panel members who have served for shorter periods.

CHAIR: So, is 48 still the steady-state number, at the moment?

Mr Bulman: I will mention a couple of things. The government has not announced the latest round of appointments. Sixteen of our panel members' terms have expired. There have not been any further appointments or reappointments at this stage. It is not uncommon for there to be a delay, nor for a third of our panel members' terms to expire. That is not unusual.

There was also something very unfortunate that occurred in February. One of our panel members—a very distinguished solicitor at Herbert Smith Freehills, Ms Fiona Gardiner-Hill, suddenly passed away. That was absolutely terrible. She was a very highly admired senior practitioner in the Sydney market place and throughout Australia. That hit us as an organisation and it hit the commercial law world considerably.

At the moment we are not 48 anymore. There are 16 panel members who, at the moment, cannot sit on matters. We assume that, in the next couple of weeks, there will be an announcement. If it helps the committee we are happy to provide information on that, when that arises.

CHAIR: That would be useful, if you could provide that. I guess I am going to some of the comments about the higher rate, now, of cases that are declined. The inference is that that is due to the panel members having more confidence and understanding the issues. Clearly, the rate of turnover is important, as is the question of how you pass on that corporate knowledge.

I understand again from the submissions that there is, essentially, a quasi-jurisprudence which is now being developed by the panel. Does that take the form of a formal document that constrains people or guides people, or is it part of an induction process for new panel members? How does that work?

Mr Bulman: There are a couple of things. We have induction days for the new panel members. We discuss the process with them, there. We are also developing an index of our decisions. Currently, on our web site we have decisions from 2004 to 2013 to assist not just us but also practitioners on where the boundaries lie. We are not quite like a court—Alan might wish to clarify some aspects of what I am about to say—so we do not slavishly follow precedent, but in terms of policy we look at previous decisions and we look at consistency in that sense.

In our panel days that happen twice a year the panel members look at recent decisions, consider trends, and consider whether there are aspects that need to have more guidance. Occasionally on some issues there can be quite a robust discussion on an issue that assists the panel in a future matter. Those are the sorts of things that we deal with to ensure that panel members have some confidence in their decision-making.

CHAIR: I note the statement you made to Ms Owens before about the fact that what the panel does is a decision for government and their policy. At those professional development or standardisation days do you also discuss things like the scoping report from Treasury or the recommendations that have come out of various places—the book or the survey done by the Law Council? Does the panel form a view about which of those recommendations might be useful to adopt? Do you have an avenue to pass that back to government or to other stakeholders, such as ASIC, for their consideration?

Mr Bulman: At our panel days, things such as the survey are discussed. We discussed the survey at a panel day. We discussed the Treasury proposals. A representative of Treasury actually attended one of panel days a few years ago to discuss those issues. Many of our panel members attended the roundtable discussions. When we do see that there are issues of law reform that we think would be particularly useful, we tell Treasury. We have a very good relationship with Treasury. We contact Treasury every couple of weeks on one issue or another. We will talk to Treasury about possible law reform or possible tweaking of the system and give our views to Treasury about other people's suggestions.

CHAIR: In September 2012, there was one judicial review regarding President's Club Ltd. Can you talk to the committee about what brought that about, how that was handled, what impost in legal costs there was on the Takeovers Panel and the outcome.

Mr Bulman: I will hand over to Alan to discuss that.

Mr Shaw: The application was brought to us by the President's Club, which is essentially a timeshare arrangement, because there had been an acquisition of voting power which they alleged did not comply with the Corporations Act. They alleged that it breached the 20 per cent limit. The panel made a finding to the same effect. Having looked at it, the panel said that, yes, it was a contravention of the Corporations Act and made a declaration and orders. That was judicially reviewed and was heard by the Federal Court in July last year and the decision is reserved.

The panel is bound by a principle known as the Hardiman principle, which is a principle laid down by the High Court which says, in essence, that a tribunal to which a matter might be remitted should not take a partisan approach to a judicial review because it might indicate pre-judgement or bias on the part of the tribunal. So the panel is in a position where in a judicial review of its decisions it is limited to making submissions on the processes and procedures. We go through the material that was put before us and answer any questions that the court might have.

The contradictor before the court needs to be ASIC or one of the parties if they want to appear in court and argue that position. In this case, President's Club did appear, but we have had judicial reviews in the past where the person who brought the application to the panel did not want the expense and difficulty of also appearing in court and so it has been left to ASIC to act as contradictor. As for costs, we have obviously incurred costs, but until a decision comes down we cannot know whether we will get those costs back.

CHAIR: How frequently do you have a judicial review of panel rulings?

Mr Shaw: Infrequently. In 415 matters before the panel, there have been six judicial reviews, and two of them involved the same matter.

CHAIR: My last question goes to the MoU between you and ASIC. I am just interested to know whether that is a living, working document that is referred to every day. If so, is it functional and practical? Are there changes that you believe are required to that? Or is it very much just a framework document that sets the rules of engagement and does not affect how you work daily?

Mr Bulman: The MoU was negotiated with ASIC some time ago, in the early years of our history. We meet with ASIC quite frequently—more than twice a year face to face—and we also have quite a lot of interaction generally. We have had discussions around aspects of the MoU in practice. We always remind one another of our policies that might relate to takeovers where we might need to consult the other, for example. That is in the MoU. At this stage, we see no real need to do a major review of that MoU because the relationship is working reasonably well, but it is of course something that we might turn to at a later time, depending on circumstances.

CHAIR: My understanding is that the panel has the power to reverse, overturn or put aside—I am not sure of the correct term—a decision or ruling of ASIC in a matter. Where that occurs, do you do that completely independently, do you engage in discussions with ASIC ahead of that decision? Can you talk the committee through what the relationship is where you are going against their previous ruling?

Mr Bulman: The first comment I would make is that in the 415 matters we have had only 20 have actually been reviews of ASIC decisions. I think at the early stage of the panel's history the panel thought that it would be a bigger part of its job, and it has turned out not to be the case, presumably because parties are reasonably happy with the decisions ASIC makes on takeover matters. When an application for review comes in ASIC usually will provide the panel and the parties with the reasons for its decision and will be a party to the action to explain its decision and discuss it, and there will be discussions between us and ASIC as a party, like any other party in relation to that. The other aspect—and this is in our guidance on reviewing decisions—is, like any administrative review body, we sit in the shoes of ASIC and we have to have reasonable regard to ASIC's policy. It would be dangerous for the panel to completely ignore an ASIC policy, just like the AAT or any other administrative review body. In those 20 matters I can mention that two of them were withdrawn. We affirmed the decision in 12 matters and in six matters we set them aside. We also have not actually had that many review applications of late. The last was in 2010, and we had three in 2009. It is not a major part of our work, and it is actually decreasing, if anything.

Mr COLEMAN: I might just pick up on that specific point, Mr Bulman, because that was one of the questions I was going to ask. As I understand it, if someone is seeking relief against some of the provisions of chapter 6 of the act they go to ASIC first, and if they are not happy with the outcome they can appeal to you, which does not happen that often. Isn't it the case that, sometimes, that might be because the time that it has taken ASIC to address the issue means that things have moved on and that perhaps there is not time commercially to go through another process?

Mr Bulman: I would say that it is hard to know. Generally ASIC, I think, takes the view that if there is a matter of urgency, and the applicant feels the matter is urgent and may be thinking of review to the panel, they could simply ask of ASIC, 'We must have this decision tonight.' Then ASIC, if it does not have time to make the decision, would say no. That is actually a brake on that issue. The other thing I should note is that a few years ago the panel decided that ASIC reviews, if they are confidential, should remain confidential at the panel. There has been one matter where review of an ASIC decision was made and we have never published reasons or made it public. Of course, as you would understand, some transactions are confidential and somebody might approach ASIC on a confidential basis, and if ASIC says no it would never become public. On thinking about the matter further we thought it was important that an applicant could do the same with us. They could come to us and if we said no it would also not be public. Despite that, for want of a better word, encouragement we have not had that many reviews.

Mr COLEMAN: Where I am going with this is: do you think there is a case for some of those appeals to go directly to the Takeovers Panel rather than via ASIC? Without being critical of ASIC, is there an argument to the effect that there is perhaps a greater commercial sensibility within the Takeovers Panel and on some of these more complex matters and it would be simpler for everyone if it went straight to the Takeovers Panel?

Mr Bulman: It is hard to know whether it would improve things or not. It would mean in the end that you would need to have some review process within the panel, I suspect, from a policy perspective, because I think there is a view of government that every administrative decision should have at least one appeal mechanism. So you would not necessarily be removing the appeal mechanism by taking it straight to the panel. It would be a strange sort of model to have an administrative decision made, potentially, by two different bodies. In the end, those sorts of decisions are matters for government.

There is a chapter by Rodd Levy and Neil Pathak in a book edited by Ian Ramsaey that discusses a whole lot of potential and quite radical changes to the takeovers provisions. Again, in the end, they are matters for government—working out what the things are that would actually enhance economic efficiency and decision making going forward.

Mr COLEMAN: The other area I want to ask you about is schemes of arrangement and takeovers. I think a lot of people who have had some experience in this area would say that it is an interesting area, and, from a common-sense perspective, it is sometimes not always clear why something is a scheme of arrangement and, therefore, dealt with through the courts as opposed to a takeover and, therefore, dealt with through your panel. Do you think there are opportunities to clean up the regulation of this area to make it simpler for business?

Mr Bulman: If I can take a step back and actually describe what I think the difference is between a scheme and a takeover, it might help. Schemes come from a very old area of the law going back almost a hundred years. Historically—predominantly in relation to dealing with creditors—it was actually an insolvency provision. It has increasingly become used for friendly mergers. There are things that schemes can do that it is difficult for takeovers to do. A court can actually make orders to move assets between subsidiaries and restructure in ways that are not necessarily as easy in the takeover space.

The other thing about a scheme is that it is an 'all or nothing' transaction. You put the matter to the shareholders who appear at the time, and, if 75 per cent vote in favour, it is then approved later by the court. If 50 per cent of those attending are in favour and it is something approved by the court, then it is done. A takeover is a more dynamic situation. Takeovers need to get to 90 per cent for there to be compulsory acquisition. So depending upon the market and how the market works, schemes are sometimes popular because everybody wants to do a friendly deal and wants the 'all or nothing' flexibility and, maybe, an arguably lower threshold for compulsory acquisition. But sometimes there are more hostile deals, and takeovers, in theory, can actually be quicker than schemes. Sometimes, takeovers take the ascendancy.

The other thing I would mention is that the panel has, to some degree, some jurisdiction over schemes as a control transaction. Historically, the panel has been reticent in intervening in schemes where the court has been involved, but there have been some matters to do with deal protection measures and other unacceptable issues around competing bids where the panel has looked at schemes. Whether the scheme jurisdiction needs to be reviewed or not—I am starting to sound like a broken record!—working out whether the scheme provisions are useful is a matter for government. A few years ago, CAMAC looked at the issue and thought that the scheme provisions still had some use. There has been talk of having some other form of merger provisions that are more like those in the US, Canada and New Zealand and which could be more efficient. Again, these are just matters for debate.

Mr COLEMAN: But isn't the practical reality that people pick and choose between either the scheme provisions or takeover provisions depending on whichever is more favourable in their situation? Again, I appreciate that we, not you, are the legislators, but, from your practical experience, do you think that achieves the best outcome for the sector?

Mr Bulman: The fact that there are alternatives has some benefits. If you have multiple ways of doing the same corporate transaction, that does have some level of benefit. The courts have increasingly looked at Takeovers Panel decisions and Takeovers Panel guidance on things such as deal protection measures in considering their issues in schemes. So there is a reasonable amount of interplay between our jurisdiction and theirs. Alan, do you have any other observations?

Mr Shaw: No, I do not think so.

CHAIR: Can I take you back to the Law Council survey? You talked about a couple of your 'professional development days', where the panel got together and discussed things like consistency and predictability. Clearly, those days are designed to enhance that. Do you have any longitudinal measures that you are putting in place to get feedback from people to get an assessment of whether you are improving on some of those areas where surveys have identified deficiency, or have you taken steps but are not measuring the outcomes?

Mr Bulman: There are a couple of preliminary points. The survey showed that about 56 per cent of people were very happy in terms of predictability and consistency. Another 32 per cent were, you could say, reasonably happy with it. I think there is a feeling, from commentators, that panel decisions are as consistent as they can be, given the fact that takeovers are a dynamic area. We are talking about a principles based system.

I will also mention that it is a difficult area. When the courts were dealing with this, they were very heavily criticised about their decision making as being a bit like a lottery. Predictability and consistency are always an issue. We talk about consistency of decisions on our panel days. Every time we finish a matter, we send out material to the parties to get feedback on our processes and on what they thought about the decision. Then we try and bring that feedback in to our panel days.

There was a survey that the panel, itself, did in 2005. This 2010 survey was done by the Law Council—we had some involvement in that. It would make some sense next year, given that it will have been 15 years of the panel, for us to potentially do another survey of some description. We certainly have been thinking about talking with practitioners. From time to time, usually about once every 12 to 18 months, we will have roadshows or discuss matters with practitioners. We have, from time to time, been going to law firms and discussing matters with them and their clients, such as investment bankers, to discuss where things could improve. We have also been chatting about the fact that, given the government's views on deregulation, it would be useful for us to talk with our stakeholders about whether there are aspects of what we do that could assist and be deregulatory. It is a very small space, so I would not overstate any benefits that might come from that, but we thought that would be of some use.

Mr Shaw: There is, perhaps, one thing I could add. It is important, when you think about consistency, to define your terms quite carefully, because there is a difference between outcomes and policy applications. The panel should strive for consistency of policy application. But because it is a very fact based jurisdiction that takes an individual case and applies particular circumstances to that policy you might get quite different outcomes on quite small changes in fact circumstances.

CHAIR: I want to ask about two things: one is from the Law Council, and one is from a paper, by Justin Mannolini, talking about advance rulings of private rulings. Does the panel believe that there would be value added to the corporate sector if you were able to make different kinds of rulings?

Mr Bulman: There has been quite a bit of discussion about that by practitioners that that would be of some use. I should mention in overseas jurisdictions they do things quite differently. For instance, the London panel is the whole regulator of mergers and acquisitions. So it would be like merging the panel with the takeovers functions of ASIC. The London panel gives advance rulings. Hong Kong's Securities and Futures Commission has the panel almost as a division of itself. Again, they also give advance rulings. If the panel was to be given that sort of power there would have to be some consideration about how that would work in terms of the role of the executive and panel members There have been at least one or two decisions where there has been a great desire of the parties to get some sort of ruling from us, but it is not one of our powers.

CHAIR: It is not one of your powers, but do you think it would be useful for—

Mr Bulman: Certainly, a number of practitioners consider that it would be useful, but it raises the whole issue of the fact that we are predominantly a dispute resolution function while the regulator is ASIC.

CHAIR: The last question is on the way you consider evidence. My understanding—correct me if I am wrong—is that at this stage the panel considers evidence that is presented to it; it does not proactively go and seek out additional evidence, and there has been a recommendation that perhaps it should, that perhaps the decisions would be better if it did. Has the panel considered that recommendation, and what would be the implications if that path were pursued?

Mr Bulman: To take a step back, the panel has some powers to elicit evidence. For example, in an association case the panel can ask questions in its brief and try to elicit questions that way, and so from time to time, even although the panel's ability to do this is limited, the panel can become a little more inquisitive—I would not say investigatory, but certainly inquisitorial, about asking questions and getting evidence. It can also call a conference and question witnesses. But, to be fair, its powers to do that are limited. I think part of the law reform proposal that was suggested by Rodd Levy and Neil Pathak was that the panel would be self-starting. We actually cannot do anything until an application is made to us. Again, that goes to the whole model of ASIC being the corporate regulator of takeovers as well, and us being a dispute resolution body—with regulatory functions but still, effectively, a dispute resolution body.

CHAIR: Hopefully a far more timely and cost-effective one than a court of any kind is.

Senator DASTYARI: Mr Coleman has much more corporate experience and I have so perhaps you may need to explain a few things to me in more detail. Let us take a step back. What is the process in a takeover before your involvement? At what point in the process will you get involved?

Mr Bulman: When somebody makes an application to us—when somebody considers that something occurs in a transaction that is unacceptable and they make an application and they pay a fee. That is when our jurisdiction is enlivened.

Senator DASTYARI: You used the figure before of 415. Is that 415 people who have applied or was that 415 that you had chosen to be involved in?

Mr Bulman: No, 415 who applied.

Senator DASTYARI: Would some of them be vexatious?

Mr Bulman: 'Vexatious' is right at the end of the scale, so we would not have that many vexatious applications as such.

Mr Bulman: Misguided, maybe?

Mr Bulman: Misguided, or they may have had a point. There was a case recently where we felt that if the applicant had made a different point a month earlier they would have had something to have grasped onto. Unfortunately they came a month late with a totally different case. Those things happen from time to time.

Senator DASTYARI: I note, not being an expert in this area, the quite impressive turnaround time you have of under three working weeks. That strikes me as being quite impressive considering that some of these takeovers would be quite complex arrangements. In every instance you only get involved after the event—is that correct?

Mr Bulman: We only get involved after somebody raises an issue. Whether you call that after the event—

Senator DASTYARI: But there is a difference between post the event, post the takeover, post the proposal, me writing to you and saying I have an issue, I pay a fee, I think something deserves to be looked at, or if I write to you when there is a proposal, at the beginning of a takeover process—I want to get my head around when you get involved.

Mr Bulman: Applications often happen while the process is going on. There is not a lot of point in applying to the panel once a transaction is finished.

Senator DASTYARI: That is what I was asking. That goes back to a point that Mr Coleman was making earlier, which is this idea about things getting too late, once you have gone through an ASIC process. Are some of them just people applying after an event and you say there is nothing you can do?

Mr Bulman: Not usually. Usually it is in the heat of the moment when people apply, and that is why we have to try to get to a decision as soon as possible—because people are waiting. So, for example, in the Warrnambool Cheese and Butter application, that was in the middle of a contested bid situation.

Senator DASTYARI: So what happens? If I write an application to you and it is the middle of a process, do you then say, 'Right, pause, we are going to look into this'?

Mr Bulman: It may be that the applicant wants to make some sort of interim order to pause. Usually we will take the view that if we can actually get onto the matter and deal with it and put the matter on track then there will be no need for some sort of interim order. Sometimes we have to make an interim order that might stop something potentially, but usually we are very keen to get on to the matter and resolve the matter as soon as possible so that if the transaction has gone slightly off the rails, and Warnambool is an example of a situation where it went slightly off the rails, we can get it on track as soon as possible.

Senator DASTYARI: With the MOU you have with ASIC, and Mr Medcraft is arriving in a few minutes, do you then refer things back to ASIC as well if in your process you start identifying—or has that never really arisen as an issue?

Mr Bulman: Yes, sometimes that happens.

Senator DASTYARI: As you go through your process you might see, 'Hang on, there are corporate governance issue or criminal,' which is obviously the extreme. Out of your 415 would you have any statistics on how many you have sent the other way? You have the figure of 20 to you from ASIC.

Mr Bulman: We do have statistics. I do not have them in front of me at the moment.

Senator DASTYARI: Can you take that on notice?

Mr Bulman: I can take that on notice if you like. We can provide that. I need to be careful. I am not sure whether we have that statistic for our whole history; we may only have it for a period.

Senator DASTYARI: What you have. You were talking about the relationship with ASIC. Can you expand on that a bit? There is an MOU that was written—when was that agreed on?

Mr Bulman: It was around 2001. It might be 2002, I am not sure, but I think it was 2001.

Senator DASTYARI: And that is when you went through your restructure and effectively became the Takeovers Panel.

Mr Bulman: Correct.

Senator DASTYARI: Since then that has not been revisited?

Mr Bulman: As I mentioned before, we have constant interaction with ASIC and aspects of the MOU come up. At this stage there has been no need to revise it but maybe one day in the future there might be.

Senator DASTYARI: Is that a public document?

Mr Bulman: Yes, it is. It is on our website.

Senator DASTYARI: Apart from having the MOU, you said before that twice a year there is a conference—

Mr Bulman: Meet with ASIC, you mean? We will meet formally with ASIC more than twice a year usually. It is usually the senior executives in the corporations team will meet. But occasionally we will also meet with a commission member or with other staff and quite often we will be in conversations with mid-level staff of ASIC from time to time on matters.

Senator DASTYARI: The bit I did not quite get my head around and would ask you to explain to me is their appealing to you from a decision of ASIC. You say that have been 20 instances and it has not happened for about five years or so since the last one.

Mr Bulman: A couple of years.

Senator DASTYARI: ASIC makes a determination. Can you explain that?

Mr Bulman: ASIC has powers under the Corporations Act to exempt or modify. There is an interesting history lesson around all that because, funnily enough, our power to make declarations of unacceptable circumstances back in the early 1980s was sort of the flip side of that power. There was a debate originally about whether or not takeovers regulation should be some sort of more flexible regime such as the London Panel that had a rulebook or whether it was better to have a legislative sort of regime. The government at the time decided, given the culture of Australia, the size of the country and the business centres it was not like the city of London, it was a number of centres, it was felt that a more legislative approach was better. But in that debate it was thought that it was important for the regulator, which was the NCSC at the time, to have the power to exempt or modify from those provisions and also to make declarations of what was then unacceptable conduct if something bad happened that was against the spirit of those provisions but the provisions themselves were not actually contravened. There was then debate about whether or not the NCSC was judge, jury and executioner for those declarations of unacceptable conduct—I think possibly a bit unfairly so. But, anyway, when the Australian Securities Commission was formed it was decided to take that power and give it to the panel. The panel was actually created in about 1990, but because it had only a very limited role, only four matters were ever referred from ASIC to the panel. Then, in 2000, because it was felt that takeovers were being caught up in the courts it was decided to expand the jurisdiction of the panel so that anybody could come to it.

With this power that ASIC has to exempt or modify, originally the appeal right went to the AAT. By 2000 it was decided that the appeal right in relation to the takeovers provisions should come to the panel, and the review right for decisions that ASIC made under the substantial holding provisions during a takeover would also go to the panel. That basically is how it works.

Senator DASTYARI: I would like to clarify something you were having a discussion with Mr Coleman about. With takeovers versus schemes, if I decided to structure a corporate action as a scheme, does that mean it falls outside your jurisdiction?

Mr Bulman: It does not, exactly, because of our jurisdiction in relation to control generally. But we do recognise that the scheme provisions are provisions that are supervised by the courts. From the very early period of the panel's existence it was decided that if the courts were involved in a scheme then usually the panel would probably refrain from being involved. I should mention that within the scheme provisions there is actually an anti-avoidance provision in relation to schemes and takeovers, which allows the courts to consider takeover protections and takeover issues in the context of a scheme.

Senator DASTYARI: To summarise, what you are saying is that taking the scheme path as opposed to the takeover path is not a way to sidestep?

Mr Bulman: There has been a lot of debate—

Senator DASTYARI: That is what I am saying—

Mr Bulman: Historically, there has been a lot of debate over that—section 411(17), which has had quite a lot of debate about the protections for bids and whether schemes have those protections. Predominantly they do. There is a CAMAC report that discusses that very issue in quite a considerable degree of detail.

Senator DASTYARI: But these schemes are going to do you out of a job!

Mr Bulman: For a start, scheme matters do come before us from time to time. We have a job to do when they come to us. It is a question of the way markets go. If everybody wants to merge by being friends then schemes will become more popular. But the way markets go, eventually, people want to do deals where they do not want to be friends, and it will be a bid, and, particularly if they are very unfriendly, they will come to us.

Senator DASTYARI: Out of the 400 or so we were discussing before, how many were actually schemes that had been referred to you? If you do not have the statistics it is not a concern.

Mr Bulman: I do not have that in front of me but I think I can provide it to you on notice.

Senator DASTYARI: If you can, great. If you cannot, it will not be an issue.

Mr COLEMAN: To pick up the same theme, you made a point about deregulation and simplification and so on. There is an argument—because I know there are practitioners who probably advance this argument—that the takeovers panel probably has the highest and best understanding of this space generally and therefore a) the capacity to go to ASIC in the first instance over the variations of chapter VI matters and, b), the whole scheme area should basically all just come through one central body rather than there being three involved. As a matter of common sense, isn't that sensible?

Mr Bulman: It potentially has some benefit on some levels, but on other levels some practitioners believe that if it is not broken there is no need to fix it. There are some practitioners who would like the see the panel in schemes. That is true. There are some practitioners who are very keen on the flexibility of the scheme provisions to do various things, and they are very protective of that area. They like the flexibility of schemes, they like the certainty of schemes, and they are a bit nervous about any changes. So there are varying views in the marketplace. Mergers and acquisitions practitioners love debating these sorts of matters. There is quite a lot of debate about whether the scheme provisions should stay with the courts or something else should occur.

Mr COLEMAN: On the chapter 6 matters, isn't it right that the depth of experience in the Takeovers Panel in this area is substantially greater than that which sits in ASIC and that it may be more sensible and expeditious for the requests for the variations to go straight to the Takeovers Panel rather than having to go through this ASIC process, which I am told can be quite time-consuming?

Mr Bulman: I think that the panel would have to be a slightly different beast if that occurred. We would move more to the London model if we did that. As I said, it is a government decision, so I do not particularly want to say one way or the other, but to give you the counterargument, ASIC will of course be making decisions, thinking about the whole regulatory structure within disclosure and within how other aspects arise. They will have knowledge about products and issues that are different to the panel and the panel membership. ASIC brings something to the table in terms of that decision making. In terms of the way things work internationally, as I said before, in Hong Kong there is a takeovers panel but it is effectively supported by a division of the Securities and Futures Commission. The Securities and Futures Commission regulate, they will refer matters to their panel and they will support their panel, and that is how that works. It is a more combined model. The UK model is different again, where all takeovers regulation occurs within the Takeover Panel.

Ms OWENS: I would like to talk about your revenues and expenditure briefly, mainly because there was a recommendation by someone that the Takeovers Panel could introduce modest fees on bidder statements. I wanted to have a look at your figures for a little while. I notice you have an $88 million surplus for the year. Is that fairly—

Mr Bulman: It is $88,000, I think.

Ms OWENS: My apologies.

Mr Bulman: I just thought to myself: 'Oh my goodness!'

Ms OWENS: The first time I said it I actually said 'billion' because I have been talking about 'billion' all week. So, $88,000 is only four per cent. It is a quite reasonable surplus. Is that the usual circumstance for the Takeovers Panel?

Mr Bulman: To give you some idea, the panel has usually had a budget of somewhere between $1.8 million and $2 million throughout its entire history in nominal terms. In real terms, the panel has been constantly reducing its budget in real terms throughout its history. It is a fairly simple business, deciding applications. There are some staff costs, there is a small place to reside, there is some travel in terms of panel days, and there are matters sitting fees. The variables, in terms of our budget, tend to be: how many matters we have, in terms of matters sitting fees, and whether we have to deal with any judicial reviews. That happens rarely, but they do have budget impact. For the last couple of years we have either had small surpluses or very small deficits. We have been able to, over time, streamline our processes and the way we work so that, for any cuts that we have, we have been able to, at this stage, absorb.

Ms OWENS: Do you roll those surpluses and deficits—

Mr Bulman: No, we do not.

Ms OWENS: So you do not get to budget across a cycle?

Mr Bulman: No. The London panel is different. The London panel raises its own funds. It then manages it by having a buffer. They prudentially manage their business that way. That is not the way we operate. We are a line item in Treasury's Markets Group budget, basically.

Ms OWENS: I notice $52,141 in agency receipts. What are they?

Mr Bulman: I will need to take that on notice. There is an obvious answer—it is just not hitting me at this particular point!

Ms OWENS: Yes, I am sure there is. That is fine. The purpose of introducing fees is, first, to raise revenue, which means you would have to be able to raise more than it cost you to collect them or, second, to reduce illegitimate applications, as well as to not reduce legitimate ones. So, there are three aspects to it. What is your response to the notion that you could actually introduce modest fees?

Mr Bulman: It is just a question of whether our funding model changes from being a line item in the markets group budget to being some other form of body. Based on the way we are structured currently, raising our own fees and operating on that may be associated with some difficulties because of our small scope. But if things changed and we were a slightly different body then it might become like the London panel—more of a possibility.

Ms OWENS: Yes, that is pretty much what I thought from looking at your figures. I just thought I would ask the question. How does ours compare, generally, with the equivalent bodies overseas?

Mr Bulman: In some respects, because of our history—the London panel, the Hong Kong panel and Singapore—we are all fairly similar. Our regimes are relatively similar and have similar sorts of protections. A report was put out a couple of years ago. I probably do not have a copy of it now, but it suggested that Australia's takeover regime was actually one of the best compared with Canada. But different academics will have different views about that.

Ms OWENS: There has also been the suggestion in a number of the submissions that there has not been a great deal of review of takeover law since you guys were formed. Is that right?

Mr Bulman: That is correct up to a point. There have been some tweaks here and there in our jurisdiction and also generally in the provisions, but only very small ones. Again, as I said, among practitioners there are lots of debates. So, some practitioners are saying, 'Isn't it time to actually look at some issues', and others are saying, 'If it ain't broke, don't fix it'. So, there are those two sort of camps.

Ms OWENS: There always are! Thank you.

CHAIR: I have one final question for you. Are you aware of any other dispute resolution mechanisms similar to the Takeovers Panel that operate in other jurisdictions in Australia where other regulatory bodies have—existing under the same legislation or incorporated by government—a dispute resolution mechanism whereby people from industry who are knowledgeable and current in the issues are actually the people responsible for its operation, as opposed to the AAT or another court?

Mr Bulman: I think each body is slightly different in its own way. There is the superannuation complaints tribunal, which has some expertise in superannuation, for example.

CHAIR: I am looking specifically for where a dispute resolution body has the power to overturn a decision of the regulator.

Mr Bulman: I am not aware of an industry one, no. There is the AAT, of course, which has quite a big role. But my understanding is that it is not an industry based body.

CHAIR: There are no more questions, so I thank you both for attending today and providing evidence to the committee. You have undertaken to provide some answers on notice, so I ask that they be provided back to the committee by 22 April. Thank you.

**Proceedings suspended from 14:44 to 14:56**

ARMOUR, Ms Cathie, Commissioner, Australian Securities and Investments Commission

DAY, Mr Warren, Senior Executive Leader, Australian Securities and Investments Commission

KELL, Mr Peter, Deputy Chairman, Australian Securities and Investments Commission

KIRK, Mr Greg, Senior Executive Leader, Australian Securities and Investments Commission

MEDCRAFT, Mr Greg, Chairman, Australian Securities and Investments Commission

PRICE, Mr John, Commissioner, Australian Securities and Investments Commission

SAVUNDRA, Mr Chris, Senior Executive Leader, Australian Securities and Investments Commission

TANZER, Mr Greg, Commissioner, Australian Securities and Investments Commission

CHAIR: The committee will reconvene and we welcome officers from the Australian Securities and Investments Commission. Thank you for attending today's hearing. I understand you have been provided with a statement from the secretariat about privilege, in which case I will not read through the whole statement again. I invite you to make a short opening statement, Mr Medcraft. I am aware that you have a longer statement that you are going to table. Could I ask that, in future, if you are going to provide a longer statement, it is provided to the committee at least several days ahead of the hearing for us to absorb that information and to be able to question you sensibly on it, so it would be good to have the time to read it.

Mr Medcraft: That is a good idea and I am very happy to do so, Chair.

CHAIR: If you would like to make a short opening statement you have the call.

Mr Medcraft: Thank you, Chair. We are pleased to appear today before the PJC and we congratulate you on your appointment as chair of the committee. We would also like to congratulate the new members of the committee and acknowledge the longstanding members. It has been eight months since ASIC last appeared before the PJC. We have lodged a longer statement and, as you said, I will not read it but will table it, and we will fit in with what you have suggested in the future.

The statement aims to familiarise new members with ASIC's three priorities: confident and informed investors and financial consumers; fair and efficient markets; and efficient registration licensing. It also shows how we are tracking against these priorities based on some of our recent announcements. The statement also addresses two other issues: how ASIC is helping the government achieve its deregulation agenda and ASIC's involvement with the Senate Economics References Committee inquiry into the performance of ASIC. Chair, we are happy to take the committee's questions.

CHAIR: Can I go to that deregulation agenda for a start—I think you are aware, Mr Medcraft, that I am a great believer that regulators will increasingly struggle to attract and retain people with the same level of subject matter knowledge as the industry, and therefore industry are good players to engage with in co-regulation. I would just like to talk a little bit about your personnel. Obviously you need to have people with the appropriate competencies to engage with industry, and to have that constructive dialogue. On page 67 of the annual report you talk about your graduate program and about how you manage and retain talent in the organisation. You talk about the number of graduates who have applied from a range of disciplines. How many new intakes into ASIC are graduates, and how many are people who have relevant industry experience across the different sectors that you regulate?

Mr Medcraft: We will take that on notice, Chair.

CHAIR: I am happy if you take the numbers on notice, but could you talk in principle in terms of how you plan to structure your workforce and how you approach that issue?

Mr Medcraft: Most of our positions are externally advertised and, for example, particularly in the markets areas, most of the people are formerly from the markets. In investment banking, most of the people have come from investment banks or in the markets areas; so we tend to get a lot of people who have perhaps made their money and are interested in doing something different. The other thing we do is that we have secondment programs where we basically swap with law firms, with investment banks, with industry groups et cetera in terms of staffing industry associations, including the accounting bodies. So we have a policy as much as possible of trying to really have that recruitment, then what often happens is that people will move away from ASIC into banks et cetera, and they often come back to us later. So there is a fair bit of interchange between the two.

CHAIR: Can you give us an idea of how large that secondment program is? Are we talking half a dozen people or 60 people?

Mr Medcraft: I will come back to you with some statistics on that, but it is something that we do encourage. Ideally what we try to do is have a swap—where basically they send somebody into ASIC and then we send the ASIC person out, so that essentially we maintain our resource. I think the swap arrangement is not a bad thing to have. We will come back to you on that.

CHAIR: With the data you provide, could you give us a breakdown not only of numbers but of the sectors and the level of seniority that people go into.

Mr Medcraft: Absolutely.

CHAIR: Is that something where industry approaches you and indicates a willingness to be engaged or do you approach industry?

Mr Medcraft: It is both ways. Having come from an industry background, I have often said, 'How about us looking at this?' But it is both ways. I am quite a big fan of getting people seconded—I think it is the best way of really getting that industry experience, as well as recruiting in from industry.

CHAIR: Particularly for the secondment situation, I am assuming you have appropriate probity structures in place. Do they take the form of an MOU, or how is it structured?

Mr Medcraft: We are very careful. If we do a secondment, clearly we have to be sure that they are not into an area where they are regulating their own firm, for example. We can provide you with details on that as well.

Mr Kell: There are confidentiality agreements that people have to sign that formalise those requirements.

Mr Medcraft: They are subject to the same restrictions as any other ASIC staff member.

CHAIR: You mention your senior management's development on page 66, and it says 60 senior managers took up an invitation to develop their leadership. Is that purely a voluntary scheme, or do you specify competencies for the different levels of management and then proactively seek to ensure that the personnel attain, develop and maintain those required competencies?

Mr Medcraft: This was a proactive program where we basically wanted to strengthen those at that senior manager level in terms of leadership development. It was actually one of the business plan objectives of our people and resources group last year.

CHAIR: Beyond the generic job description, have you specified for any given level of management within ASIC particular competencies—that is, qualification plus experience—that you expect your people to have?

Mr Medcraft: Yes.

CHAIR: And at this point in time, are you comfortable that 100 per cent, 90 per cent or 50 per cent achieve those competencies across the board?

Mr Medcraft: Yes, I believe so. Again, we will come back to you on that, if you like; but I believe we do. Also, it forms part of our performance management framework in terms of training and development; it is one of the key objectives. Also, one of the things that we have done in the last few years is an inventory of what skills exist throughout the organisation. If somebody is recruited in a particular role, it is often quite useful to know their background. Having that matrix of what skills are actually available to us is quite helpful. It is something else that we have done.

CHAIR: I would like to go to a paper that you have provided, which looks at some of your strategic policy initiatives, and one of them is improving the regulatory tool kit. We have discussed previously the concept of co-regulation with industry. I would like to link that to specific measures that you are putting in place in terms of your personnel and their understanding of your policy objectives, as well as your thoughts on innovation and what you are doing to change or empower a culture to engage with industry with a concept of co-regulation as opposed to acting as 'the regulator'—the capital 'R' regulator with the big stick. Could you talk to the committee about concrete steps that you have taken or are taking in that area.

Mr Medcraft: It is probably best to come back to you on that on notice. I do not know whether you want to comment on that specifically, Peter. We have done some work on this.

Mr Kell: I am happy to come back with some details around that, but it is certainly the case that it is specified for our senior executives and senior managers that that nature, level and type of engagement with industry is a critical part of their performance assessment and performance management—their ability to externally represent ASIC, their ability to externally engage. Part of it ranges from consultation on regulatory issues through to, in some cases, developing co-regulatory initiatives with industry. I am happy to come back on your particular point, which is, as I understand it, about the co-regulation piece.

Mr Medcraft: It does go back to the restructuring that we undertook after McKinsey's recommendations six years ago, creating the stakeholder groups across as ASIC. It was part of the dynamic to strengthen that interface with industry sectors. We will incorporate that in our response to you.

CHAIR: I would like to move to another issue under the same general area of deregulation, which is about increasing the productivity of industry. In relation to access to data, I am aware that ASIC gets only $717 million in revenue from fees and charges. I assume an element of that is from data which is accessed from behind a pay wall. Could you tell the committee whether that applies to all data that ASIC holds—that is, a fee is required—and what percentage of your revenue does that contribute to.

Mr Medcraft: Certainly. Greg, do you want to respond to that?

Mr Tanzer: If I may. The vast majority of information that ASIC collects is available for free. In fact, 93 per cent of searches that come to ASIC each year are free searches. Obviously, that means about seven per cent of searches are not free. That garners revenue for government in the order of $50 million; it was $52 million last financial year. The type of information that is behind the pay wall is the more detailed type. As you would expect, it is the more detailed company financial information, the more detailed copies of particular documents, that may be lodged, whereas the general information that is freely made available is typically identification information and a summary of the documentation that is lodged with ASIC. The charging policy is not set by ASIC. The charging policy is set under regulation through the parliament, and I guess endorsed by government and then set through the parliament.

Mr Day: Just to give you an example, some of that material that might be, to use your description 'behind the firewall,' might be statutory reports that are required to be lodged by liquidators, which the legislation effectively sets out as 'in confidence'. We know from various submissions from various inquiries and forums that many academics would like to have free access to that material. There are a whole range of legal restrictions around that, as currently set in the law. Also, there are probably policy reasons behind that that, in fact, liquidators—using them as an example—are quite happy with because they want to feel they can be free and frank with the information they provide to the regulator without that being open publicly at that point. There are a whole range of issues and information in that as well that get lodged with ASIC but are not available for searching.

CHAIR: Sure. I am quite comfortable with the fact that there will be information for commercial or confidentiality reasons that cannot be released. I am looking specifically at that information which can be released, but you have chosen, as you have said—perhaps not you, but it has been decreed that there will be a charge for it. I am happy for you to take this on notice, but does the $50 million in revenue represent the bulk, numerically, of those searches?

Mr Tanzer: No, as I said, that is seven per cent of searches. Out of all of the searches that are made to ASIC, 93 per cent are free searches. The other seven per cent, which garner the $52 million or so in revenue, are paid searches.

CHAIR: Are you aware of any studies that look at the nature of that information which is behind the pay wall and the potential productivity which may be gained by the broader business sector if that were freely available? That is the contention of the whole open data movement. Are you aware of any that pertain particularly to those items and information that are behind your pay wall?

Mr Tanzer: I am not specifically aware with respect to the ASIC information. But I will go back and check on that, because I know that we have looked at this broader policy issue on previous occasions, typically around when the policy issue arises about whether or not they want it freely available. I am not aware of anything specific, but I will check.

Mr Medcraft: One thing you may want to check is whether other comparable jurisdictions—

Mr Tanzer: There certainly are in other jurisdictions.

Mr Medcraft: I do not think Companies House charge.

Mr Tanzer: There are a number of examples. Also, I think the Scandinavians took a view some years ago that they would make all of that information freely available in return for a much more substantial initial establishment fee of a particular entity, for example. As I understand it, in Scandinavia you pay once for the creation of a new business and then after that all of your lodgement requirements do not attract a fee and searches of that information do not attract a fee—

Mr Medcraft: There are alternative models. I think Companies House in the United Kingdom is actually providing open access to metadata. If it would interest you, perhaps we could provide information on comparable jurisdictions and what they are doing in terms of access and benefits.

CHAIR: My understanding from what you have said is that in relation to that division between the 93 per cent and seven per cent, you are constrained by regulation or legislation as to the nature of information which you must charge for. Is that what you are saying?

Mr Tanzer: The legislation prescribes a fee payable for particular types of searches and other lodgements as well. But for particular types of searches the regulations and aligned legislation prescribe a fee.

CHAIR: Could you identify that specific regulation for us?

Mr Tanzer: Certainly.

CHAIR: Speaking of fees—and this is my last question, before I throw to Senator Dastyari—Mr Medcraft, you have been quoted in the media recently as saying you would like to be able to charge the white-collar sector much larger penalties. In fact, you have released a paper around that whole penalties structure. Could you talk to the committee a little more, just strategically, about why you believe that is important and the particular sectors where you believe the government should be moving on that?

Mr Medcraft: I think it is important because, fundamentally, you need penalties that actually incentivise the right behaviour and basically make sure that those who cross the line and intentionally break the law are forced to think twice about it—it is that fundamental human behaviour. Frankly, if the penalty for something is $50,000, but you are going to make $500,000 from breaking the law, then that probably does not disincentivise the wrong behaviour. That is the fundamental premise. Penalties are meant to be a deterrence to breaking the law.

What we thought we would do in this white paper is compare the penalties with the acts that ASIC manages in Australia with other ones that we manage. And there we found, for example, that somebody who breaches a financial services licence faces a maximum penalty of $35,000, and for somebody who breaches a credit licence or does not have a credit licence it is $350,000—so it is 10 times the difference. Part of that is that the credit penalties were established very recently, so penalties are often not kept up to date, even with inflation.

The second thing is that we compared them between ourselves and other Australian law enforcement agencies. Again, we found, for example, that for individuals the maximum penalty that we can levy at the moment is $200,000 for a breach of corporations law. For the ACCC, for example, the maximum is $500,000. On corporations, the maximum we can levy is currently $1 million. For the ACCC, it is $10 million or the higher of three times the benefit. So that is what we saw when we compared across agencies.

Thirdly, we compared across the world in terms of penalties. We found that for criminal penalties we were reasonably consistent, except with the United States, where the jail penalties were twice Australia's. But on civil and administrative remedies we found that we fall well short in terms of either the dollar amount or, in particular, the disgorgement. I guess the issue we are raising is that if we have a system whereby those who do the right thing can see that those who do the wrong thing really do get penalised, then it ends up with a fairer outcome. If we want to have a self-execution system, then those who cross that line intentionally should feel the full weight and impact of their actions. Equally, we have observed that for those who unintentionally break the law, or when it is a minor breach, we need to think more about infringement notices—something whereby we are not taking them to court and through civil penalties. So it is about trying to get a balanced regime.

CHAIR: Do you have any longitudinal evidence from other jurisdictions, whether they be in Australia—and you mentioned the ACCC—or overseas, where, having brought in these higher civil penalties, they have actually seen a drop-off in the occurrence of this intentional regulatory breach, or have the numbers continued? I ask that question because there has been a long civil-society debate around things like the death penalty and harsh sentencing, and some say that it does not actually change either the initial rate of crime or, for those who are jailed, the reoffence level.

Mr Medcraft: We actually have a very good example in Australia, because, with insider trading offences, the penalties were doubled from five years to 10 years. Chris, you may want to comment on this, but what we found is that it has changed things a lot, hasn't it?

Mr Savundra: Yes, I think there is a greater willingness now to plead guilty and obtain discounts, given the doubling of the penalty. So there has been a greater number of outcomes, and particularly a greater number of guilty pleas, as a result.

Mr Price: I do recall—and I will take it on notice, if that is okay—that there has been a study, I believe through the World Bank, that found that it was not so much the drafting of insider trading laws that had an impact on insider trading; it was their enforcement.

CHAIR: I guess that is another good segue to page 34 of your annual report. You say there:

City Index Australia Pty Ltd paid a total of $13,200 in penalties under two infringement notices … These were the first infringement notices to be issued under the Australian Consumer Law provisions in the ASIC Act.

Could you just clarify for me: is that because they were new provisions, or is that because they were provisions that had been extant for a period of time that you had not to date actually exercised?

Mr Kell: They are new provisions that came in as part of the Australian Consumer Law reforms a few years ago. We are up to about 14 or 15 instances of infringement notices under those new provisions now, so we have been using them quite actively in the past year.

CHAIR: Having brought in new provisions in order to apply a penalty, have you seen a corresponding change in behaviour, or does the fact that you are now up to 14 notices imply that the behaviour has not actually changed very much?

Mr Kell: It is right across the board, so it is a little hard to tell as yet. How we are trying to use them, for example, is that we have had a series recently where we are targeting misleading advertising targeted at self-managed super funds, particularly around property advice in relation to self-managed super funds. It is a little hard to tell what impact that has had so far, but I would note that the discussion within the industry saying that ASIC is looking at this and it is cracking down on people has been very extensive in the specialist industry media. We would hope that that is a sign that people are now thinking twice about it, but I could not give you a definitive figure just yet. I am happy to check whether we have anything more.

Mr Medcraft: Another example I always cite, having lived in the United States, is that in America, if you cheat on your taxes, you go to jail. We could probably get evidence of this, but generally people just do not cheat on their taxes because you go to jail. I think it is an example where basically the penalty actually incents people, frankly, to not break the law. There is an issue where, if the penalty is sufficiently severe, people, just acting rationally, think twice about breaking the law, so I think it does shape human behaviour.

CHAIR: This is my last question on this area. You mentioned before the discretion to decide whether it was an unintentional or innocent error versus an intentional act. That clearly goes to the quality of regulation and hence my thinking that the more that can be co-regulation, so industry are very much engaged in setting a sensible and understandable set of regulations—can you just talk through your view of how you would manage that considerably higher penalty regime with, correspondingly, a government drive towards deregulation and providing a framework whereby both industry and you as the regulator were comfortable that those lines were clear enough to both parties, in that accurate and consistent decisions around intent and breaches could be made?

Mr Medcraft: I think that is a very good question. If you do not mind, I will take it on notice and come back to you. It is a very good question. I will take it on notice.

CHAIR: Philosophically, though, Mr Medcraft, you must have some—

Mr Medcraft: Philosophically, having come from an industry group and having run an industry group, I think that co-regulation can work very well, but co-regulation with an industry group does mean that the industry group has to go from just simply being in advocacy and education to actually being its own, if you want, enforcement body. So, if you are an industry group, you have to accept that that is part and parcel. Many of them do not want to move to that, but, if they do want to, it does mean taking a different shape. But I do think that a co-regulatory solution can work, and we see it working very successfully in Australia and around the world, so I am actually quite supportive of it. But I think that at the end of the day it has to have the right checks and balances in it to make sure that it does work properly. Certainly, for example, in the audit profession there has been a lot of talk about what you do about auditors. There is an example where I think you could actually do a lot more in terms of better co-regulation. I think the profession pretty well is self-regulated at the moment. I think there probably needs to be a strengthening of oversight, but then we need to strengthen the checks and balance. That is my view. I think that it can be made to work and I think it can clearly be made to work in the context of a deregulatory environment, frankly. It clearly close to deregulation. I guess what you want to do is make sure that the outcomes that you are getting are as good as, if not better than the outcomes you are getting today. I always take the view that generally industry is in a better position to deal with these issues because they often know where the problems are in their particular sector. So I think it can work and I think that it is often more efficient as long as the industry is willing to take on that role of policing its own sector. So hopefully, that gives you some feel for it, but we will come back to you.

Senator DASTYARI: I do want to begin by acknowledging the penalties for corporate wrongdoing, the report that you released, and the media around it. I think it was fantastic. It was a really strong response and very, very impressive.

Mr Medcraft: Thank you.

Senator DASTYARI: Is your minister Mathias Cormann now?

Mr Medcraft: Yes.

Senator DASTYARI: Explain to me exactly where we are at, as far as you understand it, in the proposed FOFA changes.

Mr Kell: Our understanding is the public understanding, that the government recently announced that it will put the implementation of the FOFA changes on hold to engage in some further consultation and also because the changes have been referred to the Senate Economics Committee for consideration. That is where things are at, as far as we understand.

Senator DASTYARI: Last time we spoke, we spoke about13-355MR, which was the update that you provided on your website on 20 December—you know what I am talking about, right?

Mr Kell: That is right, yes.

Senator DASTYARI: It said—and these are my words, not your words—that because there was a process that was being undertaken or a perception that there was going to be some kind of immediate legislative action—

and these are your words—

… ASIC will not take enforcement action in relation to specific FOFA provisions that the government is planning to repeal.

Are we changing that process now?

Mr Kell: We are still well within the facilitative implementation period, which ASIC obviously publicly announced and flagged as the approach we would be taking during the first 12 months of FOFA. We do not intend to alter our approach at this point in time, but where we are liaising closely with the government then obviously we are paying very close attention to the process that is currently occurring around the reforms. It is a situation that we need to keep under close review including any consideration that might arise where there is potential detriment to consumers and, if we need to modify our stance given the change in the timing, we will consult and clearly communicate as soon as possible.

Senator DASTYARI: Is the position at ASIC right now that if I breach the specific FOFA provisions—and I am using your words here—that the government is planning to repeal, you will not take enforcement action?

Mr Kell: Consistent with the approach we have announced all along for the implementation period of FOFA, if those breaches are not causing consumers harm or are not serious breaches that are going to damage the industry, then at this point in time that is correct. It is a balance that has to be struck. It is not straightforward and I am not going to pretend it is. The balance is between assisting industry to implement complex and major new reforms as efficiently as possible while also ensuring that investor protection is not compromised. It would not be sensible for us at the moment to initiate legal action on, say, a technical breach of the law if that law is repealed soon afterwards. That is why we are looking at this very closely to make sure that our actions are consistent with the progress of the reforms.

Senator DASTYARI: I have two issues with that and I want to explore both of them. You make two points there: the first one is the entire approach as a whole. Park that for a moment. Secondly, you talked about the specific provisions. We do not know what those specific provisions are anymore. My issue becomes this: at this point in time these FoFA reforms are the law of the land. The government have now said they are going to go through a pause and consultation process for an indefinite period of time and at some point will do something. I do not understand how you can make a decision based on what you do and do not enforce in the first place, let alone when you do not know what the specific provisions are even going to be.

Mr Kell: This is not unique to FoFA, the issue where the final shape of the legislation is not yet determined. We had similar issues arise during the implementation of the credit reforms under the previous government. I agree that we cannot provide 100 per cent certainty; there isn't 100 per cent certainty out there. The process of finalising the reforms and the final shape of the reforms is the responsibility of government and ultimately the parliament. We are providing what certainty we can during this current period and we are reviewing very closely as the consultation process plays out how this goes.

Senator DASTYARI: I will ask another question: what is it that you are not enforcing? I do not even know what the proposal is. The government does not know what the government's proposal is. It is them going through a process, and government is entitled to do that. I am not going to be hypocritical, because I argue that they should have paused it and they should not do these changes. I am not going to criticise them for pausing to review something that I think they should not do. But if the government itself cannot tell us right now what its proposed changes are, how do you then know what you are not enforcing?

Mr Kell: What we are working on now is the government's announcements, the package of changes that was made a few months ago in December. That is when we made our announcement. Let me provide some context here, because there has been some misreporting about this. This does not mean that we are not taking enforcement action in relation to egregious or harmful conduct in the financial planning sector. Since the implementation period, since our facilitative approach came into play on 1 July last year, we have banned 11 people permanently from the industry and remove five others. We have cancelled nine licences for failure to comply with financial services law. We have obtained four court enforceable undertakings from advisory firms that have not been obeying the law. We have issued a range of infringement notices. We also currently have a range of matters that we are considering for enforcement, including some that involve potential breaches of the new FoFA laws. So we are very much actively out there enforcing the law in relation to matters of involve harm to consumers. What—

Senator DASTYARI: Although some of those are FoFA laws, are some for breaches of the current section 962S of the Corporations Act? Are any of them that?

Mr Kell: I cannot remember which one—forgive me if I cannot remember the exact term.

Senator DASTYARI: That is the one which requires fee disclosure statements to be provided to retail clients.

Mr Kell: No, we are not enforcing that one. That is the one referred to in the media release you talked about. I will give you the reason why. That requires very substantial and expensive systems changes to be implemented by financial services firms, very substantial, far reaching systems changes to be implemented by firms right across the board. It would—

Senator DASTYARI: But, Mr Kell, it is the law—

Mr Kell: Sorry, it would not be sensible for us to initiate—

CHAIR: Just a minute, Mr Kell. Senator Dastyari, can I ask you to let the witnesses finish answering the question. If they go on too long, by all means I am happy to cut them off, but please let them finish.

Mr Kell: It would not make a lot of sense and I do not think it would reflect well on ASIC if we initiated legal proceedings for a technical breach of that requirement if that law was very soon after repealed. There will have to be at some stage obviously, given the will of the government and the parliament, where it becomes clearer as to whether that is going forward or not. But at this point in time it is not something that we have to enforce. Indeed, at the stage it has not even come into play, this particular provision you talk about. It comes in in a few months.

Senator DASTYARI: Yes, it comes in on 1 July. I will move on in a second, because I think we will start going around in circles on this, but you are not disputing that all of these proposals are the law? It is a matter of fact. Is that correct?

Mr Kell: I am not arguing about what the law is as it stands.

Senator DASTYARI: So the only issue is the decision of ASIC based on what it will and will not choose to enforce. When we last spoke the position from ASIC—and I am paraphrasing this; tell me if this is wrong—was that because these changes are imminent they will not be enforcing specific things that the government is about to introduce. Now, I disagreed with that. That is fine; I am allowed to. You are ASIC, you guys make the decisions, you are an independent statutory authority, and that is your call. People like me are allowed to disagree with it, but it is your call. My question is this: you are telling me that there are now no actual proposals that the government is proposing—all they are proposing now is to consult—but you are still not going to enforce these provisions. What does it take to enforce them?

CHAIR: Mr Kell, perhaps I could just get you to clarify that the statement by Minister Cormann is that the government still intends to fully implement the undertakings they took to the election and that the pause at the moment is to better communicate the changes and, if there are specific concerns, to hear them, but that at this stage their intent is to fully implement the changes that were identified at the election.

Senator DASTYARI: Hang on, that is putting words there that—

CHAIR: I am just asking him to clarify that that is what the minister has communicated.

Senator DASTYARI: Well, the minister said more than that, and I am happy to go through that process too.

Mr Kell: And that is obviously underpinning our current approach. The government announced that it was putting the changes on hold rather than dropping them altogether, that it was still its intention to go forward.

Senator DASTYARI: So, the bulk of provisions came in on 1 July last year.

Mr Kell: Correct.

Senator DASTYARI: So we are now nine months into this. It is correct that the minister said that they have an intention to proceed. But the minister did also say that they are going through a consultation process and that if things are required they are prepared to look at changes. My understanding is that the senator has not said that they have ruled out making any changes. That is why they are going through a consultation process. If they had ruled out any changes, then what would be the point of consulting? That is just informing. This is my frustration here: what will it require before your position changes? Will the first vote in parliament be enough? Will it take the new parliament coming in? Are you going to wait until then? It is starting to strike me as an arbitrary decision about what you will and will not enforce. At what point does that position change?

Mr Kell: I have two responses to that. The first is that it is a reasonable question. At some stage we may, after we have spoken to government and seen how this plays out, have to make a decision like that. But at the moment there is no indication that the reforms are not going to go ahead but, rather, that there is an engagement around consultation.

Senator DASTYARI: But there are no reforms to go ahead right now.

Mr Kell: The second issue is what would make us enforce. I reiterate what I have said, because I think this is very important: if we do see harm to consumers or we do see conduct in the market that is going to have a detrimental impact on the end customer, we will take action irrespective of whether we are in a facilitative period or not.

Senator DASTYARI: I just want to clarify that, because it is not quite what you said a minute ago. Your media release says that you will not; now you are saying that you may. The problem is that in your media release of 20 December there was no qualification based on intent, or grievous—the word you used was—

Mr Kell: I would encourage you to read that media release, which is a very short media release, in the context of our wider statements about our approach during the facilitative period, where we set out very clearly that our aim during that period is to help ensure that the large-scale FoFA reforms can be bedded down, and that firms and advisers can undertake the sorts of complex systems changes that are required. But we very clearly signalled from day one that, if there was egregious conduct, either in relation to the existing law or the new law, we would step in. That has been part of our facilitative approach from day one. As to other issues that may come into play here: again, we are monitoring these developments very closely, as I have said. We will consider the length of delay and the development of the reforms as they are taken forward—

Senator DASTYARI: Are you not prepared to change your position?

Mr Kell: but our current position is quite clear, and it is based on the government's position—that they are planning to go forward with these reforms, subject to some consultation.

Senator DASTYARI: I have got a few more things; I am not quite sure how much time I have.

CHAIR: Another 10 minutes.

Senator DASTYARI: The difference between the facilitative phase and this, as I see it, is: in the facilitative phase there was legislation that had been passed, and you were slowly implementing them—that was the difference between the legislative phase that you talked about in the introduction. The difference here is: there is no legislation that has been passed by the parliament. But, Mr Kell, I did not get a clear answer from you on the question of: at what point do you then say, 'We will be enforcing these like it's the law.' Your answer seems to be, 'We may enforce them like it's the law.'

Mr Kell: I am not sure that I can give you 100 per cent certainty on that. It is a hypothetical question—

Senator DASTYARI: It is not that hypothetical, because it is the law. It is not an unreasonable question.

Mr Kell: and it is the sort of issue that comes up, as I have said, not just in relation to FoFA; it came up in the credit reforms, where we were asked by the previous government not to enforce existing laws, at some stage, pending their passage through parliament—

Senator DASTYARI: Were you asked by this government not to enforce these laws?

Mr Kell: Consistent with our facilitative approach, this is a decision that we made—

Senator DASTYARI: In consultation with the government?

Mr Kell: and the government supported it, because they have supported our facilitative approach all along—as has this committee, in its previous manifestations.

Senator DASTYARI: So has the minister sat down and spoken—

Mr Medcraft: The previous government also supported the facilitative approach.

Mr Kell: Yes.

Senator DASTYARI: I see this as two [inaudible] things. I see a facilitative approach once the legislation has been passed as a very different thing, about taking into consideration facilitation for legislation that, at the moment, is in the never-never of consultation. But that is a political point.

I understand it has only been a week and parliament has been sitting, but have there been discussions between the new minister and ASIC about the implementation of FoFA changes?

Mr Medcraft: No.

Senator DASTYARI: There has been no discussion between the minister and you. So, when the minister said he was putting it on hold, how did you find out about that?

Mr Kell: This is the sort of area where we have discussions with Treasury, because they are the policy department here, and others about these sorts of approaches. As you just mentioned yourself, this is a very recent announcement. And that is one of the reasons why I think it would be, in any case, inappropriate for us to suddenly switch until we have had a better opportunity to consider—

Senator DASTYARI: Let me put it a different way, then. Did you know before the minister got up on Monday that the proposal was going to be placed on pause?

Mr Kell: Look—

Mr Medcraft: No.

Mr Kell: I did not know that.

Senator DASTYARI: So you found out after question time on Monday, which is how I found out, watching it on TV or whatever? I mean, you guys are busy, obviously. But that is how it came to your attention?

Mr Medcraft: Yes. You have got to remember: we had the ASIC forum on Monday and Tuesday this week.

Senator DASTYARI: One or two matters regarding the fines: is it fair to say—you kind of float around this in your statements, so I want to confirm this—that you want ASIC's maximum penalties to match those of the ACCC, or are you using that as a guide for what we should be looking at?

Mr Medcraft: I think that it is important to have consistency, in terms of penalties, and ones that, as I said, provide the right disincentives. One of the most important things out of all of this, as we have seen around the world and in Australia, is that basically there should be some element where there is a multiple of the benefit that was actually gained by the party who is being punished, because, frankly, you have got to deal with fear versus greed. Basically, there has to be a disincentive to breaking the law so that if you are going to win $50,000 you could potentially lose $150,000. There has to be a disincentive to doing the trade.

Equally, with globalisation we need to be very careful that our penalties are reasonably consistent with other countries in the world. Otherwise, you run the risk of being targeted as a jurisdiction that has light penalties. You could be regarded as a place where it is quite good to go and break the law. So, with globalisation it is even more relevant to have penalties that are consistent with other major markets, particularly financial services markets.

Senator DASTYARI: There are two points here. The first is the premise that the penalties should be bigger and larger—

Mr Medcraft: They should be consistent. They should be a disincentive for the wrong behaviour.

Senator DASTYARI: I could not agree more with you. I think you would find a lot of support for that out in the community as well.

Mr Medcraft: And they should be indexed to inflation.

Senator DASTYARI: That is a good point. In your statement you make the comparison with the ACCC. At the moment you maximum is $200,000—is that right?

Mr Medcraft: For individuals, yes.

Senator DASTYARI: And for the ACCC it is $500,000?

Mr Medcraft: Correct.

Senator DASTYARI: You are saying that obviously this is a matter for government but if you are looking for consistency $500,000 is something that should be looked at.

Mr Medcraft: That is, again, a matter for government, but clearly it should be enough to be a disincentive for the wrong behaviours. Also, if you compare us to overseas jurisdiction you see that in some jurisdictions the penalty amount is unlimited.

Senator DASTYARI: How much is it for a company?

Mr Medcraft: For a company it is $1 million for us at the moment.

Senator DASTYARI: And for the ACCC?

Mr Medcraft: $10 million.

Senator DASTYARI: So at the moment their penalties are greater by a factor of 2½ for an individual and 10 for a company?

Mr Medcraft: Correct. And even within our own law, as I said before, the Australian Financial Services licence penalties were set 20 years ago at a maximum of $34,000. Credit licences, more recently established, are at $340,000—10 times larger. So the message here is that probably the law needs to make sure that penalties are kept up to date and that they are consistent.

Senator DASTYARI: At the moment I assume—I was not aware of this—they are not indexed.

Mr Medcraft: No. If you think about it—we did the calculation—the amount today is roughly, in real terms, half of what it was 20 years ago. So having a unit system, where it is automatically indexed for inflation is quite important.

Mr Tanzer: There are some criminal penalties which do adjust. They are expressed in terms of penalty units, and the penalty units are adjusted from time to time. We are talking here about civil penalties; they do not adjust.

Mr Medcraft: I just remind you that criminal penalties, we found, were reasonably consistent.

Senator DASTYARI: So it is reasonably consistent on the criminal front but—

Mr Medcraft: It is the civil administrative penalties that—

Senator DASTYARI: I think this is really interesting. Your point is, firstly, that the penalties should be indexed. That does seem to make a bit of sense. Secondly, it should be consistent.

Mr Medcraft: Yes.

Senator DASTYARI: It should be a disincentive.

Mr Medcraft: Correct.

Senator DASTYARI: That is, effectively, saying that the penalties should be higher. Your idea of consistency is not bringing ACCC penalties down to the level of ASIC; it is raising ASIC to the level of ACCC.

Mr Medcraft: No, it is raising it.

Senator DASTYARI: I just wanted to be clear on that.

Mr Medcraft: It should probably be a much higher maximum base level and/or the higher amount of, say, three times the amount gained. Frankly, for somebody who has been in financial services for 30 years—we are dealing with money here—it is often a matter of fear versus greed. You have to lift the fear. If you lift the fear such that somebody who is thinking of taking a gamble of winning $50,000 versus receiving a penalty of $50,000 would say, 'Will I get caught?' and 'Will they succeed in going after me?' If they could lose $150,000 versus $50,000, they would probably think twice about breaking the law.

That is why, if you look at that chart, you see a sort of logic in it. Around the world, in most countries, the penalty is basically three times the gain. Around the world there is a concept of triple damages. That is probably the most important thing, particularly in financial services, where it is about money.

Mr COLEMAN: Thank you all for coming along this afternoon. In a bit of a change of pace, I just wanted to ask about the appeals under chapter 6 of the Corporations Act to ASIC that then can be appealed to the Takeovers Panel in M&A situations. I also wanted to get your view on whether that process is working as effectively and as quickly as it could and whether or not there is an argument, from a simplification perspective, for those applications to go directly to the Takeovers Panel.

Mr Price: Firstly, I should probably note at the outset that my understanding is that there have been, in recent times, very few, if any, appeals of ASIC decisions that have gone to the Takeovers Panel. Secondly, I would make the point that one of the reasons for having the Takeovers Panel as the appellate body rather than the AAT was the specialised nature of the knowledge that is involved in mergers and acquisitions work. So it is actually quite a tightly held skill.

Mr COLEMAN: Sorry, not the AAT but the Takeovers Panel.

Mr Price: The Takeovers Panel? Yes, that is why the Takeovers Panel has the right of appeal for ASIC relief decisions. But, sorry, your question then was?

Mr COLEMAN: Why does it need to go to ASIC at all? Why wouldn't it go directly to the Takeovers Panel?

Mr Price: So, relief decisions—and when I talk about relief decisions I am talking about ASIC having discretionary powers to waive various provisions of the law. One of the primary reasons is that ASIC, more generally, has those discretionary powers to waive provisions of the law, and has quite a well-known established body of policy about how it makes those decisions. We of course look at the actual mechanics of the takeover transactions. So, for example, we will get documents such as bidder statements, which are the documents that make the offer to purchase a particular company, and target statements, which are the documents that are refuting the offer. Often, the decisions to have waiver requests are part and parcel of that process that ASIC is already going through, looking at documents around bidder statements, target statements and so forth.

The other important point is: it is generally accepted that it is quite important for there to be a separation in terms of who makes a particular decision on this sort of matter—a waiver sort of matter—and then who has appeal rights. In other areas where ASIC makes these waver decision, it is the AAT that actually has the appeal rights. In the case of mergers and acquisitions, it is the Takeovers Panel. So if you have the Takeovers Panel as the primary body making the decision about these waiver applications, the question would then arise: 'Who would hear the appeal?' Would it be right for the Takeovers Panel to hear the appeal or should ASIC hear the appeal?

Mr COLEMAN: Are you confident that ASIC's teams have the expertise in M&A to expeditiously rule on these matters?

Mr Price: Yes, I am. Not talking about mergers and acquisitions now but talking about these waiver requests generally, we receive thousands of these every year and we grant 75 per cent of them. The team that considers these requests generally have a background in financial services, such as investment banking. Alternatively, they come from top-tier law firms and have worked in the mergers and acquisitions area and now work at ASIC. Alternatively, they are graduates or more junior staff who are supervised by those senior people. I am actually very confident that we have the expertise to make those decisions.

Mr Medcraft: Just on the senator's comments: as to the staff that are mentioned in that group, perhaps we could give some background to the sort of people that we have.

Mr Price: Yes, sure. The senior executive leaders of that area both have backgrounds at major law firms. One of the ladies who heads up that area worked at Sullivan & Cromwell, a major law firm in the US, for many years—

Mr Medcraft: They were working in M&A, I think.

Mr Price: working in M&A. And the other lady who works in a senior executive role in that area was actually in the employ of a firm called King & Wood Mallesons, which is one of the top-tier law firms.

Mr Medcraft: She was in M&A as well. So we actually have a lot of either M&A bankers and former bankers or M&A lawyers that are in that team.

Mr COLEMAN: So you are not aware of frustrations in the—for want of a better term—M&A sector in relation to ASIC's performance in this area?

Mr Price: Sometimes you will get people who are disappointed with particular decisions. When you are asked to make a decision on an issue, you need to make a decision one way or another.

Mr COLEMAN: It is not so much the decisions, but the process around the decisions, I guess.

Mr Price: No, not so much. I actually regularly sit on the business law section of the Law Council of Australia. I attend those meetings monthly, if I can. There is a regular item on the agenda about the performance of ASIC and that takeovers panel. I cannot think of too many, if any, concerns that have been raised about ASIC's handling of relief applications—

Mr Medcraft: As an aside, the stakeholder feedback on the corporations area was actually very positive, wasn't it?

Mr Price: Yes, we did a stakeholder survey, and the feedback from a wide variety of stakeholders, both business and consumers, was very positive about ASIC's market function as a whole. If there are particular instances of frustration or concern, I always say to people that they should feel very comfortable in contacting me directly. Before I was appointed commissioner I actually headed up the corporations unit. This was several years ago now. So I am quite familiar with the issues, and the issues around mergers and acquisitions more broadly.

Ms Armour: Having come into the commission from an M&A industry background, there is a really active dialog. There are quarterly liaison meetings that practitioners attend with this particular team. They are very open about what is on the agenda. They give statistics about some of the tricky issues they have dealt with—timeliness and the number of applications they have considered—so it is a very transparent process.

Mr COLEMAN: Mr Kell, I think you made some comments recently about retailers getting into the financial services space. I think you made some broad comments to the effect that there may be a need to look at regulation or look at this area more generally. I was just wondering why that would be the case, because presumably the regulation is about the provision of financial services products themselves as opposed to whether it is a retailer, or whoever, that is offering them.

Mr Kell: I think those comments were in context of what some of the bigger picture structural changes are. Changes in the shape of the industry might be explored in the financial system inquiry. I was not suggesting that ASIC was pushing for some change to the laws as they might relate to the provision of insurance by a Coles or a Woolworths right at this point in time, but, rather, some of the changes that are potentially coming down the track that might involve significant new entrants that are non-traditional financial players coming into the market—whether it is a Coles or a Woolworths or a Google or whatever. In the context of considering the longer term of our financial regulation it is a matter of whether that should require any modification to the current setup, whether we have the right sort of settings in place and whether we have the flexibility in our toolkit to deal with that. So it was in that context of looking quite a way out during the current financial system inquiry. The members of that inquiry have publicly flagged that changes in technology and new entrants are going to be part of the set of issues they will look at. So that is where it came from.

Mr COLEMAN: Picking up on the earlier discussion on fees. Mr Tanzer, you said that 93 per cent of the searches are for free products and seven per cent are for paid services. Is that seven per cent of completed searches, or do you mean that seven per cent of searches result in somebody completing a request that involves them paying a fee?

Mr Tanzer: Of the total searches made to us and that we respond too, seven per cent involve the payment of a fee. The other 93 per cent are free.

Mr COLEMAN: What about when you search something on an ASIC site—and I have done this myself—and you basically get to the point where it says: this is $50 or $100, do you want to go any further? Are you catching that in the seven per cent?

Mr Tanzer: That is right. If you pay the $50—

Mr COLEMAN: If you did not pay the $50 because you are a consumer and you get to that point and you say you do not want to pay the $50 and you stop?

Mr Tanzer: If you did not pay the $50, that is counted as a free search.

Mr COLEMAN: That is probably not the greatest statistic then, because—again, I am speaking from experience—over the years I have searched the ASIC website for lots of things and you might get to a point where you are asked to pay and you just stop the process, because it is a sufficient disincentive that you are not going to pay the $50 or whatever it is. Do you have any statistics on how many people get to that point and then stop.

Mr Tanzer: I will check. I suspect we would now, because this free search service online is a relatively new service over the last couple of years.

Mr Medcraft: We had 68 million searches overall in 2012-13. Did we mention that number?

Mr Tanzer: Yes. In 2013-14 to date there have been over 19 million free searches and about 189,000 paid searches.

Mr COLEMAN: But the way you are defining a free search includes searching that is free but ultimately gets you to a point at which you are asked to pay and stop searching?

Mr Tanzer: Yes.

Mr Day: No. Can you please clarify that question, Mr Coleman.

Mr COLEMAN: Unless the site has changed recently—

Mr Day: The data that Commissioner Tanzer has given you is about when you receive the information product—that is, the results of the search. It is not including the point where it identifies that certain information might be available but you have to pay for it. That is not included as a search result.

Mr COLEMAN: So that is not in the data at all?

Mr Day: We can get you that data, as Commissioner Tanzer indicated. But you were indicating by that question just then that if you seek certain information and then the system indicates that there is certain information available that you then have to go on and pay for—I took it that your question was saying that that is counted as a search that was free.

Mr Tanzer: If that is your question, that is not right. As I understand it, the free searches are ones where you have asked about information about David Coleman Pty Ltd, you have got the information back from the free search about what you can get, and then you say, 'I see that I can pay for this extra; can I get that?' and you are told that you need to pay, that does not count as a search. If you pay for it, that counts as a paid search. The bit where you got the free information counts as a free search. Sorry, I thought what you would have done is run your David Coleman Pty Ltd search and got back what it is—and that counts as a free search—and then you go on and ask for something further that requires extra payment. Unless you make that payment—

Mr COLEMAN: That is neither a free search nor a paid search; it is just some other category of search.

Mr Tanzer: It will not be anything that is made.

Mr Day: We can potentially get you that data, Mr Coleman.

Mr Medcraft: It would be interesting to see whether we can get the data, if it is possible, of those that go that far. But then—

Mr COLEMAN: I suspect that is a significant number because it goes to the question of how many people are not actually getting what they want because they do not want to pay the $50 or whatever it is.

Mr Medcraft: It would be quite interesting. I would just remind you that, obviously, the revenue that comes from this does not come to ASIC.

Mr COLEMAN: I have a couple of other quick things to ask you about. The accounting firms after Enron et cetera largely got out of broader consulting services and so on but in the last year or two seem to have gone back into that space. I think the SEC and some of the other US bodies have just made some broad comments about that. Do you have any concerns about that?

Mr Medcraft: As I said before, philosophically I think there is a need to strengthen the co-regulation, particularly with the auditing provision. I think that is a global issue. Audit quality is declining around the world. Early in my life I was an auditor at KPMG. Standing back from it, I think the issue that people are concerned about here is audit quality and what is driving the decline at the moment—or drives the increase. The solution has been to say 'If they are there too long, they will decline in quality'—that is an assumption—'and therefore we should rotate them' or that if they've got too much other business it could affect their independence. I think there is a presumption behind that.

If you stand back from it, I think that what we want is to make sure that we get good-quality audits. My view on it is that, standing back, we need to think a bit more laterally about it. How can we incent good-quality audits? If somebody has been doing an audit for 20 or 30 years, if they are doing a good job as assessed by the oversight regulator, then why should you necessarily be tossing them out? I guess where I have come out on this is—

CHAIR: Can we just keep the answers fairly short, because we have another couple of batches of questioning and only 25 minutes remaining.

Mr Medcraft: Yes, certainly. I think that, in the case of auditors, there are really four principles. Perhaps I will pass over to Mr Price.

Mr Price: Just very briefly: one of the concerns that can arise where accounting firms are buying these other businesses, as our chairman has intimated, is where the same firms are then auditing that work. There can be a concern where a firm is auditing its own work. In Australia that is probably less of an issue because we have had since around 2005, through the so-called CLERP 9 reforms, requirements that auditors need to maintain an appropriate level of independence. From my own point of view, I think that forms a valuable safeguard against this problem of auditors auditing their own work. When firms buy these consulting arms, they do need to be mindful of that particular issue and the role of the audit.

Mr COLEMAN: Thank you.

CHAIR: One of our colleagues who could not be here today has been monitoring proceedings and has just sent me through a message to ask you to clarify this, just coming back to the issue of penalties. You made the comment, both in your article that was in *The Australian* and in your talk today, about a maximum of $200,000. He indicated that potentially the Corporations Act allows for maximum penalties, including for things like insider trading and market manipulation, of up to $765,000 or three times the value of the benefits obtained by the offence, whichever is greater, or, for corporations, $7.65 million or three times the value of the benefits, whichever is the greater. I am happy for you to take it on notice, but could you confirm to the committee if that is correct and whether that applies to ASIC's range of options?

Ms Armour: That is correct. It was recently changed by—

Mr Medcraft: That is actually in the report, yes.

CHAIR: Thank you. Can I just take you to the chairman's report. In the 'Structural change' section, you say:

ASIC will be significantly impacted by the growth in superannuation.

Obviously that is an expanding sector. I just want to come to two questions—and again, conscious of the time, I am looking for short answers—one around transparency and one about fairness in advertising or accuracy in advertising. There was an article today in the *Financial Review* about the Fair Work Commission's expert panel, which allocates funds to awards. I realise that that is not directly your responsibility, but the thing that does come to your responsibility is that, on page 28 of your annual report, you talk about how you have:

… moved to require platform operators to explain how they choose the different products on offer to investors through their platforms … so that investors who invest through a platform are adequately protected compared with direct investors.

So transparency is clearly an important thing. What we see under the current mechanism with the Fair Work Commission and the expert panel is that the reasons for their decisions are not transparent, so the reasons why they allocate a particular fund—all of which, all the ones which apply, have been approved by APRA—or the reasons for which they approve that fund to a particular award, are not transparent to the policyholder. Do you have any intention to take action on or look into the lack of transparency in this current process?

Mr Tanzer: Our responsibility here is with respect to the disclosure to the investor. For the investor, what needs to be clear is where the funds are going and the mechanism by which that decision is made. I am happy to look at it again, but I do not see that we have particular jurisdiction to require the Fair Work Commission to disclose its reasons for actions that are taken there. I think that is a matter for the Fair Work Commission. What is necessary is that the investor clearly understands what decision has been made.

CHAIR: In terms of the advertising, I know back in 2005 that 'Compare the Pair' ad campaign was pulled up because of what was essentially misleading advertising. That issue is again being raised.

Senator DASTYARI: How do you know though?

CHAIR: There are decisions by ASIC.

Senator DASTYARI: I remember the ads. They were very effective.

CHAIR: Again, there have been concerns raised particularly around the fact that the disclosure in the form of the very fine print for the average consumer means absolutely nothing—(a) they probably do not have time to read it, and (b) they would not understand what it means anyway—and it is flashed up so quickly. I have seen, for example, calculations clearly by people who are supporting retail funds where they show that a retail fund's performance for a given set of conditions clearly exceeds that of the average industry fund, let alone some particular industry funds, yet the advertisement would lead the average person to believe that every industry fund is going to deliver a better outcome than a retail fund for all the various reasons that they say. Do you have any intention to go back and revisit this current ad campaign given those concerns that have been raised?

Mr Tanzer: Yes.

CHAIR: Are you able to talk any further or is that—

Mr Tanzer: No, we are looking at the campaign in the context of the complaints that have been made including the issues that you mentioned—whether it provides a fair representation or conveys a misleading impression.

CHAIR: Moving to a completely different area, the Companies Auditors and Liquidators Disciplinary Board: the caseload for them has declined significantly over the last decade, do you have any reasons or do you understand why that decline is there? Are there any reforms needed of the board's arrangements?

Mr Price: Certainly there was a decline in the numbers of proceedings for a couple of years, I think immediately following the GFC. If you have a look at most recent figures, however, the number of matters that are being referred to that board, or CALDB, if I can refer to them as that, have increased substantially. I can think of around five liquidator matters, insolvency practitioners matters, for example, over the past 18 months that have been referred to that board.

As to why the board is used or not used in particular circumstances, there might be a whole range of reasons for that. For example, if we come to a point where we believe that a certain outcome is warranted against the party, sometimes we will contact that party and their legal representatives and say, 'Basically, this is our case. This is what we think is a fair penalty,' and we can either come to a negotiated outcome, which may involve, for example, someone removing themselves from the industry for a period of time, or we can take the matter to CALDB. So it does depend on those sorts of issues.

CHAIR: You also undertook a review of the costs of ASIC's support to the Companies Auditors and Liquidators Disciplinary Board. What were the findings of that review? What has been implemented as a result of those findings?

Mr Medcraft: We can take that on notice and come back to you, Senator. We did actually do an efficiency review and there were some adjustments made to the staffing and also to the accommodation arrangements. But it would probably be better to come back to you with the detail.

CHAIR: I take it from that that there were more staff than required for the role.

Mr Medcraft: As you said, their activity is less and they are now actually housed separately within ASIC in order to save money on office space. Our audit team did look at it and also looked at the Superannuation Complaints Tribunal as well from an efficiency perspective.

CHAIR: You have a number of tables in your annual report for various areas. Generally speaking from a longitudinal perspective, I think the most I have seen is about two years in a contiguous table. What would be useful for the committee is to have tables that go over a longer period even just at the summary level. But if you can throughout the detail, that would be good. It would give us an understanding of trend in looking at workforce expenses et cetera against the different activities that ASIC has undertaken. If in future you could include those in your annual report, that could be useful.

Mr Medcraft: Sure. Would you like to come back to us with suggestions as to which ones you think we could—

CHAIR: Take it as a general comment but, if there are ones that you think are going to be excessive in workload to produce, come back and we will tell you if we are happy for them not to have that more longitudinal approach. Preferably, if you can, across all of them would be useful.

Mr Medcraft: On page 152 we do have stakeholder data back to 2008. That is six years. We will look at the others as well.

CHAIR: Thank you. I am happy for you to take this question on notice. Obviously the AAT is one of the key appeals processes, except for takeovers, where you have the Takeovers Panel. How many decisions have been made by the AAT in relation to ASIC? Can you provide some information about the time taken, both for the outliers—what is the quickest and what is the longest—and on your average time taken for the AAT? Have you done any work to understand the cost not just to ASIC but to industry of that time? Are there any proposals you have to improve the appeals mechanism for the commercial sector?

Mr Tanzer: Since July 2009 we have had 153 matters appealed from ASIC to the AAT. The general areas that they fall into relate to decisions to disqualify or ban directors, to ban a person from the financial services industry or the credit industry, or to cancel or refuse a licence. Those tend to be the larger categories. More recently, just in the last 12 months or so, an emerging category is business name refusals—refusals to register a particular business name. We took that function on a little over two years ago. It is difficult to make a calculation, because the time periods differ, but one in five or so decisions that we make to refuse or cancel a licence or discipline a person in some way might be appealed to the AAT. The success rate, if you call it that—the decisions that would be varied or upheld by the AAT—is about one in 10 of those that are appealed, broadly speaking. So you would say that one in 50 might be upheld and one in five might be appealed out of a population of, say, 200. When I talk about director disqualifications, over that period we might have had about 200 director disqualifications, and about 20 would have been appealed the AAT. We will take the time frame issue on notice.

CHAIR: If you could. I am just very conscious of time. We have about 12 minutes remaining.

Mr Tanzer: I understand. I was trying to be as quick as I could. I take your point. In general terms, we can give you one or two outliers. The obvious outlier that we have had is a matter involving Ross Tarrant, a Trio-related financial adviser, which went through the AAT and has only recently been resolved. But actually, when you look at the figures, the vast majority of those are resolved within a year or two.

CHAIR: What I am concerned about is to understand whether the process is as efficient as it can be and whether there is a better way to have an appeals process that imposes less cost on both you as a regulator and, particularly, on the sector.

Mr Medcraft: We will take that on notice.

CHAIR: Given the time, I will ask you to take this on notice. Given the increased interest in the use of virtual currencies like bitcoin—I believe there are 191 of them now available in the market—and the fact that some of our mainstream financial providers such as banks are, I understand, starting to provide an interface with those virtual currencies, I would be interested to know whether ASIC believes there is a role for a government as a whole, but specifically you as a regulator, to look at that area.

Mr Kell: We are happy to provide that. We will take it on notice.

Mr Medcraft: We have a detailed response which we will provide to you.

CHAIR: Thank you very much. I ask the same question in relation to social impact bonds or social benefit bonds.

Mr Medcraft: We are happy to provide you with detail on that.

CHAIR: That is, as you know, increasing in popularity in New South Wales, in South Australia and potentially overseas.

Mr Medcraft: I actually had a discussion with Mike Baird only yesterday about social bonds and what they are doing.

CHAIR: Very briefly—I will obviously look for your detailed response—is that something you believe there is a role for ASIC to take a particular view on?

Mr Medcraft: We will come back to you, but it is certainly an area, as a form of capital markets, which is quite interesting. Yes, we have a briefing prepared on this issue, and we will provide you with comment.

CHAIR: I promised Senator Dastyari 10 minutes, which he has.

Senator DASTYARI: On the Murray review, I just want to get an understanding of how that interaction with ASIC works. Obviously they are off doing their own thing, but—because Wallis and so on were so significant in the modern ASIC—has that process begun yet?

Mr Medcraft: We are just finalising our submission. It has to be lodged by next Friday—or next week.

Mr Kell: Monday, actually.

Mr Medcraft: Is it Monday?

Senator DASTYARI: But discussion of that—

Mr Medcraft: Sorry. We have had meetings with Mr Murray and others on the team. Mr Kell has been leading our efforts in this area, so perhaps I will pass over to him.

Mr Kell: I do not purport to speak on behalf of the financial system inquiry, but they are actually located in our building, so we do have regular dealings with them. We have had a series of meetings with the panel and also members of the secretariat, like other regulators. We have provided them with extensive information about aspects of financial regulation and data on the current operation of the financial sector, broadly speaking. We have a monthly meeting with the other regulators and the members and the secretariat to just test anything that the inquiry may want from us in terms of research or other things, so there is quite a high level of engagement going on. Again, I do not want to speak for them, but I understand that the panel and the secretariat are having extensive meetings with participants in the finance sector ranging from the largest banks through to consumer organisations.

Senator DASTYARI: Are you co-located or just in the same building? Are they working out of your office or not?

Mr Medcraft: We are renting them space, yes. We also have staff that are seconded into the inquiry, like other regulators.

Senator DASTYARI: I am sure this is all on the public record. Has a decision been made about whether the submission that you will be making will be a public or a private submission?

Mr Kell: We will be making a public submission.

Senator DASTYARI: The submission you make in two weeks or so will be publicly available?

Mr Kell: That is right.

Mr Medcraft: Well, we will make a public submission, and we may make a private submission also.

Senator DASTYARI: And that is a decision that obviously, because the submission is not final, you have not made?

Mr Medcraft: Exactly.

Mr Kell: But there will certainly be a public submission, and that will be our main submission. There may be some—

Mr Medcraft: Private.

Mr Kell: types of information that we and other regulators provide privately.

Senator DASTYARI: If you were going to make criticisms of structures, sometimes those things are better made privately.

Mr Medcraft: As Peter said, it is probably more likely to be providing information.

Senator DASTYARI: Something that makes ASIC quite unique is that you raise more revenue through the role you play than you actually cost to run. That is putting it very simply. Correct me if I am wrong: in last year's budget, it was $352 million or so?

Mr Medcraft: That is correct.

Senator DASTYARI: Which was about $5 million lower than the year before?

Mr Medcraft: Yes.

Senator DASTYARI: In the past, Mr Medcraft, you have talked a lot about a kind of user pays or moving more and more towards user pays. Is that where you anticipate you will be going in the next year?

Mr Medcraft: That is a matter for government, but certainly, if you want a deregulatory move, if you provide something to somebody that they do not pay for, I do not think they value it as much as if they pay for it, so I think it is important to take away the free option in any system.

Senator DASTYARI: Did the Commission of Audit meet with you?

Mr Medcraft: We made a submission to the Commission of Audit.

Senator DASTYARI: That was not public, though, was it?

Mr Medcraft: No. But I think our views on user pays—at the time of Wallis it was recommended that ASIC should be a user-pays-funded model. They did decide to do it for APRA. But I think that, back 20 years ago, the companies fees were closely correlated with ASIC's costs, whereas today a large part of our costs is largely reflected in financial services markets and credit and not companies. There is a disproportion.

Senator DASTYARI: I am just very, very conscious of the time. Apart from your making a submission, have they made contact with you? Did they speak to you? Did they meet with you?

Mr Medcraft: Who—the Commission of Audit?

Senator DASTYARI: Yes.

Mr Medcraft: No, I did not meet with them.

Senator DASTYARI: Did they meet with anyone in ASIC though?

Mr Medcraft: Not that I am aware of, no.

Senator DASTYARI: And there was no contact with them?

Mr Medcraft: Not that I am aware of. We did make a submission.

Senator DASTYARI: But you did not hear back after the submission was made?

Mr Medcraft: No; not that I am aware of.

Senator DASTYARI: Sure. I understand. Finally, is there any update on where you understand things are at with Leighton Holdings. I know this falls into that very complicated space we talked about before, which is that there are criminal matters which are AFP issues. We have had many discussions around it before. Obviously putting aside what the AFP are doing, have they come back to you and said that they are dropping everything?

Mr Savundra: Senator, there are obviously limits to what I can say but my understanding—and, again, I do not want to speak on the behalf of the AFP—is that their investigation is ongoing. We have a separate investigation, which is on foot.

Senator DASTYARI: So you have started a parallel investigation?

Mr Savundra: I am trying to recall whether it was Senate estimates or this committee that we advised on the last occasion or on a previous occasion that they were investigating. I can confirm that we are continuing to investigate.

Mr Medcraft: It means we have opened a formal investigation, so we can use our compulsory powers.

Senator DASTYARI: Can you tell me when that started—or whatever you would normally disclose?

Mr Savundra: I would have to take that on notice. It was this calendar year. Again, as we said last time, we transitioned to a formal investigation where it is necessary to use—

Senator DASTYARI: I completely appreciate this is a very complex thing, because there are criminal things that are not your responsibility; they are the AFP's.

Mr Medcraft: I remind you that we have to be careful that we do not get timed out.

Senator DASTYARI: What is the time line?

Mr Savundra: I guess it depends on what the accusations are.

Mr Medcraft: Normally it is five or six years.

Mr Savundra: Six years is the statute of limitations. Just to add: we are working very closely with the AFP and we are coordinating our activities with the AFP.

Senator DASTYARI: I know you have got the memorandum and that one of your guys has been seconded to the AFP. I am very, very conscious of the time. The AFP are working on their own investigation, which is looking at the criminal accusations of bribery, which are obviously quite serious but are not spaces for ASIC. They are not corporate; they are criminal. I understand that you are helping them with their investigation, but how would they be helping you in your investigation? They cannot give you their documents. You have to get them yourself each time.

Mr Savundra: That is right. But they are looking at Corporations Act matters from a criminal perspective. We are looking at it from a civil perspective.

Senator DASTYARI: When you say you get timed out in six years, is that up until when you—

Mr Savundra: We issue the proceeding. So it is from the date of the alleged breach or contravention to the commencement of the proceeding.

Senator DASTYARI: Do you know what the date of the alleged breach is?

Mr Savundra: I would have to take that on notice.

CHAIR: Having just gone quickly through your submission, there are a number of reports and reviews that are referred to. I am aware that you may not be able to provide all of them. There is the deregulation report to Treasury. If it is possible, could the committee receive a copy of that as well as the small business booklet?

Mr Medcraft: That is due to be provided to Treasury in April, so we will copy the PJC when that is provided.

Mr Tanzer: And the small business booklet,

CHAIR: You talk about conducting a wholesale review of 84 class orders that are sunsetting. Some visibility of that would be useful. Also, you are making law reform suggestions. An indication of what those reforms are would also be useful. I note again in here that you talk about $200,000 figure. You have just confirmed that the Corporations Act did in fact have the $765,000 and the $7.65 million figures. An explanation as to why you have stuck with that lower figure when the act actually allows a higher figure would be useful.

Mr Medcraft: In fact, the report did carve out that it did not include the corporate governance and market related offences. We will come back and clarify that.

CHAIR: Thank you. That would be useful. I thank all the witnesses today. I also thank the secretariat for the work they have done to prepare for this, as well as Hansard. You have been asked to table a number of documents and give answers. If you could do that by 22 April it would be appreciated.

**Committee adjourned at 16:30**