

## SENATE

### ECONOMICS LEGISLATION COMMITTEE

#### Reference: Corporations Amendment (No. 1) Bill 2010

WEDNESDAY, 3 NOVEMBER 2010

SYDNEY

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*[Excerpt of transcript from 1.59pm – 2.58pm pages E21-E31]*

**BIBBY, Dr Martin, Committee Member, NSW Council for Civil Liberties**

**BLANKS, Mr Stephen, Secretary, NSW Council for Civil Liberties**

**STEWART, Mr Malcolm, Vice President, Rule of Law Institute**

**CHAIR**—Welcome. Thank you for coming along to speak to your submissions. Do you have an opening statement you would like to make?

**Mr Blanks**—Yes, if I may on behalf of the Council for Civil Liberties. There are three areas which this bill deals with and I would like to make some remarks in addition to our written submission on each of those three areas. Firstly, in relation to the amendment dealing with the company register access rights, the bill makes it a requirement that persons seeking access to the register state the purpose for which they require access. That of course will inform the board of the company what the purpose is. There will be many situations where people seeking access to a register will be hostile to the board and the board will be hostile to them. It seems to me to be an imposition on somebody seeking access to the register for totally legitimate purposes which is beyond what is really necessary for the purpose of the legislation. It should be sufficient for somebody to be required to declare that they do not have an improper purpose for accessing the register. That is in relation to that matter.

In relation to the matter concerning the telecommunications interception it seems to me that ASIC is seeking to get access to telecommunications interception powers via a bit of a two-step trick here. Generally, telecommunications interception powers are available only in the most serious sorts of crimes starting with terrorism, murder, child sex offences and so on. There is a list of the sorts of offences that the powers apply to in the telecommunications interception and access annual report. They really are very serious offences, drug import and export offences, terrorism and things with sentences of more than seven years.

All the market offences that ASIC now seeks the power in relation to currently have maximum jail sentences of five years and so, on any analysis of the offences as they currently stand, these would not be eligible for telecommunications interception powers. The very first step that is being undertaken here is to make these offences seem more serious than they currently are by doubling the maximum penalties from five years to 10 years. It seems to me that regardless of doubling the maximum penalty the fact will remain the same that for the vast bulk of prosecutions for these types of offences the penalty ultimately imposed is going to be significantly less than five years.

What is really going to be happening as a result of this bill is that telephone interception powers are going to be used routinely for offences which are going to be attracting, if the prosecution is successful, penalties in the range of two to three years imprisonment. That is really a use of the telecommunications interception powers which is beyond what they ought to be used for. They should be reserved only for the most serious types of criminality.

The third area that the bill deals with of course is the amendment to the requirement in relation to ASIC obtaining a search warrant. The current provision requires that a search warrant obtained

under the ASIC Act can only be obtained if there has been a failure to produce records pursuant to a notice first. As a result of that failure the warrant can be applied for. When considering this amendment, it is important to understand that the power to obtain a search warrant under the ASIC Act is only one of numerous ways in which ASIC is able to obtain search warrants. The primary way that ASIC is able to obtain search warrants is under the Crimes Act. Of course, that is in relation to criminal offences. When you look at the criteria in the Crimes Act, it is plain that there has to be a suspected criminal offence or a criminal offence is being investigated for which the search warrant is necessary. To the extent that the power in the ASIC Act is additional to and separate from the power in the Crimes Act, one assumes that the power in the ASIC Act is going to be used in situations where there is not an investigation of a criminal offence underway. In those circumstances it is very important that there is a proper basis for the extreme coercive power being used of executing a search warrant. Where ASIC has power to require production of documents, it is appropriate that that power is used first. If there is nonproduction of documents, that itself is a criminal offence and the person who has failed to comply with the order can be prosecuted for that.

To have a search warrant as the first port of call in a non-criminal investigation is inconsistent with the principles applying to coercive powers that have been floating around for at least the last 10 years. I refer the committee to some of the materials. The committee is, no doubt, more familiar with this than I am, because I only trawled through it this morning. There was a report of the Senate Standing Committee for the Scrutiny of Bills in 2000 on entry and search provisions in Commonwealth legislation which reviewed the whole gamut of coercive search powers. That led to a government response in 2003. ASIC made some submissions in response to that government position in 2004. I have not quite tracked through where the Scrutiny of Bills Committee got to in all of that. Certainly, in the process of that inquiry, there was recognition that the use of search powers in a commercial or regulatory environment, which differs markedly from an overtly criminal environment, raises some issues. I will read here from the government's response in 2003 to the Scrutiny of Bills Committee report:

The routine involvement of police in such circumstances could cause unnecessary alarm, embarrassment and distress, as well as consuming scarce police resources. Police would, of course, be involved where officers judge that their involvement is justified by the particular circumstances of the case. Using police officers where a search is likely to involve examination of large numbers of documents or computer files would consume scarce police resources.

There is a lot of other material in this report which highlights that the coercive search power warrant really is a last resort power. It should not be generally available in non-criminal investigations. This amendment would make it so and, from a civil liberties point of view, that is objectionable. That is all I would like to say by way of my opening remarks.

**CHAIR**—Anyone else?

**Mr Stewart**—I have some information on our institute if any senators would like to see that. A search warrant—and I have been involved in them for a number of regulators—is not a pleasant exercise for the occupier. There have been a lot of comments made judicially about the extraordinarily wide use of the power, how it is a derogation of common law rights and about intrusion into home and property. It is important to remember in this context that having a search warrant and applying for a search warrant has to be done with great circumspection. A judicial officer has a very important role in that: to act independently to ensure the rights of the person who is going to be at the receiving end of the search warrant—to the extent they can be—are taken into account. I will come to a number of reasons in discussing the issues this bill presents on a rule of law basis and also on an accountability basis. I want to make that clear.

Without being tedious or overly dramatic, I have been present when a search warrant has been executed.

What normally happens is that at six o'clock at night you get a bang on the door. You are half-asleep, as most people are at that time. They announce themselves before you open the door. You open the

door. If you are lucky you will get pushed against a wall and you will get frisked—you will have fingers run through your hair.

Then five ASIC officers and five Australian Federal Police with guns and all sorts of paraphernalia come into your home. They then commence a search of the home that is going to last between about six and eight hours.

They go through everything—every piece of clothing you have, computer and children's rooms. There is nothing that is left out. That is the nature of the search warrant. It is a very drastic technique that is used for information gathering, and I support what Mr Blanks has said: it should be used sparingly.

I can say that the occupiers of homes and offices that I have spoken to feel violated and helpless while this process is going on. I should also add that any material that is seized under a search warrant can be shared with any other regulatory agency in Australia—any state regulatory agency that it is appropriate to give it to—or for that matter any foreign or overseas regulatory agency as well.

I would like to pick up where Stephen left off in talking about the Crimes Act search warrant—the ASIC powers it already has under the Crimes Act—and just explain those and also the current proposed powers, if I may, without sounding like it is going to be a lecture. It is a very simple distinction, which Stephen has alerted us to. ASIC has to satisfy an appropriate court officer that a federal offence either has been committed or that there is reasonable suspicion that an offence has been committed. We say that is a very appropriate test for a judicial officer. That is what they do every day of the week. They are able to assess guilt and innocence if, indeed, an offence has been committed or if there is a reasonable suspicion of that offence having been committed. The Rule of Law Institute says that that is why parliament has given this oversight power to the judiciary.

However, to a large extent this bill does away with that. There no longer has to be any reasonable suspicion of anything. There does not have to be the commission of any offence or reasonable suspicion of that offence—there does not even need to be a reasonable suspicion of a contravention in a civil sense of any of the acts that ASIC oversees either.

The type of documents they can get is also important. They are anything; documents relating to a corporation, which could be bank statements, employee records, customer records, supply records or records relating to any provision of any financial services. Therefore it picks up all the insider trading matters and all the market manipulation matters. The sorts of documents that they can obtain from this proposed new power are exceedingly wide. We have on the one hand this proposed power, where all ASIC needs to show is a reasonable suspicion that there are going to be documents on a premises. That is the lowest hurdle I have ever heard for being able to propose to issue a search warrant.

One of the first problems the Rule of Law Institute has with that is it is obviously a huge discretion that is given to a regulator, and you really are putting yourselves in their hands as to when it is appropriate that they have this very wide power to simply say to a magistrate, 'Well, we believe that at that premises there are books and records relating to a corporation or relating to some function that we are performing under the act.' And that is all. In our submission, we say that is inappropriate—especially when Stephen has already pointed out that there are a whole pile of other powers that they can use to do that.

The second Rule of Law Institute issue—first is the discretion of ASIC—is the invocation, as it were, for this to go to a judicial officer, and all the judicial officer decides is whether or not there is a reasonable suspicion that books are on the premises. It is very different to the current powers they have under the Crimes Act. That is all the judicial officer has to consider, and it is my submission that in allowing that to occur it is not an appropriate judicial function for a magistrate or a judge to simply sit there and say, 'In giving the courts imprimatur on this search warrant, the only thing I am allowed to consider is whether it is reasonable or not that the documents are on the premises.' We would say that is not appropriate. In fact, there were comments made by the High Court late last

year in a related matter—it was not precisely on point, but to do with proceeds of crime—but I will leave that to one side.

The accountability issue is something that in fact has been pursued by this committee, and the institute really does congratulate this committee on its work in ascertaining how often ASIC have in the last three years utilised their coercive information-gathering power. We know that figure now. It is 18,625 times in the last three years. I point out that that number does not include any search warrants, which are what we are here talking about today. It does not include any wire taps, which again are what we are here talking about today. It also does not include obtaining telephone logs—who you have called and who has called you—and it does not include obtaining bank records and things like that, which they do a considerable number of times as well. So the information we have is not complete. I think it is important for the accountability of this that we know that sort of information and that there be proper policies and reporting put in place to ensure that, both for the current powers that they have and for any new ones that come along, the parliament should understand how often those powers have been utilised. I think that is important.

I will just deal briefly with ASIC's reasons, as we understand them, for requesting this additional search warrant power. Just to reiterate: if I am an ASIC officer and I believe there is a document on a premises and that is a reasonable belief on my part, I can get a search warrant for it. The first thing is to assist in insider trading and market related offence investigations. The simple answer to that is that they already have that power under the Crimes Act. Insider trading and market manipulation are criminal offences. It is simply that if they have a reasonable suspicion that there is a commission of one of those criminal offences they can get a search warrant. They do not need this additional power, which is not based on the commission of any offence, either civil or criminal, for that purpose. And I do not understand there to be any problem with that power in those types of investigations.

**Senator WILLIAMS**—Excuse me. Are you using 'they' to refer to ASIC, which can do an investigation?

**Mr Stewart**—Yes, I think I was. I am sorry, Senator.

**Senator WILLIAMS**—That is fine.

**Mr Stewart**—I am sorry I was slightly confused and probably talking too fast on that aspect. The second one was mentioned by Minister Bowen, for whom the institute has great respect. He was obviously commenting on information he had been provided, but he did say early on, back in January, when this was first mooted, that it was to bring ASIC's powers in line with the ACCC. That has not been mentioned since, and the reason is that it is incorrect. The ACCC's powers are based on a contravention of the Trade Practices Act. They cannot get a search warrant unless there is a contravention of the Trade Practices Act. I just wanted to point out that that comment had been made. I might also add that the reason these powers were brought in in January—for what it is worth, and it was suggested in January—was that we all know that in December ASIC had a series of three very highly publicised losses in various cases. The response, which I always find annoying, when they seem to have these losses is that there is some problem with the processes they are under. The guilt or innocence of a person, or whether that could be a possibility, just does not seem to matter. I make that comment very much in passing.

The last reason, as we understand it, why ASIC seeks these powers—and this, I think, was put in the explanatory memorandum—is that there is a problem with using documents seized under a warrant under the Crimes Act, which they can currently do, in civil proceedings. That is correct. There is a provision under the Crimes Act—just for the record, it is section 3ZQU—which prevents documents seized under a Crimes Act search warrant being used in civil proceedings. Our response to that is to say that, given the very intrusive and invasive nature of search warrants, that is an appropriate safeguard to ensure that they are used in criminal proceedings, and that is why we have search warrants issued under the Crimes Act. As to the extent that that is still pursued as a reason for this new search warrant power, really the debate needs to be about the search warrant power under the Crimes Act, not having an entire new power here that is done in such a way as to get round that. I might add that in the current search warrant power they have in the ASIC Act that is not a

restriction. They can use any material they have under their current ASIC Act search warrant power in any civil or criminal proceedings.

There are a couple of things I want to come to briefly—that is, what other regulators do. One is the Australian Building and Construction Commissioner. We have objected to the very existence of that commission, but it does have an extraordinary power to enter premises to obtain documents. But I will say that that is at least limited to construction sites. It does not exist on residential premises, and the inspector cannot use force either. From the institute's point of view, we do not think we should have another regulator; we would prefer to do away with that, but that is very different to the search warrant powers that ASIC are now proposing under the new bill, where they can use force and they can go into any premises they like.

The other one is the Australian Taxation Office, just to round off the major regulators. The equivalent power here is a bit like the Australian building and construction commission inspector. It is not in fact a search warrant power; it is what is known as a wallet authority, which entitles an ASIC officer to go to any premises, produce the authority and ask for specified documents. That is very different to what is happening here with the search warrant power, in the sense that, firstly, it is a revenue statute—I just want to make that point— where parliament has changed the onus and put it onto the taxpayer rather than the commissioner, which is just a flavour of it being an important revenue statute rather than a Corporations Law statute. But you are not entitled to use force under the warrant authority either, and I would also add that you cannot do anything that is unreasonable or excessive. For example, if the occupier says, 'I want to get legal advice; this has got to stop,' the whole thing stops while the occupier goes away and gets legal advice. And you do not have Australian Federal Police officers there with guns and that sort of thing. It is a very different environment to what you experience under a search warrant. That is all I wanted to say. I am happy to answer any questions.

**CHAIR**—Thank you, Mr Stewart. First of all, I would like to make a couple of observations, one of which is that the corporations and people running corporations have not put in any submissions suggesting that these provisions are unduly onerous. Indeed, Chartered Secretaries Australia, who were here this morning, said that they agreed with the provisions, as did the Law Council, who are very relaxed about them. What you have said seems to downplay the significance of white-collar crime, basically. We are talking about market manipulation and insider trading, which can in many cases cost shareholders and the economy many, many millions of dollars. It is not the act in itself, perhaps, that is so terribly serious but the consequences of that act. I think that, regardless of what was said in 2003, this is what is being acted on in this instance. It seems to me that it may be that, in an excess of zeal to guard people's interests, you leave open the possibility of egregious market manipulation and insider trading, which can adversely affect a lot of people.

**Mr Blanks**—Firstly, I should have prefaced my opening remarks by saying that we are very grateful for the opportunity to address this committee and give evidence before it. As a council, we make submissions often to government inquiries, and we always appreciate the opportunity to give evidence.

To respond to that: there is nothing in our submission or position which seeks to downplay in any way the seriousness of white-collar crime. It is a submission which is directed to examining the appropriate tools available to the state to deal with criminal activity and other activity which the regulator is there to regulate. If we just draw the distinction between criminal activity—because, Senator, your remarks were directed to criminal activity—the power to obtain a search warrant in relation to investigating criminal activity is not predicated in any way on the failure to comply with a production notice issued by ASIC. That power exists independently of any requirement for failure to comply with a production notice. What we are dealing with in this amendment is a proposal to allow search warrants for non-criminal matters, non-criminal investigations— so not the sorts of investigations which you had in mind—where the primary remedy available to ASIC is production of documents pursuant to a notice, but instead of using that ordinary remedy they want to have available to them the extraordinary remedy of a search order with all the prejudicial effect that

execution of a search order carries with it if it is done publicly, and quite often these are done publicly. You will see the media release from ASIC issued as soon as the search warrant is executed. The prejudicial effect of following the coercive search warrant power instead of the normal production power in a non-criminal investigation is severe.

**CHAIR**—You would have seen ASIC's response that often an order for the production of documents results in those documents being disposed of. In a lot of cases of insider trading and market manipulation, where people know they are doing something very wrong, often it is via a civil case that ASIC can get to the actual documents and find the evidence that they need to undertake either a civil or criminal proceeding.

**Mr Blanks**—The courts have got powers to issue search orders in civil cases. They are well developed and known as Anton Piller orders. They are well regulated by the courts. If ASIC has a particular matter where it satisfies the ordinary criteria for a civil search order it can go along the court and get one, just like anybody else can. Those orders are subject to a great deal more supervision and scrutiny than these search warrants would be. As an example, there is a requirement with an ordinary court supervised search order that there be an independent solicitor who supervises the execution of the order, takes proper records about what occurred and ensures the integrity of the material that is seized.

**CHAIR**—We have had well publicised examples of people hiding money offshore and destroying documents, and of regulatory authorities having great difficulty in following the paper trails of companies, trust structures and overseas accounts. It seems to me that you are arguing that ASIC should not have the tools provided here in order to track those down and that the current structures are good enough. But in those cases that we have seen publicised those structures are not good enough.

**Mr Blanks**—In the material that I have been able to research I do not see any material that shows that any problems in prosecuting those matters resulted from the inability to obtain material because a search warrant was not available as a first resource in a non-criminal investigation. There just does not seem to be any material available. I might be wrong. I know Senator Bushby asked a lot of questions in Senate estimates a couple of weeks ago about the use of coercive powers, but I did not see in any of the information that was provided—

**Senator CAMERON**—It was not the ABCC, was it? Was he asking about the ABCC?

**Mr Blanks**—No, he was asking about ASIC.

**Senator CAMERON**—I did not think he would be. I just wanted to clarify that.

**Mr Blanks**—Senator, you would understand that as a civil liberties organisation we would have grave concerns about the ABCC's powers as well. But in relation to ASIC, there is no information before the committee, as far as I can find, which shows extensive non-compliance with production orders.

**CHAIR**—Did you say that there has to be extensive non-compliance for it to be a problem?

**Mr Blanks**—Why the need for the bill? There ought to be a demonstrated requirement for this legislative measure which removes a substantial protection and will potentially result in a significant change in the way that ASIC's coercive powers are exercised. If it is not broke, what are we doing here trying to change it? The failure to keep records which are required to be kept under the act is a criminal offence. The destruction of records which are required to be kept under the act is an offence.

**CHAIR**—Only if you know that they have been destroyed, or if you can prove that they have been destroyed.

**Mr Blanks**—Are ASIC coming along and saying, 'We think that there are records being destroyed here but we can't prove it, so we can't prosecute anyone for the destruction of records, so we've got a problem'? I do not see any evidence of that.

**CHAIR**—We will ask ASIC that later. To go back to this serious criminality which you talked about, you implied that market manipulation and insider trading did not constitute serious criminality.

**Mr Stewart**—I hope I did not say that. That is very serious criminality, and the institute takes the same view as the civil liberties council: that it should be stamped out and we should do everything

we can to stamp it out. I think it is a balancing act, and that is what this ultimately boils down to. We must not forget a couple of things. One is that there is a presumption of innocence in this country. Search warrants can be issued and— this is the second point—they do not need to be directed to a person who has been involved in the criminality.

Yes, we need those powers, because ASIC needs to be able to do its job properly. If it has reasonable suspicion of a criminal offence, it gets the search warrant even though there is a presumption of innocence, and it overrides the presumption of innocence in that sense. Also, it seems important that, as I said, the recipient of the search warrant might have had nothing to do with it. So that is the sort of balancing exercise that the committee and the Senate, and indeed the parliament, need to come to.

The institute takes the view that, in all the circumstances, there is a problem with allowing ASIC to have a power like this that does not exist anywhere else in Australia: 'Do you have a record in relation to a corporation, to insider trading or to anything to do with our powers? We can issue a search warrant to get it.'

That is our complaint. ASIC already has a search warrant power there. You say documents might be destroyed.

If it is that serious, I would have thought we would be getting into the criminality side. If people are destroying records, that sounds to me like crime, and the search warrant provisions under the Crimes Act are the right ones to take it through.

**Senator BUSHBY**—On that, in what circumstances do you envisage that ASIC would be seeking to use a search warrant if not in criminal investigations?

**Mr Stewart**—In any civil contravention of the act they might try to use it. Do not forget that they can still use it for criminal investigations as well.

**Senator BUSHBY**—Yes, I understand that.

**Mr Stewart**—But suppose they were going to say to themselves, 'Even though this is not provided for in the bill, we will use these only for civil contraventions—any civil contravention.' The truth is that with a lot of those criminal prosecutions they can prosecute civilly anyway with the civil penalty provisions, so they might try to say, 'We'll use it under here and keep our powder dry as to whether we decide to use it as a criminal matter or'—as they did in James Hardie—'just have the civil penalty provision proceedings,' which is a lower burden of proof, as you know—balance of probabilities rather than beyond reasonable doubt.

**Senator BUSHBY**—The Rule of Law Institute's submission—I might get the sections wrong—said that section 28 set out a list of circumstances in which ASIC could use some of their coercive powers and that this proposal somehow sidesteps that so that they are no longer bound by those when using this search warrant process.

**Mr Stewart**—Yes.

**Senator BUSHBY**—I put that to Treasury this morning and they indicated that they thought that there were still some limits and that it had to be within the purposes of the act somehow under a couple of the sections— 30-something or other—which they quoted. I do not have *Hansard* yet, so I cannot repeat it. That then brought it back to section 28.

**Mr Stewart**—The problem is that therein lies the ambiguity here. Section 28 says that this provision does not apply to section 35. That is the problem: it is not clear. I admit that it is something that can be fixed simply by making it clear in one sentence, but it was more a technical point. That is really why I have not addressed it today. Section 28 says, 'We don't apply to section 35,' and lists all the reasons you can get these documents. So you have to go through this other route to use one of ASIC's other powers to get the document, which does bring in 28, but then it always comes back to 35. Sorry if I am not making myself clear. The difficulty is that 28 excludes 35, so if you go under 35 for anything then it looks as if section 28 does not apply because of the wording of it: section 28 says it does not apply to 35. That is the difficulty.

**Senator BUSHBY**—So fixing that technicality would not actually address the main concern that you have.

**Mr Stewart**—No, absolutely not.

**Senator BUSHBY**—It would not require a judicial officer when considering a search warrant to actually examine those particular issues that are set out in section 28?

**Mr Stewart**—No.

**Senator BUSHBY**—As you were saying it basically comes back to the only thing needing to be satisfied is that there is a reasonable suspicion that documents are on the premises.

**Mr Stewart**—It is correct to say that a judicial officer does need to satisfy themselves, too, as to whether ASIC could obtain the document using one of their other powers. But that is not a practical—

**Senator BUSHBY**—In what sense? If a judicial officer was confident that they could under an order to produce documents—

**Mr Stewart**—Because it falls within their powers. ASIC—

**Senator BUSHBY**—Would they then say that they do not need the search warrant?

**Mr Stewart**—No, not at all.

**Senator BUSHBY**—They would say that because they do have that power the search warrant is—

**Mr Stewart**—Correct. And they cannot stop it, even if they think of using one of these other powers. Or if they are thinking: has a criminal offence been committed? Or if they are thinking: is it appropriate that some property, business premises or otherwise gets raided at 6 o'clock in the morning and we have got officers there all day searching through everything. They might have all of those concerns, but they are just irrelevant. Is there a document that is relevant to an ASIC process on that premises? And I am a lawyer and I know that that is not a proper use of our judiciary—with respect.

**Senator BUSHBY**—I asked Treasury this morning about what a judicial officer would look at when making such a decision. They were of the opinion—but I do not think the people sitting in front of us were lawyers, but I might be wrong on that—that there was a body of case law, surrounding the issue of search warrants, that would apply to the extent that legislation does not exclude it. Is that the case?

**Mr Stewart**—Sorry, I missed the point.

**Senator BUSHBY**—There is case law that would actually help guide a judicial officer in terms of—

**Mr Stewart**—But that case law has been developed in the context of a judicial officer having to determine if there is a reasonable suspicion of the commission of an offence, or the commission of an offence. No, it will not, because the only [*inaudible*] that documents might be on that premises.

**Senator BUSHBY**—Is that because of the wording of this or the lack of direction—

**Mr Stewart**—No, that is because of the wording of this proposed section.

**Senator BUSHBY**—It limits the ability of a judicial officer to look at it in a broader context of what sorts of things—

**Mr Stewart**—That is what New South Wales tried with their proceeds of crime act last year. The case I refer to is the International Finance Trust Company case. It is not well known, but in essence what the High Court tried to do there was that, as long as the regulator was satisfied there was the commission of an offence and the regulator was satisfied that there were proceeds of crime, the Supreme Court was simply asked to rubber stamp and therefore you can seize those proceeds of crime. And in fact they were seized. I am trying to draw an analogy with that here. It is not exactly the same, and in the circumstances there the Supreme Court did not even have a discretion. Here the court has got a discretion but I say that the discretion is so feeble because the issue of there being a reasonable suspicion that the document is on your premises is so easy to satisfy.

**Senator BUSHBY**—Treasury also said that the issue of search warrants in this case includes all protections and some new ones—but all the protections that currently for search warrants. Would you like to respond to that?

**Mr Stewart**—I cannot respond to that because by this provision you have removed the requirement for a judicial officer to determine whether there has been any criminality or any suspicion of a crime. Here it is: is there a document on a premises?

**Mr Blanks**—I might add to that. One of the very important protections in relation to [inaudible] is the existence of a supervisory body external to the agency that obtains the warrant and the publication of detailed statistics about the number of warrants issued and executed, the number of prosecutions that result from the execution of warrants and the number of convictions that result. You will see other agencies that have coercive powers are subject to those sorts of supervisory rules, and there is nothing here that suggests that any of those sort of supervisory protections are going to be in place.

**Senator BUSHBY**—I agree that I cannot find anything that suggests that it will be. It is something we might ask ASIC about when they appear before us later.

Coming back to your technical point about section 28, Treasury also said—and I wrote it down verbatim— that ‘a search warrant can only be used where section 28 purposes are satisfied.’ They actually said that.

**Mr Stewart**—Then there should be no difficulty. We can simply add in a sentence to amend the provision to make that very clear.

**Senator BUSHBY**—But it still does not solve the bigger problem.

**Mr Stewart**—It does not solve the bigger problem because section 26 says it does not apply to section 35.

**Senator BUSHBY**—On the use of telecommunications interception—this was probably raised more by Mr Blanch—I asked Treasury this morning to outline the list of what currently constitutes serious crime from the perspective of enabling telecommunications interception. I have also asked them to say what was originally in that when it was first put together and what has been added since—so I can track that to see how it has gone.

They are not actually giving ASIC the power to conduct telephone interceptions; by adding the offences to the list in the communications Act, that enables ASIC to apply for the relevant interception agencies to go off and do that for them. They are saying that they are going to have to convince them that there is a prima facie case.

They are going to have to go through a whole bunch of hoops before the interception agency would agree to do it in the first place. That agency then has to get a judicial officer to agree to it as well. So to some extent, that sounded reasonable. I am interested in your views on that.

**Mr Blanks**—In relation to telecommunications deception, we do have the benefit of very extensive reporting manually of how the powers are exercised.

**Senator BUSHBY**—They also made that point, which I thought sounded good.

**Mr Blanks**—Yes. That is important and you can see that there are about 15 or 20 agencies which have the power nationally, mostly state agencies and a number of Commonwealth agencies, and there are statistics about the number of prosecutions that result and the number of convictions that result from those prosecutions.

So from the reporting point of view the infrastructure is in place. What we are concerned about from a civil liberties point of view is that what are essentially powers for the most serious types of crime through function creep—

**Senator BUSHBY**—Which is why I asked that question.

**Mr Blanks**—Yes—through function creep are becoming available to more and more crimes. Of course market manipulation can be a very serious crime. There have been instances around the world where rogue traders have lost billions of dollars and it is not just the bank that suffers—it is the whole community that suffers when these very serious offences occur. The question is: are these very intrusive powers to be subject to the sort of function creep? In this particular case, to get there we first of all need recognition that the sentences which are currently available for these offences do not bring them within the level of seriousness for which these powers are available. I think you would be hard-pressed to find any case where the court has imposed a maximum sentence on an offender under these offences and complained that the sentencing options are inadequate.

**Senator BUSHBY**—So really the issues with respect to this are more to do with an objective analysis of whether these crimes should fall within those powers, rather than an analysis of whether the process involved is sufficient?

**Mr Blanks**—Yes.

**Senator BUSHBY**—Because it appears that the process is certainly a lot better and would apply to the search warrant case in terms of ensuring that those powers are exercised in a transparent manner and that appropriate checks and balances are in place before they are used, whereas a search warrant is another matter all together, as we have discussed with Mr Stewart.

**Dr Biddy**—It is a question of reporting because if the other agencies are reporting the interceptions under their own annual report, then the specific ones for ASIC are not there—that is a different category.

**Senator BUSHBY**—Is that currently happening with all agencies in terms of telecommunications interception?

**Dr Biddy**—To my knowledge, yes. It is a very extensive—even ASIO has to report.

**Senator BUSHBY**—Treasury indicated that the interception agencies had to report. If ASIC was engaging interception agencies to do these sorts of things, presumably they would have to report.

**Dr Biddy**—But the statistic would be lost in their own general—

**Senator BUSHBY**—It would be lost. I did make that point.

**Mr Blanks**—Yes. It is actually a very, very large number of agencies. It is a page and a bit on the list here, in one of the tables of agencies that have got these powers. If ASIC were to be added to it, it would be good.

ASIC already is here for some type of power. It is one of the agencies listed.

**Senator BUSHBY**—It is probably worth understanding what that is at this point.

**Mr Blanks**—Yes. It is chapter 6 of the report. Sorry, I have not read the whole of this report in careful detail.

**Senator BUSHBY**—Too many things to read.

**Mr Blanks**—Indeed.

**Senator BUSHBY**—With telecommunications intercepts, the transparency and process are generally there.

No doubt you can always tweak that and make it better. There are two issues. One is the issue of the degree to which ASIC is making use of reporting, and the second is the question of the seriousness of these crimes compared with those that are currently in there and whether those crimes warrant inclusion in such a dramatic action that can be taken.

**Mr Blanks**—That is right. Just to emphasise the point, the sorts of offences that are here are murder, people-smuggling, organised crime, serious drug offences, terrorism and so on. One would expect the sentences that are imposed after conviction of those sorts of offences to be lengthy sentences, regardless of the increase in sentences. Even accepting a reflection that market manipulation offences ought to be perceived more seriously than they have been in the past, I doubt that the level of sentencing is going to, in practice, be commensurate with the level of sentencing for the current categories of serious offences that are covered.

**Senator BUSHBY**—That is probably all the questions I have.

**Senator CAMERON**—Firstly, can I congratulate the Rule of Law Institute for the interest that you showed in the Australian Building and Construction Commission.

**Mr Stewart**—Absolutely. Thank you for that.

**Senator CAMERON**—Can I take you to the explanatory memorandum, chapter 4, page 17. The explanatory memorandum seeks to contextualise the amendments in this part. It says:

4.2 Insider trading and market manipulation offences cause serious harm to the fair and efficient functioning of Australia's financial markets.

I think you have agreed with that position.

**Mr Stewart**—I certainly do not want to quibble with that.

**Senator CAMERON**—It goes on:

4.3 The offences related to market misconduct have been identified as offences which should be included in the definition of 'serious offence' in section 5D of the TIA Act.

That is the Telecommunications (Interception and Access) Act. You have got a difference on that point, have you?

**Mr Stewart**—I really have not addressed the telecommunications. I have left that to Civil Liberties. I have tried just to stay with search warrants. Stephen, did you have a comment on that?

**Mr Blanks**—We do not necessarily quibble with the comment 'the current level of criminal penalty imposed has been identified as insufficient'. But we make the point that it will be a rare case within these categories of cases that attracts the maximum penalty. There is a run-of-the-mill sort of case in these categories, and the run-of-the-mill sorts of cases do not attract anything like the maximum penalty under the current regime and are not going to attract the maximum penalty under the new penalties.

**Senator CAMERON**—That is a legal term I am not aware of: run-of-the-mill cases! I am not a lawyer, I am a fitter, but I am not sure about that one.

**Mr Blanks**—There is a typical pattern of market manipulation or insider-trading sorts of cases, all of which are very bad but which occur not infrequently. They do not involve billions of dollars or tens of millions of dollars or even millions of dollars. The people are caught and prosecuted; the cases just go through the courts and do not attract any headlines. They will get a piece in the *Financial Review*, but that is about it.

**Senator CAMERON**—But some of these offences do involve millions or billions of dollars, some do cause businesses to go bust and they do cause huge trauma for individuals who are caught up.

**Mr Blanks**—That is absolutely right, Senator, I absolutely agree with that, but they are the exceptional case. It is a category of offences which cover a wide range of social culpability. The big corporate collapses that we have seen over the years, where there have been issues of market manipulation and dishonesty and so on, are very serious cases and the people who are responsible for those ought to get very serious sentences when prosecuted. But those are not every case that is prosecuted under the sections that we are talking about.

There is a level of, as I say, run-of-the-mill case which is not regarded as serious—does not attract those sorts of penalties.

**Senator CAMERON**—Okay. At 4.4 it says:

Insider trading and other market offences are difficult to investigate as these offences by their very nature involve complex networks of people, technological sophistication and avoidance of paper and traceable communications. In addition, the transactions often occur in real time, meaning that telephone conversations are often the only evidence of the offence.

Does the institute have any difference with that analysis in 4.4?

**Mr Blanks**—For the Council of Civil Liberties, the observation I would make in relation to that is that the interception power is not going to help because until you have something to investigate you are not going to be intercepting telecommunications. Certainly, all telecommunications with market participants are recorded, and that is a legal requirement. All telephone calls and all other communications are recorded. Very extensive record-keeping is required by market participants.

To the extent that any of the illegal activities go on outside the scope of what is required to be recorded, other than routine telecommunications interception, where there is no suspicion of any offence, I do not see how telecommunications interception can catch the sorts of things that are being talked about in that paragraph. And I hope we are not at the stage yet where parliament is going to sanction routine interception of telecommunications just because somebody thinks you might do something—apart from ASIO, of course.

**Senator CAMERON**—Are you saying that this bill meets that definition that you have just outlined?

**Mr Blanks**—No. This bill would not assist ASIC on iota in dealing with the problem outlined in paragraph 4.4.

**Senator CAMERON**—On page 3 of your submission, the Rule of Law Institute submission—

**Mr Blanks**—That is Malcolm's.

**Senator CAMERON**—Mr Stewart, you have outlined on page 3 a number of dot points. You say: The use of coercive powers needs to be accompanied by demonstrated capability improvement and performance monitoring— and you have put four points there. You then go on to say: In this regard it would be beneficial to know the answers to the following questions:— and there are three dot points laid out there. Do you think the act as it is being proposed by the bill does not meet these points that you have laid out there?

**Mr Stewart**—It does not. I suppose it gets back to the accountability issue that I was talking about earlier.

We have now discovered the number of times coercive powers have been executed over the past three years and we know that does not include search warrants and we know that does not include phone taps. We are still not aware on that front of how many there are. What this is also getting at is: do you have a policy in place given that it is such a wide discretion? Do you have guidelines? Do you have policies? The tax office, for example, have very extensive policies and guidelines in relation to when they go about issuing things. They always have an exception in dramatic cases, but that is what that is getting at in terms of trying to limit the discretion from an administrative basis. A search warrant is very invasive; it is the most serious type of coercive power there is. I would be very keen for that not to be left to the regulator's discretion but for parliament, if it is going to do that, to set out some guidelines. In the circumstances here, I have serious concerns about the judicial aspect of it—of the court being used, in this case.

**Senator CAMERON**—You say the issue should be referred to the Australian Law Reform Commission.

What is the time frame for that?

**Mr Stewart**—It is difficult to know because at the moment the Law Reform Commission is having some difficulties of its own, as I understand it, regarding funding and support. I do not want to go down that line, but our position certainly is that there needs to be an independent review of regulatory powers across the board— things like the ABCC, the ATO, the CCC and the lot.

**Senator CAMERON**—You know how to get me on side, don't you?

**Mr Stewart**—I know that might be a correct statement, however it is very genuine. I have been in contact with officers from the CFMEU on this and we have seen the Greens on this, and everyone else we can think of because we do not agree with it. A lot of things we do agree on. We have representations concerning Stern Hu, anti-people smuggling, whistleblowing, the Administrative Review Council and the New South Wales OH&S—we think there should be a national body for that; the reversal of onus in New South Wales is ridiculous. In the *AFR* some two weeks ago there was a comment by the commissioner saying that he would be willing to discuss our concerns with the Rule of Law Institute. We are available to discuss those at any time. Unfortunately I am tied up to 11 November, but on 12 November onwards I would be delighted to sit down with anyone from ASIC and discuss our concerns with them further, if they think that is appropriate.

**CHAIR**—Thank you, to the Rule of Law Institute and the NSW Council for Civil Liberties for coming in this afternoon.