COMMONWEALTH OF AUSTRALIA

# Proof Committee Hansard

## PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES

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

(Public)

FRIDAY, 25 NOVEMBER 2016

SYDNEY



BY AUTHORITY OF THE SENATE

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**PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES**

**Friday, 25 November 2016**

**Members in attendance:** Senators O'Neill, Williams and Ms Butler, Mr Falinski, Mr Irons, Mr Keogh, Mr Van Manen.

Section 243 of the Australian Securities and Investments Commission Act 2001 sets out the duties of the committee as follows:

a. To inquire into, and report to both Houses on:

i. activities of ASIC or the [Takeovers] Panel, or matters connected with such activities, to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; or

ii. the operation of the corporations legislation (other than the excluded provisions); or

iii. the operation of any other law of the Commonwealth, or any law of a State or Territory, that appears to the Parliamentary Committee to affect significantly the operation of the corporations legislation (other than the excluded provisions); or

iv. the operation of any foreign business law, or of any other law of a foreign country, that appears to the Parliamentary Committee to affect significantly the operation of the corporations legislation (other than the excluded provisions); and

b. to examine each annual report that is prepared by a body established by this Act and of which a copy has been laid before a House, and to report to both Houses on matters that appear in, or arise out of, that annual report and to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; and

c. to inquire into any question in connection with its duties that is referred to it by a House, and to report to that House on that question.

## WITNESSES

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

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

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

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

**MACAULAY, Ms Louise, Senior Executive Leader, Australian Securities and Investments Commission**

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

**MULLALY, Mr Tim, Senior Executive Leader, Australian Securities and Investments Commission**

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

**SAADAT, Mr Michael, Senior Executive Leader, 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**

**Committee met at 09:01**

**CHAIR (Mr Irons):** Good morning. Welcome to the first hearing of this committee in the 45th Parliament. I now declare open this hearing of the Parliamentary Joint Committee on Corporations and Financial Services. I welcome Australian Securities and Investments Commission and my colleagues. In the middle of the last two weeks of parliament, it is a fairly hectic time, so it is great that you have all been able to attend today.

Today the committee is taking evidence as part of its ongoing oversight of ASIC, the Takeovers Panel and the corporations legislation. This is a public hearing and a *Hansard* transcript of the proceedings is being made. The hearing is also being broadcast via the Australian Parliament House website. The committee generally prefers evidence to be given in public, but, under the Senate's resolutions, witnesses have the right to request to be heard in private session. I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. If a witness objects to answering a question, the witness should state the grounds of the objection and the committee will determine whether it will insist on an answer.

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 to a superior officer or to a minister. This resolution prohibits only questions seeking 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. I particularly draw the attention of witnesses to an order of the Senate of 13 May 2009 specifying the process by which a claim of public interest immunity should be raised.

*The extract read as follows—*

- **Public interest immunity claims**
- That the Senate—
- (a) notes that ministers and officers have continued to refuse to provide information to Senate committees without properly raising claims of public interest immunity as required by past resolutions of the Senate;
- (b) reaffirms the principles of past resolutions of the Senate by this order, to provide ministers and officers with guidance as to the proper process for raising public interest immunity claims and to consolidate those past resolutions of the Senate;
- (c) orders that the following operate as an order of continuing effect:
  - (1) If:
  - (a) a Senate committee, or a senator in the course of proceedings of a committee, requests information or a document from a Commonwealth department or agency; and
  - (b) an officer of the department or agency to whom the request is directed believes that it may not be in the public interest to disclose the information or document to the committee, the officer shall state to the committee the ground on which the officer believes that it may not be in the public interest to disclose the information or document to the committee, and specify the harm to the public interest that could result from the disclosure of the information or document.
  - (2) If, after receiving the officer's statement under paragraph (1), the committee or the senator requests the officer to refer the question of the disclosure of the information or document to a responsible minister, the officer shall refer that question to the minister.

- (3) If a minister, on a reference by an officer under paragraph (2), concludes that it would not be in the public interest to disclose the information or document to the committee, the minister shall provide to the committee a statement of the ground for that conclusion, specifying the harm to the public interest that could result from the disclosure of the information or document.
- (4) A minister, in a statement under paragraph (3), shall indicate whether the harm to the public interest that could result from the disclosure of the information or document to the committee could result only from the publication of the information or document by the committee, or could result, equally or in part, from the disclosure of the information or document to the committee as in camera evidence.
- (5) If, after considering a statement by a minister provided under paragraph (3), the committee concludes that the statement does not sufficiently justify the withholding of the information or document from the committee, the committee shall report the matter to the Senate.
- (6) A decision by a committee not to report a matter to the Senate under paragraph (5) does not prevent a senator from raising the matter in the Senate in accordance with other procedures of the Senate.
- (7) A statement that information or a document is not published, or is confidential, or consists of advice to, or internal deliberations of, government, in the absence of specification of the harm to the public interest that could result from the disclosure of the information or document, is not a statement that meets the requirements of paragraph (1) or (4).
- (8) If a minister concludes that a statement under paragraph (3) should more appropriately be made by the head of an agency, by reason of the independence of that agency from ministerial direction or control, the minister shall inform the committee of that conclusion and the reason for that conclusion, and shall refer the matter to the head of the agency, who shall then be required to provide a statement in accordance with paragraph (3).

- (d) requires the Procedure Committee to review the operation of this order and report to the Senate by 20 August 2009.
- (*13 May 2009 J.1941*)
- (Extract, Senate Standing Orders)

Witnesses are reminded that a statement that information or a document is confidential or consists of advice to government is not a statement that meets the requirements of the 2009 order. Instead, witnesses are required to provide some specific indication of the harm to the public interest that could result from the disclosure of the information or the document.

Welcome. I now invite you to make a short opening statement and, at the conclusion of your remarks, I will invite members of the committee to put questions to you.

**Mr Medcraft:** Good morning, Chairman, and congratulations on your appointment as chair of the committee. We are very pleased to appear today.

This is a our first appearance before this reconstituted committee. This brief opening statement touches on two important ASIC documents, which I have here: the ASIC annual report and the corporate plan. We have copies available if any members would like them. The annual report was tabled in parliament last month. Along with a range of statutory issues, which we need to report on, it includes a wealth of information on ASIC. I encourage members—in particular, new members who are unfamiliar with our organisation—to have a look at it. Crucially, it spells out our enforcement record. At the end of the day we are fundamentally a law enforcement agency. It is worth reciting a few of the numbers from the last 12 months to 30 June this year: we had over 1,400 high-intensity surveillances; 175 investigations were completed; 22 criminals were convicted; 13 people were jailed; we achieved $1.3 million in civil penalties; 136 people or companies were removed from providing financial services; 39 people were removed or disqualified from directing companies; and we achieved compensation of over $200 million for investors and consumers.

The corporate plan, which is the other document here, is required to be published by law now, but it continues something that we had done previously. Basically, at the start it outlines our vision, which is, fundamentally, to allow markets to fund the economy and in turn economic growth, which contributes to the wellbeing of all Australians. We do that by promoting investor and consumer trust and confidence, by ensuring that markets are fair and efficient and by providing efficient business registration services. The corporate plan actually explains how we hope to achieve that vision over the next four years. Firstly, by outlining what we see as the long-term challenges or risks to that vision. Secondly, it outlines what our strategy is for responding to those challenges and those risks and in particular it is our detect, understand and respond approach. It is how we are strengthening our capabilities. Thirdly, it sets out specific actions for addressing our long-term challenges, key risks and the areas that we are going to focus on particularly in the 2016-2017 year and then more broadly over the four-year horizon. Most importantly it sets out the measures that we will use to evaluate our performance. I am happy to take your questions.

**CHAIR:** Since late August this year ASIC has publicly announced the outcomes of 11 significant actions against banks and lenders. Over $1.7 million customers have been involved and it appears that at least 10 different banks and lenders have been involved. How are the fines calculated and why are they not always imposed?

**Mr Medcraft:** We might get our banking senior specialist, Michael Sadat, to answer.

**Mr Saadat:** Could you just, if you do not mind, repeat the matters that you were talking about.

**CHAIR:** You have provided us with some information that has a table of the fines and the penalties, but how are those fines calculated, in particular for those 10 different banks and lenders? Did it depend on their breaches? And, why aren't the fines was imposed?

**Mr Saadat:** There is a range of outcomes that we are looking at here. Some of it go to fines, but the actions that we have taken recently have primarily focused on obtaining compensation or remediation for consumers. That is where we have obtained, for example, $4.5 million following ANZ's failure of their One Path subsidiary's compliance functions and paying back basic account holders for incorrect late-payment and over-the-limit fees and so on so. In those cases, we were not seeking, in most instances, through a court based outcome, a pecuniary penalty; rather, our focus was on rectifying the situation and ensuring that the money is returned to the affected customers as fast as possible. In those instances, we work very closely with the banks to ensure that they have a very robust system in place to identify all affected customers so that no-one is going to be short-changed and the full amount gets back into the pockets of those customers. Typically, this will involve some sort of independent third-party oversight to make sure that happens. So, if I understand your question correctly, that has been the primary focus in relation to some of our more recent actions in the banking sector, and it has resulted in very significant refunds to consumers—including, for example, $20 million in credit card foreign transaction fees being refunded.

**Mr Medcraft:** Just on penalties, and why sometimes we do not necessarily go after penalties: do you want to comment on that, Michael?

**Mr Saadat:** We treat each matter on a case-by-case basis. Some of the matters that I think you have referred to were breaches that the banks had reported to us. So they had identified a problem and reported it to us, and then we worked with them to establish what the remediation for that breach should be. In some cases, that included refunds to consumers who may have been overcharged or charged inappropriately. In some cases, though, where there are breaches, we can impose infringement notices and, in a number of cases, we have done that as well. We can only seek civil penalties through the courts, and in some cases we may find that that is the appropriate course of action as well. So each is dealt with on its own individual merits and—depending on whether we think we should be prioritising remediation for consumers who may have been affected by the misconduct—we may work with the bank to achieve that. In some cases, actually, it is quicker to work with the bank to get the remediation to consumers and the refunds to consumers rather than going down the court process, but we treat each case on its own merits.

**Mr Kell:** The other contextual point to make here is: the government announced, about a month ago, a major review following on from one of the recommendations coming out of the Financial System Inquiry—a major review of ASIC's enforcement powers and penalties regime. We do take into account the fact that, at the moment, in our view—and we have articulated it before this committee before—some of the penalties that we could obtain, by going through the often lengthy, time-consuming and expensive court process, ultimately are not particularly high. So that review—it is going to be a very important review—is looking at: whether there should be higher penalties, whether there should be greater ability for us to take action against senior managers in banks, and whether we should be able to more easily direct financial institutions to take actions to remedy the sorts of problems that arise. So that is another factor at the moment. I think it is safe to say that we think that a stronger penalty regime will give us more practical options in this area.

**Mr Medcraft:** The penalties, as you know, at the moment, Chair, are often not indexed to inflation, so sometimes they are 20 years out of date. Sometimes people have almost an incentive to break the law because the penalty is basically less than what you could actually gain from breaking the law. So there is a lot of stuff that has got to be fixed up inside the penalty regime, and the government has actually announced they are going to address that.

**Senator WILLIAMS:** Chair, can I ask one question on that very issue of fines?

**CHAIR:** I will just finish, Wacka, and then you can. You mentioned about senior managers being held to account in the banks. How are they currently held to account?

**Mr Kell:** There is a range of issues that we can look at, but one of the problems at the moment is: we do not have a straightforward capacity to ban or take action against senior managers in the same way that we do against

those directly providing advice. That is an issue that we have highlighted before. That is an issue where we think we do need stronger powers, and that is an issue that has been identified as one of the matters that are going to be considered in this review.

**Mr Medcraft:** At the moment, we do not really have an ability to go after managers. That is it. That is the answer. That is the thing. Again, Murray recommended that that occur, and the government has accepted that recommendation. The sooner it happens the better.

**Mr VAN MANEN:** Just to follow on from this discussion: you have over $200 million of refunds to consumers there as a result of your actions and several million dollars worth of fines. Can you name me one bank executive that has lost their job as a result of these findings?

**Mr Medcraft:** I think that is the point. That is the point. That is the point. This came through in the inquiry. That is the point. But it is not just the point here; it is the point around the world. It is the point around the world: individual accountability. That is it. So there is work, as you said. The Murray inquiry pointed it out. The government have actually said they are going to bring in the power to ban management. But also the banks themselves have to sort out their own culture and deal with bad apples, including managers. That is it. It should not be about just the law dealing with it; it is up to them to take responsibility for their own management, frankly, and deal with it. That is why the community are upset, frankly. That is why they are upset.

**Senator WILLIAMS:** So I guess that is a no, Mr Medcraft—you do not know of anyone.

**Mr Medcraft:** I think the parliamentarians and the community have expressed their concern, and the banks have got to wake up to that, frankly.

**Mr FALINSKI:** Mr Chairman, the question I have is: with all these scandals that the banks have faced, do you have any evidence that they have lost market share?

**Mr Medcraft:** No.

**Mr FALINSKI:** Are you suggesting that they can rampantly go around—

**Mr Medcraft:** I think, Mr Falinski, you know what an oligopoly is.

**Mr FALINSKI:** So you are suggesting that in funds management there is an oligopoly in Australia?

**Mr Medcraft:** I am saying that basically we have four dominant institutions in this country that are vertically integrated.

**Mr FALINSKI:** Can I infer from that statement that one of the problems might be the vertical integration that the banks have undertaken over the last few decades?

**Mr Medcraft:** When you have an oligopoly, you end up with certain pricing behaviour affecting the market. Again, we are just seeing that classic behaviour. Personally, I think that in Australia the significant competition is coming and will come from the digital side in the coming years anyway. The world is changing, frankly.

**Mr Tanzer:** Mr Falinski, you mentioned funds management specifically. Funds management in Australia, of course, is significantly impacted by the superannuation system. In the banking system we have four large banks. Those banks also engage in superannuation activities. But I do not think it is fair to say that the superannuation system is dominated in the same way by the four large banks and therefore that funds management is dominated in the same way by the four large banks. I do not think that is correct to say, because there is a significant but shrinking, obviously, corporate and public sector fund sector and also a significant industry fund sector, together with a large and growing self-managed super fund sector.

**Mr FALINSKI:** So would you say that this applies to financial planning then? Most of these scandals seem to be in the financial-planning area.

**Mr Medcraft:** Peter, how much do the big five have of the market?

**Mr Kell:** With the data we have on the financial advice register, the big four, I think, control around 40 per cent or so of the planning.

**Mr Medcraft:** And, if you add in AMP, what is it?

**Mr Kell:** That includes AMP. The vertical integration obviously raises issues of conflicts. That is something that ASIC is focusing on. We are doing some work at the moment on the sorts of consumer outcomes that arise when you go to a planner within a vertically integrated institution, and we are looking at how conflicts of interest are managed in those institutions. This is not a straightforward debate because there are—

**Mr FALINSKI:** It is not so much the consumer outcomes; it is the consumer behaviour that I am interested in at this point. If an institution is scandal ridden, you would normally see consumers leave that institution, so you

would lose market share. But what you guys are saying is, 'That's not happening because there's an oligopoly in financial planning'—unless I have misunderstood.

**Mr Medcraft:** My point is that I think the banking system is an oligopoly. I am talking about banking per se. And then clearly, within that oligopoly, obviously they are integrated. But I must say I think that what we are seeing with what happened with the Wells Fargo scandal in the United States is that, frankly, the days of cross-sell being about cross-selling products, which you think about as justification for a bank being integrated, are probably going to be put into question now because it is not actually seen as particularly good to be just cross-sell. So I think we may be starting to see, perhaps, a change.

**Mr FALINSKI:** That is the point I am trying to get to. Is it the vertical integration that the banks have undertaken over the last three decades that is the problem? Or is that at the heart of the problem?

**Mr Kell:** I certainly think that is one of the issues—there are no two ways about it—and the dominance on the product-manufacturing side. But, to your point around financial advice, it is probably also worth noting that the nature of financial advice and some of the problems that we see mean that consumers may at times be unaware of what is impacting on their investments or the advice. The recent *Financial advice: fees for no service* report that we put out showed hundreds of millions of dollars being charged but no service being provided. Most consumers would not have been aware of that situation.

That is a bit different from a consumer who is aware and for some reason decides to stay. Sometimes switching is difficult to do. It is not straightforward to move all your investments, so I think there is a natural level of inertia there. Maybe we can look with new technology at ways of facilitating an easier switching of financial products between institutions.

**Mr FALINSKI:** Absolutely. I guess, though, that I would hate all of us to be chasing the symptoms of the disease rather than the cause of the disease, which is the vertical integration of the banks.

**Mr Tanzer:** The cause of the disease is conflicts of interest.

**Mr FALINSKI:** What I am hearing is—

**Mr Tanzer:** It is not entirely joined to vertical integration. A vertically integrated model produces certain types of conflicts of interest. The heart of these sorts of scandals is conflicts of interest. Throughout the financial services industry, for a very long period of time, conflicts of interests have been things that lead to very poor outcomes.

**Mr FALINSKI:** But the other real problem here is that the banks by their very nature, because they have the payment system involved, are highly regulated and protected by government for very good reasons. You do not want the payment system falling over. It would seem that they have taken the advantage that they have from that regulation and protection and then used that to leverage themselves into other financial products.

**Mr Tanzer:** Certainly the feature of vertical integration is that, yes, they are involved in a number of other financial products. Whether it actually follows—

**Mr FALINSKI:** Mr Tanzer, I just want to clarify—

**Mr Tanzer:** I do not know that that is correct. No, I do not think it is correct that it necessarily flows from the payment system, but the payment system is obviously central to the regulation of banking in Australia. It is a very important part of the regulatory framework.

**Mr Medcraft:** It is not just one single point. Structure is important, but, as we keep saying—we have talked about it—culture in the banking system is a problem, and it is not just a problem here; it is around the world. There is not one single driver. Structure is one, but the whole culture thing inside banks is a problem. But that is a big problem.

I think the big issue these days—to Peter's point—is more transparency. Perhaps we are seeing it now. We could not see it before. Some would argue it is actually better than it was years ago, which it probably is, but essentially it is back to the social licence. We are seeing more of it, and we are going, 'Actually, that's not acceptable.' So I think it is a bit of a dynamic; that is all.

**Mr VAN MANEN:** Greg, you touched previously on the issue of Wells Fargo. I would be interested to know, given what happened with Wells Fargo, the incentives there and the opening of fake accounts by staff to meet sales targets, what work you are doing in that space in terms of liaising with our existing banking sector to see what they are doing to make sure that that is not happening here.

**Mr Kell:** Thank you for the question. Yes, we have written to the four major banks plus Suncorp, BOQ, Citi and HSBC just recently—

**Senator O'NEILL:** Was that in the last couple of weeks?

**Mr Kell:** yes, within the last week or so—asking them to undertake an audit of this issue of the cross-selling practices within their institutions and to report that to the regulator. We do not have evidence at this stage. We have not seen that type of almost straight-out fraudulent cross-selling in Australia, but we want to make sure, and we want to be able to reassure you and the Australian public that we do not have a Wells Fargo type of problem in Australia. Generally, the levels of cross-selling that Australian institutions have achieved have not been at the levels that we have witnessed with Wells Fargo, where I think they were up to about eight products per customer.

**Mr VAN MANEN:** What is the average in Australia?

**Mr Kell:** I think it is somewhere between three and four.

**Mr Medcraft:** Yes. If you can get a cross-sell of three, that is amazing.

**Mr Kell:** In effect, we are announcing now, in response to your question, that we have written to the banks, and we will be looking forward to their response. We would hope that some of them were already undertaking such a review in the light of what Wells Fargo has shown, but, if not, we will be requiring them to do that and report to us to make sure that we can do that. We will be, obviously, checking very closely how that reporting plays back to us.

**Senator WILLIAMS:** Mr Kell, just in relation to vertical integration, I have a real problem. I do not blame people for being dedicated and committed to the company they work for. This committee has done a lot of work over a long time now, from the Storm Financial inquiry to FOFA and so on. Say I work for Toyota and a couple come in, a mum and dad with five children, and they say to me, 'We want to buy a car that's best for us.' They live out on a dirt road, a corrugated road with potholes et cetera, pretty rough, which gets very wet. I sell them a Toyota Tarago, knowing full well that an all-wheel-drive Ford Territory seven seater would be a far better vehicle for the rough conditions. How do you stop this? You do not blame the Toyota dealer saying, 'I'm getting a commission, a kickback; I'm securing my job, working for the Toyota company, the business I'm working for.' How do you stop this vertical integration? Surely people favour their company. Is it a case where we have to go down the UK road where, if you are a financial adviser, you simply cannot be linked to or employed by one of the big financial product companies?

**Mr Kell:** There are a couple of points. One is that the work that is currently underway to lift professional standards is fundamental here. For too long, I think the sector has described itself as a profession but not really acted as a profession, where putting the interests of the clients first is supposed to be fundamental. So we strongly support the reforms that are underway in that space to require minimum qualifications.

**Senator WILLIAMS:** But will that stop vertical integration? That is the question.

**Mr Kell:** That will, I think, make a contribution. In terms of vertical integration, the key issue is that, under the law—and this is what we are now testing as part of our review and our work, and you will start to see results coming out; we have already seen it with some of our bannings—you have to act in the best interests of clients. You have to put the clients' interests first. You have to avoid conflicts of interest. The challenge for those vertically integrated businesses is: can they do that? Can they achieve that within that model?

**Senator WILLIAMS:** That is the challenge.

**Mr Kell:** Most of them would say that they can.

**Senator WILLIAMS:** Of course they are going to say that.

**Mr Kell:** That is going to be the test under these new laws: can they act in that way within a vertically integrated model? That is the question.

**Mr KEOGH:** By definition, is it not almost impossible to have a business model that operates if you have taken away any financial incentive to the financial adviser to favour that bank's product line, which you would have to do to actually say that there was no conflict of interest? If they were remunerated in a way that favours them pushing that bank's or that financial service's products over any other products in any way then that is a conflict of interest by definition. That is what has to be removed and it should be. I think that goes to Commissioner Tanzer's point—that conflict of interest is a part of this problem. Once you take that away, there is no reason to have a vertically integrated business model because there is no advantage to the financial service.

**Mr Medcraft:** If you take away the cross-sell then the basic presumption behind an integrated business goes away.

**Mr Kell:** That is really the question, isn't it? I am not sure that ASIC ought to be here trying to dictate exactly what business model an individual bank should follow. That is the question that needs to be put to them. Are you

going to be able to run a model that provides high-quality, impartial advice to your customers within that vertical integration?

**Mr Medcraft:** I think the issue is not so much about the law. I think the market is frowning upon cross-sell after Wells Fargo. I actually just think the market will probably reshape that vertically integrated structure, frankly.

**Mr KEOGH:** Picking up on the point before, there is a more sophisticated client base, who are aware and who understand what the remuneration systems are that are involved in the cross-sell push but there is a much larger group of customers who are not aware. So, even with the transparency, that is not something they are looking into. If you look at more established professions, there is not this idea of: we think we are still acting in the best interests of our client or customer when we are remunerated by someone else. There is a blanket understanding that that is a conflict of interest. It seems to be saying you can manage a conflict of interest when you are remunerated over here. In no other profession would that be countenanced.

**Mr Kell:** It is a policy issue obviously in many ways. There will always be a set of consumers who go to large institutions because of the perceptions of safety and accessibility. But that issue around independence and avoiding conflicts is at the heart of what the relatively new FoFA regime is attempting to achieve in this area.

**Mr KEOGH:** With the financial advisers themselves, are you concerned about the lack of any unique identifier for financial advisers in the system such that under the FAR you can have multiple registrations for a single adviser, which sort of seems to completely undermine any attempt to stop people being a bad egg in one bank and moving to other bank or setting up their own shingle or even having multiple shingles and any negative reporting not affecting their other registration.

**Mr Medcraft:** They are arbing the system.

**Mr KEOGH:** Precisely, arbitraging the system where, again, in other professional senses, there is always a unique identifier in some way that follows the individual.

**Ms Macaulay:** We follow individuals by their names rather than by the identifier. You are right; they may have an identifier under the financial advisers' register. They may have several, and we are looking at from the perspective of the register. But that is not relevant because we track people by their names.

**Mr KEOGH:** That might be good for you, but that is not good for the consumer, who is looking up an individual and finds only one of their multiple registrations—

**Ms Macaulay:** They would appear in both instances on the register—

**Mr KEOGH:** But under separate—that is my point.

**Ms Macaulay:** In the same name. The register is searched by name, so you might have two entries come up—

**Mr KEOGH:** That is right; you might have two entries.

**Ms Macaulay:** Say, with Matt Keogh—and often they contain not identical information but the same information, so you will realise they are the same—

**Mr KEOGH:** But often they do not contain the same information. There are many examples in the register where you would have the same person with different information recorded—the same name and the same date of birth but different information recorded. So if the consumer says, 'Oh well, this person is registered here, and I will look at that record,' and the other information does not come up.

**Mr Kell:** I think it is a good point. The financial advice register is relatively new. We think it has been a very important reform. It has turned out to be very popular. We have had 1.2 million searches to date. The intention was always that once it was up and running—because previously we could not even track financial advisers; we did not have a line of sight on them at all, and that was unacceptable—

**Mr KEOGH:** Do not get me wrong, I am not saying it is bad. I am just trying—

**Mr Kell:** I think there are a range of areas, and we always said we would undertake a process, once the register had been in place for a bit, of identifying potential improvements. Some of these are relatively modest, such as better locational information for consumers to access, and some of them go to issues such as the one you have raised around identifiers or whether we should have—this goes to something that Senator Williams has raised in the past—information about, for example, whether a Financial Ombudsman Service matter has been found against them. I think the popularity and the effectiveness of the register already indicates that there is scope to build on it and to take up some of these issues.

**Mr Medcraft:** I think it is a good point. We will take that on board.

**Mr VAN MANEN:** On that note, is there now a requirement for advisers to display a certificate of registration in their offices as part of that, with their identifier on it, or provide that detail in a statement of advice?

**Mr Tanzer:** I think in the Financial Services Guide you have to. I am not sure about the statement of advice on each occasion. The Financial Services Guide is what you get first up when you become a client.

**Mr Kell:** But the identifier is not, to my understanding, currently required. You obviously have to indicate who you are working for—your licensee—and the authorisations that you have in terms of what you are allowed to advise on, but not the identifier at this point in time.

**Mr Medcraft:** In the office, I think you always have to identify your AFSL number, correct?

**Mr Kell:** Yes.

**Ms BUTLER:** Do you mean up on the wall or—

**Mr Kell:** In your Financial Services Guide those sorts of things—

**Mr Medcraft:** It has to be attached to every document.

**Senator O'NEILL:** I have a series of questions I want to go to, and I would like to ask some questions in response to a few things that have been said. But before I do, Mr Tanzer, I know that this is the last hearing where you will be with us—you are retiring.

**Mr Tanzer:** I regret that!

**Senator O'NEILL:** We will miss you. Thank you very for your contribution to many of the discussions we have had over the course of the last five years. I think I have been on the committee for five years, and there is now a wonderful new group of people here with me. Thank you. You have been here for all of that time, and I appreciate your contributions. They have been very significant. Indeed, I think there have been a lot of conversations about getting that register up and running, and it is wonderful that we are critiquing the register, but not that long ago there was not even one, so things have moved quickly. With regard to the register—I am always asking questions about the RG 146; I really long for the day when I do not have to ask about that anymore—

**Mr Kell:** So do we!

**Senator O'NEILL:** Can I just find out the flow in terms of banks sending people to get an RG 146: how many of them are doing their training in-house, how critiqued it is, how many people are picking up the very cheap eight-hour online version and are essentially able to set up their own financial services, get their licence and go out and give dangerous advice. What is happening with RG 146? The end of it has been long delayed.

**Mr Kell:** I am not sure we have the numbers. I am happy to take the question on notice. But you are right: until the reforms are through—I think they were introduced into the parliament this week—RG146 is the requirement. In some ways, the headline indicator is how many new advisers are coming into the industry. And we can give you an indication on that as well, as part of our response.

**Senator O'NEILL:** I have seen it reported—and I believe it to be the case—that it is over 1,000 people in the last year to 18 months. Is that right?

**Mr Kell:** It is a growth industry.

**Ms Macaulay:** There would also be people leaving the industry and retiring. The current figure for advisers on the register—

**Mr Kell:** We might see if we can look this up if you have further questions.

**Mr Medcraft:** It would be useful to see what is coming in and also what is going out—exit and entry.

**Senator O'NEILL:** The concern is that, while this has been raised as an issue—I think we put the joint report from this committee to parliament in November 2014—here we are in November 2016, a whole two years later, and the evidence we received then still stands that there are very dubious practices in terms of people's acquisition of these licences and the licence gives you the capacity to give financial advice. There are 1,000 new people who have recently got these licences. What does that tell us about the quality of financial advice?

**Mr Kell:** Not all of them would have obtained licences as such—most of them would be 'authorised'—but yes, 1,000 have entered the industry. You know ASIC's position. We have been strongly supportive of high professional standards and we are very supportive of the reform package. We are very keen to see it come through.

**Mr Medcraft:** We consider it to be our No. 1 risk area. And we have increased the resources allocation in terms of surveillance and enforcement with the wealth management project. But we do the best within the system

that we have. We probably support all of the reforms. Louise, can you give us an idea of what we have been doing in the wealth management project in the last 12 months.

**Senator O'NEILL:** It concerns me that the cost in addition to poor advice—

**Mr Medcraft:** By the way, part of the government's additional funds are going to surveillance in this advice area as well.

**Senator O'NEILL:** In addition to people entering the industry with a very low level of preparation and training, which I think would alarm people if they understood it, the problem I see here which I am very concerned about is that the two-year delay means there has been an increase in the workforce of such low quality as people with some experience have withdrawn from it and there is a cost to your agency to clean up what has been a terrible time lag for a failure to introduce legislation that was agreed in principle to years ago.

**Mr Kell:** I am sure you understand that the passage of the reforms is not ours.

**Mr Medcraft:** It is a matter for government, not for us.

**Senator O'NEILL:** It is very slow.

**Mr Medcraft:** Financial advice is our top concern. We are allocating a huge amount of the resources that we have and prioritising it. And, as you know, we have the wealth management project. So we are doing as much as we can to provide a deterrent by detecting those who are providing inappropriate advice. Louise, do you want to comment on where we are with this at the moment.

**Ms Macaulay:** In the last 12 months, in relation to the four banks and the other two entities included in the wealth management project, we have had one criminal action commence, we have had 12 bannings and we have published the report in relation to the 'fee for no service' review that has been done by the banks.

**Mr Kell:** The 'fee for no service' report underlines your point: an industry that carries on in that way is not professionalism. That is why I think these professional standards reforms are so critical. In my view, taking people's money but not actually providing a service is the antithesis of professionalism. That is why I think these reforms are very important.

**Senator O'NEILL:** Do you have any oversight of the training that is continuing to be offered? Are the banks taking this more seriously and providing a better quality of training within their banks in this interim period? And are there still cowboys, outfits out there operating, and what are you doing about it?

**Mr Kell:** Well, we have a lot of work underway in terms of looking at the financial advice businesses of the major banks and Macquarie and AMP. But also more broadly in the industry some of the most problematic conduct we see is in small to medium players as well, and we have been taking action there, and there will be some more forthcoming that you will see. We will soon have, we think, our first test case in the courts on the best interests duty, for example. But, more broadly, regarding your question about what the large entities are doing around their professional standards, we have been pleased to see that they are anticipating that with this new requirement for higher standards coming in it makes sense to look at recruiting people for whom, for example, there is a minimum requirement of a degree, and that sort of thing. So, there is obviously a way to go, but I think most of the sector realises that these standards have to go up, and they are moving in that direction. That is certainly the case with the larger entities, but I cannot tell you across the board exactly how that is operating.

**Mr Medcraft:** And I will say that there are some interesting developments happening at the moment in technology that we are already starting to see, the reg tech, which is the ability to actually scan advice within an organisation to actually come back and determine that perhaps inappropriate advice is being provided. I think also it is heartening to see some of the technology developments in this area more broadly in the reg tech area, frankly, and it is something that we were also engaging with and thinking about how we might help reg tech start-ups with creating a data lab where basically reg tech start-ups can come in and test their models. I think technological developments should be able to help, in addition to the fact that having the right culture is probably foremost, but equally, having the ability, with machine learning and artificial intelligence, to scan advice that is being delivered to determine inappropriate advice and then call it out and get it corrected. I think that is also an interesting development.

**Mr Price:** And to link it back to your point about training, some of the business models, in addition to finding where there might be problems in the documentation, will then link it back to the training needs of the individual, so that rather than generic-type training it becomes very tailored, based on what the machine—

**Mr Medcraft:** And that is a reg tech model we are seeing on financial advice that is already out on the market that detects that actually the advice that you have just looked to provide—

**Senator O'NEILL:** It reveals a knowledge gap.

**Mr Medcraft:** It uses a natural language processing algorithm, and it says, 'Are you really sure you want us to use those words?' And it takes them back and says, 'Here's the law.' So, it is a very good point that John raises. So, in addition to improving culture, there is some hope there.

**Mr VAN MANEN:** I would be interested to know, from ASIC's point of view, what you have done with your various guidance notes in terms of updating things to reflect changes, because I have been advised that RG246 on conflicted remuneration has not been updated since 2013, that there is no guidance on opt-in and that RG245 on fee disclosure statements has not been updated since changes in the legislation in relation to fee disclosure statements. We are talking a lot about the responsibilities of advisers, but if they are coming to your website and looking for guidance on these particular issues, the feedback I have had is that the guidance notes on the website have not been updated in some period of time. I am happy to be corrected on that, but if that is the case, how can the advisers—they are trying to do the right thing and get the right guidance, yet the information provided on the regulator's website is not up to date with changes in law.

**Ms Macaulay:** There are some small amendments that we are looking at the moment in relation to those regulatory guides; that is correct. While it is substantially correct, we have also published additional guidance in relation to the review and remediation, and we have amended our class order in respect of record keeping.

**Mr Kell:** We have also issued guidance around 'robo advice' as well. You can provide advice in a digital environment. On some of the issues you are referring to, the law has not changed in the past two or three years, so we are not necessarily changing our guidance if the law has not changed. We are always happy to sit down with firms if they want some additional advice around how to comply, but if the law does not change, we are not necessarily going to change the guidance that comes in. There was quite a big project that went on when the FOFA changes came through—as I am sure you can appreciate—to re-write a lot of guidance in conflicts of interest, disclosure and so on and so forth. You are correct; most of that has not changed since the new laws came into place, as the laws had not changed. We will, obviously, have to change some of that given the impending legislation, but we will wait until we see the shape of that. But the 'robo advice' thing, I must say, has been very well received in how firms can adapt their practices to enable the offering of that sort of digital advice which does not necessarily involve direct interaction with an adviser.

**Mr Price:** Perhaps if I can make a more general comment as well. There is a more general project within our regulatory agency, which we refer to as a 'sunsetting' project. The idea behind that is to look at the legal instruments that we issue to facilitate business and the guidance we provide, and to review all of those on a rolling basis. These initiatives have actually come from whole-of-government initiatives, so this idea about 'sunsetting' of legislative instruments was introduced some years ago. It has meant that we have had to, basically, go through a very large amount of legal instruments and a very large amount of guidance, and look to roll those over, because unless we do, they actually cease to operate from a legal point of view and that causes disruption in the market. Inevitably, that requires a process of prioritisation and working through methodically to get everything updated so it continues on as it needs to.

**Mr Kell:** I pick up your point more generally, though. I think in the new year it would be useful for us to engage with some of the key financial planning groups out there and ask them if there are areas where there need to be updates, for example, where there might have been minor amendments with the laws, and take that up. We are happy to do that.

**Senator O'NEILL:** I am mindful of the time; we only have a half-day hearing. I have indicated to the committee—and I think it is agreed—that we will have full-day hearings in future so that we can explore some more of this territory. Can I ask on notice: we had some discussions during the initial hearings around this professionalisation of the financial service sector and I would like to have an understanding of how many people are operating within the banks, how many licences are actually owned by each of the big institutions that are engaged in financial advice, and how many people are under each of those licences. If you could provide that on notice, that would be of interest. May I also go to the point that you just raised about your first test case, and ask for a little more information about that, because that is quite interesting.

**Mr Kell:** It is quite limited as to what we can say at the moment.

**Senator O'NEILL:** I thought that might be the case.

**Mr Kell:** I am happy to update you on that, hopefully, in the not-to-far-distant future, but it would be inappropriate for me to go into a lot of detail.

**Senator O'NEILL:** Can you just give the context, because this is quite a significant moment for the industry, isn't it? Without giving specifics away—

**Mr Kell:** It really goes to that issue of whether the advisers under the licensee have been acting in the interests of the clients, especially in terms of switching people between products and whether they have really taken into account the investors' and consumers needs' in providing the advice. I would prefer not to go into more detail—we are at a fairly critical phase—and comment down the track.

**Mr Mullaly:** We do have a matter that is in court, so it is public, where we have commenced proceedings under the best interest obligations. So our concerns are around advice provided and whether that was in the best interests of the client, and also whether the entity, the licensee itself, may have breached its obligations to ensure that its representatives provided advice in the best interests of the clients. That is before the courts, so I would prefer not to say too much about it. We have commenced those proceedings. That is the first of those. There are others that we are looking at as well.

**Senator O'NEILL:** I remember being so shocked that we had to have legislation that declared that people should act in the best interests of those who were employing them to act in their best interests. It is good to see this going forward. I appreciate that legislation was put through.

**Mr Kell:** We will provide an update in the new year.

**Senator O'NEILL:** Thank you. I have a number of questions around the House of Representatives Economics Committee report, which only came down yesterday. But I am sure some of you might have had a bit of a look at it.

**Mr Medcraft:** Yes.

**Senator O'NEILL:** You may or may not be able to comment on this. Recommendation 1 proposes that a banking and financial sector tribunal be established by 1 July 2017. Can you supply any commentary on that recommendation?

**Mr Kell:** I think we should make a contextual comment here: the report, as you said, has only just come down; we have not had a chance to digest it yet ourselves. It is a report to government. So government will be making a response to the recommendations. We welcome the report, and we are looking forward to working with Treasury and the government in developing that response, because obviously quite a few of recommendations go to actions or responsibilities that ASIC might take on. But at this stage it is safe to say that we have not really had the opportunity to do that, and we need to talk to government about it.

On the issue of a banking tribunal, though, we have been very actively participating in the current Ramsay review of EDR. We certainly think that there is scope to strengthen the EDR framework. It has been a successful part of the consumer framework, but we think that there is scope to improve it and strengthen it—for example, to extend the coverage to small business to a greater degree than is the case at the moment, to potentially look at some of the monetary limits and to look at rationalisation in the sector. We also support some of the issues that have been identified in the report around improving governance. As to whether a tribunal model versus an ombudsman model would be the best way forward—

**Senator O'NEILL:** Mr Kell, you will be aware that there was some considerable concern noted in the dissenting report and that consumer advocates—such as the Consumer Action Law Centre, the Consumers' Federation of Australia, Financial Counselling Australia and the Financial Rights Legal Centre—have actually written to the Prime Minister saying that they are very concerned that the new tribunal may in fact deliver worse outcomes for consumers, because we are talking about replacing the Financial Ombudsman Service and Credit and Investments Ombudsman. Are you aware of those concerns? Do you have some concerns about the nature of the change?

**Mr Kell:** We are aware, yes. Those groups provided copies of those letters to ASIC and I think to other parties as well. I think the positive element here is that everybody has the same objective in terms of strengthening the system. I think there are some debates around the model. ASIC's starting point is that we can see benefits in building on the current model, but ultimately the structure is not ours to decide upon. We are assuming that the Ramsay review will start with the current model and look at how that might be improved, and that has been our input into the process.

**Senator O'NEILL:** Going to recommendation 4, which gives you a gig.

**Mr Medcraft:** Overall, to Peter's comment, we do welcome the report in terms of what it can do to help improve bank culture and improve competition, in terms of outcomes for consumers. So, overall, the direction is a good one.

**Senator O'NEILL:** Recommendation 4 says that you should develop a binding framework to facilitate the sharing of data, making use of application programming interfaces, APIs, to ensure the appropriate privacy safeguards are in place. Is that achievable for you within the time frame that has been articulated?

**Mr Medcraft:** That is what Peter said—but we will need to look at the recommendations, and government has to responded to it. One thing they are focused on, being APIs, is the right thing to focus on. I was in Singapore last week, at FinTech, and the constant feedback basically from fin-techs was that you have to have access to the APIs in terms of really getting data. So the focus is correct. Whether it is ASIC or some other party, clearly there will have to be resourcing to enable that, if we take that on. But, as we said, a) it is to government, and, b) I guess we will look at the recommendation. But I do think the API recommendation is absolutely key in terms of interconnectivity.

**Senator O'NEILL:** Do you have a view about the ADI threshold at 15 per cent?

**Mr Medcraft:** We support competition that produces better consumer outcomes. It is interesting that if you look, for example, at the United Kingdom, there have been many new banking licences granted in the last five years that are focused on lowering the threshold of entry into banking. So the capital level to be a bank in the UK is I think £10 million versus $50 million here. Even then, that capital can be provided progressively. So they have basically lowered the barriers to entry. And there is no ownership restriction on a bank in the United Kingdom, for example. You can own 100 per cent of a bank as an individual, but then the corporate governance aspect of it is dealt with separately from a Prudential regulatory perspective. So you separate the management from the actual control. That has facilitated people who perhaps have a mortgage bank or a finance company or whatever not being required to sell 85 per cent of their business to become a bank. Again, it is a matter for the government, if you want to have competition. The UK prudential regulatory authority published a very good report on this five or six years ago, which signalled the advent of lowering the barriers to entry. And as I have said, you have seen digital banks and mortgage banks. Again, this is banks that open up as SMEs. So it has actually encouraged more competition and, I think, probably delivered better, more-focused consumer outcomes.

**CHAIR:** In relation to senators' questions regarding the Corporations Amendment (Professional Standards of Financial Advisers) Bill 2016, my advice is that it was introduced into the parliament during the week. The Assistant Treasurer did say that these government reforms will significantly increase education, training and ethical standards for financial advisers.

**Mr Kell:** It is very welcome.

**CHAIR:** It has been introduced, and that answers your question.

**Ms BUTLER:** As you know, I have an interest in the ASIC registry sale and I wanted to ask some questions about that proposed sale. You would be aware that the terms of reference for the scoping study into the sale that the government produced included a requirement that the report of the study address, among other things, identification of any national security issues and mitigation strategies. Can I take that to mean that on the ASIC registries that you currently hold there is secure, or otherwise confidential data, as well as the data that is publicly available through people using the usual types of searches that we see more commonly?

**Mr Tanzer:** Yes, basically. It is not just that there might be some confidential information maintained on the databases; it is also that for other national security purposes other agencies link to our database to get access to the public information and whatever other information we hold.

**Ms BUTLER:** So in the event that the registry is privatised, as opposed to just, say, separated from ASIC and stored in another location in government, do you foresee any issues that might arise with those other government agencies interfacing with that private entity that holds the data?

**Mr Tanzer:** One of the terms of reference, as you mentioned, was to take into account the interests of the incumbent writ large, including, in particular, national security considerations. But they have also talked about other considerations, such as privacy and the like. The intention with the scoping study and with the tender process has been to see how a private sector operator would deal with those issues and what contractual legislative requirements could be put around to ensure the performance of the obligations in the appropriate way.

**Ms BUTLER:** On that note, I assume that the idea is that it would probably be a fairly large company, possibly a multinational, that would take over the business if the registry privatisation were to be affected. Would there be any assurance that that company would have to be in majority Australian ownership or would have to stay in majority Australian ownership?

**Mr Tanzer:** There you are getting into speculation about the identity of a bidder. I am afraid I am not really at liberty to go to that, largely because the tender process really is at that very sensitive stage which is that final bids have closed and government has a decision to make. So I would really rather not speculate about that.

**Ms BUTLER:** That is absolutely fine, of course.

**Mr KEOGH:** Perhaps I could just clarify something on that one. It is therefore not a requirement that there be a majority of Australian ownership—

**Mr Tanzer:** No, I did not say that. I said that I would rather not speculate on that.

**Ms BUTLER:** And that is reasonable. Of the issues that you mentioned, obviously privacy is one. But you would know, obviously, that there is a worldwide trend towards making government data more publicly available so that citizens, open-source developers and others can use that data to create new products. Has the digital transformation agency been consulted in relation to how this privatisation might compare with that sort of imperative? Has the public data branch in the Department of the Prime Minister and Cabinet been consulted about it? I am interested, because it seems to me that this is slightly at odds with the government's ostensible approach of moving towards more open data.

**Mr Tanzer:** Well, 95 per cent of searches that are done on the ASIC database right now are free, so the sort of basic information about what companies exist and when they existed from and so on is all freely available data right now. We make all the freely available data available through data.gov.au, both the company's registered business name, for instance, and including the financial advisers register. ASIC is one of the top three agencies that are searched through that facility.

So there are already mechanisms in place to make data available freely, especially that sort of information that facilitates regular commerce, which is the basic identity information—the fact that a company exists, the fact that it does actually have the ability to enter into contracts and so on. I think that is an important factor to take into account. The terms of reference for the process include that the government would retain ownership of the data itself, which is an important protection as well.

As to your questions about the Digital Transformation Office, my understanding is that yes, they had been consulted. ASIC is not in control of this process; this is run through the Department of Finance as the advisers to the government on a government asset, albeit an asset that ASIC has run for the past 26 years. So, I cannot answer your question directly. It would be better directed to the Department of Finance. But my understanding is that yes, they had been consulted, and no doubt those sorts of considerations are the types of things that government needs to weigh up right now.

**Ms BUTLER:** They would be, wouldn't they. In terms of that use of data.gov or any of the government platforms to get the data, as I understand the registry, one of the reasons that there is a view that it needs an upgrade is that it is about 31 separate registries that are one big relational database, but 31 separate databases.

**Mr Tanzer:** There is a need for a technology upgrade, particularly with respect to the companies register. When the ASC was first created out of all the state and territory corporate affairs commissions, one of the key aims was to create for the first time a national company database. That was done in 1990 and 1991. That system has been upgraded, like jumbo jets have been upgraded, but the fundamental aspects of the system, the shape of the system, the fact that it is built on a mainframe and is built in an old software language—all of those remain as they were. There is a need to upgrade that system, not because the system is unstable—the system still continues to perform quite well—but it is quite old.

**Ms BUTLER:** It could be better.

**Mr Tanzer:** If you compare it to the business names register or the financial advisers register, both of which were built in and implemented by ASIC in the last three to four years, both of those use much more open-source data. They are built on more open platforms. They do enable the use of relational-type techniques and they are much more functional in that respect. That was one of the parameters within which the government embarked on this exercise, recognising that there would be a need for an upgrade.

**Ms BUTLER:** So you can see that my point is that although the data might be available and a lot of it on a free basis, the intention of the privatisation would be to have some private firm create a much better way of using the data through a big overhaul of the technology so that the database can become relational. There is no guarantee, is there, that that more convenient form in which the data would be produced would then be made available in that new and improved format versus the format that it is in now?

**Mr Tanzer:** The intention was certainly to be able to test the appetite of the private sector to operate the registry and provide the services that are currently provided, and to upgrade the technology to enable new value-added products to be produced. Within the scope of that—recognising that there is already a range of private sector operators who access registry data and produce value-added products—the government has in mind, as I understand it, within the terms of reference, also taking into account the competition consideration: the registry operator needing to, if it was to engage in both, provide the information available on a similar basis to what ASIC

does right now and, were it to engage in that sort of competition, to do so taking account of Australia's competition laws.

**Ms BUTLER:** Against that, we have just heard that the banks are in an oligopoly. This is a situation where you might have some private sector operators offering value-added products now, but this new private operator would have a much more powerful database that instead of being 31 silos would be one big relational database. The whole point of this is for them to be able to create new value-added products from a much more powerful source than the current providers. And although there is intended to be price regulation for existing products, there is not intended, as I understand it, to be price regulation for the new products to be created.

**Mr Tanzer:** I see the point. You are getting into aspects of what would effectively be the outcome of the bid, so it is difficult for me to comment. I would say one thing about the 31 different databases. I must say, I have not had it described to me that the issue is really about being able to bring those all together and produce better information. It has had much more to do with being able to use the information that is in the company database, which is a very old database, in a much more cost-effective way.

**Ms BUTLER:** I understand. I have just one last question on this issue, and thank you for your indulgence, Chair. I think the member for Burt has some other questions, but my last one on this issue is this: is there any reason to believe that there would be a massive increase in search volumes if the registry was to be privatised?

**Mr Tanzer:** I think there is good reason to believe that there is going to be a continuing massive increase in search volumes.

**Ms BUTLER:** What I am saying is: is there a causal connection between an increase in the search volumes and the privatisation of the registry?

**Mr Tanzer:** I am not a scientist, but if you were asking me as a scientist, I would say that I do not think there is scientific evidence of that. I would say, as somebody who has been involved in operating this business, that if you can make the information available in a much more usable way you will get an increase in search volumes. We certainly saw that, by putting the information available on data.gov.au, which then enables the person to manipulate some of that information, there has been a significant spike in search volumes. When ASIC commenced in 1991 there were a little less than one million searches a year. Last year there were 90.5 million searches in the year, and the trendline is certainly very significantly up. Now, I have no doubt that some of that is electronic data scraping, but a lot of it is definitely related to greater use, and I would draw the link, just based on my experience, that better availability of the data leads to better searching.

**Ms BUTLER:** So the new products that will be created are likely to mean a fairly big increase in search volumes. Obviously there is no baseline to compare that with, but if there are new products that are created on a for-profit basis by a new provider, there is likely to be a reasonable demand for those.

**Mr Tanzer:** Yes. I think the sorts of things where the value-add happens that I have seen happen in the past—and that I envisage would happen in the future—tend to be where you combine, and more cost-effectively combine, this type of public identification data with other data that might be in the marketplace, like credit information, financial status information or consumer behaviour information. I think the combination is much more likely to be the availability of a big stock, which is about companies and company office holders, together with other sources of data that people might be able to find.

**CHAIR:** With that 90.5 million searches, how much of that do you think would be private companies building their own databases from your information?

**Mr Tanzer:** As I said, we have seen some scraping that does go on where people look to do that. That is certainly the case. Of the 90.5 million, I would be surprised if it were a very large number because if you wanted to do that you would be much better off going to data.gov.au—not that I want to advise any of the data scrapers in the world to do that because it is—

**Unidentified speaker:** They probably already have a bit of an idea.

**Mr Tanzer:** Yes.

**CHAIR:** You have just crashed their site!

**Mr Medcraft:** Actually, you now have a problem. In some places, data scrapers have caused a slow down.

**Mr Tanzer:** They have, and we have put in place mechanisms to try to avoid data scrapers because it does cause us a service problem. So my answer to you is: because of the way our database currently works, it is not the best place to go get that sort of information—they tend to be much more individual searches of individual companies—but it is possible.

**Mr KEOGH:** I have a more practical logistics query about how this would work. As I understand it, the information in the companies database—and, I am sure, in a number of other databases—is currently processed by ASIC through Traralgon. Is that processing of the data to go onto the database within the scope of the privatisation, or is that an exercise that ASIC will continue to have the function of performing?

**Mr Tanzer:** The tender process is to operate the registry function, which includes the processing.

**Mr KEOGH:** As I understand it, Traralgon is also where a lot of ASIC's evidentiary document processing occurs as well.

**Mr Tanzer:** Yes.

**Mr KEOGH:** What is going to be the effect on Traralgon? Will ASIC keep that within its other internal document management and evidence processing operations?

**Mr Tanzer:** There is no outsourcing of the evidence services. ASIC's evidence services functionality will continue because that is a critical part of our regulatory business. We have no plans to move it out of Traralgon.

**Mr KEOGH:** Then will the capacity that is linked to the processing of company registration and updating move out of Traralgon?

**Mr Tanzer:** It depends on the actual bid.

**Mr KEOGH:** It will be no longer done at Traralgon.

**Mr Tanzer:** No. Actually, one of the parameters that the government set for the tender process was that the government indicated a strong preference for maintaining or increasing the Traralgon operation and asked bidders to make bids accordingly.

**Mr KEOGH:** Would that be on a co-location basis of having a private staff and ASIC staff operating out of the same building? How is that going to work?

**Mr Tanzer:** We will need to—

**Mr KEOGH:** But that is an option?

**Mr Tanzer:** Well, that is what we would need to work out once we have got to the point of having a successful bid, or whatever. The vast majority of the people who work in Traralgon operate in the registry business. The government has indicated its strong preference for those people, for the operations and all of that to continue in the Latrobe Valley, and has asked bidders to address that. So my expectation would be that, if there is a successful bid out of that, there would still be a substantial operation in Traralgon that we could negotiate with.

**CHAIR:** How many staff are there?

**Mr Tanzer:** There is of the order of 250 or so staff. Of the vast majority of those, 220 or so are direct registry staff. There is evidence services people. We have some finance people there and so on.

**Mr KEOGH:** To the extent that that information for the company register for other registers is processed from hardcopy forms—which I am hoping is quite a small amount now; it is probably still not an insubstantial amount—who owns those documents?

**Mr Tanzer:** The data retains—

**Mr KEOGH:** Not the data but the actual hardcopy documents.

**Mr Tanzer:** There is a good legal question. I think the—

**Mr KEOGH:** Would they be wholly processed and held by whoever takes over the database or would ASIC receive possession of those documents and archive them itself?

**Mr Tanzer:** I think the forms and the information and the data remain the property of the government.

**Mr KEOGH:** But they may be managed by whoever takes over?

**Mr Tanzer:** Exactly. What we do right now when we process paper documents is—it isn't a large number now. There are a lot of transactions like notifying changes to company office holders and those sorts of things. A fair bit of that is now electronic, but north of 88 per cent of our transactions are all electronic now. But, in any case, when we process paper all of that gets imaged and then included on the system. And I do not think we keep the paper.

**Mr Day:** No, we do not. Where we receive paper, they are scanned. They are put on the register. We do quality checks. My understanding is: within 28 days they are destroyed. We just could not keep that—

**Mr KEOGH:** And those scans are maintained on an ASIC database?

**Mr Day:** Correct. And as Commissioner Tanzer said, ASIC retains that data. That is the record. And that would still be the case—

**Mr KEOGH:** So, essentially, that database would become one of the privatised databases?

**Mr Day:** Yes, it would. But the ownership of the data still retains—

**Mr KEOGH:** Yes, I understand that. If the registries are privatised, what is going to be the capacity of ASIC to change the scope of what the data is that is on those registers? So if ASIC internally or because of legislative change says, for example—and as we were just discussing: 'We're going to add a unique identifier to the financial advisers register and, therefore, will somewhat have to redesign it.' What is the capacity for that to occur? And if there is capacity for that to occur, is that going to come at some additional cost?

**Mr Tanzer:** The government is ultimately responsible for what goes on the ASIC database because it is set out in legislation, and that would not change. So the government would maintain responsibility for what information is collected and is maintained on the database. But, as I say, that is for the fundamental reason that it is legislation that decides what that is, not something that a private operator can do. What the operator can do is take the legislation as it has it and, effectively, undertake the administrative role that we have right now of operating the registry. If that were to change in the future, that would be a matter that would need to be dealt with under the contract, whatever the contract said about that. But, as I understand, in other privatisations of this nature some have varying sorts of ways of dealing with that type of outcome—whether it is that there is a cost that needs to be paid to deal with that, whether it is that there is some trade-off for the information that is obtained and the value of it. It depends on the nature of it.

**Mr KEOGH:** So in the context of where you might be designing or recommending legislative change or regulatory change or your own legislative instruments that you are able to change that may affect the data or the nature of data stored in the database, that would then become something that also has to engage the Department of Finance in renegotiating the contract for the register?

**Mr Tanzer:** No. The contract would deal with that up-front. It would not be a matter of renegotiating each time. One would understand what the mechanism—

**Mr KEOGH:** Or negotiating what has to then happen—

**Mr Tanzer:** Exactly. One would understand what the mechanism needed to be, and that would be the mechanism that would be applied in the future to whatever other change would come.

**Mr Day:** Just to give you some background as it is at the moment, there are a handful of forms that are prescribed forms. In fact, the very data that must be collected under that form is set effectively in legislative stone, so to speak. They are actually quite few. There are a range of other things that you might call forms, but effectively ASIC has discretion to ask nearly whatever it likes; however, we would only do that, or make changes there, often through consultation and other discussions with industry and the groups that fill in those forms. So if there is a change to a prescribed form, the requirements—having to seek legislative reform to have that form changed would still be there. In relation to, as Mr Tanzer said, let us say there is another data point—for want of a better expression—or question we want to ask on a non-prescribed form, there would be a service-level agreement that we could speak to the provider about for changing that. We obviously are aware and awake to that issue, so we would be making sure there is not an additional cost to us or we would try to minimise any additional cost to us, because of course as the industry changes and circumstances change we want to be asking more questions or asking different questions and in fact removing old redundant questions so that we can get the type of information and data we need to be a better regulator. So we are awake to that issue. Part of our process to date in assisting the process has been looking at those we see as pure registry data gathering forms and those that are regulatory data gathering forms—that is, that assist us not for a public registry purpose but for a regulatory purpose—and there are lots of those forms where we collect information that in fact the public does not get to see—

**Mr KEOGH:** And those sort of data collection points or databases are not within the scope of what is being moved?

**Mr Day:** That is very much part of the work we are doing so that we can fine-tune the final negotiations after any government decision as to those that we would say we would want a new provider to look after or in fact those we may say we may want to do ourselves. A good example would be someone who applies for an Australian Financial Services Licence. That is a regulatory form, yet that application and the answers to those questions are for us and for our eyes only. They are not made public. Once they get a licence, that is made public, and the details of who they are and then if they change address or they change officers of control, authorisations

and such things, those things become public. But when they apply for the licence in the first place that is a regulatory form. It is the case that we would be keeping that to ourselves.

**Mr KEOGH:** But you have not made a call around whether that is on a database managed by the registry—

**Mr Tanzer:** No—the regulatory databases will be ASIC's. In embarking on this exercise ASIC understands that the registry business is fundamentally a public information business; it is a customer service business; it is an outward facing business. ASIC's regulatory business sometimes can be very outward facing, but it is not a customer service business. It performs a regulatory function. ASIC does not want to be in the business in the future of running public registries, because we believe that is the type of business that deserves attention to itself—

**Mr KEOGH:** I understand that. So those databases will stay internal—

**Mr Tanzer:** And our strategy with respect to this is that if there are databases that are really public-facing databases, which are there to inform the public—to enable people to identify different people—those are the sorts of databases that we are expecting to be operated outside of ASIC. But for ASIC's regulatory purposes—all that information and all of those databases—our strategy is to have the systems to deal with that internally.

**Mr Day:** And we have put detail onto that. In the flow of work, when someone applies for a financial services licence, that application form would come to us as the regulator. We would assess that and process that at our end. If we think they are fit and proper to hold a licence, we would then inform the registry, as we do now; we inform our registry of operations to effectively show those details publicly. We would show that now, in that circumstance, to a third party. So that is the registry information, and then they would take over at that point. So, if a financial services licensee wants to change its address, they would have the form process that they would go through with that provider, and we would not have anything to do with that. However, in a different circumstance, where they might want to change control of that licence holder—

**Mr KEOGH:** That has to be approved.

**Mr Day:** That is something where they may receive it in the first place but we will still then need to be a decision point about whether or not we will agree to that.

**Mr KEOGH:** Are there currently any databases where that information that comes for processing or assessment by ASIC before it becomes a public register type of information is on the same database and it is really just toggled as to whether that information is now public?

**Mr Tanzer:** Yes.

**Mr KEOGH:** So there is. Does that mean that, in moving towards a privatised model, you are going to have to look at splitting some databases?

**Mr Tanzer:** Yes.

**Mr KEOGH:** A lot of the reason for privatising these databases is to improve the databases. To the extent that data is now going to be kept on internal databases by ASIC, or split out of databases, does that mean that those databases are not going to receive the benefit of that privatised database improvement?

**Mr Tanzer:** No, the transition planning that will be undertaken is to make sure that we and other government agencies—this goes to Ms Butler's question—have access to the information on the public databases in real time.

**Mr KEOGH:** I am asking about the databases that stay within ASIC. Will those databases be upgraded as well?

**Ms Armour:** The answer is that they will be. The government announced additional funding of close to $60 million for the purpose of us replatforming all our regulatory businesses, and as part of that we will be moving to new platforms.

**Mr KEOGH:** If that cost is being incurred by government to replatform ASIC's internal databases, what is the marginal benefit of outsourcing to replatform what will then become a private database?

**Mr Tanzer:** It has to do with the upgrade of the technology. It also has to do with a question about whether government needs to be in the business of running that service into the future or whether that is a resource that will be better applied to some other purpose.

**Ms Armour:** The new platforms of the—

**Mr Tanzer:** The initial idea of privatising the ASIC registry was part of a broader government analysis of whether government needed to be in a whole range of businesses.

**Mr KEOGH:** Which is separate to the cost issue.

**Mr Tanzer:** Yes.

**Mr VAN MANEN:** Can I just follow up on something that really concerns me in an answer you gave a couple of minutes ago. You have just said that if somebody applies for an adviser's licence—an AFSL—you do the processing and the application to approve that, so that goes onto your database, and then it is also fed through to the public database. But you just said, and this really bothers me, that if they then want to change their details—say, change an address—that is going to be done by the public registry, but it is not going to be done by you guys unless it is a control issue. So what you are going to finish up with is two completely different sets of information for the same AFSL. So how does that change of address feed back to you guys?

**Mr Tanzer:** It operates in the same way as it does now. The intention of how we are planning to replatform this is that there would be one source of truth around the information that is held on the public database, which is going to process the information—

**Mr VAN MANEN:** I am happy that the public—

**Mr Tanzer:** which we draw for the purposes of our databases.

**Mr VAN MANEN:** Okay, so you will have a capacity to draw back into the regulatory database any changes from that.

**Mr Tanzer:** Without getting too technical, there are various ways that this can be devised, but one mechanism we have in mind is just an ongoing sync—a synchronisation of the information that is held on that database to get it back into our databases where appropriate—our databases and systems where we need it.

**Mr VAN MANEN:** I just wanted to clarify that.

**Senator WILLIAMS:** Commissioner Price, in 2008 I moved an inquiry through the Economics References Committee into liquidators and insolvency practitioners. One—

**Senator O'NEILL:** It is on my list, John—those ones, too.

**Senator WILLIAMS:** Good. I will be getting to that, Deb. It was very frustrating—the unanimous report of the committee in early 2009, from memory. The Rudd-Gillard-Rudd government did absolutely nothing about those changes for almost five years. We finally got them through when we got into government. They have been passed. On 1 January those changes will come in, I think, Mr Price. I ask this question two reasons. One is: can you tell the committee what it will mean for creditors and their powers. And the second reason is to give a message to Senator O'Neill. If she wants to play politics on this committee, I am glad to accommodate her with that. Could you answer that question? You need not worry about the second question.

**Mr Price:** The parliament passed the Insolvency Law Reform Act 2016 on 22 February this year. That act reflects the main themes of the report that you were talking about. And a key aim of that report was to align the regulation of personal insolvency and corporate insolvency. The reforms will actually take effect from next year in two stages. From 1 March 2017, the reforms relating to the registration and discipline of registered liquidators will commence, with the balance of the law reforms in that legislation to commence from 1 September 2017.

In terms of what I would highlight as some of the key features of the legislation, firstly, in relation to registration, new applicants will only become registered liquidators after they attend a three-person committee interview, and they may be required to sit an exam.

**Senator WILLIAMS:** Instead of doing a paper application?

**Mr Price:** Instead of doing a paper application.

**Senator WILLIAMS:** Good.

**Mr Price:** In terms of discipline, a three-person committee will be set up comprising representatives of ASIC, industry and a person appointed by the minister to hear disciplinary proceedings. That sort of disciplinary process hopefully will avoid what you sometimes get through court processes, which can be quite legalistic, time-consuming and so forth; so hopefully a more expedited disciplinary process.

There are some significant changes in terms of ASIC's powers. We will be able to suspend or cancel a person's registration as a liquidator on certain specified grounds without even going to the disciplinary committee. For example—

**Senator WILLIAMS:** Or a court?

**Mr Price:** if there is a failure to maintain adequate insurance—that is very good example—we would be able to cancel a registration. There will be an ability to introduce show-cause notice processes. If there is a failure to provide an adequate response to an ASIC question, that can result in us referring the practitioner to the committee.

In certain circumstances we may also direct a registered liquidator not to accept further appointments if a person fails to comply with a written direction from ASIC to do certain things.

**Senator WILLIAMS:** The power of creditors, Mr Price.

**Mr Price:** Creditors will be empowered to request information from the registered liquidator. Those requests must be complied with if it is reasonable to do so. They will be given greater powers to set up reporting regimes specific to the particular insolvency matter in question, which is quite important. The other thing that I think is very important is around remuneration. Remuneration of practitioners has been a concern for some in the community, I think. The legislation will make it clear that the entitlement to remuneration is for necessary work that is properly performed. That is the first important point. The second point—and I think a very important point—is that there will be greater powers that will enable an independent person to be appointed by a court, by ASIC or by creditors to review specific aspects of an external administration. That might include, for example, remuneration. So you can bring in an external party to look at various issues around remuneration. There are a variety of other issues around remuneration that members of the committee might be interested in, but I will stop there.

The final thing is just around removal. Creditors will be empowered to remove and replace external administrators by resolution passed at a meeting of creditors convened for that purpose and, importantly, without any court involvement.

**Senator WILLIAMS:** That is a big power handed to the creditors. The liquidators have to work on behalf of the creditors.

**Mr Price:** Yes.

**Senator WILLIAMS:** The creditors can pass a motion to sack the liquidators. When those creditors vote on it, is that based on value and number? If you have five creditors, and one is owed $2 million out of a total of $3 million, would that one creditor have two-thirds of the vote?

**Mr Price:** I think I know the answer to that question. I would like to take it on notice, to be honest.

**Senator WILLIAMS:** Okay. Well done. Mr Medcraft, I want to raise a totally new issue with you. I have had people come to my office about a big scam in the gold industry. Have you read anything in the media about this? Let me explain it to you. If you were to go and buy a bar of gold bullion, which might be one ounce, a kilo or 12½ kilos of gold bullion—99.9 per cent pure gold—you do not pay GST when you buy the gold bullion. A 12½-kilo bar is worth about A$700,000. If I were to take that kilo of gold bullion, or 12½ kilos, put it on an anvil at home in my shed, get a sledgehammer and just belt it a few times—damage it and do away with the print—I can then go and sell that, not as gold bullion but as gold, and I get GST. So I could go and sell it to some processor for $770,000. I collect the $70,000 GST. I then do not pass it on to the ATO; I pocket the $70,000. Then the processor processes it and puts it back into gold bullion but does not get paid GST, so that processor has to claim the $70,000 back. I have just had a case where three university students from overseas here in Australia were selling $12 million worth of gold a week, collecting about $1 million a week or more in GST and not passing it on to the ATO. I think this scam has cost the ATO between $1 billion and $2 billion since the GST was brought in. Is there anything you can do to work with the tax office to try to clean this mess up?

I say it is a mess because now the ATO have stopped returning the GST to the gold bullion processors who cannot collect it. The processors are turning over hundreds of millions. They need that GST back, and it is sending them broke because they cannot get the GST. If they go and buy $10 million worth of gold and pay $1 million in GST in a week, they want that $1 million in GST back, because when they sell it they cannot collect GST. Their cash flow is destroyed. Now the ATO have stopped paying the GST back under suspicion of fraud. This is a really serious issue. I am also very concerned because I am aware of some of this money being siphoned off. Has it gone into bad hands in the Middle East, Syria or wherever? So is there anything you can do to have a good close look at this gold industry, as far as corporations law et cetera goes? I can put people onto you to give you information.

**Mr Medcraft:** We do work closely with the ATO.

**Mr Price:** Senator, we are more than happy to have a look at the circumstances that you set out. My initial reaction based on my experience is the following: gold itself is not a financial product. If these people are acting on their own behalf rather than bringing a group of investors together as some sort of collective investment scheme, I am not sure we will have jurisdiction over these matters.

**Senator WILLIAMS:** Fair enough.

**Mr Price:** But I am certainly quite concerned with what you have raised, and we are more than happy to go away and do the proper analysis so we can respond.

**Mr Medcraft:** I will say we do work very closely with the ATO on a whole range of issues. Where they can use our databases, we do work with them.

**Mr Day:** This issue was widely reported in the press about a month or so ago. There was a large expose about it. So, yes, we have heard of it. We have not been approached by the ATO, but, as the chairman of ASIC, Greg Medcraft, has said, we do work closely with the ATO and we are happy to assist them. I find it hard to see how there is any jurisdictional assistance we can give, given they are not using the corporate form and they are not using it, as we can see, as a collective investment vehicle. Then it is not a financial service, as Commissioner Price has said. It is a matter for the ATO and, I would expect, the Federal Police.

**Senator WILLIAMS:** The only reason I asked, Mr Day, is that, being a registered company, they may be breaching something in the Corporations Act.

**Mr Day:** I would caution you there, Senator. We have put out information publicly about this. Just because the corporate form was used does not mean ASIC will get involved.

**Senator WILLIAMS:** Fair enough.

**Mr Day:** Otherwise it is double jeopardy every time someone does something wrong. That would cover work health and safety and environmental protection. You could name any form of legislation in this country state at and federal level and on that rationale you would say ASIC should get involved, because you would say that the director of the company has done something wrong. That is not always the case. We have a very formal information sheet on the policy of ASIC to say: just because something is done by the company does not mean ASIC will get involved. We would not have the resources to do that in any event, but we just do not think it is appropriate. As the commissioner has said on previous occasions, we focus on those things that are in our primary jurisdiction and where those primary offences occur.

**Mr Price:** Senator, let us take that information away, rather than just dealing with it off the cuff.

**Senator WILLIAMS:** I think that is a good idea.

**CHAIR:** I will just interrupt here. We will suspend the meeting. I am a stickler for time and it is 10.45.

**Proceedings suspended from 10:46 to 11:03**

**Senator O'NEILL:** On the Wells Fargo matters, you indicated that you had sent a letter to the major institutions. What was the return date by which you required that information for their assessments to be given to you?

**Mr Kell:** We wanted it as soon as practicable, but we want them to undertake a very thorough review. So we will be confirming that we want that completed by the end of the first quarter of the new year. But if they find something that needs to be breach reported before, then obviously that would be something they are obliged to do under the law.

**Senator O'NEILL:** So 31 March?

**Mr Saadat:** We have asked that they confirm the scope and the methodology of the review before the end of the year. We are having discussions now with those banks that we have written to to work all that out. But, as Peter said, the actual review we expect to be completed by 31 March.

**Senator O'NEILL:** Thank you.

**Senator WILLIAMS:** Mr Saadat, on listed forms of companies—family owned, mutually owned et cetera—do you adapt your approach to firms on the basis of their ownership structure at all? Does that alter anything as far as ASIC's role is concerned?

**Mr Saadat:** One of the main things we take into consideration when we are doing proactive surveillance is market share. So we tend to focus our activities on the firms that are the biggest market share and therefore the biggest impact on consumers. What that tends to mean is that when we do an industry review or where we are looking to do a proactive industry surveillance, it is not usually the case that the smaller banks or smaller ADIs will get included in a proactive review simply because they do not have as many customers, and we want to focus our efforts where we can get the best return for our resources.

**Mr Kell:** Otherwise, our approach to the compliance with the law and compliance and what not, the ownership structure ultimately does not matter. We have taken action, say, in relation to misleading advertising by mutuals on credit products just as we have taken it in relation to for-profits. For consumer outcomes it is the same, and it should be.

**Senator WILLIAMS:** Does whether it is domestic owned or foreign owned make any difference?

**Mr Saadat:** No.

**Senator WILLIAMS:** It is just a matter of the law. I want to take you to the responsibility for updating the Corporations Act. Can you explain how the responsibility for keeping the Corporations Act updated is managed and how the amendments and improvements are generated?

**Mr Tanzer:** In talking more generally about law reform—

**Senator WILLIAMS:** Just generally, yes.

**Mr Tanzer:** with respect to the Corporations Act, is it more to do with company directors—

**Senator WILLIAMS:** When you are updating or amending the Corporations Act, does it have to be driven through parliament? Is there any other way it can be driven? Can it be driven through ASIC or through some of those companies for which you have oversight?

**Mr Price:** Generally, if you are speaking about the legislation itself or regulations, that will be a process that occurs through parliament—the actual changes. The primary body that will advise government in relation to that will be Treasury, although ASIC will certainly have input into that as well. But that is not the complete end of the story because, in many instances, ASIC has some fairly wide powers to either provide waivers from particular parts of the law or sometimes even change the way the law operates. We have had those powers for many, many years—as long as I have been at ASIC; it goes back to the 1990s—and it is really designed to address situations where there have been changes in market circumstances or the law is not operating as it has been intended when you take into account a particular individual's circumstance.

If we use those powers on a class basis, there is some very strong oversight that is associated with that. Generally speaking, we would always consult before we used our powers in that way. Additionally, when we use our powers on a class basis, they are what is known as legislative instruments and legislative instruments are subject to a disallowance process through the parliament. So it is a bit of a tapestry of things. But if you are actually talking about changes to the law itself or regulation of itself, that primarily would be a matter for the Treasury and the parliament.

**Senator WILLIAMS:** In relation to mutuals, we were talking about competition in the big four earlier on today. Do you have particular expertise in ASIC that understands mutual business to concentrate on them?

**Mr Price:** Yes, Mr Saadat can comment further. But, for example, we have a policy guidance that has been developed within ASIC around mutually owned enterprises. Several years ago there was actually a transition of the regulation of mutually owned bodies from state based institutions to ASIC as the national regulator.

**Senator WILLIAMS:** Do you have a working relationship with any mutuals or their representative bodies? Do you work with those?

**Mr Saadat:** Yes. We meet regularly with the Customer Owned Banking Association, which is the industry body for mutuals. We have a formal and regular schedule of meetings with COBA. We also meet on an ad hoc basis when issues arise. They are the main source of information for us about mutuals and we use them as a conduit to get our messages out as well.

**Senator WILLIAMS:** How do you distinguish the laws between state based cooperative laws and the regulations under the Corporations Act? Aren't we looking at two sets of laws here? The Corporations Act may be an influence on some mutuals, then they have the co-op laws from the states. Is there a conflict there?

**Mr Saadat:** I guess we focus on the conduct obligation, which are all in the Corporations Act and the ASIC Act and the National Credit Act. Those obligations apply regardless of the ownership structure or the state or Commonwealth laws that apply to those structures.

**Senator WILLIAMS:** I have a couple of questions, Mr Price, on insolvency. With the new insolvency laws, every insolvency firm must update its precedents and templates. This is a massive and costly task. I know of a group of 40 independents, a small firm of liquidators. Small firms are creating one set of documents that they will all use as templates. It is an industry first. This will save ASIC work. Is ASIC prepared to work with this group to develop these templates?

**Mr Price:** Certainly. We would be happy to discuss with groups that are thinking about that. Indeed, one of the industry representative groups for insolvency bodies, a group called ARITA, is looking at updating their forms in a similar fashion. We are having discussions with them as well.

**Senator WILLIAMS:** I have mentioned to you before, Mr Medcraft, about prepacks. We have 9,000 small businesses fall over in Australia. I will read out what I have been given here: Given the average cost of voluntary

administration is about $80,000 and only four per cent of insolvent companies use administration to restructure, is Australia's current statutory framework an effective tool to save the 9,000 or so small businesses that become insolvent each year?

We know administration works well for the big companies, the management set-up et cetera. I am talking about the small companies that have little. As soon as they go into administration they just seem to fall over into liquidation. Are you familiar with the prepacks?

**Mr Medcraft:** Yes. I did work in insolvency for a little while. John, do you want to comment any more?

**Senator WILLIAMS:** Anything that is an opportunity to get businesses to survive is a very good thing, especially small businesses. Mr Price, are these prepacks—

**Mr Price:** Firstly, just a bit of context for the other members of the committee. Prepacks, essentially, are a procedure where some or all of a company's assets are packaged together and transferred prior to the appointment of an administrator. That is what a prepack is. Certainly, a company could use a prepack to preserve value for creditors, and that is a very positive thing. On the other hand, if there are not good controls in place a prepack might be used to facilitate phoenix activity. That is where the debate around prepacks tends to occur.

The Productivity Commission, recently, in a report into business set-up, transfer and exists, did suggest that consideration be given around what they were referring to as proposition sales, which is a type of prepack. They did suggest various controls around that. I think that report is currently with government. That is a report that is worthy of some consideration and I think prepacks can provide a valuable role. It is just a question of what safeguards are in place to make sure that you are not encouraging, unintentionally, phoenix activity or other activity that might be—

**Senator WILLIAMS:** That is the last thing we would want.

**Mr Medcraft:** Yes. I think the general principle and the government's announcements on insolvency or reform, getting that balance and making sure we do not have an increase in phoenixing that allows businesses to exit in good fashion, is good.

**Senator WILLIAMS:** We come back to those penalties, Mr Medcraft. If you are phoenixing, what are the fines, what are the punishments? A smack with a feather?

**Mr Medcraft:** And surveillance and enforcement.

**Mr VAN MANEN:** You get people who have a history of that. What capacity do you have within your databases to track and identify those people such that you are able to ensure that the bans are enforced and they are kept track of? Part of the commentary out there is—

**Mr Medcraft:** Repeat offenders.

**Mr VAN MANEN:** Repeat offenders and how they are allowing them to become repeat offenders.

**Mr Medcraft:** Repeat offenders and also you have very popular sectors.

**Mr Price:** Earlier, this committee discussed issues around the financial advisers register and unique identifiers. We indicated that, really, we track people on name. The same can be said for company directors. There is no unique identifier for company directors. What you have on databases is names and addresses. At one level there may be difficulty in working out whether there are repeat offenders as far as company directors who are doing the wrong thing go. For that reason the Murray inquiry a little while ago suggested that a measure that might be considered is the introduction of a director identification number as a means of tracking directors to try to deal with some of these issues. I understand that is an issue that is being considered and advice is being taken on it.

**Mr Medcraft:** On top of that, as I said, there are sectors. Clearly, our surveillance focus is on things like labour hire and construction groups. We also work with Fair Work Australia. There are some issues in sectors. There is the surveillance side of it. John makes a very good point. One of the things we thought about at one point was whether we should be flagging the directors who have been associated with more than a certain number of insolvent companies. There were practical issues around that, weren't there?

**Mr Tanzer:** Yes. We were thinking about whether it would be possible to put a flag on the public register against a particular director if they had been involved in two or more or three or more or some number of liquidations of companies that failed to pay 50c in the dollar, because we get reports from liquidators of those companies. We provided some advice that it would be necessary to probably have some more reform because you would be adding something to the register that would not otherwise be there. The reports the liquidators file that a company has failed and is paying less than 50c in the dollar is not public on the database. They are confidential

reports to ASIC. They report to creditors and they report to ASIC, but they are not otherwise public. The fact of a report is public.

**Mr VAN MANEN:** I am not so much concerned about that being flagged publicly, and, whilst that is probably worthwhile, I would have thought it would be far more important that it is flagged internally and, equally, that there is also a flag attached to that which details the period of the ban and that the period of that ban is rigorously enforced. That is really the essence of my question: is that being done and how is that being done?

**Mr Tanzer:** One of the issue with that is that, yes, we have disqualified persons register and, yes, the period of the banning is notified on the register, and that is public. It is not just internal to ASIC. We encourage people to look at the disqualified and banned persons register whenever they are dealing with a person to see if they are on there. One of the difficulties that you are alluding to is that sometimes a person will not be silly enough to put themselves back on the register; they will put somebody else on the register who acts as a shadow director. That is one of the things that we will look at, but it needs to rank against the different priorities. We ban in the order of 60 to 70 persons a year from being a company director for having been involved in two or more failures of a company, where the company failed to pay 50c or more in the dollar. That number varies, depending on the sorts of resources we have to apply to it. We have, as the chairman mentioned, tried to focus on the industries where we seem to see more of this activity—that is, construction and labour hire, and there are some problems with taxi services as well.

**Mr VAN MANEN:** I come from a part of the world that was known for having what was called the white-shoe brigade, so I understand!

**Mr Medcraft:** If you think about where phoenixing hits, it hits the tax office, it hits potentially employees and it hits creditors. We are working with Fair Work and the ATO. Watch this space because there is still more to do.

**Mr VAN MANEN:** Can I finish off one bit?

**CHAIR:** Yes.

**Mr Medcraft:** Because it is really shocking what happens for small business or for employees or whatever.

**Mr VAN MANEN:** Mr Tanzer's point about using related entities or close personal relations—

**Mr Medcraft:** Yes, shadow directors.

**Mr VAN MANEN:** to facilitate these things down the track is interesting. In superannuation or particularly around self-managed super funds, there is quite a bit of regulation around related entity transactions and that sort of stuff. I am not sure there are any of those sorts of provisions in the Corporations Act in that space, is there?

**Mr Tanzer:** Not by private companies.

**CHAIR:** A helpful suggestion might be that you keep a list of creditors affected by these people because they know exactly where those directors go and they keep track of them so they are doing your work for you. But in regards to your annual report, there has been a reduction in the companies identified as having potential to conduct illegal phoenix activities during the last three years. It has reduced dramatically from 6,223. There have been fluctuations. It has increased in the last year.

**Mr Medcraft:** What page are you on?

**CHAIR:** It is page 22 of your report, where you are conducting surveillance. In the last three years there has been a fluctuation in the amounts of companies. Is there any reason for that? You have gone from 6,223 to 2,072 then back up to 11,494.

**Mr Day:** It fluctuates for a number of reasons. One reason is it depends on the nature programs we have been running. We have done a lot of work with the assistance of industry data and some other data identifying those industries where phoenix activity is more likely to occur. You may be aware that the construction industry is one of those industries. Certainly labour hire, cleaning, other forms of contracting of that nature are industries that have high prevalence of phoenix activity. You have got to be careful when you talk about phoenix activity because there is no legislative definition of phoenix activity, but I think we might generally have an idea.

**Senator O'NEILL:** Is that required?

**Mr Day:** I do not think so. There are provisions in our legislation, the tax legislation and others that assists us to combat that. We are working through in the Phoenix Taskforce with the ATO, the Fair Work Ombudsman, the department of employment and other involved agencies about whether or not there might be benefit in that. We are undecided on that. I will go back to the main point. We do a lot of work with those industries. We identify through the data we have got about those entities that show indicators of past phoenix activity or likelihood to

conduct phoenix activity or do phoenix activity in the future and we effectively have an intervention program. So we outreach to them, we communicate with them and that has had massive positive impacts on those industries.

**CHAIR:** Is that a preventative measure?

**Mr Day:** Yes.

**Mr Price:** If I could provide a broader context, really we have a five-point strategy in relation to phoenix activity more broadly. Firstly it is around enforcement and that is typically directed at the parties who have been involved in illegal phoenix. Mr Tanzer referred to the fact that we can take action against company directors if they have been involved in multiple failed companies where the return to credit has been poor and we do to that. Secondly, Mr Day referred to what we do around surveillance including using external data providers to augment the information we already have and to work out who we think are at high risk and write to them and let them know that we are actually watching, so that can have a preventative effect. The third very important thing we do is work with the insolvency profession and we do that in two ways.

Insolvency practitioners have an obligation to report to us if they think there has been a breach of laws including around phoenixing. Sometimes they run into problems because companies have not kept correct books and records. We have a liquidator assistance program and we will prosecute company directors who do not keep proper books and records because that is sometimes a real risk warning that there could be phoenix activity going on. The other thing we have is what is known as an assetless administration fund. Sometimes when an insolvency practitioner comes in, there are no money and no assets in the company that would fund them to do their work and then make a report to ASIC. In those circumstances, the insolvency practitioner can come to us and we actually can provide them with a grant to do the work to see whether there has been misconduct. We do that quite regularly. Stakeholder engagement here is very important; for example, in the construction industry we have worked with the Master Builders association and various other associations, and we work with law societies and so forth. And the final thing—because phoenixing is not just an issue for ASIC—is that this is a substantial issue for the ATO, the Fair Work Ombudsman and others. There are various cross-agency committees—on which Mr Day sits, and which I am involved in—which bring together the regulators to get a coordinated response to this particular issue.

**Mr Day:** I want to flag an additional item, in an area where we do preventative measures, if you like. This is an interesting issue in relation to open data. We have had some what we call pre-insolvency adviser work: so we identify—with the benefit of our own data but also some external data—those companies that are under some form of stress, say there are statutory demands being placed on those companies. What we then do is write out to those companies and say: 'It is likely you are going to be approached by someone to offer you ways out of your current predicament.' And: 'Effectively, these are persons—some of them are ex-liquidators—who will be saying to you, "we can effectively phoenix this company"—they will not use those words—and they will make offers to you.' What we have found, though, is those practitioners, or those persons, are using the same types of data that we have got access to—because some of it is public, some of it is able to be bought—and they are trying to write earlier. So they are trying to get ahead of the game and write to these people earlier, and assist them through into phoenix activity models.

What we have learnt and what we and the ATO and the Fair Work Ombudsman agree on, is that, mostly, phoenix activities are learned behaviour. People do not wake up one morning and suddenly say, 'oh, I now know how to do phoenix activity'. It is a learned behaviour, and what we see is that these pre-insolvency advisers are assisting these people in this space. And so our letter-writing campaign—and it is done, effectively, out of our insolvency practitioners area in ASIC—is writing out to these directors and educating them, but warning them about the types of contact they are going to get from these pre-insolvency advisers and how to avoid that, and reminding them of what their legal obligations as directors are, where they cannot pay their debts when they fall due and payable, so that we do not have that. Through that, that has been very effective, as well as disrupting these business models of these pre-insolvency advisers. So we are doing a lot of proactive work in this space, both with industry and with unions. We have had a number of meetings with relevant unions in this area as well, who have given us a lot of valuable intelligence, as well as construction companies and cleaning companies and others. We are working very heavily with our regulatory agency partners in this space, but we are also using the smarts of the data and then trying to have those proactive, preventative measures that try to disrupt this behaviour.

**CHAIR:** I will add that, from my experience in the construction industry, part of our surveillance of potential phoenix activity was to look at who the accountant was for the particular companies we were dealing with—

**Mr Medcraft:** As a red flag?

**CHAIR:** And it was usually a red flag for us not to deal with those companies. I do not know what your experience with that area is like.

**Mr Price:** Recently with the ATO we were involved in some—I think the term used in the media was 'unscheduled visits' to certain accountancy firms around the country.

**Mr Tanzer:** With that letter-writing campaign—and it sounds like a fairly soft sort of campaign—but it is interesting that the analysis that we did after it, and the statistical significance of it—it was not a huge sample, but it was a sample of a good two or three hundred or so—it was highly statistically significant that the incidence of potential phoenix activity—that is, the winding up and then creating a new company afterwards—fell dramatically. It fell by 50 per cent in the group that we wrote to, compared to a control group.

**CHAIR:** What about companies that have a major creditor who is an interrelated company and then, all of a sudden, they fall over. What are the actions ASIC takes?

**Mr Price:** At the first instance, when there is an insolvency, the insolvency practitioner plays a very important role in terms of analysing what has gone wrong. They also have a role in terms of looking at whether there are any what is called 'unfair preference payments.' And if there are any concerns about inter-company payments, they actually have a statutory obligation to report that to us. At that stage, we will become involved.

**CHAIR:** Are you able to see how much success there is in getting those preferred payments back through the court? Or is it usually too difficult to process?

**Mr Price:** I do not have that data to hand, so I might take that on notice if I can to see what we—

**Mr Medcraft:** Often we help with the liquidator assistance program trying to get that [inaudible] payment.

**Mr Price:** Yes, that is exactly right in the sense that if it is not reflected in books and records, then you—

**Mr Medcraft:** Basically, that is when sometimes we will say to the liquidator we will actually give you money to go after something.

**Mr Day:** The problem is that it is hard to get data [inaudible] about this because those actions are run by the liquidators in terms of the preference payments. Because they are run through the different state court systems or, sometimes federal systems, the alignment of that data and the reporting back to us is not high. But, again, that is an example going back to a very early discussion this morning; that it might be the type of question we start asking liquidators in the future so we can get better ideas about that. This is where we want to make sure we have got that flexibility—answering your question, Mr Keogh—into the future, so that we can get the type of data points we need to get the right insights into those things.

**Mr KEOGH:** Can I just follow up?

**CHAIR:** Yes.

**Mr KEOGH:** In relation to these pre-insolvency advisers that you have identified, have you taken any action against them for aiding and abetting in an offence or for any other breaches?

**Mr Price:** The short answer is yes. There are a couple of examples where we have done that. A fellow called Mr Sommerville, a New South Wales based lawyer—several years ago, we took action there. My recollection is we have a couple of current matters underway as well.

**Mr KEOGH:** Just going back to that issue about the data bases: you identified that a unique identifier for directors was a recommendation which government has accepted, at least in principle. That is quite a substantial change to the operation of the company register database. Is that recommendation and its acceptance something that has been factored into the privatisation of the register to be done?

**Mr Tanzer:** Yes. It has been considered in the context of that. It has been flagged as one of the potential reports.

**Mr Price:** Yes. So, to clarify, I am not sure there has been a final commitment that it go through, but certainly its consideration is ongoing.

**Mr KEOGH:** But it is not part of the design of being privatised at this point?

**Mr Tanzer:** We do not have—

**Mr KEOGH:** No, but it is not something where you are saying to a potential privatised operator: 'But we want you to make this change'?

**Mr Tanzer:** No.

**Mr KEOGH:** No.

**Mr Tanzer:** There is a range of things—there are actions underway where government has committed to action or we have commenced some changes to registers. For example, there is a single business registration portal that is being developed by the Department of Industry. That is included in the documentation so that a potential bidder knows that that will be happening. Then there are other things that are being flagged as potential.

**Senator O'NEILL:** I just have a question on this. I am sure that you are aware of the PricewaterhouseCoopers report in 2012 on this. They actually estimated that the cost of phoenix into business workers and government was between $1.78 billion and $3.19 billion annually. Have you got any assessment of the scale of the impact of phoenixing in this community?

**Mr Day:** We have had discussions again with the Phoenix Taskforce agencies about this. We are reviewing the methodology of that calculation. We have some concerns about the methodology that has been used in the past about that. And that—

**Senator O'NEILL:** So are you saying it is too high or too low, Mr Day?

**Mr Day:** We suspect it may be too high. But the bigger problem is that we think that the methodology used means that it cannot go down. Because in Australia—and Mr Tanzer referred to this earlier—the number of companies in Australia is going up, and has since the start obviously. So the way that the model would appear to work for calculating phoenix activity is based on the fact that—and includes inherent in it the number of companies in Australia continues to go up—on that basis, it would appear that the methodology might not ever allow contemplation or to take into account the fact that any of our activities might succeed because it just keeps working on the fact that the number of companies goes up. So we are reviewing that at the moment. We think it is probably higher than it should be, but we do not know how much higher, but we still think that that 2012 number is well within the ballpark.

**Senator O'NEILL:** Okay.

**Mr Price:** There is an excellent academic article by a Melbourne university professor, Helen Anderson, which goes through in some detail the challenges of getting a correct methodology for calculating this.

**Mr Day:** It is a significant issue and financially cost the Australian economy and taxpayers through lost revenue and other things into the hundreds of millions to billions of dollars. It is a big problem. We really do want to quantify, as best we can, what that is so that we can give better advice to government and yourselves about that. That is why we are reviewing that methodology at the moment.

**Senator O'NEILL:** Do you have conversations with the Fair Work Ombudsman in addition to—

**Mr Medcraft:** Yes. As I was saying before, we work with them on various things.

**Mr Price:** In terms of cross-agency work on the Phoenix Taskforce, the key agencies that would lead this work would be us, the Department of Employment, the Fair Work Ombudsman and the Australian Taxation Office.

**Mr Day:** We have a number of joint initiatives with the Fair Work Ombudsman. We liaise with the Fair Work Ombudsman formally. The chairman met with Natalie James, the Fair Work Ombudsman, directly two months ago. We have a number of initiatives that we work through with them. As I said, we sit on the Phoenix Taskforce together as well. They have referred a lot of matters to us that we will look at. Some of those flow from the 7-Eleven work they have been doing—

**Senator O'NEILL:** That is one of the questions I wanted to ask.

**Mr Day:** on the director activities. So we are looking at those. They are current matters. We are not at liberty to discuss those in any detail.

**Senator O'NEILL:** I would like to come back, if we have time, to 7-Eleven. You would be very aware that there are over a million people in Australia who are on work permit visas of some sort. We heard a lot of evidence in the education and employment committee hearing in the last parliament that significant numbers of 417 and 457 workers were getting work inside these sorts of companies, particularly labour hire companies, that are being phoenixed over and over and driving down wages in regional parts across the country. Are you aware of the scale of exploitation not just of those workers but of the actual labour market in the region?

**Mr Medcraft:** As John said, I have actually met with the head of the Fair Work Ombudsman and we have signed a memorandum of understanding. Yes, we are certainly aware of the issue and where particularly some bad stuff is happening. We are pursuing some cases jointly with the Fair Work Ombudsman, aren't we, John?

**Mr Price:** Yes, that is right. To your question, Senator, quantifying it is difficult for the reasons it is actually difficult to quantify the cost of phoenix activity in the Australian economy more broadly. We will continue to endeavour to get the best numbers and data we can, but it is not a simple exercise.

**Mr Day:** You may be aware that there is a migrant workers task force that is in operation. We are a member of that task force. There was an initial meeting of that in the last week. There is a further follow-up meeting planned for late January. We will be participating in that. We do not see ourselves as being a major partner in that work, but we are assisting where we can with that.

**Senator O'NEILL:** Are you in conversations with major companies in Australia such as Woolworths and Coles that were part of the chain of employers who were, I would say, abrogating a lot of responsibility and not acting in the way that Australians think directors should about the responsibility to prevent the funding of labour hire companies that are engaged in this phoenixing activity? Do you have any role in connecting those parts of the system? Can you raise any consciousness or awareness?

**Mr Price:** Certainly we can look at raising consciousness. More generally, though, the issues go back to perhaps an earlier discussion that Warren Day raised with the committee. Let's say that a particular company has breached an environmental law. A common question we often get is: 'ASIC, will you take action on director duties in relation to that director?'

**Senator O'NEILL:** Yes, we heard about that.

**Mr Price:** That, for us, is problematic. It is for this reason. To actually establish a breach of director's duties in that case, you need to do a few things. First of all, you need to demonstrate that the primary law has been breached—it might be the labour hire law, the environmental law or whatever.

**Senator O'NEILL:** Which is some other agency's responsibility.

**Mr Price:** That is another agency's responsibility, to start with. The second thing you need to do is show that the director knew or was reasonably to have known about the circumstances that led to that breach of the law. And then the third thing you need to do is show that it has actually damaged the company as a result. So, if you look through that chain and think about whether it is more effective for ASIC to do this or for the primary agency that regulates, say, the labour hire or the environmental legislation to do it, it becomes a pretty simple equation, if you see what I mean. Either you can prove one thing or you can prove three things. We are the people who need to prove three things and they are the people who need to prove one thing.

**Ms BUTLER:** One of the things in the corporate plan is about culture, and that is obviously a very significant part of the corporate plan. And you mentioned specifically the gatekeeper culture and related issues. One of the cultural issues that I am obviously very concerned about is making sure that there is a pro-disclosure culture in relation to any wrongdoing that is happening and in turn making it safe for whistleblowers to blow the whistle and ensuring that the rest of their lives are not ruined because of ramifications of having blown the whistle. I do not know whether there is any whistleblowing involved in the recent situation whereby one of your employees was charged with an offence—something that has been reported in the papers. Given that this is the first public hearing I think since that occurred, I wanted to give you the opportunity to say anything you might want to say about that.

But I did also want to ask you specifically about the US SEC system, where up to 30 per cent of penalties and proceeds of legal action, as I understand it, can be remitted to a whistleblower. I know that there has been some reporting that a whistleblower in BHP Billiton had received $3.75 million in relation to some issues on which that person had blown the whistle under that US SEC scheme. I am sorry: this is a question in too many parts. But you have made some comments about looking at bounties but also questioning whether a translation of the US system into Australia would be aligned with our culture. So I just wondered whether you wanted to expand on those things.

**Mr Medcraft:** Yes, sure. Thanks for the two questions. On the issue of that recent allegation that has led to this arrest, I think it certainly did not come from a whistleblower. But I think what it certainly does highlight is that the greatest risk that everybody faces is the people who walk through the door. It certainly has resulted in us doing an internal review of our procedures and also, most importantly, cooperating with the AFP on the investigation. I cannot really say anything more. And, again, these are allegations which will be in front of the court. Greg, is there anything you want to add to that particular aspect?

**Mr Tanzer:** No. I think that is all we can say.

**Ms BUTLER:** Might I say on that—and I should be really clear—that no-one reasonable would suggest that because a senior employee of an organisation was engaged in unlawful activity then the entire organisation should have its reputation besmirched or be questioned.

**Mr Medcraft:** Absolutely. And equally, I will say that we have no evidence that has compromised any of our investigations at all. It is also important to underline that.

**Mr KEOGH:** Perhaps I could ask some further questions just on that one point before we turn to the broader issue. Who identified the alleged offending? Was it identified by ASIC internally? Or was it identified by an external law enforcement agency?

**Mr Tanzer:** There is a gentleman before the court. I suspect that the way in which all of that came forward will be a matter before the court. I am worried about commenting publicly about that. It is a criminal matter that is before the court, so I would prefer not to answer in a public hearing.

**Mr KEOGH:** It is an allegation—

**CHAIR:** There is a principle of sub judice, is that right, that we need to—

**Mr KEOGH:** I do not think that question crosses over the matter of—

**Mr Tanzer:** I am not sure that that will not be an issue of fact before the court.

**Mr Medcraft:** We can take it on notice, if you like, and come back and look at it.

**Mr Tanzer:** I am not trying to be evasive. I do not know, and I do not want to be in a position where we could compromise our—

**Mr KEOGH:** If you could take that on notice, that would be great.

**Mr Medcraft:** We will take it on notice.

**Mr KEOGH:** And I have one further question on that, and maybe I will phrase it in such a way as to avoid that problem. Is it yet a public part of the case that is being alleged against this alleged offender whom they were assisting by providing information?

**Mr Tanzer:** I do not believe so.

**Mr Medcraft:** That is not public. I have underlined that is not information in relation to any of our own ASIC activity. And that probably gives you a pretty strong hint that it nothing to do with ASIC activity. But otherwise, no.

**Mr KEOGH:** Maybe when that information is able to be released you can provide that on notice as well.

**Mr Medcraft:** We will tell you as much as we can. Now, back to the issue of whistleblowers, what we have said previously is that we certainly believe that whistleblowers should be compensated. The US system has been very successful. The SEC has an office of whistleblower compensation that has actually paid out a large amount of money. But the bounty system I think does not necessarily mesh with our culture. One of the things I think would work for government would be to at least compensate them for loss of lifetime income and potentially compensate them out of the proceeds of any fines et cetera. I think the most important behavioural aspect is to take off the table that if you see something going wrong you actually do not have to worry that you will never get another job again and your family will suffer. The heart-wrenching thing is that sometimes these people are very courageous and their lives are destroyed, and that should not be the case. Many of these people are heroes, really. They should not be detrimentally affected. I think that is probably the system that reconciles compensation and recognising whistleblowers. There was a guy at UBS who was in jail for several years—Brad Birkenfeld—and got $10 million or something like that, or maybe even more.

**Ms BUTLER:** I should have asked before when we were talking about the registry privatisation: under the privatisation, would whistleblowers within the registry be subject to the public interest disclosure regime, or the Corporations Act regime? Do you know, Mr Tanzer?

**Mr Tanzer:** I do not know.

**Ms BUTLER:** Perhaps you could take it on notice. Let's not get derailed by it.

**Mr Tanzer:** Sure.

**Mr Medcraft:** But whistleblowers are really important intelligence to us, I can tell you.

**Mr Tanzer:** You are thinking of a whistleblower within the ASIC registry?

**Ms BUTLER:** Yes.

**Mr Tanzer:** If it was privatised.

**Ms BUTLER:** If they became employed by a private firm.

**Mr Tanzer:** Right. Okay.

**Ms BUTLER:** On the question of lifetime compensation, would you be concerned that that would shift really all of the burden of establishing an entitlement to compensation onto the whistleblower themselves at a time when

they are probably quite vulnerable, when they are going through really difficult times and they are often having reprisals brought against them, compared with a bounty system that—

**Mr Medcraft:** Yes, except that what happens in the States is, as you would expect, there is a whole industry of lawyers that has developed who actually package it up and take the case to the SEC for the bounty. I expect that equally if you had compensation here from loss over a lifetime then probably the legal industry would develop and actually take it. So, whether it is a bounty or a loss of lifetime employment, I expect that you would get the development of an industry around it to actually take it on board.

**Ms BUTLER:** But I guess my point is that compensation would depend on assessing that individual's possible lifetime employment, what their other skills and training might be, whether they have a prospect of getting another job, how old they are, whether the loss of the employment is really due to the whistleblowing or due to do something else. I am saying that it is complicated.

**Mr Medcraft:** Yes, except that, if you think about it, at the moment in the insurance area the courts actually have developed rules—determination of loss of lifetime income is something that already exists within our judicial system.

**Ms BUTLER:** I understand that, and I am saying that it is complicated when they do it.

**Mr Medcraft:** But equally, with the whole issue of bounties in the States, when they are trying to work it out, it is quite complicated to work out the level. It is not a set formula. They have to assess what the contribution is. So, I think either is quite complicated.

**Ms Armour:** Just one issue that I think is relevant to the bounty question is the capacity in the US to actually issue fines. The regulators very frequently have an unlimited capacity to issue fines. We do not have, generally, a fining capacity; we have a very small infringement notice capacity, so the bounties would not be very substantial.

**Ms BUTLER:** I understand. Would you see—whether it is a compensation or a bounty—some sort of financial support for whistleblowers after they have blown the whistle? Would you see that as something that could apply in a framework where the whistleblowers themselves are able to bring some form of legal proceedings; or would you only see it occurring in a situation where ASIC was initiating—

**Mr Day:** A whistleblower can now.

**Ms BUTLER:** Would you apply a bounty—

**Mr Day:** So, in answer to your question, a whistleblower can now. As you say, it is complicated and it is not straightforward. Do we see that we have got a role in that? I think, at the moment, our position is: we do not. It gets more complicated because, harking back to what Commissioner Armour said, comparing us to the US is very problematic, because the fines that are awarded there are much higher than what are available in Australia. It is not a compensation payment. The chairman is right: it is not complex. It is not a pure cut, but it is not far off that, so there is something taken into account on that. Effectively, what happens is the whistleblower provides a well-packaged piece of information through lawyers, as the chairman has said, and they just sit out. They are contacted occasionally just to keep them updated or for further information and then they wait for the end of the matter. The payment is made under the guidance of the office of the whistleblower and the SEC.

**Ms BUTLER:** I feel like I was not being sufficiently clear, so I apologise. I was thinking more along the lines of the US False Claims Act, where an individual could bring proceedings and then, if the government thought that those proceedings had merit can take them over. Regardless of whether the government took them over or not, ultimately, the individual could, even in proceedings that they initiated themselves, obtain financial payment, if they were successful. So my question was really: if you were to have a bounty or a compensation payment in Australia, should it be the case that that would only apply in situations where the actual formal action was initiated by a regulator or by government; or would you extend it to a situation where private individuals are bringing proceedings?

**Mr Day:** I think that is a great question. I think it is a very difficult one to engage with. I would expect that it is the type of thing that really needs to be considered through the current considerations on whistleblowers—you may be aware that the government has put out its open government national action plan, and whistleblowing is a feature of that: that they want to take consultations about. I think that is the place that those types of things should be considered. I think, for ASIC, it is very difficult. In a way, it harks back to what Commissioner Price and I have said: ASIC seems to be at the pointy end of this discussion, because we are the corporate regulator. But, if we are talking about whistleblowing that could occur in relation to a whole range of other activities outside of financial services markets and those types of things, is it that ASIC, under your proposed scenario, should take that on? It is a question of whether ASIC nearly then becomes—and I do not mean to be in any way dismissive or insincere by what I am about to say—legal aid for whistleblowers. Is that what is intended? I would expect that it

is for legal aid to take over those types of cases albeit, under your scenario, the trigger might be a regulator takes action.

We have made informal commentary before that, for us to take that over, would mean that we are, again, diverting resources away from what our primary area of focus is—fair and efficient markets; confident, informed investors and consumers.—if we move into that type of space. Your question is a great one. The issues you raise are great, but I think they are really part of those wider consultations about whistleblowers in corporate life.

**Mr Medcraft:** There are broader issues. I think anything done to actually help compensate them is a really good thing. The fundamental principle—we are being supporters of not only compensating but actually broadening the availability of whistleblowing protection for a number of years and that includes to former employees, and even I think former directors, for example. They can be a really important part of the system.

**Ms BUTLER:** I really acknowledge—and I should have acknowledged at the outset—the work that you have done in promoting the importance of whistleblowing legislation. It is certainly something where I think, if you are thinking about the gaps in how to make our companies better and our economy therefore more productive, encouraging a pro-disclosure culture amongst them—

**Mr Medcraft:** And even, as we have said, within companies. We have actually said to companies: 'Beyond coming to ASIC, encourage people who are whistleblowers. Have an independent whistleblower office.' There is lots to be done in this area.

**Ms BUTLER:** Yes.

**CHAIR:** Just as a hypothetical: if you had, say, a whistleblower who had initially promoted the activity that he wanted to blow the whistle on because the lifetime compensation is a pretty attractive thing to have, how would you see that being dealt with?

**Mr Day:** It is one of the difficulties in that space, Mr Irons. It is a really difficult space, and that is why we get into very difficult communications and interplay with the whistleblower, because effectively our own approach is to keep them updated on a regular basis about what we are doing when they come to us with information. But of course, through our investigations, we would soon become aware, or it would be apparent from the get-go, that this person is complicit in some way or has themselves conducted those types of activities that they are now bringing to our attention. So then there is a limit to what we can tell them, because, quite frankly, they are potentially a person of interest that we may charge as well.

For our enforcement teams, this becomes a very difficult and complex area that they have to negotiate. On one hand, there is a potential for this person to probably ring Senator Williams and say, 'ASIC aren't telling me enough,' or go to a media outlet and say, 'ASIC aren't taking my information seriously, because they'll tell me nothing,' but of course we have to be very careful because they are probably someone we are going to have an aim at. So that becomes very complex.

We try to at least say: 'We haven't forgotten about you. We thank you for the information.' We might be clarifying certain things they have told us. But at some point, if they are someone that we want to investigate in relation to their involvement in that, they will become aware when we start calling them in for examinations, other discussions and other interviews that they are probably a person of interest in what we are doing. At that point it becomes difficult.

**Mr Medcraft:** But equally let us underline that, for people who come to us and let us know, even if they are guilty, that does mitigate potentially any future penalty. We want to encourage people to come and talk to us.

**Mr Day:** And it is true that people come to us and they say, 'I just can't act this way anymore.' There is a penny-drop moment. They realise that they have been involved in something that is wrong, and they do want to tell us about it.

**Mr Kell:** And they are often the most valuable whistleblowers.

**Mr Day:** They are.

**Mr Kell:** It is valuable information, so it is very important to manage people in that situation very carefully.

**Mr Day:** And those types of things then get taken into account at the point when we move to a prosecution phase in discussions with the Director of Public Prosecutions and those things. They will get discussed at that point.

**Mr Medcraft:** We will underline that, even if you have done something wrong, if you want to blow the whistle, it is in your best interest to do it—do it to us if need be—as quickly as possible.

**CHAIR:** That would reduce their capacity to get a lifetime compensation, if they were part of the scheme?

**Mr Day:** Again, that is speculation about how such a regime would work.

**Mr Medcraft:** It is interesting in the States in the bounty system, as I mentioned. One gentleman, I think, may even have got $100 million. He got out of jail after several years and then collected his money.

**Senator WILLIAMS:** How much?

**Mr Medcraft:** I think it was $100 million, actually. Bradley Birkenfeld—you can check it out.

**CHAIR:** We will get that.

*Senator Williams interjecting—*

**Ms BUTLER:** No, Wacka, I think there is a report that the total scheme in 2014 was about $435 million, so it is not small money. Sorry, I meant Senator Williams, not Wacka.

**Mr Medcraft:** He was the guy who reported the UBS scheme.

**Mr KEOGH:** One thing I just want to clarify that a few of you alluded to is the issue of penalties—if I understand you correctly. It is my understanding that the capacity of a bounty system or compensation to really compensate somebody for loss of employment or to provide a genuine incentive to come forward as a whistleblower and for it to be somewhat proportionate to the penalty would be virtually nil in Australia unless there were a significant increase in the penalties that could be obtained by the regulator for these sorts of breaches. But also, it would not be just about lifting limits or maximums. You would need to see a wholesale leap forward from existing penalties as they currently are handed out by courts. Firstly, is that sort of summation correct?

**Mr Kell:** Again, it would depend on the model. If it is based on the American model then, at the moment, that is right. The fines are not comparable and would not generate the same sorts of outcomes you get in the US, which might mean that you would consider alternative models in Australia. But—

**Mr KEOGH:** So maybe, unless it was funded by government—

**Mr Kell:** we want higher penalties in any case. We think they are desirable for a range of other reasons. But, depending on the model, that might also help in this instance.

**Mr KEOGH:** But unless it was funded by government you would need to increase the penalty.

**Mr Kell:** Yes.

**Mr Day:** That is why it emphasises the importance. Money is one thing, and it needs to be discussed in line with what you have just said, but the broader things about the other forms of support, the other forms of recognition and protections, are the things that I think are equally if not more important to discuss in considering what we should be doing for whistleblowers than merely the monetary thing, the compensation thing. If that is not a lever that is easy to move or deal with, then those other things—those being just some of those things—have to then be meaningfully engaged with.

**Mr Medcraft:** Sorry, just to correct the record: Bradley Birkenfeld got $104 million, actually, after 2½ years jail.

**Mr KEOGH:** Thank you, Mr Chairman. If there were such a move in particular to say it was a bounty type system, and seeing what happens in the United States, what are the unintended consequences or negative consequences that sometimes can be seen from that sort of regime?

**Mr Day:** One of the consequences which have all ready been canvassed—and this is the discussions we have had with the SEC Office of the Whistleblower over the last little while—is that a whole industry has developed in the US of a number of law firms and other lawyers who have devoted practices to assisting whistleblowers, packaging their information up and then providing it to the regulators. That is seen to have a very good impact from the regulators' perspective, because the quality of the information is really high. It has already, if you like, been pre-vetted. It has been set up in a really good way. Extension questions have been asked; it is not merely, 'Here's the problem.' So that would seem to be a benefit.

The other problem with it, though, is those people then taking their own cut of the cut, so to speak. Also there is a question of expectation management and those types of things that come with that as well. So there are those types of unintended consequences that come from that.

I think it is then the question—when the fines and therefore the bounty that goes with it are going to be bigger—of: what are the unintended consequences of the behaviour then with the entities that the whistle is being blown in respect of and how they behave? Do they continue to still have robust frameworks themselves? I have said before, I think, in this committee or potentially in the Senate estimates committees that whistleblowers

existing is potentially an indicator of complete failure of that entity in terms of both its culture and its own frameworks, because it should have been picked up earlier, and it should have been avoided in the first place.

We are involved with the research project that is being led by AJ Brown at Griffith University. Part of that is focused on surveying companies: have they got whistleblower provisions or policies within their organisation? But it may be that at that point they will not matter anymore, because the whistleblower will say: 'Why am I going to tell the company? I'm sitting on retirement money here at the age of 35. I'll just go straight to the regulator, I'm not worried about any of that.' So it may have that unintended consequence of just avoiding problems or, if you like, nipping them in the bud early. Rather than the whistleblower going to their company, going to the internal audit, going to the director or going to their line manager, they will say, 'I'll just sit on that because I think this is going to be worth $30 million or $40 million for me, and I'll just go straight to the regulator.' So you could have that unintended consequence as well.

Is that what we want, or would we rather that companies have the chance to rectify that problem properly, meaningfully and responsibly at an early point, being alerted to it early? That is something we need to think about as well.

**Ms Armour:** I am thinking about the limited circumstances where the whistleblower has been involved in some wrongdoing. It does challenge our fundamental precept that somebody should not benefit from a criminal act—

**Mr Medcraft:** Yes, correct.

**Ms Armour:** so we would have to be prepared to change that basic underlying philosophy.

**Mr Medcraft:** Possibly, for essentially having to go to court to demonstrate the loss of lifetime income, you are right—then you would have to take that into account.

**Mr Price:** I suppose another philosophy question might be: what is the balance in terms of protecting whistleblowers as opposed to trying to protect people who might say, 'I'm a whistleblower; I want to use these protections,' but for different motives—for example, if there were an employment dispute between parties? I know that, when the whistleblower protections that were introduced in the Corporations Act first came in around the mid-2000s, that was actually an area of great policy debate at the time—just what the right balance is around those things. For that reason, when the Corporations Act provisions were put in, they actually did not apply to former employees. You can say that is right or wrong, but it just illustrates that policy tension. That is all I am saying.

**Mr KEOGH:** Finally on this: how would you see this relating to penalties and penalty types if you were to be given the option of having a deferred prosecution agreement type option as a penalty? I feel like a giggle is worth 1,000 words!

**CHAIR:** Do you want to take that on notice?

**Mr Medcraft:** Yes, I will take it on notice. There is a lot of debate about DPAs.

**Mr KEOGH:** That was my segue.

**Mr Medcraft:** Exactly. You know that they are basically used in criminal law. We will come back on notice on that one because it is an interesting topic, actually.

**Mr KEOGH:** Okay.

**Mr Medcraft:** But the big thing on penalties—

*Senator O'Neill interjecting—*

**Mr Medcraft:** It might be. Actually, no, the big thing on penalties is to get penalties that equal a multiple of the benefit gained or lost. That is the big one. Basically it has to be triple whatever the benefit gained is. That is the massive change that has to occur. Even in competition law you have that ability. I think that will change things dramatically. But we will come back to you on the DPA.

**Mr KEOGH:** Yes, can I suggest that you do come back to us on notice with that. Do mention the interrelationship with whistleblowing as you see it, and we might make that a main topic when we are here next quarter on a full day.

**CHAIR:** I will talk to the chair about that!

**Mr Medcraft:** One of the things I did suggest to the chair about the full day—'Might we just spend the day together?'—would be perhaps to divide the day and have a half-day briefing on a significant part of ASIC. Maybe we might take the markets or the financial services first and give you a briefing on that—a download, a

PowerPoint or whatever—and then have half a day of Q and A. We thought of maybe dividing it between the two because there is a lot to cover if we do it well.

**CHAIR:** We will have a discussion on that.

**Senator O'NEILL:** And we have a lot of questions we are not going to get through.

**Mr Medcraft:** Okay. It was just a suggestion; that is all. The briefing I think would be very interesting for you—for example, to tell you what we are doing in, say, data analytics in terms of investigation and surveillance. I am just suggesting perhaps a format.

**CHAIR:** We will come back to you on that. I am just putting on notice that we will be finishing at 12.30 because that is when we are scheduled to finish. Mr Van Manen has a question, and I will give the opportunity for each member of the committee to try to get a question in before we finish at 12.30.

**Mr VAN MANEN:** I just want to change tack a little bit. One of your key responsibilities in your vision that you talk about is promoting investor and consumer trust and confidence. If I read through your report—and I had a look at all of your public statements, particularly in the financial services sector—I see a lot of commentary about things that people have done wrong, a lot of commentary about what a small minority of advisers have done wrong. Yes, the banks have done wrong in certain segments, but, by and large, overall, what they do is beneficial. My concern is that there seems to be no balance in what ASIC puts out as a public commentary in the financial-planning sector, with life insurance, with banking and with other things. I fully accept that there are people who do the wrong thing in those sectors, as there are in other professions and other industries.

**Mr FALINSKI:** Even in politics!

**Mr VAN MANEN:** Even in politics, yes. If part of your vision and your mission is promoting investor and consumer trust and confidence, how do you achieve that when all you report or all you speak about publicly, largely, is the negative stuff that goes on?

**Mr Medcraft:** It is a good question—and if you could go to page 36-37 of our corporate plan. I am very pleased that you have raised this question because I agree with you. We are a law enforcement agency, unfortunately we often see the poor side of things. In the corporate plan, one of the things we have for each of the sectors we regulate, and it will become part of our communication, is we have set out what good looks like. So rather than continually pointing out what bad looks like, let us point out what good looks like, or where falling short of what good looks like is perhaps the way we should describe it. We have been engaging with corporations on this and we would hope that entities take this on board and go, 'Well, we are actually what good looks like.' I can tell you that in markets, actually we have pointed out what good looks like because in markets we are what good looks like.

We released a report very recently on the cleanliness of our market. Compared to the rest of the world, we are leading. On market cleanliness, the levels of insider trading and market manipulation are very low. There is a good example where we have actually said, 'This is what good looks like.' I would hope that we can start talking more about what good looks like and, to your point, talking about it in a more positive vein. This is the start, I believe, of a very important communication strategy. We are probably one of the first in the world amongst market regulators to do this. But, to your point, it does allow more focus on the positive and where people fall short, and to celebrate the positive but not to forget the negative.

**Mr VAN MANEN:** On the market cleanliness one in the financial markets, are you looking at doing that piece of work in the financial services sector as well?

**Mr Kell:** Probably not identical to that. We do try to call out good behaviour and good advice where we see it. One of the challenges that we always find, and I suspect you are in the same boat, is that the good news stories do not tend to be picked up in the same way. I think, therefore, part of the positive story is perhaps captured through another aspect of ASIC's activities and that is through our financial literacy work. Our MoneySmart program which has two main elements—our general MoneySmart financial literacy work through our MoneySmart website, which gets more than half a million unique visitors every month; and our MoneySmart work through the schools, where we now train thousands of teachers each year in more than half the schools around Australia—allow us to present a much more positive and engaged set of information and advice and guidance to consumers.

You are right: many consumers say, 'You've told me what is going wrong and what I should avoid, but I also want to know what I can do that is positive.' So next week, for example, we will be launching our latest version, and I think it is a terrific product, of how to engage and how to choose a financial adviser and what you should do when you go and see a financial adviser. We have worked that up with the financial advice associations and we have tested it with them, and we are hoping it gets a big launch next week. It would be great to get your feedback

on it. So that financial literacy work, I think, does allow us to present, in a different context, a more positive view of how you can engage with your adviser, your super fund, your bank and that sort of thing.

We are really pleased that one of the key measures that we get from MoneySmart is that 90 per cent of the people—and this has been tested several times—that go to the site do something positive about their finances, which is a really good move. It is not quite the same thing, I think, that you are talking about exactly in this matter, but I think that allows us to present a more positive way that consumers can engage with their financial services provider.

**Mr Medcraft:** I think it is quite interesting that, if you look at financial advisers, what we say is, and this probably does not surprise you, that financial advisers act professionally, avoid conflicts of interest, treat consumers fairly—and you would go, 'Well, that makes common sense'—deliver strategic financial advise aligned with consumers' needs and preferences, and ensure consumers are fully compensated when losses result from poor conduct. But it does start to say: this is what good looks like.

**Mr FALINSKI:** Is there much that you can say about your investigation into the alleged manipulation of the bank bill swap rate instrument? Does it relate to the LIBOR investigation that occurred in the UK about five years ago? Was your investigation prompted by that, or was it something that you were already looking at?

**Mr Medcraft:** I will let Cathie comment on it, but we are continuing that case. There are negotiations going on. One of the things that we have done is to think about trust and confidence in Australian, and the reason we are doing that is clearly because we believe benchmarks are basically almost like the electricity of the financial system. One of the things that I thought we would lodge today is a diagram that explains the impacts of BBSW, which we thought would interest the committee. It is for illustrative purposed only, but it does give you an idea of why we consider BBSW to be really important to all Australian, which is that sometimes the secondary effects of it do impact and it potentially touches everyone. This is an important case. Cathie, do you want to just comment on where we are?

**Ms Armour:** Just going back to your question: yes, the LIBOR scandal did raise the question about whether financial benchmarks generally across the globe were being operated appropriately. We, like other regulators, are testing whether or not there has been poor conduct in key financial benchmarks. In Australia, there has been a really concerted effort for all of us to be comfortable that BBSW today is a very reliable benchmark. So the industry has changed its methodology. The Council of Financial Regulators has done substantial work on that, and the government has announced changes to the regulatory regime. So our cases are about poor conduct that we saw some time ago, and the court is considering whether that poor conduct is illegal conduct. But, yes, it does flow from the international interest in financial benchmarks.

**Mr Medcraft:** What people do not appreciate is that we do compare notes.

**Mr KEOGH:** Why are criminal charges not being pursued in the case, given that the elements are essentially that same? Can you give the committee some further understanding as to the allegation that ASIC should be embarrassed by its understanding of the rate?

**Ms Armour:** On the 'embarrassed' point, as you would appreciate, in litigation there are various terms used in a pleading. This is a pleading point, and it is not a general commentary by that particular defendant on the case that has been brought against them. It is a pleading point. The judge is the person who determines whether or not the pleadings are appropriate and deals with those matters. So, thanks for raising that because it is—

**Senator O'NEILL:** It is a bit embarrassing!

**Ms Armour:** I think it had been blown out of proportion a little bit or misunderstood in some ways.

**Mr Medcraft:** And we had no problems funding our case for years, frankly. So, let's also put that aside.

**Mr KEOGH:** What about the criminal point?

**Mr Savundra:** As you are probably aware, prior to us commencing civil penalty actions, we consult with the DPP. Obviously, the commencement of civil penalty action does not preclude criminal action, either against entities or individuals.

As we have said, our investigation is ongoing. At this point, and for various reasons, including limitation periods which apply to civil claims, we have commenced these actions, obviously complying with our obligations under the legal services directions in terms of having a case on which we have got advice that there is a reasonable basis to bring the claim and also discharging our obligation as a model litigant.

**Senator O'NEILL:** Firstly, with regard to Youi insurance, we have had reports that ASIC is looking into allegations that the insurer has been charging customers without their consent. Can you provide comments on where you are up to with that and when it is likely to be finalised? What have you done to ensure that consumers

are protected in the meantime and what is ASIC's view on how widespread these issues are? Secondly, can you give us an update on your interactions with regard to the appalling behaviour that we have been seeing reported with 7-Eleven?

**Mr Savundra:** We are in discussions with Youi about the allegations that have been made. We have also had discussions with the New Zealand regulator, who had commenced action against Youi in New Zealand for the conduct that you described. It is too early for me to say what the outcome of those inquiries will be, but we are in active discussions with Youi to understand whether that conduct occurred in Australia and, if it did, what needs to be done about it.

**Senator O'NEILL:** We have had a conversation about whistleblowers. Most of this information has become available through whistleblowers from within Youi.

**Mr Savundra:** Yes, and we are looking at all aspects of that.

**Mr Kell:** We are working with APRA as well on that. It is a very thorough review, so they are under no illusions; it is going to be close scrutiny. We are happy to update you.

**Mr FALINSKI:** Is Youi cooperating?

**Mr Savundra:** Yes, they are.

**Mr FALINSKI:** So Youi has been cooperating in your investigation?

**Mr Savundra:** They have been so far.

**CHAIR:** Senator O'Neill asked whether that behaviour is continuing or whether you have done anything to prevent it from continuing.

**Mr Savundra:** In discussions with Youi they have already made changes to a number of things within their organisation to deal with that. I cannot go into those details at the moment, but they have made changes and also changed the monitoring and oversight of their staff as part of their response to these allegations.

**Senator O'NEILL:** Can you discuss 7-Eleven?

**Mr Price:** With regard to 7-Eleven, currently we do not have an investigation on foot. That goes back to some of the earlier discussions we have had about the role of other regulators vis-a-vis the role of ASIC. We do see ourselves as having an important education role in respect of the need for directors to comply with other laws, however. I am a regular contributor to the relevant director's journal—the AICD journal. I have written an article on this topic, which was published recently.

**Senator O'NEILL:** I would be interested in receiving that.

**Mr Price:** Sure, I can provide you with a copy of that.

**Senator O'NEILL:** You are aware that we are conducting an inquiry into the insurance sector more broadly.

**Mr Kell:** Yes, I think our submission will be in soon.

**Mr Price:** Just to be quite clear, the article was around the role of directors in complying with other laws, not specifically on 7-Eleven.

**Senator O'NEILL:** Just to make a comment, I am very aware from the Fair Work Ombudsman's point of view—given the fact that basically they contracted out the assessment of this to Professor Fels, and we have seen how that has gone—that the Fair Work Ombudsman might need a little support from you. Clearly, they are overwhelmed. What we saw this week in terms of the pay scam is absolutely outrageous. I take the point that you made about the three dimensions that you need to investigate, but there needs to be very significant signal to other businesses that are looking at this as a business model. They are getting away with it, despite splashes across the entire page of the newspaper.

**Mr Medcraft:** We are engaging with Fair Work. We have lifted our cooperation with them. I think we have seconded people—

**Mr Day:** We are seconding staff to and receiving secondment from the Fair Work Ombudsman. That will start from January. That has already been agreed to. We have had discussions about matters flowing from the Fair Work Ombudsman's work in relation to 7-Eleven, and it is likely that there are matters that we will look at in relation to matters they have already taken on and what assistance we can give.

**Mr Medcraft:** So we are ramping up cooperation.

**Senator WILLIAMS:** Mr Medcraft, I have one simple question. I hope it is simple. To increase the fines, the punishment, can the minister do it by regulation or does it have to be legislation? What is the story? I do not know. Do you know?

**Mr Price:** I think it needs to be legislation.

**Mr Kell:** They are meeting in the New Year. It will probably be a good opportunity to discuss our understanding of where this review of fines and enforcement powers is up to. I am sure you will be interested in what they are looking at. We would be happy to discuss it.

**Senator WILLIAMS:** When is that review due to be handed down, Mr Kell? August?

**Mr Kell:** It is not until the middle of next year. It is going to be looking right across the board at all our powers.

**Senator WILLIAMS:** Who is doing the review?

**Mr Kell:** It is being run out of Treasury at the government's request.

**Senator WILLIAMS:** It is slow, by August next year.

**Mr Kell:** There is a lot to cover.

**Senator WILLIAMS:** The wheels in Canberra turn very slowly, I can assure you.

**Mr KEOGH:** Does ASIC have any comment, in relation to the timing of the BBSW cases coming so long after similar cases that have been brought in the US and Europe—in relation to their equivalent indices—and why has it taken so long for ASIC to take action?

**Ms Armour:** Probably the only comment is to repeat things that we have said in the past, which is we have devoted a significant number of resources to this review and we have not always met with the most—

**Mr KEOGH:** Maybe I can ask a more targeted question. Would you see that the timing—

**Mr Medcraft:** We have not had the most timely cooperation, is the answer.

**Mr KEOGH:** So it is less an issue of ASIC resourcing and more an issue of the cooperation of those that may be the target of the inquiry.

**Ms Armour:** It is a big inquiry, but yes. In future we would like to see a different approach.

**Mr Medcraft:** One could say that these offences had time lines of expiry on them. One might say that by delaying responding to us, waiting this out, might be a strategy that people might want to adopt, which is not a very good strategy.

**Mr Savundra:** I would add to that, the means of enforcement is different. We have to prove substantive manipulation or unconscionable conduct, which is very different to what would be proved in the UK. It is done through an administrative mechanism and its breach of one of their business principles, which is the conduct is not consistent with upholding the integrity of the market. I am not quoting that exactly but, broadly, that is the principle. Provided the conduct is seen as poor conduct and not consistent with that very general principle, it is a contravention on which the FCA can impose an administrative penalty—whereas we have to go through the rigour of proving the substantive conduct, which is manipulation and unconscionable conduct, which is a long way short of what the UK has to do.

**Mr KEOGH:** Should that be a flag to the need for legal change in the regulation of these sorts of markets being required to provide you with that capacity?

**Mr Savundra:** The difficulty is the constitutional limitation around the imposition of penalties. In Australia we cannot impose penalties administratively. The general mechanism by which it is done for the Corporations Act is infringement notices, which is really a voluntary regime. We issue an infringement notice and it is up to the recipient of that notice as to whether they want to pay the penalty or not.

**Ms Armour:** But the government has announced changes to the BBSW financial benchmark rate, which will assist. They will not go to the heart of these basic points but they will assist the regulatory regime.

**Mr KEOGH:** Finally, there appears to have been a glaring omission in these cases. As we have been discussing, there are four major financial institutions in the country and one of them is not, currently, the subject of proceedings.

**Mr Medcraft:** I think we said our investigations are continuing.

**Mr KEOGH:** Is there a concern about the limitations period kicking in, in respect of those ongoing investigations?

**Mr Savundra:** It is not appropriate to comment on the ongoing nature of the investigation. Limitation is always an issue when pursuing civil matters but, obviously, we would not be continuing the investigation if limitation had expired.

**CHAIR:** Thank you everyone. I appreciate you all attending today. I would particularly like, again, to mention Mr Greg Tanzer and his service to ASIC, over many years, and the assistance he has provided the committee over many years. We congratulate you and wish you well in your retirement.

**Mr Tanzer:** Thank you.

**CHAIR:** There are questions on notice, and there will be some more questions on notice in writing from the secretariat and maybe from some of our members. Answers to those questions taken on notice should be provided by 16 December 2016.

**Committee adjourned at 12:30**