

<p>1 2 (2.00 pm) 3 MS PATRY HOSKINS: Good afternoon, Mr Richards, Dr Bowe. 4 Just before we move away from the discussion we've just 5 been having about the Russell Brand/Jonathan Ross 6 complaint, can I raise with you something that was said 7 yesterday in evidence about the time in which it takes 8 to deal with complaints. 9 It was said yesterday by Lord Grade that when the 10 complaint came in to them at the BBC, the matter was 11 resolved very quickly. They were able to deal with the 12 complaint in the course of a week or ten days. 13 But of course the same complaint to Ofcom, he said, 14 would take much longer to resolve, and that was 15 a disadvantage of statutory regulation in his view. Do 16 you have any comment to make about whether or not that's 17 a disadvantage of statutory regulation? 18 MR RICHARDS: Perhaps one or two observations. 19 I think the first is that we have a very, very wide 20 range of complaints, and some of them are dealt with 21 very quickly. Those are the easy ones. When 22 a complaint takes a longer period to resolve, it's 23 typically more complex and requires more consideration. 24 I think the second point is that you would expect 25 the organisation responsible, the governance of the</p> <p style="text-align: center;">Page 1</p>	<p>1 I think can be and are dealt with very swiftly because 2 they are relatively straightforward. 3 LORD JUSTICE LEVESON: Presumably in a case such as that, 4 you will also be thinking about the wider ramifications 5 beyond the specifics of Mr Brand and Mr Ross. 6 MR RICHARDS: Absolutely. And as we mentioned before lunch 7 that was a case which -- through which we used our 8 exceptional circumstances. There was no complainant. 9 And therefore it did raise wider implications, and 10 therefore I don't think I would want to remotely 11 apologise for taking due consideration to come to 12 a conclusion. 13 LORD JUSTICE LEVESON: No, I don't think it was a question 14 of requiring an apology. I think the point that Lord 15 Grade was making was rather different. He was saying 16 "As a self-regulatory body we can act extremely quickly 17 and get it done in short order, whereas statutory 18 regulators have compliance procedures and it's much more 19 formalistic and all terrified about judicial review, 20 et cetera, et cetera". I possibly don't do him full 21 justice. 22 MR RICHARDS: There's clearly an element of truth. If you 23 are subject to judicial review in that way, then you 24 need to take the right amount of care and so on. 25 I think the BBC Trust were making the other decision in</p> <p style="text-align: center;">Page 3</p>
<p>1 organisation responsible for a situation of that kind to 2 act swiftly, because there are editorial compliance 3 issues, there are managerial responsibility issues and 4 things of that nature. 5 I would always expect any of our licensees or people 6 we regulate to make their own judgment about something 7 that happened under their watch in their organisation, 8 and you'd expect them to do that reasonably quickly. 9 We in this regard are a statutory regulator, so we, 10 of course, have to consider due process, we have to make 11 sure representation is taken, we have to make sure that 12 in exercising our powers we do so properly. So in 13 a complex and difficult case, that is likely to take 14 longer. 15 I think the other peculiarity of that particular 16 case is that I think I recall that we knew the BBC were 17 doing their own investigation -- 18 DR BOWE: Yeah, we did. 19 MR RICHARDS: -- we knew the Trust were looking at it, so we 20 bided our time because it would clearly be relevant to 21 any finding, particularly in the context of any possible 22 sanction, as to what response the BBC themselves had 23 taken. 24 So I wouldn't myself read too much into that, and 25 I would emphasise that sometimes we have cases that</p> <p style="text-align: center;">Page 2</p>	<p>1 the Ross/Brand case, and they are a statutory body as 2 well. 3 LORD JUSTICE LEVESON: That's a charter. 4 MR RICHARDS: Slightly different. So it is true to say that 5 we have to exercise our power carefully and with due 6 process. It's probably true in a perfectly formed, 7 well-functioning, self-regulatory environment that 8 decisions potentially can be made quicker, and that's 9 probably potentially the case, but I think it's much 10 more important in the long term that whether it's 11 self-regulatory, co-regulatory or statutory regulation, 12 it's much more important that there is respect for the 13 decisions at the end of the process. What matters far 14 more is that the decision is the right one and has been 15 taken in the right way, rather than it has been taken 16 quickly. 17 MS PATRY HOSKINS: Is that even true from the point of view 18 of a complainant? 19 MR RICHARDS: I think a complainant is far more concerned to 20 have the right answer, or have a fair process, and then 21 in their mind ideally the right answer, but certainly 22 a fair process. I think complainants would be far more 23 concerned about that than the speed of the answer, 24 generally speaking. 25 Q. The second point I wanted to raise before I moved on was</p> <p style="text-align: center;">Page 4</p>

<p>1 on the Broadcasting Code. You'll remember that the 2 Chairman asked you a few questions about who has input 3 into the code. 4 MR RICHARDS: Yes. 5 Q. And you pointed out that industry figures would have 6 input in the way that you explained. But I wanted to 7 understand whether there's any form of public 8 consultation or any other procedure that would involve 9 the public. 10 MR RICHARDS: Yes, absolutely. So the Broadcasting Code is 11 very similar to anything else we do in that respect. We 12 would consult on any revision to the code and we would 13 expect to receive responses and input on that from 14 practitioners but also literally members of the public, 15 bodies representing members of the public, bodies 16 purporting to represent, bodies of opinion of the 17 members of the public and so on, and typically on the 18 code we would have a very wide-spread range, a diverse 19 range of consultation responses, but we would always 20 consult widely for a revision to the code, that's right. 21 Q. That's helpful. I'm going to move on now to the 22 adjudication of complaints, please, and the procedures 23 that are in place. The procedures for considering and 24 adjudicating on fairness and privacy complaints are set 25 out in a document headed "Procedures for the Page 5</p>	<p>1 the broadcaster, so what we call a broadcaster-first 2 approach, and we encourage people to take the complaint 3 and seek immediate redress for their concern or 4 explanation from the broadcaster. The reason for that 5 is, in a sense, linked to the earlier question, which 6 is: if that does offer resolution, then that is very 7 speedy and very efficient, so that's a preferable route, 8 and that's what lies behind that. 9 Q. Okay. So they're encouraged to follow the broadcaster's 10 own complaints procedure, but if they don't, are they in 11 any way precluded from coming to you? 12 MR RICHARDS: No. 13 Q. Moving back now to when you were considering 14 a complaint, I'm going to summarise again: the complaint 15 needs to be made within a reasonable time and generally 16 speaking that means within 20 working days after the 17 broadcast of a programme, although it can be extended. 18 MR RICHARDS: Mm-hm. 19 Q. You decide whether or not at that stage to entertain the 20 complaint. If it is entertained, then representations 21 are invited from the broadcaster. You then come to 22 a preliminary view and there's then publication of an 23 adjudication. 24 I know I've summarised it in very basic terms and 25 probably missed some stages out, but is that a fair Page 7</p>
<p>1 consideration and adjudication of fairness and privacy 2 complaints". It's in tab 18 in file 2. It's 3 a different process from other content complaints, as 4 far as I understand. I have given you the reference so 5 we can turn it up and refer to it if necessary, but 6 again I'm going to summarise the procedures in the 7 interests of saving time. Tab 18. It's 05144. 8 MR RICHARDS: Yes. 9 Q. In essence, there'll be an investigation and it will -- 10 I'm summarising in very general terms and then I'll come 11 onto the specifics. In general, there will be an 12 investigation, it will look into whether there is an 13 issue to be considered under the code and if so whether 14 the code has been breached. 15 Can I start from this point: complainants are 16 firstly encouraged to approach the broadcaster directly 17 before complaining to Ofcom. 18 MR RICHARDS: Mm-hm. 19 Q. We can see that from paragraph 1.7 of the procedures 20 document. 21 MR RICHARDS: Yes. 22 Q. Do you provide any kind of assistance with that stage? 23 Is there any mediation service or are they simply 24 referred to the broadcaster? 25 MR RICHARDS: I think our general approach is to refer to Page 6</p>	<p>1 assessment of the process? 2 MR RICHARDS: It is and there are occasionally cases where 3 the 20 days is extended. We had a particularly 4 celebrated one during the course of the last year or 5 two. So there are circumstances in which that 20 days 6 is moved. 7 Q. That's absolutely clear from 1.10 of the document. It 8 actually explains that -- yes, ordinarily you won't 9 accept a complaint after that, but there are 10 circumstances in which the time can be extended? 11 MR RICHARDS: That's right, and that does happen. 12 Q. What I want to understand is a bit more about the 13 process. Let me ask you a series of questions, the 14 first being: to what extent can you require the 15 production of evidence by broadcasters? I mean, require 16 it, say, "Look, provide us with X, Y and Z material"? 17 MR RICHARDS: Yes, we are absolutely able to do that and 18 there is an obligation on broadcasters to keep records. 19 So we would -- I can -- I'm not going to quote the exact 20 obligation, but we can provide that to the Inquiry, but 21 we expect and there is an obligation for broadcasters to 22 provide such evidence, that's right. 23 Q. Right. And then going back to the timeliness point, do 24 you consider yourself under an obligation to adjudicate 25 quickly and if so, how do you ensure that all the Page 8</p>

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<p>1 necessary evidence and issues are considered in an 2 effective way?</p> <p>3 MR RICHARDS: I think this is again an echo of what I said 4 in answer to one of the earlier questions. It often 5 depends upon the complexity of the case.</p> <p>6 Q. Indeed.</p> <p>7 MR RICHARDS: So we have internal measures to ensure that we 8 are not being lax or slow or inefficient, but that would 9 be an average or for a typical case, so we test 10 ourselves against that efficiency measure, but within 11 that there will always be fairly straightforward cases 12 which come well within the time period, and complex 13 cases which typically take longer, and that is to do 14 with the body of evidence you need to gather, the time 15 it takes to assess that evidence, take representations 16 and so on and so forth.</p> <p>17 So I think it's quite closely linked to the 18 complexity of the case.</p> <p>19 Q. All right. Still sticking with procedures when you're 20 considering fairness and privacy complaints, the 21 document does allow for an oral hearing to be held. Is 22 that something that happens on a regular basis?</p> <p>23 MR RICHARDS: It doesn't happen on a regular basis. It has 24 happened and it is important to say that the opportunity 25 is there. Typically we don't find it necessary, and</p> <p style="text-align: center;">Page 9</p>	<p>1 MR RICHARDS: No. I think one of the key parts of our whole 2 approach is what I would call -- I would say it is 3 essentially free at the point of use. I regard that as 4 something that is extremely important here. The 5 threshold of being able to complain and to pursue 6 a complaint is very low, and I think we regard that as 7 at the heart of making sure that we're an effective 8 organisation, and it's simply about accessibility. The 9 right of complaint is not really a right if it costs 10 a significant amount of money to exercise it, so we try 11 and minimise any cost and the core activity is free at 12 the point of use.</p> <p>13 Q. I understand. Can I move on to statutory sanctions. As 14 I understand it, sanctions apply equally to standards 15 and fairness cases. Again I'll attempt to summarise it 16 so we're not going through lots of pages of legislation. 17 In the event of the breach of a condition of a 18 licence you have the power to impose statutory sanctions 19 on the broadcaster under provisions which are contained 20 by and large in the Broadcasting Acts?</p> <p>21 MR RICHARDS: Yes.</p> <p>22 Q. Can we make it absolutely clear, just because there's 23 a finding by Ofcom that there's been a breach of the 24 Broadcasting Code following a complaint doesn't 25 necessarily mean that there will be a sanction, there</p> <p style="text-align: center;">Page 11</p>
<p>1 I would say that is predominantly the case, so we -- 2 it's not a common occurrence, but the opportunity is 3 there.</p> <p>4 Q. Right. If an oral hearing were to be held, is it very 5 legalistic, are lawyers invited, do lawyers represent 6 the parties?</p> <p>7 MR RICHARDS: I think they can do. I think people have that 8 opportunity. What you mainly want to get to, of course, 9 is an accurate understanding of the case, the concern 10 and the circumstances, so I wouldn't want to exaggerate 11 the legal nature of it. It's more about really 12 understanding the source of the concern and the nature 13 of the circumstances of the complainant. And then also, 14 of course, the broadcaster's side of the story. It's 15 very important to take both sides, both perspectives, to 16 make a judgment in this kind of area.</p> <p>17 Q. So if I were a complainant on a fairness or privacy 18 complaint, I would put in my complaint to you, I could 19 request an oral hearing -- if it was entertained then 20 I could put in a request for an oral hearing, I could 21 attend, I could be represented if I want to, the 22 broadcaster could also be represented presumably in 23 those circumstances as well?</p> <p>24 MR RICHARDS: Yes.</p> <p>25 Q. And is there any cost jurisdiction?</p> <p style="text-align: center;">Page 10</p>	<p>1 can just be a finding there's been a breach?</p> <p>2 MR RICHARDS: Absolutely. In fact, I don't have the 3 statistics to hand, but a very significant volume, 4 a very significant volume, are simply breaches. And 5 that is about not seeking to use the sanction powers 6 unnecessarily or gratuitously. It is quite often the 7 case that sometimes an error of judgment has been made, 8 good compliance was in place and -- but in our view it's 9 fallen the wrong side of the line and we need to make 10 that clear, and broadcasters learn from that and make 11 better judgments, we hope, next time. But in many, many 12 cases we do not consider a sanction at all; it's just 13 clarity that that was a breach and we leave it there.</p> <p>14 Q. All right. We'll come on to consider the situations in 15 which you would consider imposing a sanction, and in 16 that respect can we turn to the next tab, tab 19, 17 "Procedures for the consideration of statutory sanctions 18 in breaches of broadcast licences". I congratulate you 19 there on your use of plain English.</p> <p>20 It's obviously a document which sets out the various 21 different procedures, and if we look, please, firstly at 22 paragraph 1.10, which is on the fourth page, I think 23 this reflects what you've just been saying, Mr Richards: 24 "The imposition of a sanction against a broadcaster 25 is a serious matter. Ofcom may, following due process,</p> <p style="text-align: center;">Page 12</p>

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<p>1 impose a sanction if it considers that a broadcaster has 2 seriously, deliberately, repeatedly or recklessly 3 breached the relevant requirement." 4 So that's the threshold, am I right? 5 MR RICHARDS: Yes. 6 Q. You have various sanctions available to you, and I will 7 again attempt to summarise them in this way: you can 8 issue a direction not to repeat a programme or advert, 9 you can issue a direction to broadcast a correction or 10 a statement of your findings, you can impose a financial 11 penalty, you can shorten or suspend a licence (that's 12 only applicable in certain cases) and/or you can revoke 13 a licence again. That's not applicable to all channels, 14 for example the BBC would be excluded from that, but 15 have I accurately summarised the sanctions available? 16 MR RICHARDS: Yes, you have. 17 Q. One of those is obviously a financial penalty, and I'll 18 come on to explore with you some of the examples of 19 financial penalties, but in some cases they can be 20 considerable. We will come on to see penalties imposed 21 of hundreds of thousands of pounds. To what extent do 22 you consider the existence of a financial penalty to 23 have a chilling effect on your broadcasters? 24 MR RICHARDS: A chilling effect on the broadcasters? 25 Q. Yes, a chilling effect is one of the buzz words -- buzz</p> <p style="text-align: center;">Page 13</p>	<p>1 having any alleged impact on the conduct of 2 investigative journalism. 3 LORD JUSTICE LEVESON: Of legitimate journalism. 4 DR BOWE: Yes. 5 MR RICHARDS: There is no reason at all why the presence of 6 a financial penalty should deter good, effective 7 investigative journalism, because good, effective 8 journalism stays within the code and is therefore not 9 subject to it, and indeed there are plenty of examples 10 of broadcast journalism, broadcast investigative 11 journalism, which has been both controversial, highly 12 challenging, which has been done entirely within the 13 Broadcasting Code. So the notion that it is simply not 14 possible or somehow there is no investigative journalism 15 in broadcasting because of the presence of the code or 16 the possibility of a financial deterrent simply, to me, 17 is not supported by the evidence. 18 That is my perspective, that is a perspective borne 19 from my experience here, it's a perspective borne from 20 talking to dozens of journalists in broadcasting who 21 I know, and you will have taken your own evidence from 22 practitioners. 23 LORD JUSTICE LEVESON: To me it doesn't make sense. If you 24 can do the job properly, then that's what you do. 25 DR BOWE: Yes.</p> <p style="text-align: center;">Page 15</p>
<p>1 phrases? 2 LORD JUSTICE LEVESON: Yes, but I hope it would have. 3 MR RICHARDS: Well, I would distinguish between the chilling 4 effect on bad behaviour contrary to the code on the 5 broadcasters, where I think it is extremely effective, 6 and any chilling effect on, for example, investigative 7 journalism, which I am not at all persuaded that it has. 8 MS PATRY HOSKINS: How can you tell that there's 9 a difference? 10 MR RICHARDS: I think the difference is in our own 11 experience over many years and indeed our predecessors 12 in relation to the effect on the effectiveness of 13 compliance, the attitude and the response of 14 broadcasters when there is a threat of or when there is 15 an actual financial sanction. It is -- it focuses the 16 mind. It has significant reputational impact, it 17 obviously has an economic consequence and it is a very 18 effective deterrent. Very effective deterrent. But the 19 effect it is having is on the effectiveness of 20 compliance, the procedures, the focus withing the 21 broadcaster, both individual journalists or producers 22 and higher up the editorial chain on ensuring compliance 23 with the code. 24 I think that is quite different, and I'm happy to 25 explore this in more depth, from a financial penalty</p> <p style="text-align: center;">Page 14</p>	<p>1 LORD JUSTICE LEVESON: If you have to break the rules, then 2 you're breaking the rules. 3 MR RICHARDS: Right. I think that's right. 4 DR BOWE: If you want to read a good account of how this 5 looks to a current broadcast journalist, I'd suggest you 6 might like to have a look at Jon Snow's recent Cudlipp 7 lecture, which is on precisely this point, where he 8 vigorously challenges the proposition that the kind of 9 statutory regulation that he works within has a chilling 10 effect on his journalism. 11 LORD JUSTICE LEVESON: Yes, that's the slightly different 12 question, isn't it? That's going to the statutory 13 self-regulation issue, rather than whether it's 14 appropriate to impose a financial penalty. 15 DR BOWE: Well, it's connected, though, I think, because 16 I think a lot of the comment we have heard in recent 17 weeks has slid very quickly from statutory to chilling, 18 as it were, in the way that this topic was first 19 introduced. 20 LORD JUSTICE LEVESON: I understand the point that you're 21 making. 22 MS PATRY HOSKINS: Perhaps another way of looking at it 23 would be this, would be to consider the caselaw, if 24 I can put it that way, of decisions that you have -- 25 adjudications that you've handed down over the years</p> <p style="text-align: center;">Page 16</p>

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<p>1 with a view to seeing whether financial penalties have 2 ever been imposed in situations where all that was 3 really happening was good investigative journalism. Are 4 you aware of any case in which a financial penalty has 5 been imposed where the breach was as a result of some 6 kind of true investigative journalism? 7 MR RICHARDS: I'm struggling to recall one. I don't want -- 8 there is a difference. I don't want to convey the idea 9 that we think the broadcast environment is identical to 10 all other environments like the press and so on. There 11 is a difference. And I think it's clear that people in 12 the press are able to, shall I say, take more risks, 13 might be the way of putting it. But what I think 14 I would challenge and hopefully have done is the notion 15 that investigative journalism, robust, effective 16 investigative journalism is somehow inconsistent with 17 the regulatory model that we have, because I simply do 18 not think the facts support that. 19 DR BOWE: But on your precise question of instances of 20 financial penalties, I think we're going to have to 21 provide information to you on where there have been 22 financial penalties and in what context. You will see 23 from the fact that we are both struggling to think of 24 a case where there has been a financial penalty in 25 respect of some investigative broadcast journalism,</p> <p style="text-align: center;">Page 17</p>	<p>1 sure that I've summarised them correctly? 2 MR RICHARDS: That's right. 3 Q. And you have penalty guidelines which set out the 4 procedure for assessing an appropriate penalty in the 5 event of an unfairness finding and again all those 6 factors will be taken into account. 7 MR RICHARDS: Yes. 8 Q. I'm now going to ask you very briefly about some 9 adjudications of complaints in practice -- 10 LORD JUSTICE LEVESON: Before you come to practice, I want 11 to ask a different question. 12 MS PATRY HOSKINS: Of course. 13 LORD JUSTICE LEVESON: How much more significance is 14 attached to the imposition of a financial penalty over 15 and above a direction to broadcast a correction? My 16 question is linked -- I'm sure you see the parallel. 17 DR BOWE: Yes. 18 LORD JUSTICE LEVESON: The Press Complaints Commission 19 require a publication of an apology, or some redress, 20 but can't impose a financial penalty; you can do both. 21 I rather gather, if only looking at the bullet points 22 and the way they're set out, you see the issue of 23 a direction as coming below the imposition of 24 a financial penalty, so you might very well issue 25 a direction without imposing a financial penalty.</p> <p style="text-align: center;">Page 19</p>
<p>1 there's nothing that springs straight away to mind, but 2 it might exist. 3 MR RICHARDS: The only one that suddenly springs to mind is 4 the Carlton TV case to do with the drug wars, as 5 I recall, many, many, many years ago. It predates Ofcom 6 by many years, but that's literally the only one I can 7 at the moment recall. 8 Q. I'm sure you can provide answers. If there was an 9 example, we'd be grateful to receive it. 10 Again, I just want to wrap up one other point, 11 that's the extent to which Ofcom seeks to impose 12 penalties that are proportionate to the broadcaster's 13 revenue and also to the severity of the offence and also 14 to the financial gain that's attributable to the breach. 15 Can I summarise this very briefly without turning up the 16 rather complex provisions: in most cases, the maximum 17 financial penalty for commercial TV or radio licensees 18 is £250,000 or 5 per cent of the broadcaster's 19 qualifying revenue, whichever is the greater? 20 MR RICHARDS: Yes. 21 Q. And in terms of licensed public service broadcasters 22 it's very slightly different. For the BBC, the maximum 23 financial penalty is 250,000? 24 MR RICHARDS: That's right. 25 Q. These are very complex provisions. I just want to make</p> <p style="text-align: center;">Page 18</p>	<p>1 MR RICHARDS: Yes. 2 LORD JUSTICE LEVESON: But would I be right in saying you 3 wouldn't issue a financial penalty without also giving 4 a direction? 5 MR RICHARDS: I think that's right. It depends upon the 6 nature of the case, but generally speaking that is 7 right. 8 I think the other point to make in drawing the 9 parallels that you're inviting us to do, the other key 10 aspect of our direction in relation to corrections or 11 statements is that we determine its form and its 12 location and its visibility. And that is 13 non-negotiable. 14 LORD JUSTICE LEVESON: I think that's very interesting. And 15 more than one witness has expressed the view that the 16 PCC could do rather better at this, or whatever comes 17 out of the review of regulation of the press. But I'm 18 just keen to get your view upon the additional value of 19 the financial sanction. 20 MR RICHARDS: I think the -- if you affect the bottom line, 21 that always makes a difference. I think it's probably 22 broader than that, though. If you require a correction 23 to be broadcast, what we would typically do is require 24 that correction or our determination to be broadcast at 25 a similar time, with similar visibility, such that the</p> <p style="text-align: center;">Page 20</p>

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<p>1 people who would have been watching the original 2 programme will also see it. So, for example, if the 3 programme was a current affairs programme that went out 4 at 9 o'clock on one of the main channels, which secure 5 millions of viewers at that point in time, we would not 6 even countenance the idea that the correction should be 7 broadcast at 12.30 at night on a remote channel. It 8 would go out at 9 pm, at the same time, in the same 9 slot, ideally in front of the next episode of the same 10 programme. So the 5 million people who watched the 11 programme in which the problem arose are highly likely 12 the same 5 million would see the correction. That's, 13 I think, a key point.</p> <p>14 The advantage of a financial penalty is firstly the 15 bottom line, obviously, but much more importantly, 16 I think is that it tends to have far more significant 17 reputational consequences, so a financial fine is not 18 just a correction which the 5 million people watching 19 that programme would see, but it's something which will 20 then be reported by the rest of the media, and which 21 a broader, far wider range of people would also be aware 22 of, and therefore I think it has an additional deterrent 23 benefit.</p> <p>24 DR BOWE: Also, I think I would add to that the fairly 25 obvious point that the financial penalty is something</p> <p style="text-align: center;">Page 21</p>	<p>1 MR RICHARDS: "Resolved" is actually a very important 2 categorisation. It sounds neutral, but it actually 3 isn't neutral. It's a situation in which the 4 complainant has raised a concern, we are entertaining 5 it, we're considering it, but the broadcaster then 6 offers redress of some sort, offers something, typically 7 redress, to the complainant and the complainant is 8 satisfied with their redress. At that point, the case 9 can be declared resolved and we don't have to issue 10 a judgment.</p> <p>11 But the key to that is that the complainant is 12 satisfied with the redress on offer, so it's again 13 a more efficient and speedy way of a satisfactory 14 resolution.</p> <p>15 Q. But of the 25,000 complaints approximately that you 16 receive, 168 were found to be in breach of the code. 17 Why, in your view, were so few complaints upheld? Does 18 this have anything to say about public expectations 19 compared to Ofcom's application of the code?</p> <p>20 MR RICHARDS: The short answer is I don't think it does, but 21 let me explain why.</p> <p>22 Firstly, we have that number of complaints, but 23 those complaints are often about the same issue, so on 24 some occasions we have a single programme, a single 25 incident on a programme, and that might attract</p> <p style="text-align: center;">Page 23</p>
<p>1 that will probably gain the undivided attention of those 2 who are responsible for the management of the business, 3 as distinct from those who are responsible for the 4 editorial side of the business, and that is another 5 issue to bear in mind in thinking about how one 6 constructs the appropriate sanction.</p> <p>7 LORD JUSTICE LEVESON: That's very useful. Thank you.</p> <p>8 MS PATRY HOSKINS: I was going to ask about the adjudication 9 of complaints in practice. I'll deal firstly with 10 standards cases and then move on to fairness and privacy 11 adjudications.</p> <p>12 Dealing firstly with standards, this is dealt with, 13 Mr Richards, in your statement, but we probably don't 14 need to turn it up. You tell us that in the financial 15 year to 2011, Ofcom received just shy of 25,000 16 complaints about broadcasting standards. If you want to 17 turn this up, it's paragraph 29.2.</p> <p>18 MR RICHARDS: Just to remind myself.</p> <p>19 Q. Of course. File 1, first tab, paragraph 29.2.</p> <p>20 MR RICHARDS: Yes.</p> <p>21 Q. You tell us that 9,031 of those complaints resulted in 22 published decisions, of which 168 cases were found to be 23 in breach of the Broadcasting Code. 36 were resolved. 24 8,827 cases were found to be not in breach.</p> <p>25 My first question is: what does "resolved" mean?</p> <p style="text-align: center;">Page 22</p>	<p>1 thousands of complaints. We have had extreme cases 2 where there have literally been many thousands of 3 complaints for one incident. So the number of 4 complaints is not a reflection of the number of issues.</p> <p>5 Once one is then looking at the issues, there is 6 a very, very wide range of issues. At one end there are 7 serious matters which end up with a breach finding. At 8 the other end, there are frankly very -- relatively 9 trivial matters. The most well-discussed is the one in 10 which a viewer called us to complain about an episode of 11 Tom and Jerry, and they complained that Tom had set fire 12 to Jerry. That, I can understand, may have caused that 13 individual some offence, but under the Broadcasting Code 14 it was relatively easy to dispatch. So some cases are 15 quite easy to rule out.</p> <p>16 So you then gradually distill down to a number of 17 issues which you then fully consider, and then assess 18 them on their merits.</p> <p>19 I would be much more concerned the other way, if we 20 were finding hundreds and hundreds and hundreds of 21 in-breach decisions every year, because all that would 22 tell me is that our code and compliance with the code 23 was ineffective. So I don't think it tells you that we 24 are out of kilter with public expectations. I hope what 25 it tells you is that the public generally speaking knows</p> <p style="text-align: center;">Page 24</p>

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<p>1 where to complain, feels comfortable complaining, does 2 complain. We then look at them on the merits and that 3 because the compliance is generally pretty good, the 4 actual number of cases that are found to be finally in 5 breach are, as a proportion of the total number of 6 complaints, relatively few, but I would be far more 7 concerned the other way around, that we sat here today 8 reporting that 5,000 cases a year we were finding as 9 breaches of the Broadcasting Code. That would be far 10 more troubling.</p> <p>11 LORD JUSTICE LEVESON: I thought from what you just said 12 that I was thinking to ask the question that if you had 13 9,031 complaints, some of them may be multiple 14 complaints, how many issues, but I'm not sure that's 15 right, Mr Richards, because you say that 8,827 cases 16 were found not to be in breach. So unless most of your 17 complaints were multiple complaints that weren't in 18 breach --</p> <p>19 MR RICHARDS: I think that's probably the case.</p> <p>20 DR BOWE: Yes.</p> <p>21 MR RICHARDS: We can do the mathematics --</p> <p>22 LORD JUSTICE LEVESON: I'm just quite interested to know the 23 number of issues, but that would suggest, rather oddly, 24 to my mind, that more complaints not only doesn't mean 25 breach established, it might be quite the reverse.</p> <p style="text-align: center;">Page 25</p>	<p>1 references so that the Chairman may look at them in due 2 course.</p> <p>3 The first of the three standards cases that 4 attracted a statutory sanction was the Teletext Limited 5 case. That's behind tab 27. We don't need to turn it 6 up, but Ofcom in that case imposed a financial penalty 7 of £225,000 in respect of Teletext's failure to provide 8 the public service content of the licence. Can I assume 9 from that that that was something that didn't attract 10 a huge number of complaints, but nevertheless was a very 11 serious finding of breach?</p> <p>12 MR RICHARDS: You can, and it was I think an exemplary 13 deterrent sanction. It was all about being clear that 14 when you have obligations that you've signed up to as 15 part of your licence, we expect you to deliver them.</p> <p>16 Q. The second is the DM Digital Television Limited case. 17 That's behind tab 46. This is a situation where the 18 Advertising Standards Authority referred three breaches 19 of their code, or their broadcasting code, to Ofcom for 20 consideration of a statutory sanction. I'll come on to 21 discuss the authority both with you and with them later 22 on this afternoon, but they referred these three 23 breaches to you in relation to the broadcast of an 24 advert which they had held to be harmful and in breach 25 of the code, and in that case you imposed a financial Page 27</p>
<p>1 DR BOWE: Yes.</p> <p>2 MR RICHARDS: I think that's the case, and to pick up from 3 where we were before lunch, in the Jonathan Ross/ 4 Russell Brand case, there were hardly any complaints at 5 all, and yet it ended up being a very serious in-breach 6 finding with sanctions and so on. So there is 7 absolutely no clear relationship between --</p> <p>8 LORD JUSTICE LEVESON: I understand.</p> <p>9 MR RICHARDS: -- the volume of complaints and the breach 10 finding or indeed the seriousness of the breach finding. 11 I think the Ross/Brand case illuminates that very 12 clearly.</p> <p>13 LORD JUSTICE LEVESON: Of course, a member of the public who 14 complained wouldn't necessarily come within your 15 complainant group, would they?</p> <p>16 MR RICHARDS: For fairness and privacy, that's right, they 17 wouldn't.</p> <p>18 LORD JUSTICE LEVESON: Right.</p> <p>19 MS PATRY HOSKINS: We're on standards cases at the moment.</p> <p>20 LORD JUSTICE LEVESON: I understand, I understand.</p> <p>21 MS PATRY HOSKINS: Perhaps it would be illustrative then to 22 look at the only three standards cases which were 23 considered serious enough for statutory sanctions in the 24 financial year 2010/2011. In the interests of time, I'm 25 not going to turn them up, but I'll give the tab</p> <p style="text-align: center;">Page 26</p>	<p>1 penalty of £17,500 and required the licensee to 2 broadcast a statement of your finding on their service. 3 Again, is that a fair and accurate --</p> <p>4 MR RICHARDS: Yes.</p> <p>5 Q. So again that's not something that's been dealt with 6 because there have been numerous complaints but because 7 you've been referred the complaint by the authority?</p> <p>8 MR RICHARDS: That's right, it was an ASA reference.</p> <p>9 Q. The last one is the Bang Channels and Bang Media case 10 that we've looked at in part, tab 22. In that case you 11 imposed financial penalties of over £150,000, and again 12 that was multiple breaches of the Broadcasting Code and 13 licence conditions, but in that case it was to do with 14 adult chat and daytime programming on those services, 15 and there there had been a wholly inadequate compliance 16 system, as you've already explained, and you also 17 revoked the licences on the basis that they were no 18 longer fit and proper to hold the licences. Again can 19 we take it from that --</p> <p>20 LORD JUSTICE LEVESON: Yes, you concertinaed that a bit I 21 think Miss Patry Hoskins because as I read the decision, 22 you imposed fines for one set of breaches, and while all 23 those breaches were being investigated, they carried on 24 breaching.</p> <p>25 MR RICHARDS: That's exactly right. So there was a separate Page 28</p>

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<p>1 finding.</p> <p>2 MS PATRY HOSKINS: Absolutely right, two separate findings.</p> <p>3 But again not linked to the number of complaints -- the</p> <p>4 seriousness of the penalty is not linked to the number</p> <p>5 of complaints necessarily but linked to how serious the</p> <p>6 breaches were considered to be.</p> <p>7 In the other cases -- so if my maths are right,</p> <p>8 there were another 165 cases where there was held to be</p> <p>9 a breach of the Broadcasting Code. Were sanctions</p> <p>10 imposed in those cases or can you give us a feel for</p> <p>11 whether any sanction at all was imposed in those other</p> <p>12 cases?</p> <p>13 MR RICHARDS: No, most of those would be an in-breach</p> <p>14 finding, as I mentioned earlier, so that would be</p> <p>15 a reasoned decision that is published that is available</p> <p>16 for everybody to read and ideally learn and understand</p> <p>17 from, and we in those cases would not have judged it</p> <p>18 necessary to take or impose a sanction.</p> <p>19 I think by and large that is what we vastly prefer</p> <p>20 to do.</p> <p>21 Q. Can I ask you this question on sanctions before we move</p> <p>22 away from standards: you will remember right at the</p> <p>23 start of this session we discussed the approach under</p> <p>24 section 3 of the Comms Act and in particular the</p> <p>25 principle that essentially regulatory activity should be</p> <p style="text-align: center;">Page 29</p>	<p>1 deciding whether or not to entertain a complaint?</p> <p>2 MR RICHARDS: We are assessing it against the -- so the</p> <p>3 complaints come in and let's take the most obvious</p> <p>4 example. We have to satisfy ourselves that it meets the</p> <p>5 statutory criteria.</p> <p>6 Q. Yes.</p> <p>7 MR RICHARDS: So in relation to fairness and privacy, for</p> <p>8 example, one of the questions we're asking there is</p> <p>9 whether the complainant is in fact the person or</p> <p>10 representing the person affected by the broadcast.</p> <p>11 Sometimes that isn't immediately obvious. If it isn't</p> <p>12 the actual individual, we have to establish whether or</p> <p>13 not the individual has been authorised by the affected</p> <p>14 party or not, and sometimes that's very quick and clear,</p> <p>15 and other times it isn't. So it's those kind of things</p> <p>16 that we're considering when we are going through that</p> <p>17 process.</p> <p>18 Q. So it's an essential stage?</p> <p>19 MR RICHARDS: I think it is an essential stage, yes.</p> <p>20 Q. And it doesn't prevent you from investigating complaints</p> <p>21 that might be legitimate?</p> <p>22 MR RICHARDS: Oh no, not at all.</p> <p>23 Q. You've provided us with examples of fairness and privacy</p> <p>24 decisions. We have discussed the Russell Brand/Jonathan</p> <p>25 Ross decision. You've told us quite a lot about that,</p> <p style="text-align: center;">Page 31</p>
<p>1 transparent, accountable, proportionate, consistent and</p> <p>2 targeted only at cases in which action is needed.</p> <p>3 MR RICHARDS: Mm-hm.</p> <p>4 Q. Would it be right to say that sanctions are imposed only</p> <p>5 in cases where action is needed?</p> <p>6 MR RICHARDS: Yes. That's the approach I think we take, and</p> <p>7 that's why quite a large number do not have sanctions.</p> <p>8 Q. I understand. Let's move on to fairness and privacy</p> <p>9 adjudications, please. You explain to us that in the</p> <p>10 financial year 2010/2011 you published 171 decisions</p> <p>11 relating to fairness and/or privacy issues, very much</p> <p>12 fewer than the standards cases. Pardon me, 171</p> <p>13 decisions were published, sorry, that's not the number</p> <p>14 of complaints, but of those 171 cases, nine were upheld</p> <p>15 as in breach of the code, 36 not upheld, 13 resolved,</p> <p>16 and 113 were either not entertained or discontinued</p> <p>17 after initial consideration.</p> <p>18 MR RICHARDS: Mm-hm.</p> <p>19 Q. You tell us that in that year there were no fairness or</p> <p>20 privacy cases considered serious enough for</p> <p>21 consideration of a statutory sanction.</p> <p>22 Can I ask you this: do you find the entertainment</p> <p>23 stage to be a useful stage or does it prevent you from</p> <p>24 investigating complaints that might be legitimate? What</p> <p>25 is the -- what process do you undertake when you're</p> <p style="text-align: center;">Page 30</p>	<p>1 but for the sake of completeness, you imposed</p> <p>2 a financial sanction in that case, £150,000, and I want</p> <p>3 to ask you about an earlier decision that also related</p> <p>4 to Jonathan Ross. That was a standards complaint, as</p> <p>5 I understand it. This was the incident where Jonathan</p> <p>6 Ross, who has a chat show, a late evening chat show, was</p> <p>7 interviewing David Cameron, and made a number of</p> <p>8 comments about Margaret Thatcher. I don't think I need</p> <p>9 to say anything further.</p> <p>10 In that case, that was a standards complaint by</p> <p>11 a viewer or viewers, and there hadn't been any complaint</p> <p>12 by either David Cameron or Margaret Thatcher, and I want</p> <p>13 to ask you about the difference between the two,</p> <p>14 because, of course, technically in the Jonathan Ross/ Russell Brand case the fact there had been no complaint</p> <p>15 may have excluded the complaint, but in the standards</p> <p>16 case you were able to take on board the complaint</p> <p>17 despite the fact that neither David Cameron nor Margaret</p> <p>18 Thatcher had complained. Do you see a slight issue with</p> <p>19 the way that the structure is set up?</p> <p>20 MR RICHARDS: I don't think so. I think it's in both cases</p> <p>21 a question of judgment. It is right that the complaints</p> <p>22 around the David Cameron appearance on Jonathan Ross</p> <p>23 were largely -- well, they were entirely from members of</p> <p>24 the public, and therefore could be considered under</p> <p>25</p> <p style="text-align: center;">Page 32</p>

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<p>1 offence, but there was a broader question about whether 2 or not there was unfairness to David Cameron, and that 3 is something I recall we did consider.</p> <p>4 Let me try and draw a distinction for you, because 5 I think there is a distinction between that case and the 6 Jonathan Ross and Russell Brand case. It's probably in 7 these areas.</p> <p>8 Firstly, David Cameron went on to the Jonathan Ross 9 programme voluntarily, knowing full well that Jonathan 10 Ross is a provocative interviewer and that sometimes he 11 takes a risque approach to issues, so he was a voluntary 12 participant in a programme in which that was the 13 context. That was the editorial context. It was 14 actually broadcast at 11.30 at night, so that was the 15 context.</p> <p>16 In contrast, Georgina Bailey and Andrew Sachs had 17 nothing to do with the broadcast, were not invited and 18 accepted to go onto a broadcast. They were minding 19 their own business in complete privacy and suddenly they 20 were treated in the way that is now very familiar.</p> <p>21 So I think there is a very significant difference 22 between the two cases, and in a case like that, where 23 I think there were questions about fairness because of 24 Jonathan Ross's approach to David Cameron, we didn't 25 have a complaint from Mr Cameron or anyone authorised on</p> <p style="text-align: center;">Page 33</p>	<p>1 So I think we feel comfortable with that, and that 2 that gives us an armoury, if that's the right word, it 3 probably isn't, a set of tools, which enable us to make, 4 I hope, good judgments about what is necessary for 5 deterrents and to ensure overall compliance. By and 6 large, I think, if we come across repeated failures of 7 compliance, repeated or serious, reckless failures to 8 adhere to the Broadcasting Code, we can go up through 9 those responses and I think generally speaking we find 10 it effective.</p> <p>11 DR BOWE: It takes us back to two points that we touched on 12 this morning. One is proportionality, and as Ed says, 13 we have a range of things we can do, and I always think 14 that's an important regulatory technique.</p> <p>15 The second thing is that as Ed has touched on a few 16 times, the publication of the report of breaches that 17 have not been sanctioned is a very important part of 18 people working in the industry understanding what's 19 good, what's not so good, what works, what doesn't wok, 20 where the boundaries are. In terms of having a clearly 21 understood set of requirements for the industry, I think 22 those breach reports are actually extremely useful to 23 people in indicating where the boundaries are for 24 a working journalist.</p> <p>25 LORD JUSTICE LEVESON: On breach reports, I've read, among</p> <p style="text-align: center;">Page 35</p>
<p>1 his behalf, and therefore the question we're asking 2 ourselves is whether the circumstances of that case are 3 sufficiently extreme or whether they raise a broader set 4 of issues such that we use our exceptional circumstances 5 clause, and I think in this case our judgment was that 6 it fell the other side of the line, whereas for some of 7 the reasons that I explained earlier, the Russell 8 Brand/Jonathan Ross case I think fell the other side of 9 the line.</p> <p>10 Q. I understand. That's very helpful.</p> <p>11 It's clear from your evidence, though, that 12 sanctions are rarely imposed and some of the reasons 13 might be the reasons we've discussed. Do you consider 14 that the level of sanctions imposed is sufficient to 15 deter breaches of the code more generally?</p> <p>16 MR RICHARDS: I think generally speaking we do. I think we 17 are comfortable with the ascending order. It's 18 important to see them in that way. I think that's 19 widely understood, that the world hasn't ended if you 20 have a breach of the Broadcasting Code. It's important, 21 it matters, you need to take it very seriously, but it's 22 not the end of the world. And that thereafter we can 23 step through those sanctions, up to and including 24 revocation of licence, where, in a sense, the world does 25 end.</p> <p style="text-align: center;">Page 34</p>	<p>1 others things in your papers, but just to prove I have 2 read it, a complaint made by Mrs Yan Polcwiartek. It's 3 a building dispute case. And what impressed me about 4 this complaint, which was not upheld by the way, is that 5 it is 17 closely typed pages, and this obviously 6 involved an enormous amount of work. How long do these 7 things take?</p> <p>8 MR RICHARDS: Well, rather than respond off the top of my 9 head on that, we can provide you with the actual data. 10 We've actually been conscious of the time that it takes 11 for a little while, and about a year ago we modified the 12 procedures to try and make them quicker and more 13 efficient, and again it does depend, as I said earlier 14 on, on the nature of the case. Some do take some 15 months, and others can be done fairly quickly. It 16 really is quite case specific.</p> <p>17 The fact that it has -- I mean, the team we have are 18 experienced in this and they are used to writing 19 reasoned decisions in relation to these case, so the 20 fact that it's 17 pages, I wouldn't place too much 21 weight --</p> <p>22 LORD JUSTICE LEVESON: No, I'm not being critical, I'm 23 merely asking the question. As somebody who spends his 24 recent life writing judgments, I know how long they 25 take, and I'm supposed to be experienced doing that.</p> <p style="text-align: center;">Page 36</p>

<p>1 MR RICHARDS: They don't happen overnight for exactly the 2 reason you're describing, but we are -- we're very happy 3 to give you the actual data. 4 LORD JUSTICE LEVESON: I'm just interested because it's 5 relevant to -- 6 DR BOWE: Yes, indeed. 7 MR RICHARDS: It takes a while. 8 DR BOWE: It's case specific is the answer. 9 LORD JUSTICE LEVESON: Of course. 10 DR BOWE: Ed has mentioned that we've had a good look at 11 these processes in the course of the last year to make 12 sure they were as efficient as we can get them, but in 13 the end you have to do a proper job and I would not be 14 happy, frankly, if people came to the board and said, 15 "Wonderful news, we've sped it all up so we're now 16 turning them all around in 24 hours". That would make 17 me feel, on behalf of complainants, a bit uncomfortable, 18 to put it very mildly. 19 MS PATRY HOSKINS: Before we move away from adjudications, 20 I just want to touch on appeals against decisions of 21 Ofcom. 22 Can I summarise it in this way: if a complainant or 23 a broadcaster or a directly affected third party is 24 unhappy with an Ofcom decision relating to both content 25 and standards, the route of appeal is by way of</p> <p style="text-align: center;">Page 37</p>	<p>1 MR RICHARDS: In that case, that's absolutely right. That 2 one has consumed a lot of time and a lot of money. 3 However, it was a difficult and interesting case. 4 I think we were never uncomfortable about the fact that 5 it was being appealed and we weren't uncomfortable 6 because I think it's an interesting area of 7 interpretation of the law, and we're obviously pleased 8 that we won the case and made the right judgment, but we 9 were certainly not uncomfortable with it being appealed 10 and our judgment being tested. I think from time to 11 time it's important that that takes place. 12 MS PATRY HOSKINS: Would you like me to look at that 13 decision or not? 14 LORD JUSTICE LEVESON: Not particularly. It is a freedom of 15 speech-type decision. 16 MR RICHARDS: It is. That's exactly what it is. 17 LORD JUSTICE LEVESON: But all these things are always so 18 fact-sensitive that it's quite difficult to derive 19 enormous lessons from that. 20 MR RICHARDS: I think the general lesson is that our 21 decisions can be appealed, and sometimes they are. And 22 we are, I think, comfortable with that and I would 23 expect any regulator to be comfortable with that. 24 DR BOWE: Yes. 25 MS PATRY HOSKINS: I'm going to move on to investigatory</p> <p style="text-align: center;">Page 39</p>
<p>1 application for judicial review to the Divisional Court, 2 as I understand it, and in your witness statement you 3 describe a recent challenge in the Jon Gaunt case in 4 relation to a finding that there had been a breach of 5 the code although no sanction had never been imposed but 6 nevertheless there was still the right of judicial 7 review and that's the process. 8 MR RICHARDS: Yes, that's right, and that's the most obvious 9 recent case that, as I recall, went all the way to the 10 Court of Appeal. 11 LORD JUSTICE LEVESON: It went first to the Administrative 12 Court and then from the Administrative Court to the 13 Court of Appeal? 14 MR RICHARDS: Yes. 15 MS PATRY HOSKINS: And there was an application for 16 permission to the Supreme Court. 17 MR RICHARDS: That's right. 18 MS PATRY HOSKINS: Can you update us? 19 MR RICHARDS: I think it's been refused. 20 MS PATRY HOSKINS: There's nodding at the back of the room 21 I think I'll accept that as evidence. 22 LORD JUSTICE LEVESON: Well, it doesn't really matter. It 23 is a potential risk, because this complaint has 24 presumably taken a very, very great deal of time and 25 cost an enormous amount of money.</p> <p style="text-align: center;">Page 38</p>	<p>1 powers. I want to explore the extent to which Ofcom is 2 an investigatory body and whether it can launch 3 investigations when there is suspicion of unethical 4 activity. You'll understand why that's important. 5 I'm going to do this by reference to the premium 6 rate phone services case, because in between 2006 and 7 2008, as you know, you made a number of investigations 8 into the use of premium rate phone services in 9 television quiz shows, not exclusively quiz shows, but 10 by and large, and the result of those investigations was 11 that a number of broadcasters were fined substantial 12 sums for breach of the licence conditions. 13 There was also a report of Richard Ayre, behind 14 tab 3, in which he found there was a systemic culture of 15 denial amongst the main broadcasters about their 16 responsibility to ensure that the programmes that they 17 devise, commission or produce fully deliver on the 18 transactions they offer to viewers. 19 I won't call this the phone hacking of Ofcom, 20 although I just have, but it was clearly a very serious 21 issue which arose. What I want to understand is with 22 your ability to investigate a problem that arose, how 23 you went about it and whether or not you feel that the 24 outcomes are satisfactory. So in your own words, I'm 25 going to allow you to tell me as briefly as you can what</p> <p style="text-align: center;">Page 40</p>

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<p>1 happened and how you felt you were able to investigate 2 it.</p> <p>3 MR RICHARDS: What happened, if I go back to the start, was 4 that there was a lot of pressure on commercial 5 businesses at the time. It was a difficult time in 6 advertising, and a new stream of income was identified, 7 this was so-called revenue sharing from premium rate 8 telephone lines, and it was a tremendous discovery at 9 one level, because it combined both the interaction 10 between the viewer and the quiz. You could -- suddenly 11 the viewer could participate in the quiz by phoning up 12 with the answer or voting or whatever, with the fact 13 that they would pay to do so, so suddenly the 14 broadcaster would not only have an engaged audience but 15 also be receiving money, so it was fantastic.</p> <p>16 As a result, it took off incredibly fast. Suddenly 17 almost every mainstream broadcaster was doing it. You 18 could not conduct a quiz show without having phone calls 19 coming in, and they were commissioning third party 20 suppliers, premium rate telephone service providers as 21 fast as they could find them.</p> <p>22 The regulatory backdrop to this environment was that 23 when the Communications Act was passed, we were given 24 the duty or we were asked to have regard for 25 self-regulation or co-regulation where we could, and, as</p> <p style="text-align: center;">Page 41</p>	<p>1 the vote will be shown after the break at 9.30, and, you 2 know, vote now, and you're voting for the winner. And 3 what had actually happened was that the voting had been 4 cut off at a quarter to 9, hundreds of thousands or tens 5 of thousands of people then voted, paying £1 or more 6 a time, between 10 to 9 and 20 past 9, and their votes 7 were never actually counted. So it was direct consumer 8 harm. Consumers were paying for something, they were 9 not having the service --</p> <p>10 LORD JUSTICE LEVESON: I might call it something else as 11 well, but that's fair enough.</p> <p>12 MR RICHARDS: Now, the real point about describing this in 13 that way, because I think everybody recalls it, is that 14 there was an element of invisibility to it. The viewer 15 had no idea that their vote had not been counted. No 16 viewers did. I voted in some of these competitions and 17 you happily voted, you did not have a clue that the vote 18 had stopped. So you were perfectly happy, and nobody 19 was doing what they would normally do with us in those 20 circumstances, which is saying, "I don't like that, 21 I think I've been ripped off, I am going to phone 22 Ofcom"; nobody knew.</p> <p>23 This went on for a period, until, as I think you'd 24 expect in a situation like that, it becomes revealed by 25 whistle-blowers who are actually working in that</p> <p style="text-align: center;">Page 43</p>
<p>1 you know, we've done that in relation to advertising and 2 we'll come back to that. We were, however, bequeathed 3 an organisation called ICSTIS, which was the premium 4 rate telephone regulator. It pre-dated Ofcom. It 5 existed and it was established already as 6 a co-regulation body.</p> <p>7 When this development of premium rate use on quizzes 8 on television began, I think the challenge for 9 everybody, broadcasters, operators, but ourselves and 10 ICSTIS as well, was it wasn't absolutely clear who was 11 in charge of what. We took the view initially that this 12 was essentially a premium rate telephone service and 13 therefore we would have said it was primarily ICSTIS, 14 but suddenly it was the broadcasters who were involved 15 as well.</p> <p>16 So one observation that I begin with is that it was 17 novel, it grew incredibly quickly and there was a degree 18 of lack of clarity about who was responsible for what, 19 both from broadcaster and premium rate supplier 20 perspective and from an ICSTIS/Ofcom perspective. That 21 was the backdrop.</p> <p>22 What then happened was that a number of wholly 23 unacceptable practices began, the best example of which 24 I can give you is the cut-off of voting. So the winner 25 of the competition will be determined or the result of</p> <p style="text-align: center;">Page 42</p>	<p>1 environment and know it's taking place.</p> <p>2 LORD JUSTICE LEVESON: And they're rather troubled that it 3 seems to be a fiddle.</p> <p>4 MR RICHARDS: Absolutely. It was a good example of whistle 5 blowing. They went to the press, went to the TV 6 broadcasters, paradoxically or ironically in due course 7 whistle blowers came to us. And suddenly this series of 8 scandals was unearthed, and it turned out that it had 9 not just been happening in one or two incidents, but as 10 we looked at it more, it turned out that it was really 11 quite commonplace.</p> <p>12 MS PATRY HOSKINS: Just pause there for one moment. This is 13 where the third witness statement might have come in 14 helpful, because there's a whole table which sets out 15 all the different television shows where this was 16 happening. Have you received a copy of it yet? I'll 17 give you mine. It's section B onwards and I'll mark the 18 place where the table is so you have some idea.</p> <p>19 (Handed). (Pause).</p> <p>20 LORD JUSTICE LEVESON: This is a way to solve the national 21 debt.</p> <p>22 MR RICHARDS: It made a modest contribution at the time, 23 I think.</p> <p>24 LORD JUSTICE LEVESON: Thank you. I'll let you have your 25 statement back. I would want a copy. Let me</p> <p style="text-align: center;">Page 44</p>

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<p>1 immediately comment how grateful I am to you for 2 responding to questions that you had very, very late in 3 the day so fully. But I will study it. 4 MS PATRY HOSKINS: Sorry to interrupt. I just wanted to 5 make sure that the chairman had that. 6 MR RICHARDS: Shall I pick up the story from there? 7 MS PATRY HOSKINS: Yes. You told us that whistle blowers 8 brought it to your attention. I want to understand now 9 on what statutory authority an investigation was 10 launched and what happened from that point. 11 MR RICHARDS: From that point, once it was all clear, 12 I think we then immediately said this is clearly not 13 incidental, it's quite widespread, and we need to do 14 something really very serious about it. We then 15 investigated using our powers of investigation against 16 a couple of parts of the Broadcasting Code to do with 17 misleading audiences and quizzes and competitions being 18 fair, so we found a locus which worked for these quite 19 novel cases, but we were able to do that. 20 We then used the investigatory powers and were able 21 to access everything we wanted, really, from the 22 broadcasters. It's important to say that in this 23 context we were not able to access by legal right 24 information from the premium rate suppliers, but from 25 the broadcasters we were able to secure data, audited</p> <p style="text-align: center;">Page 45</p>	<p>1 broadcasters so there was no doubt that the broadcasters 2 themselves had a responsibility, which there was an 3 uncertainty about before. We introduced an audit 4 requirement, such that we could have confidence that the 5 broadcasters would comply in the future, and we tied all 6 that together with a cross-industry event and programme 7 around compliance, education and understanding which we 8 did jointly with the BBC Trust. 9 So it wasn't just about the sanctions. It was then 10 about ensuring that we had the right powers looking 11 forward, that there was regulatory clarity and that 12 compliance could be secured, and that there was 13 understanding about that compliance on a widespread 14 broadcasting industry basis. So it was quite 15 a broad-ranging approach once the problem had emerged, 16 which rested upon having the right powers, following 17 through with those powers and then ensuring there was 18 regulatory clarity thereafter. 19 LORD JUSTICE LEVESON: You could get the information from 20 the television companies but you said you couldn't get 21 it from the premium phone suppliers. 22 MR RICHARDS: That's right. That's because the 23 investigatory powers that we have in broadcasting are 24 licence-based, and this is a very interesting subject 25 because it's in contrast to our information-gathering</p> <p style="text-align: center;">Page 47</p>
<p>1 information, witness statements, everything we needed, 2 we were able to secure and require that of them. 3 We then did a very thorough investigation of all the 4 cases we could find. At that point, the broadcasters 5 themselves realised thoroughly what was happening and, 6 in my judgment, they were in full collaborative mode at 7 that point. They said, "We need to sort this out, the 8 house needs to be cleaned, and you can have whatever you 9 want", and we had whatever we wanted, we assessed it and 10 the outcome of that was this series of sanctions which 11 you were shown a moment ago. 12 Some were fairly modest sums, others were the 13 highest fines we have ever levied in our history and 14 involved millions of pounds, not even thousands of 15 pounds. That was the sanctions process. 16 But it's very important to go on from there, 17 I think. The question for us then was: what led to this 18 and what lessons do we need to learn and what lessons do 19 the industry need to learn in general? So the 20 sanctions, I think an effective deterrent, everybody 21 knows where they stand on that front. But we also then 22 had to go back and make sure there was appropriate 23 regulatory clarity, so we recast our relationship with 24 ICSTIS in a very clear way. That was clarified. 25 We introduced new licence conditions for the</p> <p style="text-align: center;">Page 46</p>	<p>1 and investigatory powers that we have under the 2 Communications Act in relation to telecommunications, 3 or, for example, our information-gathering powers, 4 investigatory powers under the Enterprise Act or the 5 Competition Act, where those powers are general, and we 6 can apply them in any case to any party, so long as we 7 do so in pursuance of our duties. 8 Actually, interestingly, reflecting upon this, what 9 I would observe is that our broadcasting investigatory 10 powers are extremely effective when it comes to 11 broadcasters, but are limited to broadcasters, whereas 12 in contrast, if you look at our competition powers and 13 our economic regulatory powers, they're actually more 14 broadly based and more substantive. 15 LORD JUSTICE LEVESON: But have you found -- this is 16 actually an important question -- the limitation on your 17 investigatory powers in connection with broadcasters 18 a disadvantage that if you had a magic wand you would 19 wish to change? 20 MR RICHARDS: I think the practical answer to that is that 21 we haven't. I think the vast bulk, overwhelmingly, 22 where we've needed to investigate and where we've needed 23 to acquire or gather information relevant to a case, 24 we've been able to do that through our broadcasting 25 powers.</p> <p style="text-align: center;">Page 48</p>

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<p>1 I'm not going to say that it can't conceive of 2 a situation where that limitation may not be or may be 3 relevant, but I can't really think of a practical one. 4 Premium rate phone incidents were the closest we've 5 come to it. The vast majority of what we do, as we've 6 been discussing this morning, is around the Broadcasting 7 Code and therefore it's about the broadcasters. 8 I think the problem with the premium rate affair was 9 that some of the data and some of the activity where the 10 problem was taking place in operation centres run and 11 controlled by premium rate phone service suppliers, 12 nothing to do with the broadcasters. They were a very 13 different third-party supplier. And therefore that 14 could have thrown up a challenge but I think in the 15 event, even in that circumstance, we actually were able 16 to access the information. 17 LORD JUSTICE LEVESON: You navigate your way around it, 18 because of course the premium rate supplier has 19 a contractual obligation to account to the broadcaster. 20 MR RICHARDS: Yes. 21 LORD JUSTICE LEVESON: So you Hoover up the information that 22 way. 23 MR RICHARDS: And I think that's exactly what we did. 24 MS PATRY HOSKINS: I guess finally on this subject, as 25 a function of a regulator, how important in your view is</p> <p style="text-align: center;">Page 49</p>	<p>1 to understand the role that you play. 2 You do not have jurisdiction over mergers in the 3 sectors that you regulate, by and large. Some fall 4 within the jurisdiction of the EC merger regulation and 5 are dealt with by the European Commission. 6 MR RICHARDS: (Nods head). 7 Q. And some are considered by the OFT and, if appropriate, 8 the Competition Commission? 9 MR RICHARDS: Yes, that's right, and I think for 10 completeness sake it's worth saying that when -- the OFT 11 will lead on a relevant merger of that kind, but we 12 would expect to work very closely with them -- 13 Q. I'll come on to that, but in terms of jurisdiction it's 14 theirs -- 15 MR RICHARDS: Yes. 16 Q. It's either the European Commission's or it's the OFT's? 17 MR RICHARDS: That's right. 18 Q. I was coming on to say that the OFT and the European 19 Commission do often ask you for significant input when 20 a merger is being considered in an area that you 21 regulate? 22 MR RICHARDS: Very considerable input usually, yes. 23 Q. In media mergers which involve newspaper publishing, 24 radio or TV broadcasting, you're asked for what's known 25 as a local media assessment?</p> <p style="text-align: center;">Page 51</p>
<p>1 the ability to launch such an investigation? 2 MR RICHARDS: I think it's extraordinarily important. 3 I think the -- it's difficult for me to conceive of 4 doing our job effectively in the absence of effective 5 investigatory powers. It's such a key tool, not 6 necessarily because we routinely use it, but because the 7 broadcasters know that we could. And what that means is 8 that it massively helps with compliance, with 9 record-keeping. I think it's an absolutely critical 10 tool in the effectiveness of a regulator. 11 MS PATRY HOSKINS: I was going to move on to media mergers 12 and plurality issues unless you had any other questions, 13 sir, on that particular topic. 14 LORD JUSTICE LEVESON: No. I have a little task for 15 Mr Richards, but I'll mention it at the end, thank you. 16 MS PATRY HOSKINS: Yes. I'm going to ask you about your 17 first witness statement again, Mr Richards, 18 paragraph 24.1 onwards, dealing with media ownership and 19 plurality. I want to understand simply here the role 20 that Ofcom plays here. You explain at 24.1 that 21 a variety of detailed rules apply in relation to 22 cross-media ownership. You then explain some principles 23 at 25.1 onwards, relating to merger control. 24 I'm going to try and summarise what's a quite 25 complex area quite briefly because we only really need</p> <p style="text-align: center;">Page 50</p>	<p>1 MR RICHARDS: For local media mergers, yes. 2 Q. You also have a formal statutory role in relation to 3 certain media mergers which are triggered by an 4 intervention notice issued by the Secretary of State 5 which specifies a particular media public interest 6 consideration, and those are set out in paragraph 25.5 7 of your statement that currently recognised media public 8 interest considerations are set out there. We would be 9 here all afternoon if I tried to go into those but 10 they're set out there clearly, the Chairman can note 11 them. 12 Where there has been an intervention notice, Ofcom 13 is required to report to the Secretary of State on 14 whether it may be the case that the merger may be 15 expected to operate against the public interest. 16 MR RICHARDS: Yes. 17 Q. We are summarising it. It will then be for the 18 Secretary of State to determine whether or not the 19 merger should be referred to the Competition Commission 20 for further review, and other than that, you must also 21 carry out regular reviews, at least every three years, 22 of statutory provisions on media ownership and the 23 public interest test. 24 I appreciate I've probably condensed that 25 considerably, but I just want to understand roughly</p> <p style="text-align: center;">Page 52</p>

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<p>1 where Ofcom fits into the position.</p> <p>2 You explain at 32.1 that there have only been two</p> <p>3 occasions in which the Secretary of State has issued an</p> <p>4 intervention notice in relation to a media merger.</p> <p>5 MR RICHARDS: Yes.</p> <p>6 Q. And on both occasions the public interest consideration</p> <p>7 was the need, in relation to every different audience in</p> <p>8 the United Kingdom or in a particular area or locality</p> <p>9 of the United Kingdom, for there to be a sufficient</p> <p>10 plurality of persons with control of the media</p> <p>11 enterprises serving that audience.</p> <p>12 You tell us that the two occasions were firstly the</p> <p>13 acquisition by BSkyB of an almost 18 per cent stake in</p> <p>14 ITV and you set that out at paragraph 32.2 onwards.</p> <p>15 We're not going to go into that in any detail.</p> <p>16 The second occasion on which an intervention notice</p> <p>17 was issued was the recent proposed acquisition by News</p> <p>18 Corporation of the remaining shares in BSkyB which it</p> <p>19 did not already own, would that be correct? That's the</p> <p>20 very recent and well-known example, obviously.</p> <p>21 MR RICHARDS: Yes.</p> <p>22 DR BOWE: Yes.</p> <p>23 Q. Again, I really don't want to go into a massive amount</p> <p>24 of detail on this, but I want to understand the role</p> <p>25 that Ofcom played in relation to that proposed</p> <p style="text-align: center;">Page 53</p>	<p>1 been to bring together one of the three main providers</p> <p>2 of TV news and the largest provider of newspapers,</p> <p>3 significantly increasing News Corporation's ability to</p> <p>4 influence opinion and control the agenda. Further, in</p> <p>5 circumstances of 100 per cent ownership and control, you</p> <p>6 did not believe that cultural safeguards and internal</p> <p>7 plurality could be relied upon to ensure plurality."</p> <p>8 And all the relevant reports are within the bundle.</p> <p>9 I don't want to take you through them but I want to</p> <p>10 accurately summarise what your role was.</p> <p>11 You reported and those were your conclusions.</p> <p>12 MR RICHARDS: Yes.</p> <p>13 Q. You then say at 32.5 that News Corporation offered</p> <p>14 undertakings in lieu of a reference to the Secretary of</p> <p>15 State, and they're known as UILs. You were then brought</p> <p>16 into the picture again at that stage because the</p> <p>17 Secretary of State asked you to advise on whether or not</p> <p>18 those undertakings met the plurality concerns identified</p> <p>19 in your report and also asked the OFT to advise on</p> <p>20 practicability. After a period of negotiation and</p> <p>21 public consultation, during which changes were made to</p> <p>22 the undertakings, Ofcom and the OFT recommended that the</p> <p>23 undertakings be accepted.</p> <p>24 But then, of course, as we know, events were</p> <p>25 overtaken before the Secretary of State had come to</p> <p style="text-align: center;">Page 55</p>
<p>1 acquisition.</p> <p>2 We start, I think, in the process at paragraph 32.3.</p> <p>3 You explain that the proposed acquisition was an EC</p> <p>4 merger. You remember at the start of this short session</p> <p>5 I was explaining that there could be an EC merger or an</p> <p>6 OFT jurisdiction merger.</p> <p>7 The Secretary of State's intervention notice</p> <p>8 specified the public interest consideration that we've</p> <p>9 set out, and you report it.</p> <p>10 By that stage, and it's important to note this, the</p> <p>11 European Commission had already cleared the merger for</p> <p>12 competition purposes?</p> <p>13 MR RICHARDS: Yes.</p> <p>14 Q. So before you were even asked to report. Ofcom</p> <p>15 recommended a reference to the Competition --</p> <p>16 LORD JUSTICE LEVESON: No, it was before Ofcom were due to</p> <p>17 report.</p> <p>18 MS PATRY HOSKINS: That's what I meant to say.</p> <p>19 Ofcom then recommended a reference to the</p> <p>20 Competition Commission, considering that as a result of</p> <p>21 the proposed transaction there may not be a sufficient</p> <p>22 plurality of persons with control of media enterprises</p> <p>23 providing news and current affairs to UK-wide</p> <p>24 cross-media audiences, and you say:</p> <p>25 "The effect of the proposed transaction would have</p> <p style="text-align: center;">Page 54</p>	<p>1 a decision, News Corporation withdrew the undertakings</p> <p>2 and then its offer to acquire the shares in BSkyB.</p> <p>3 Does that accurately and fairly summarise the role</p> <p>4 that you play? You were asked to provide two specific</p> <p>5 reports, but ultimately the decision was not that of</p> <p>6 Ofcom.</p> <p>7 MR RICHARDS: That's right.</p> <p>8 DR BOWE: Yes.</p> <p>9 Q. Was there anything else that you would like to say about</p> <p>10 that?</p> <p>11 DR BOWE: No. I think that's a full, accurate account.</p> <p>12 MR RICHARDS: I guess the only small thing is to emphasise</p> <p>13 the nature of the negotiation period. That is</p> <p>14 a vigorous exchange. So the process between the offer</p> <p>15 of undertakings and the acceptance is not a benign</p> <p>16 exercise. I think that perhaps doesn't entirely come</p> <p>17 across from the wording.</p> <p>18 LORD JUSTICE LEVESON: And that's between you and News</p> <p>19 Corporation?</p> <p>20 DR BOWE: Yes.</p> <p>21 MR RICHARDS: That's right.</p> <p>22 MS PATRY HOSKINS: Perhaps the important point for the</p> <p>23 Chairman's interest is that in the course of considering</p> <p>24 the proposed merger, and this is what you say at 32.6,</p> <p>25 you came to the view and advised the Secretary of State</p> <p style="text-align: center;">Page 56</p>

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<p>1 that the current statutory regime is not effective to 2 secure plurality. 3 You said in your report that you recommended the 4 government should consider undertaking a wider review of 5 the statutory framework to ensure sufficient plurality 6 in the public interest, and specifically you argued 7 there may be value in providing for intervention where 8 plurality concerns arise in the absence of any 9 transaction involving media enterprises and which are 10 not safeguarded by the current media ownership rules. 11 Can you update us on that? As a result of that 12 report and the views and the advice to the Secretary of 13 State, has there been any further correspondence or 14 input between you and the Secretary of State on these 15 issues? 16 MR RICHARDS: There's been discussion of it. The Secretary 17 of State -- we included that point in every single 18 public document or every single document that we have 19 produced on this topic, both the original report, 20 recommendation, undertakings and I think even in 21 a separate letter to the Secretary of State. So it has 22 been a matter of discussion ever since the original 23 report was submitted on 31 December in 2010. So there 24 has been discussion about it, and our impression is that 25 the government is considering it and certainly appears</p> <p style="text-align: center;">Page 57</p>	<p>1 Q. Yes. 2 MR RICHARDS: No, the work is under way and we will consult 3 on it I think probably late February/March, and we will 4 aim to conclude it by -- before the summer, June, July. 5 It's probably worth emphasising two or three points. 6 Firstly, obviously we will pick up the point about the 7 lacuna in the legislation. Secondly, I'm sure we're 8 obviously going to look at the issue of measurement and 9 how you assess plurality from a -- from the perspective 10 of things that you can actually quantify. Important to 11 underline how complex that is, but we will try and do 12 that, and that really allows you to assess diversity of 13 voice and things of that nature. 14 I think the other dimension which we will also 15 consider in light of the events of the last 12 or 18 16 months is that only one perspective here is the 17 perspective of how many voices, how many different 18 newspapers, media voices are there in the market, as it 19 were. A second factor, and I think which is also at the 20 heart of people's concerns about plurality, is the risks 21 around concentration of ownership and media influence, 22 and the conventional analysis of that is, well, how many 23 viewers or readers do I have? 24 But I think we can now see there is another 25 analysis, which is what influence in the political</p> <p style="text-align: center;">Page 59</p>
<p>1 to be sympathetic or certainly understands the point 2 that we're making in relation to the deficiency of the 3 legislation. 4 DR BOWE: I would even go further than that and say 5 I believe I'm correct in saying that when the Secretary 6 of State spoke in Parliament on his decision following 7 our report of 31 December 2010, he indicated personal 8 sympathy for the view that had been expressed about 9 there being a possible lacuna that would have to be 10 corrected. 11 Q. Finally on this, I'd like to take you to section 37 of 12 your statement, where you tell us a little more about 13 the statutory duty to review the operation of the media 14 ownership rules, 37.8 onwards. You explain that in some 15 detail. I don't want to go through it other than to 16 note that your last review was sent to the Secretary of 17 State on 13 November 2009, and then to note this, 37.11: 18 "The Secretary of State has recently asked Ofcom to 19 advise him on the options for measuring media plurality 20 across platform and to recommend the best approach. We 21 will make this available to the Inquiry when completed." 22 I'm aware that your witness statement has now been 23 in for some considerable time. Has there been any 24 update on that? 25 MR RICHARDS: In relation to that work?</p> <p style="text-align: center;">Page 58</p>	<p>1 process might I have by virtue of a control of 2 particular media assets. And I think we will also want 3 to look at that, whereas in the past we've tended to 4 concentrate on the former, but I think it's now clear 5 that that needs sufficient attention as well. 6 LORD JUSTICE LEVESON: That work cuts straight across some 7 of the material that I've been asked to look at as well, 8 so I would be very grateful if you would keep me -- 9 MR RICHARDS: Of course. 10 LORD JUSTICE LEVESON: -- as up to date as possibly can be, 11 and speaking for myself, if it's at all possible before 12 the end of June, because July I hope to be discussing 13 various options and therefore I want to factor in your 14 views. 15 DR BOWE: Right. 16 LORD JUSTICE LEVESON: I'd be very grateful. If you keep in 17 touch with the Inquiry team -- 18 MR RICHARDS: Official. 19 LORD JUSTICE LEVESON: -- that would be valuable. Could you 20 help me with this: you were asked a specific question 21 about whether the proposed undertakings met the 22 plurality concerns that you'd identified, and having 23 negotiated the undertakings, you said they did. But 24 parallel to that you said but actually this regime 25 doesn't really do the job properly.</p> <p style="text-align: center;">Page 60</p>

<p>1 MR RICHARDS: Mm-hm.</p> <p>2 LORD JUSTICE LEVESON: Could you please explain that</p> <p>3 a little bit, because people might feel that by saying,</p> <p>4 well, yes, it's all right, you're actually giving a</p> <p>5 green light, whereas in truth at the very most you're</p> <p>6 giving an amber light, but it may be it was your</p> <p>7 statutory remit that prevented you from going further.</p> <p>8 I think it would be quite useful if you could just</p> <p>9 elaborate upon that.</p> <p>10 MR RICHARDS: Certainly. There's probably three points.</p> <p>11 You're absolutely right, we had a very specific</p> <p>12 question in relation to that merger and the question</p> <p>13 before us was: you've expressed a view that it should be</p> <p>14 referred, that there are concerns about plurality; would</p> <p>15 the undertakings offered be sufficient to meet that</p> <p>16 concern? What would our recommendation be there?</p> <p>17 As I think, as I'm sure is in the public domain now,</p> <p>18 the original undertakings offered to the Secretary of</p> <p>19 State and considered by us, we said that they would not</p> <p>20 be sufficient, and hence why I emphasised earlier the</p> <p>21 process of what is called negotiation.</p> <p>22 By the end of that process we felt that the specific</p> <p>23 concerns we'd recognised could be addressed by the</p> <p>24 revised undertakings, and therefore we made a specific</p> <p>25 recommendation to the Secretary of State. That was all</p> <p style="text-align: center;">Page 61</p>	<p>1 which is: is there a regime in place which ensures that,</p> <p>2 as a country, we have a framework which ensures that</p> <p>3 there is always sufficient plurality, and we can rest</p> <p>4 assured that there is nobody with too much influence,</p> <p>5 then we don't in our view have that at present.</p> <p>6 I think the third point I'd make in relation to your</p> <p>7 question is really to echo what I said a moment ago</p> <p>8 about our future work. I think if we look at those</p> <p>9 issues again today, we would place the same amount of</p> <p>10 emphasis on the diversity and the range of plurality and</p> <p>11 the provision of media, but I think we would also place</p> <p>12 more emphasis, in light of events, on the risk to the</p> <p>13 democratic process of the influence of concentrations of</p> <p>14 media power. I think it would be impossible for us not</p> <p>15 to do that, given what has emerged over the last year or</p> <p>16 two. So I think a bit more emphasis there, but as much</p> <p>17 emphasis on the question of the range and calculation of</p> <p>18 media voice and share of audience.</p> <p>19 LORD JUSTICE LEVESON: I'm sure you'll appreciate that both</p> <p>20 those topics fall very much within my remit.</p> <p>21 DR BOWE: We do.</p> <p>22 MR RICHARDS: We absolutely do and that's why the Secretary</p> <p>23 of State has asked us to do this piece of work and we</p> <p>24 were fully expecting to provide it to yourself.</p> <p>25 LORD JUSTICE LEVESON: I'm very grateful. As you know, one</p> <p style="text-align: center;">Page 63</p>
<p>1 around a specific proposal around a specific merger, an</p> <p>2 event, if you like.</p> <p>3 The weakness in the legislation is the following:</p> <p>4 the legislation is entirely driven by events, by</p> <p>5 transactions, by mergers. The problem that we</p> <p>6 immediately saw, when confronted with this specific</p> <p>7 situation, was that you could take an organisation who</p> <p>8 didn't merge or acquire anybody, but by virtue of just</p> <p>9 the dynamics in the market, by virtue of somebody else</p> <p>10 closing down an operation, for example, suddenly or</p> <p>11 gradually had a very, very, very substantial share of</p> <p>12 the media market. There has been no transaction, there</p> <p>13 has been no merger, but suddenly you turn around and</p> <p>14 over a number of years, because of organic growth or</p> <p>15 because of others exiting the market, this organisation</p> <p>16 suddenly has far too much power.</p> <p>17 At the moment, the legislation has no means of</p> <p>18 addressing that situation and that seemed to us to be</p> <p>19 a very serious deficiency, particularly so in the</p> <p>20 context of a highly dynamic market where many media</p> <p>21 enterprises are under extraordinary commercial pressure,</p> <p>22 some of them indeed rely on intra group subsidy to</p> <p>23 survive, and therefore the scope for both change and</p> <p>24 indeed exit of the market is, I think, considerable.</p> <p>25 So if we ask ourselves the fundamental question,</p> <p style="text-align: center;">Page 62</p>	<p>1 of the modules that I'm considering is the relationship</p> <p>2 between the press and politicians, which plays</p> <p>3 absolutely four square into the third of the points</p> <p>4 you've just named.</p> <p>5 DR BOWE: We will do our utmost to ensure the work we do is</p> <p>6 available to your Inquiry and that we can keep you</p> <p>7 informed about what we are doing.</p> <p>8 LORD JUSTICE LEVESON: I'm very grateful about that because</p> <p>9 I would be very, very keen to ensure that we didn't run</p> <p>10 down parallel tracks.</p> <p>11 DR BOWE: Exactly, exactly, exactly.</p> <p>12 LORD JUSTICE LEVESON: And on this topic alone, besides</p> <p>13 anything else that I might think of as I will come to,</p> <p>14 I think you can apprehend that I'll be very keen to hear</p> <p>15 you again.</p> <p>16 DR BOWE: Yes. Well, look, in the light of this -- we have</p> <p>17 of course been aware of this as an issue, but in the</p> <p>18 light of this further exchange, we will look very</p> <p>19 closely at our planned timetable on this work and, Ed,</p> <p>20 we will have a very careful think about how we can best</p> <p>21 conduct it to ensure that it were able to contribute.</p> <p>22 LORD JUSTICE LEVESON: I'm grateful. Please do not hesitate</p> <p>23 to contact the team here.</p> <p>24 DR BOWE: We won't.</p> <p>25 LORD JUSTICE LEVESON: So that we can appraise you of our</p> <p style="text-align: center;">Page 64</p>

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<p>1 broad timetable.</p> <p>2 DR BOWE: Yes.</p> <p>3 LORD JUSTICE LEVESON: Not all of which is at least yet in</p> <p>4 the public domain.</p> <p>5 MS PATRY HOSKINS: I don't have a huge amount to go but is</p> <p>6 this a convenient moment?</p> <p>7 LORD JUSTICE LEVESON: Yes, certainly, certainly, we'll have</p> <p>8 a break.</p> <p>9 (3.34 pm)</p> <p>10 (A short break)</p> <p>11 (3.43 pm)</p> <p>12 MS PATRY HOSKINS: I want to move on to ask you a few</p> <p>13 questions about self and co-regulation, the principles</p> <p>14 that underlie those. We've discussed section 3 of the</p> <p>15 Comms Act that stipulates that you should have regard to</p> <p>16 the desirability of promoting and facilitating the</p> <p>17 development and use of effective forms of co-regulation.</p> <p>18 I know it's not for you to suggest any form of model of</p> <p>19 regulation of the press but it would be helpful to</p> <p>20 understand the conditions in which you consider self and</p> <p>21 co-regulation are likely to be effective.</p> <p>22 DR BOWE: Before we do that, and I'm sorry to interrupt your</p> <p>23 flow, there was one final point I was wanting to make at</p> <p>24 the end of our previous session about this lacuna.</p> <p>25 In terms of Ofcom's powers to look into the</p> <p style="text-align: center;">Page 65</p>	<p>1 important issue are what I call incentives. To my mind,</p> <p>2 if you have a situation where the incentives of the</p> <p>3 public interest or the regulatory objective may be</p> <p>4 regularly or frequently at odds with the industry's own</p> <p>5 interests, the commercial interests or the specific</p> <p>6 company's interests, you should be extremely sceptical</p> <p>7 about the scope for self-regulation.</p> <p>8 Self-regulation is likely to work where the</p> <p>9 incentives -- where the public interest is aligned with</p> <p>10 the industry's interest, and you have that natural</p> <p>11 reinforcing cycle.</p> <p>12 If you don't have those things, to me, I think --</p> <p>13 I'm very, very sceptical about self-regulation. Now you</p> <p>14 do get that and you can get it quite often and I think</p> <p>15 a weak form of what I call a weak co-regulatory</p> <p>16 environment, which is closer to self-regulation, again</p> <p>17 the same is true. Look for aligned incentives and if</p> <p>18 you find them, you're likely to have something to work</p> <p>19 with.</p> <p>20 A very good example of that, which we may come on</p> <p>21 to, is the advertising case. The reason it's</p> <p>22 interesting is because in that situation you have the</p> <p>23 advertising industry, who sell advertising. Now, what</p> <p>24 they require to be able to do that is for there to be</p> <p>25 public trust in advertising as a product. If advert</p> <p style="text-align: center;">Page 67</p>
<p>1 development of what we would call significant market</p> <p>2 power, absent a transaction, I would just like to draw</p> <p>3 the Inquiry's attention to the fact that we do have</p> <p>4 those powers already in respect of the telecoms sector</p> <p>5 and it is probably of interest to you to note that</p> <p>6 I think that is why it was so obvious to us that we did</p> <p>7 not have analogous powers in respect of the work that we</p> <p>8 did on media plurality. In other words, the proposal</p> <p>9 that one should be able to look at significant market</p> <p>10 power without waiting for a transaction to happen to</p> <p>11 trigger it is something that is widespread across the</p> <p>12 regulatory, certainly the European regulatory world of</p> <p>13 telecoms. So it's not an unusual or novel power and</p> <p>14 it's one that we practice ourselves.</p> <p>15 I'm sorry to interrupt you.</p> <p>16 MS PATRY HOSKINS: No, that's very helpful.</p> <p>17 LORD JUSTICE LEVESON: Thank you.</p> <p>18 MS PATRY HOSKINS: Do you remember my question?</p> <p>19 DR BOWE: Yes, we do.</p> <p>20 MR RICHARDS: Perhaps I'll kick off on that. I think that</p> <p>21 every case is different, but I do think there are some</p> <p>22 features of different circumstances which tell you quite</p> <p>23 quickly whether something is likely to work as</p> <p>24 a self-regulatory or co-regulatory or statutory</p> <p>25 regulatory environment, and they -- by far the most</p> <p style="text-align: center;">Page 66</p>	<p>1 are routinely misleading or harming or misrepresenting,</p> <p>2 then public trust in advertising would decline and their</p> <p>3 currency, their product, would be undermined.</p> <p>4 So what you have there is a situation in which the</p> <p>5 public interest in not having misleading or harmful</p> <p>6 advertising is actually very closely aligned with the</p> <p>7 advertising industry's own interests, and in those</p> <p>8 circumstances you tend to find co- or self-regulatory</p> <p>9 environments successful. Everybody broadly wants the</p> <p>10 same thing.</p> <p>11 Let me take a different example. If you take an</p> <p>12 example from our economic regulatory work, we are</p> <p>13 a price controlling company with significant market</p> <p>14 power in telecommunications, for example. In those</p> <p>15 circumstances, the interests of the public lie in having</p> <p>16 the price controlled -- the price as low as possible</p> <p>17 consistent with sufficient investment and sensible</p> <p>18 returns. The interest of the company lies in having the</p> <p>19 highest price possible to secure monopoly profit, so the</p> <p>20 interests are fundamentally opposed.</p> <p>21 In those circumstances, self-regulation is never</p> <p>22 ever going to work. You have to have effective</p> <p>23 independent and in this case statutory regulation.</p> <p>24 So by using those two examples, I illustrate,</p> <p>25 I think I have illustrated what to me is at the absolute</p> <p style="text-align: center;">Page 68</p>

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<p>1 heart of this issue. Ask yourself about the incentives 2 and interests of the industry and then you will find 3 very quickly that you can establish whether or not pure 4 self-regulation will work.</p> <p>5 Now, there's a whole host of others factors which we 6 might come on to, but underneath it all, that to me is 7 the kernel of the answer.</p> <p>8 Q. I am going to turn on to advertising now simply because 9 it's well regarded as a successful co-regulatory 10 relationship, the relationship between the Advertising 11 Standards Authority and Ofcom. It's obviously 12 interesting to understand how it works and why it works 13 well, but I'm conscious that we have Mr Parker from the 14 authority coming, so I don't want to go into it in 15 a huge amount of detail. Can I summarise it again and 16 you tell me if I've oversimplified it or relayed it back 17 inaccurately.</p> <p>18 You have entered into a memorandum of understanding 19 which has delegated some of your regulatory functions in 20 the field of advertising to the authority and the 21 Broadcast Committee of Advertising Practice. The 22 authority is responsible pursuant to that memorandum for 23 complaints handling and resolution and the committee is 24 responsible for setting a code of practice and 25 monitoring the code. There are precise wordings which</p> <p style="text-align: center;">Page 69</p>	<p>1 MR RICHARDS: HFSS, so high in fat, salt and sugar. 2 Q. Yes. That change was imposed by Ofcom in a situation, 3 you say, where the committee were unable to agree the 4 changes considered necessary.</p> <p>5 MR RICHARDS: Yes. 6 Q. Is that an accurate summary? 7 DR BOWE: Imposed by Ofcom, not on Ofcom. 8 Q. By. 9 MR RICHARDS: Yes, that's right. 10 Q. Again I'll come back to ask the authority about this, 11 but I want to understand it in a nutshell. Again 12 applications of sanctions, as the backstop regulator you 13 can assist the authority in ensuring compliance with 14 decisions and because it doesn't have statutory powers 15 of sanction, it can refer complaints to you and we've 16 already look at the DM Television ruling where just that 17 happened? 18 MR RICHARDS: Yes. 19 Q. Now you talked about incentives and it's interesting 20 because while the authority regulates advertisers, you 21 regulate broadcasters. 22 MR RICHARDS: Yes. 23 Q. So there's an incentive there on broadcasters to ensure 24 that advertisers comply with the code, would that be 25 correct?</p> <p style="text-align: center;">Page 71</p>
<p>1 we don't really need to go into. So far so good? 2 MR RICHARDS: Yes, absolutely. 3 Q. You remain the backstop regulator. In that role, you 4 don't interfere with the day-to-day work of the 5 authority as long as the undertakings, agreed processes 6 and targets contained in the memorandum are met. You 7 seek -- the memorandum seeks to respect the 8 self-regulating nature of the arrangement and notes that 9 while you retain the right to make changes to the code 10 that's been developed by the committee, because you have 11 to ensure that it remains appropriate, you won't 12 normally seek to do so because you recognise that the 13 committee is the "self" in self-regulation. Is that 14 a sort of accurate summary? 15 MR RICHARDS: Yes. 16 Q. I want to ask you about two aspects s of that 17 relationship. One are changes to the code, and then the 18 application of sanctions. 19 You explain in your witness statement, Mr Richards, 20 that in 2007 you decided that certain types of 21 advertising should be excluded from children's 22 television programmes. 23 MR RICHARDS: Yes. 24 Q. They were advertising with -- is it foods with 25 certain --</p> <p style="text-align: center;">Page 70</p>	<p>1 MR RICHARDS: Yes. 2 Q. Can you tell us in brief terms what you consider the 3 benefits of that co-regulatory model for the authority 4 to -- where are the disadvantages, where does it fall 5 down? 6 MR RICHARDS: I think the advantages are that we were able 7 by doing that to bring together a single port of call 8 for advertising regulation, so the transfer of broadcast 9 advertising responsibilities was pre-dated by the 10 establishment of the Advertising Standards Authority in 11 the first place, so there was a body of expertise, 12 a body with respect, a body with established codes and 13 a body with whom practitioners could work and knew how 14 to do so. 15 So it was the grafting on almost the completion of 16 that process which seemed to make sense and I think the 17 ASA felt the same way, so it allowed advertisers to have 18 a single point of call for their advertising regulatory 19 codes and guidance. From that respect I thought it 20 seemed to us fairly straightforward. 21 The disadvantages -- I don't think there are very 22 many disadvantages. The issues that we would be 23 concerned about all lie in the area you introduced the 24 question with, which are: do we have -- in a sense 25 delegating this, adopting a co-regulatory route -- do we</p> <p style="text-align: center;">Page 72</p>

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<p>1 have sufficient safeguards, should anything go wrong?  2 Do we have confidence that we can oversee, if it is  3 necessary? And do we have confidence in the body and  4 its make-up? And there are various hooks in our  5 relationship, in our memorandum of understanding with  6 the ASA which provide for that, and I think what we've  7 seen is that it has worked by and large extremely well.  8 You have one or two cases of the kind that you  9 mentioned, the HFSS case, where it's difficult for  10 a co-regulatory body to say we're going to introduce  11 prohibitions or limits on certain forms of advertising  12 when that is our revenue, so it didn't surprise me that  13 that was a moment in which we had to exercise our  14 backstop powers, and we did so.  15 Q. How often do you have to get the big stick out? By the  16 big stick I mean either you force changes to the code or  17 you enforce sanctions on behalf of the authority?  18 MR RICHARDS: Very rarely. In that case, in the ASA's case,  19 I can scarcely think of any. In our history with  20 co-regulators, so far I would say generally it is also  21 very rare, but there have been one or two moments where  22 I wouldn't say we have got the big stick out, there have  23 been one or two moments when we have ensured the big  24 stick was visible. Let me put it that way.  25 DR BOWE: That is, of course, to go back to the very  Page 73</p>	<p>1 behind tab 58. Would you like to describe for us just  2 briefly please the problems of convergence as you see it  3 and your brief thoughts on how the regulatory system  4 could seek to resolve those?  5 MR RICHARDS: I'll deal more with the former because I think  6 the latter is obviously harder.  7 Q. Yes.  8 MR RICHARDS: The challenge of convergence I think goes  9 right back to the question you asked me earlier today  10 about why is broadcasting licensed. Broadcasting used  11 to be licensed because of spectrum scarcity and the  12 nature of the technology. We all understood that world  13 very, very clearly. As time has passed, that world has  14 become less and less clear and the historic boundaries  15 between different distribution media have become more  16 and more blurred. Let's put that in absolutely clear  17 terms.  18 When I was growing up, I knew there was a printing  19 press, I knew what that was and I knew what that  20 produced. There was a television transmitter and I knew  21 what that was and I knew what that did. Today, when I'm  22 consuming my media, I have no idea, necessarily, where  23 it comes from in digital form. I know what a newspaper  24 is and I know what terrestrial broadcasting is, but that  25 is not where the future is. The future is in digital  Page 75</p>
<p>1 beginning of your question, one of the ways you make  2 co-regulation work, is that everybody knows that that  3 backstop power, whatever it is, exists. And the fact of  4 that is of itself important.  5 MR RICHARDS: Absolutely.  6 DR BOWE: Can I mention another quick addition to what Ed  7 said about why we were very keen -- very happy to sort  8 of partner with the ASA was not only did it have a good,  9 established track record of respect with its industry,  10 it also has very good complaint-handling procedures, so  11 from the standpoint of doing a good job for consumers,  12 we felt quite confident that here was a body that had  13 a well-established way of doing that.  14 Q. I'll ask them about their complaints handling. I'm sure  15 we'll hear about it.  16 There are two final things I want to ask you about.  17 The first is the thorny issue of convergence and then  18 I'll ask you about the costs of Ofcom.  19 MR RICHARDS: Sure.  20 Q. I'm going to try and take the convergence issue quite  21 shortly because it's an issue that you, Mr Richards, and  22 Ofcom have considered quite recently, both in a document  23 entitled "Protecting audiences in a converged world",  24 which is behind tab 61, and also summarised in your  25 recent speech to the Oxford Media Convention which is  Page 74</p>	<p>1 form and in digital form you don't have these fixed  2 silos, these separate physical distribution media  3 through which we can adopt separate regulatory  4 structures. And that is at its heart.  5 If you imagine a world not only today for those who  6 use iPads or smartphones, but in five, ten, 15 years'  7 time when everybody has a television which is itself  8 immediately connected to the Internet, you have to  9 envisage a world in which people are not only watching  10 the linear broadcasting as we've all grown up to know  11 it, but a world in which they are selecting  12 applications, watching video television-like content  13 which may in fact be being provided by a server located  14 not only in the UK but perhaps in a completely different  15 country.  16 That content, which may be highly video rich, may  17 well be provided by something that calls itself  18 a newspaper, or it could be being provided by something  19 that calls itself a broadcaster.  20 Actually, in due course it's quite possible that the  21 viewer in those circumstances would have no idea. They  22 certainly will have no idea which distribution mechanism  23 is providing it. They won't know if it's a satellite,  24 IP television, terrestrial, over the air and so on. So  25 the boundaries of digital media are highly blurred and,  Page 76</p>

<p>1 crucially, fairly invisible to the viewer, to the 2 consumer, and that is the heart of the challenge. 3 As we approach that, we can, I think, take comfort 4 in the fact that linear broadcasting is not going to go 5 away. Linear broadcasting, so channels BBC 1, BBC 2, 6 ITV and so on, despite the claims of the technophiles, 7 have proved remarkably resilient. People still like 8 ordinary television. So we can take that as 9 a relatively secure position for the next decade or two, 10 I believe. 11 But we then have to cope with the fact and think 12 about the fact that people will also be consuming 13 digital media that is not like that and what regulatory 14 context do we place around that? 15 What I said in my speech was that, and this was an 16 initial set of views, I think you have to think about 17 probably three principal areas. You have to think about 18 broadcasting, and in my view that works well, don't 19 tinker with it too much, people value it. At the other 20 end of the spectrum you need to think about what I call 21 the open Internet, and again this is back to something 22 we touched upon earlier. It is now possible to just 23 publish a blog in 15 minutes, anyone can do it, anyone 24 can be a publisher. We have to accept that there is 25 going to be a space, and we have to be comfortable with</p> <p style="text-align: center;">Page 77</p>	<p>1 presses will be retired, and I wouldn't like to make 2 a prediction. I'm sure they will be with us for many 3 years. But it's equally clear from everything that's 4 happening in the newspaper industry that the digital 5 form is as much part of the future, if not the future. 6 It's also clear that a lot of that content is not 7 only text and graphics, but is also likely to be 8 increasingly audio and video rich. So you have 9 a digital product there which a called a newspaper but 10 which is beginning to tiptoe and in some cases move 11 quite swiftly towards that area that we call video on 12 demand. It hasn't often crossed that line, but it's 13 heading towards it. 14 You have another factor in relation to the press, 15 which is I think the significance and scale and 16 influence factor. If these were services which really 17 nobody accessed, very minuscule audiences of no 18 significance, I think we can then take a very relaxed 19 view about it, but as we all know, newspapers, whether 20 in digital or physical form, have significant scale 21 influences in our society and therefore we need to think 22 about what the right regulatory regime is. 23 The key point I would make from a convergence 24 perspective, just to draw those threads together, is 25 that as the newspaper becomes more and more and over</p> <p style="text-align: center;">Page 79</p>
<p>1 and I think be delighted about the fact that this 2 extraordinary phenomenon exists and it has created 3 remarkable freedoms and remarkable access to 4 information. So that is going to be there and it's 5 going to be open and I think it's a fool's errand to try 6 and regulate it. 7 The really difficult area is the space in between 8 the two, and it seems to me there are two important 9 areas there. The first is what we call video on demand, 10 and that is the digital content, video content, which is 11 available on demand, so that's not linear broadcasting, 12 but to the viewer opening or downloading or accessing 13 video on demand, it looks remarkably like television. 14 It's very similar. And over time, the more so. 15 My question there is: given that that is going to be 16 on the television in the future, in the living room, do 17 we have the right level of regulation to meet public 18 expectations? And what our research told us was that 19 people say if you are telling me this is going to be on 20 my television in my living room with my family watching 21 it, I would like a little more protection than is 22 currently on offer, because it's more like television. 23 That is, I think, the first problem. 24 The second problem is the evolution of the newspaper 25 industry into digital form. I do not know when printing</p> <p style="text-align: center;">Page 78</p>	<p>1 time I think ultimately in digital form, we have to make 2 sure that that area, between the open Internet at one 3 end and conventional linear broadcasting at the other, 4 that is the difficult area and that is what we need to 5 anticipate, because I think that is where we're going to 6 end up, and in some cases fairly soon. 7 Q. The only other question I have is about costs. This is 8 your second statement to the Inquiry. If I can 9 summarise it in this way: at the seminar, one of the 10 Inquiry seminars -- 11 LORD JUSTICE LEVESON: Hang on, you said that you've 12 identified the problem. You said the solution was 13 rather more difficult. 14 DR BOWE: The regulatory solution. 15 MR RICHARDS: The regulatory solution is more difficult 16 because of all the different histories and so on. 17 I don't -- what we have said is that we do not think 18 that the solution is broadcast style licensing 19 regulation, for all the reasons that I think a number of 20 people have submitted to the Inquiry. 21 DR BOWE: And also importantly because of possibly the 22 changing ways in which people are expecting various 23 things from various communications media, and I would 24 put that in very tentative terms because our recent 25 research on this is no more than indicative, but it</p> <p style="text-align: center;">Page 80</p>

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<p>1 is -- the reason why Ed described this as something it's 2 difficult to find a solution for is not only is the 3 whole technology changing in the way Ed has described, 4 but how people behave around it is possibly also 5 changing, and to find something that meets people's 6 expectations and needs is not straightforward. 7 LORD JUSTICE LEVESON: Thank you. 8 MS PATRY HOSKINS: Costs. At the seminar on 12 October 9 reference was made about the costs of Ofcom compared to 10 the PCC. Obviously costs of any news body would be 11 relevant if the industry had to pay for it, so in some 12 regards what was said was quite worrying. I think it 13 was Mr Paul Dacre who said at the seminar that your 14 budget of £115 million compared rather unfavourably with 15 the PCC's budget of £2 million. 16 You've provided a statement which deals with this in 17 some detail. Can you summarise for us whether you think 18 that's an accurate comparison or a fair comparison? 19 MR RICHARDS: The comparison that Mr Dacre made is, no, it's 20 wholly inaccurate, and let me explain why. 21 The £115 million that is our budget is a budget 22 which covers every single one of our activities. That 23 is all the things that you began with: fixed and mobile 24 telecoms regulation, the management and interference 25 management of the entire UK spectrum, consumer Page 81</p>	<p>1 MS PATRY HOSKINS: Mr Richards and Dr Bowe, those are all my 2 questions. Obviously the Chairman may have some 3 additional questions, but on my behalf, thank you very 4 much. 5 LORD JUSTICE LEVESON: Two things. First of all, as we've 6 just commented, on 12 October you took part in one of 7 our briefing sessions on regulation. Are you content 8 that the transcript of what you said there can be 9 incorporated into the record of the Inquiry? 10 MR RICHARDS: I'm content, subject to -- I'm not sure I've 11 checked it, but subject to my checking it, yes, 12 absolutely, of course. 13 LORD JUSTICE LEVESON: Fine. Thank you very much. It's 14 a rather formal matter. It's only because what is 15 within the record has to be clear. 16 MR RICHARDS: Yes. 17 LORD JUSTICE LEVESON: The second is this, and let me make 18 it abundantly clear that I am not saying that this 19 should be taken as a hint by anybody, and neither am 20 I suggesting that Ofcom are anxious to move into press 21 regulation, but it's abundantly clear from all you've 22 said that you have a very great deal, indeed in this 23 country a unique deal of experience of media regulation 24 beyond the pure press. Therefore I would welcome your 25 views, not now, I ask you just to think about it but not Page 83</p>
<p>1 protection, concurrent competition powers, it now 2 absorbs postal regulation and so on. Only a relatively 3 small part of our activity is broadcasting standards 4 regulation. 5 If you ask the correct question, which is how much 6 does our broadcasting standards regulation cost, because 7 that seems to me the closest analogy to what the PCC 8 does, we provided the Inquiry with an analysis to the 9 best of our ability, which would replicate or copy the 10 closest similar analysis that we could do. In doing so, 11 we've erred on the side of caution, I should say. In 12 other words, if we've done anything, we've overstated, 13 I think, rather than understated. When you do that 14 analysis, you discover that our budget for broadcasting 15 standards is about £3.4 million falling to £3 million 16 this year, and that's what we would expect it to be on 17 an ongoing basis. 18 LORD JUSTICE LEVESON: And that includes complaint handling 19 and -- 20 MR RICHARDS: Yes. 21 DR BOWE: Everything. 22 LORD JUSTICE LEVESON: All right. 23 MR RICHARDS: So there really is quite a substantial 24 difference. 25 LORD JUSTICE LEVESON: Yes. Page 82</p>	<p>1 at the expense of your other work, on how the press 2 could be regulated in a way that preserves their 3 independence and of course the rights of free 4 expression. I leave it as open textured as that, but it 5 is something you've clearly had to think about in the 6 context of your various activities and if you could 7 write to me on that subject at some stage, I'd be very 8 grateful. 9 DR BOWE: Thank you very much for the invitation. You are 10 correct in your assumption that Ofcom is not seeking to 11 regulate the press. You could not be more correct in 12 that assumption. But of course we're very happy to try 13 to help this Inquiry in any way we can, and we will 14 think carefully about what we can say that might further 15 assist you. 16 LORD JUSTICE LEVESON: Thank you very much indeed. Thank 17 you both very much, and thank you for being so prepared 18 to give up your time in a field that is not your field 19 to help me in the work that I have to do. Thank you 20 very much. 21 MS PATRY HOSKINS: I think we should move seamlessly to 22 Mr Parker, who is the chief executive of the Advertising 23 Standards Authority. 24 LORD JUSTICE LEVESON: Thank you. 25 Page 84</p>

<p>1 MR GUY SEBASTIAN PARKER (affirmed)                  2 Questions by MS PATRY HOSKINS                  3 MS PATRY HOSKINS: Good afternoon, Mr Parker.                  4 A. Good afternoon.                  5 Q. The authority has provided a statement to the Inquiry.                  6 It's the statement of Lord Smith. Could I just ask you                  7 first of all to give your full name to the Inquiry?                  8 A. Guy Sebastian Parker.                  9 Q. Can I confirm that you've read the contents of                  10 Lord Smith's statement and that you are satisfied that                  11 its contents are true to the best of your knowledge and                  12 belief?                  13 A. I have and I am.                  14 Q. Can you tell us first of all who you are?                  15 A. I'm the chief executive of the ASA.                  16 Q. Thank you.                  17 LORD JUSTICE LEVESON: I understand it's not been possible                  18 for Lord Smith to come.                  19 A. That's right. He apologises.                  20 LORD JUSTICE LEVESON: Thank you very much for stepping in                  21 A. Pleasure.                  22 MS PATRY HOSKINS: Now, what is interesting here, just again                  23 so I can give you the structure of where we're going to                  24 go, what's interesting is the authority has different                  25 regulatory approaches within the same system. If I can</p> <p style="text-align: center;">Page 85</p>	<p>1 Q. First of all, the CAP, the Committee of Advertising                  2 Practice, that writes the codes and is itself split into                  3 broadcast and non-broadcast, which writes broadcast and                  4 non-broadcast codes, would that be fair?                  5 A. Yes.                  6 Q. The codes are administered by the ASA itself, which is                  7 split into the ASA broadcast and non-broadcast as well,                  8 but is recognised generally as one body. It has no                  9 formal legal or statutory powers and works by persuasion                  10 and consensus.                  11 A. Correct.                  12 Q. Thirdly, there's the Advertising Standards Board of                  13 Finance, ASBOF, and the Broadcast Board of Finance,                  14 BASBOF, which raises fund to pay for this system, but                  15 I'm going to safely ignore them for today's purposes.                  16 Would that be the three elements of the ASA system?                  17 A. Yes, it would.                  18 Q. Lord Smith told us but by adoption you tell us that the                  19 system is predicated on this particular separation                  20 between writing the codes, administering the codes and                  21 funding the system.                  22 Can we turn to membership of the Committee of                  23 Advertising Practice, and remind ourselves that that is                  24 the body that writes and updates the codes, both                  25 broadcast and non-broadcast. You explain in your</p> <p style="text-align: center;">Page 87</p>
<p>1 call them true self-regulation, co-regulation with Ofcom                  2 and a third system which relays a form of                  3 self-regulation with statutory underpinning the OFT                  4 system, and I'll come back to explore the models with                  5 you briefly and then perhaps ask you about the strengths                  6 and weaknesses of the approaches as you see them. Is                  7 that fair?                  8 A. Okay.                  9 Q. First of all, I'm going to start with a brief overview                  10 of the ASA system. I'll start with the remit. Tell me                  11 if I fairly and accurately summarise this. The ASA's                  12 remit covers advertisements and other marketing                  13 communications -- I should say let's look at the                  14 statement at the same time. It's paragraph 2.4.1                  15 onwards. It's not just broadcast advertising, which is                  16 what we've been discussing with Ofcom. It covers all                  17 sorts of other advertising. It includes newspapers and                  18 magazines and even door drops and all that sort of                  19 thing?                  20 A. Correct.                  21 Q. The structure of the ASA system, I'll try and summarise                  22 that, the regulatory system -- UK advertising regulatory                  23 system is split into three parts and overall I'll call                  24 it the ASA system.                  25 A. Mm-hm.</p> <p style="text-align: center;">Page 86</p>	<p>1 statement at 2.3.4 that the aim of the code is to uphold                  2 the principle that all advertising wherever it appears                  3 should be legal, decent, honest and truthful.                  4 The membership of that committee is set out over the                  5 page at 2.3.5. It consists of trade associations                  6 representing the three main parts of the advertising                  7 industry, namely advertising agencies, media owners and                  8 advertisers, and representatives of broadcasters                  9 licenced by Ofcom sit directly on the broadcast                  10 committee as opposed to being represented solely through                  11 trade associations.                  12 I don't know if you heard when Ofcom were describing                  13 the membership of their board they explained that they                  14 had no serving industry figures on their board, but your                  15 committee is made up, both in broadcast and                  16 non-broadcast committees, are made up of industry                  17 figures. Is that an advantage or a disadvantage in your                  18 view?                  19 A. It's an advantage of the self-/co-regulatory system that                  20 we operate for advertising because that's one of the key                  21 ways by which the advertising and media businesses can                  22 contribute to the system, by writing the rules. Now,                  23 those rules which appear in the advertising codes, the                  24 broadcast and the non-broadcast codes, are subject to                  25 full public consultation, and indeed the last code</p> <p style="text-align: center;">Page 88</p>

<p>1 review, which occurred in 2009, culminated in 2009,                  2 generated thousands of responses when the codes were                  3 publicly consulted upon.                  4 But yes, it's appropriate to ensure the industry buy                  5 into the system. The other key way in which the                  6 industry contributes to this system is, of course, by                  7 funding it.                  8 Q. Do conflicts ever arise, is that a particular problem                  9 which ever arises?                  10 A. The ASA and ultimately the ASA council are tasked with                  11 administering the codes and you may be intending to get                  12 on to them in a minute.                  13 Q. Yes.                  14 A. They are the independent part of the system. The                  15 chairman is independent, the majority of the members of                  16 the ASA council are independent, and there is never any                  17 undue influence upon the ASA council by any CAP members.                  18 Q. All right. I was going to come on to the ASA membership                  19 because they do administer the code, as you've                  20 explained. That includes complaints handling functions?                  21 A. That's right.                  22 Q. And the council decides whether the codes have been                  23 breached. Who appoints the chairman?                  24 A. The Advertising Standards Boards of Finance, so ASBOF                  25 and BASBOF appoint the chairman in consultation with the</p> <p style="text-align: center;">Page 89</p>	<p>1 of 12, two of them come from a advertiser background, a                  2 client background, one comes from an advertising agency                  3 background and one comes from a media background, but                  4 they're not there to represent those constituencies,                  5 they're there to bring their experience to bear.                  6 Q. The majority are independent members?                  7 A. Eight are independent.                  8 Q. I turn on in the statement to 2.5 onwards. At 2.5.4 you                  9 explain:                  10 "The system works across the spectrum of                  11 self-/co-regulation, from near pure-self-regulation in                  12 most matters relating to harm, offence and social                  13 responsibility in non-broadcast advertising, through                  14 self-regulation backed by a legal framework in most                  15 matters relating to unfair, misleading or aggressive                  16 advertising ... to full co-regulation in broadcast                  17 advertising with Ofcom ..."                  18 Then you set out some examples of how this system                  19 has a mixed self-/co-regulatory approach.                  20 It's fair to say -- I'll come back to the                  21 examples -- it's fair to say that the ASA system sits at                  22 different points on the regulatory system depending on                  23 what is being regulated?                  24 A. Yes.                  25 Q. Can I take you through the examples very briefly. The</p> <p style="text-align: center;">Page 91</p>
<p>1 Advertising Association, which is an organisation that                  2 represents advertising and media businesses, in                  3 consultation with the Secretary of State for the                  4 appropriate government department -- that might be                  5 plural because BIS and DCMS both have an interest in                  6 advertising, and in consultation with Ofcom.                  7 Q. Who appoints the council members?                  8 A. The chairman.                  9 Q. How is their independence assured?                  10 A. The majority of the ASA council members are independent                  11 members appointed by the chairman following public                  12 advertisement and following the Nolan principles. And                  13 they are not allowed to have worked in the advertising                  14 or marketing businesses, nor are they allowed to have --                  15 to hold or have held any significant interest in such                  16 businesses.                  17 Q. So how do you ensure expertise?                  18 A. Since I've been at the ASA, which is coming on for 20                  19 years, the ratio of advertising members, industry                  20 members, to independent members has been 2 to 1 --                  21 sorry, 1 to 2. A third of the members are industry                  22 members.                  23 Q. I understand.                  24 A. And that's how one gets the expertise from the industry.                  25 Of the four members who are industry members, four</p> <p style="text-align: center;">Page 90</p>	<p>1 first is pure self-regulation. That's for matters                  2 relating to harm, offence and social responsibility in                  3 non-broadcast advertising. And that's you say one of                  4 pure self-regulation and the ASA administers the                  5 advertising codes without recourse to legal backstop at                  6 all.                  7 You've already explained to us that the ASA has no                  8 legal or statutory powers so how does it persuade people                  9 to take part?                  10 A. I'm not sure persuading people to take part is the right                  11 way of looking at it, because the advertising codes that                  12 we administer are mandatory. We will apply them whether                  13 or not a company who is advertising professes to be                  14 a member of one of the trade associations that is a part                  15 of the ASA system.                  16 Q. Yes.                  17 A. How we persuade them to comply with the decisions that                  18 we reach is really covered in the sanctions section of                  19 my chairman's submission, which is 276.5 onwards.                  20 Q. Yes?                  21 A. We have a variety of sanctions that we can deploy even                  22 in cases where we have no statutory backstop.                  23 LORD JUSTICE LEVESON: The real point is that if the media                  24 groups won't take advertising that you've sanctioned,                  25 that you've said is inappropriate, that's the end of it,</p> <p style="text-align: center;">Page 92</p>

<p>1 isn't it?</p> <p>2 A. It's certainly the end of it if the advertiser concerned</p> <p>3 is using a medium -- a paid for medium to distribute its</p> <p>4 ad, and that's a very powerful sanction.</p> <p>5 LORD JUSTICE LEVESON: So that's why in one sense it's</p> <p>6 voluntary, but in another sense it's not voluntary at</p> <p>7 all. The advertisers want to get their advertising into</p> <p>8 the space they want it and if the people who hold the</p> <p>9 spaces won't carry the adverts because you've said</p> <p>10 there's something wrong with them, that's the end of the</p> <p>11 game.</p> <p>12 A. Yes, although I wouldn't say it's voluntary at all, even</p> <p>13 in circumstances other than that, because if an</p> <p>14 advertiser is distributing advertising leaflets, which</p> <p>15 do fall under the advertising codes but which can't be</p> <p>16 stopped by that media refusal sanction because there is</p> <p>17 no media gatekeeper, they're just handing out leaflets,</p> <p>18 we will still apply the code to advertising leaflets</p> <p>19 that appear to breach the code and we will still publish</p> <p>20 adjudications against the advertiser, which often</p> <p>21 results in them being named and shamed in articles, for</p> <p>22 example, in media coverage, and can be a very powerful</p> <p>23 deterrent of itself.</p> <p>24 LORD JUSTICE LEVESON: It's a deterrent for a slightly</p> <p>25 different reason, because then companies employing that</p> <p style="text-align: center;">Page 93</p>	<p>1 I am very clear that this is not a voluntary system. It</p> <p>2 is voluntary to contribute funding towards the system,</p> <p>3 which is another matter which we might get on to later,</p> <p>4 but you cannot choose not to comply with the advertising</p> <p>5 codes without consequences.</p> <p>6 LORD JUSTICE LEVESON: Without consequences, yes.</p> <p>7 MS PATRY HOSKINS: Consequences are generally industry-led</p> <p>8 sanctions, as you've explained. But ultimately if you</p> <p>9 had somebody who said "I don't like this ASA system at</p> <p>10 all, I don't like the code, I am just going to publish",</p> <p>11 they wouldn't withdraw formally necessarily but they</p> <p>12 might say "I'm going to publish, print my ads" and put</p> <p>13 them through all the doors if I feel like it.</p> <p>14 A. Mm-hm.</p> <p>15 Q. In that sense that would still be a possibility?</p> <p>16 A. It would still be a possibility what, that the --</p> <p>17 Q. That they could do that without fear of --</p> <p>18 A. In defiance of the ASA? Oh yes, and some try, from time</p> <p>19 to time.</p> <p>20 Q. And there's no statutory --</p> <p>21 A. There's no statutory backstop; correct.</p> <p>22 Q. Fine. I then turn to self-regulation with a legal</p> <p>23 backstop. This is 2.5.6 of the statement. You say the</p> <p>24 ASA is recognised by the OFT as the established means</p> <p>25 for regulating misleading and comparative ads in</p> <p style="text-align: center;">Page 95</p>
<p>1 technique won't want the agents of whoever is preparing</p> <p>2 this material for them to do the job because far from</p> <p>3 getting positive publicity from the work they're trying</p> <p>4 to do, they're going to get negative publicity.</p> <p>5 A. Yes, broadly speaking that's right. We're talking about</p> <p>6 often small companies here. They may well not use</p> <p>7 advertising agencies to produce their advertising</p> <p>8 leaflets. They will just produce them themselves. But</p> <p>9 the deterrent of adverse publicity, perhaps in the local</p> <p>10 newspaper, is still a reasonable deterrent. I won't</p> <p>11 pretend it's a game changer in every case, it isn't, but</p> <p>12 it is a good deterrent. And the fact that that small</p> <p>13 company is not a member of any trade body, is not</p> <p>14 publishing its ad in a newspaper, for example, that's</p> <p>15 a member of a trade association, that it is a part of</p> <p>16 the ASA system, that doesn't matter. The ASA will still</p> <p>17 take action, it will still apply the code and it will</p> <p>18 still publish adjudications against misleading, harmful</p> <p>19 or offensive advertising.</p> <p>20 LORD JUSTICE LEVESON: I understand that, but you have to be</p> <p>21 careful when you say it's not voluntary. You'll carry</p> <p>22 on, but whether the ultimate publisher of the advert</p> <p>23 takes any notice is a matter for him or it.</p> <p>24 A. Yes, but that's a compliance issue, I would suggest,</p> <p>25 rather than one of it being a voluntary system. I mean,</p> <p style="text-align: center;">Page 94</p>	<p>1 non-broadcast media in the UK. On the rare occasions</p> <p>2 when you are unable to secure compliance with the code</p> <p>3 you can ask the OFT to consider taking action under the</p> <p>4 CPRs or the BPRs, the business protection regulations.</p> <p>5 "The OFT can seek undertakings from a company that</p> <p>6 it will change its ads, it can also seek injunctions</p> <p>7 from the court to prevent companies from making</p> <p>8 misleading claims in their ads."</p> <p>9 LORD JUSTICE LEVESON: Because there's the whole consumer</p> <p>10 protection stuff, which actually would cope with the</p> <p>11 advert that you've just mentioned, or may do, depending</p> <p>12 on what they've done wrong.</p> <p>13 A. Yes, it would do if it was an issue that fell under the</p> <p>14 CPRs or the BPRs.</p> <p>15 MS PATRY HOSKINS: But that's not co-regulation because of</p> <p>16 course the OFT doesn't regulate advertisers. It's</p> <p>17 a specific function that it can carry out in certain</p> <p>18 specific circumstances. It genuinely is self-regulation</p> <p>19 with a legal backstop.</p> <p>20 A. Yes, I think most people would agree with that although</p> <p>21 these are not precisely defined terms.</p> <p>22 Q. No they are not but just the best we can trying to come</p> <p>23 up with a term that works.</p> <p>24 Then we have self-regulation with legal</p> <p>25 underpinning. This is the Gambling Act 2005. You're</p> <p style="text-align: center;">Page 96</p>

24 (Pages 93 to 96)



<p>1 going to have to explain this for me.</p> <p>2 A. I'm not so sure it's very different from the previous</p> <p>3 category, actually. The Gambling Commission under the</p> <p>4 Gambling Act 2005 took on various powers to regulate</p> <p>5 gambling, not just gambling advertising but gambling</p> <p>6 across the board, and one of the things it fairly</p> <p>7 quickly did was to all intents and purposes contract out</p> <p>8 the day to day regulation of gambling advertising to the</p> <p>9 ASA system in much the same way as Ofcom had a year or</p> <p>10 two before with broadcast advertising regulation.</p> <p>11 I wouldn't read too much into the fact that one is</p> <p>12 referred to in Lord Smith's submission as being</p> <p>13 self-regulation with a illegal underpinning and one is</p> <p>14 referred to as being self-regulation with a legal</p> <p>15 backstop. It actually amounts to much the same thing.</p> <p>16 Q. Final we have proper co-regulation and this is the</p> <p>17 formal co-regulatory partnership with Ofcom for</p> <p>18 broadcast advertising. Ofcom remains the statutory</p> <p>19 regulator but has contracted out the day-to-day</p> <p>20 regulation to the authority and it will only intervene</p> <p>21 in certain specified circumstances. I asked Mr Richards</p> <p>22 about this but am I correct in saying that essentially</p> <p>23 Ofcom doesn't interfere with the day-to-day work of the</p> <p>24 ASA along as the undertakings and processes and targets</p> <p>25 in the memorandum of understanding are met. Would that</p> <p style="text-align: center;">Page 97</p>	<p>1 started to consult on HFSS rules and in the end they</p> <p>2 directed BCAP to use what was then the Food Standards</p> <p>3 Agency's nutrient profiling model for the TV HFSS</p> <p>4 content rules which in fact BCAP had written. So it was</p> <p>5 a slightly complicated situation.</p> <p>6 On the sanctions side, I think we have referred</p> <p>7 seven broadcasters to them in the six or seven years</p> <p>8 since they contracted out responsibilities to us.</p> <p>9 Q. I guess I want to explore with you the extent to which</p> <p>10 you feel that you need the big stick of Ofcom. Is it</p> <p>11 useful? Does the fact that it exists mean that you're</p> <p>12 not robust as a genuinely independent regulator?</p> <p>13 A. Yes, it is.</p> <p>14 Q. What's the authority's view on that?</p> <p>15 A. It's useful, very useful. As with all sanctions,</p> <p>16 whether they are statutory sanctions or not, they are</p> <p>17 vital for ensuring that those who might be tempted to</p> <p>18 push the boundaries don't do so out of fear of what</p> <p>19 might happen if they did and the deterrent effect of</p> <p>20 sanctions, I'm convinced, secures a huge amount more</p> <p>21 compliance than the actual application of sanctions. If</p> <p>22 you have your sanctions right -- Ed Richards referred to</p> <p>23 an armoury of sanctions but if you have an escalating</p> <p>24 series of sanctions which can be applied, then what any</p> <p>25 good regulator or good self-regulator, good complaints</p> <p style="text-align: center;">Page 99</p>
<p>1 be true, practically speaking?</p> <p>2 A. Yes.</p> <p>3 Q. And the memorandum also seeks to respect the</p> <p>4 self-regulating nature of the arrangements, and notes</p> <p>5 that although it has certain powers, ie forcing changes</p> <p>6 to the code, it doesn't normally seek to do so on the</p> <p>7 basis that you are the "self" in self-regulation.</p> <p>8 A. Yes.</p> <p>9 Q. But of course, it can assist with compliance. It can</p> <p>10 assist in ensuring compliance with decisions because you</p> <p>11 don't have the statutory powers of sanction, and we've</p> <p>12 seen the DM Television ruling of Ofcom, also the Venus</p> <p>13 TV ruling behind tab 23, we don't need to turn it up.</p> <p>14 These are situations where you refer complaints to</p> <p>15 Ofcom. I want to ask you first of all Ofcom describe</p> <p>16 the system as working very well. Would you agree?</p> <p>17 A. I'd agree with that.</p> <p>18 Q. Would you agree with their assessment that they very</p> <p>19 rarely have to intervene, either to make changes to the</p> <p>20 code or to impose sanctions?</p> <p>21 A. Yes, those are very different things but it's true on</p> <p>22 both accounts. I can think of only one example which</p> <p>23 Ed Richards referred to where they intervened on the</p> <p>24 code writing side, and that was a fairly exceptional</p> <p>25 circumstance in itself, because Ofcom had already</p> <p style="text-align: center;">Page 98</p>	<p>1 handling body will do is make sure they threaten the</p> <p>2 sanction before they apply it and we tend to find</p> <p>3 certainly that eight or nine times out of ten if we</p> <p>4 threaten a sanction we get compliance. We don't have to</p> <p>5 deploy it.</p> <p>6 Q. Can I ask you about complaint handling in practice,</p> <p>7 please. First of all, do you actually need a complaint</p> <p>8 in order to intervene when a situation --</p> <p>9 A. No, we don't.</p> <p>10 Q. Turn to section 3.2.4 onwards. This is the section on</p> <p>11 complaints and investigations. You explain that the ASA</p> <p>12 considers complaints about breaches of the advertising</p> <p>13 codes from both industry and consumers. It says just</p> <p>14 one complaint can be enough to trigger an investigation.</p> <p>15 That rather suggested to me that you needed one</p> <p>16 complaint, but I think the correct answer is you don't</p> <p>17 need a complaint?</p> <p>18 A. We don't.</p> <p>19 Q. You can trigger an investigation whenever you like.</p> <p>20 A. Under our own volition.</p> <p>21 Q. Exactly, of your own volition. You explain at 3.2.5 the</p> <p>22 number of complaints that you received about a certain</p> <p>23 number of advertisements and you explain that action led</p> <p>24 to about 10 per cent of the complaints -- well, I should</p> <p>25 say 2,226 ad campaigns being amended or withdrawn, and</p> <p style="text-align: center;">Page 100</p>

25 (Pages 97 to 100)

<p>1 that complaints from the public represent 96 per cent of 2 the complaints received. I suppose that begs the 3 question who else complains?</p> <p>4 A. Competitors and other organisations with a particular 5 interest in a matter who we would regard as non-public 6 complaints. The processes that we apply to handling 7 complaints from public or non-public parties are very 8 similar. If you're a non-public party, you can't be 9 anonymous and you have to declare legal action on the 10 matter in hand.</p> <p>11 Q. Complaints are then examined carefully. If they do 12 bring to light a possible breach of the code then 13 they're sent off for a thorough investigation. You say 14 this:</p> <p>15 "All decisions on formally investigated ads are made 16 by the independent ASA Council. ASA Council members 17 must withdraw from the discussion if there is a conflict 18 of interest."</p> <p>19 That probably answers my next question about 20 independence in relation to adjudications. You then 21 say:</p> <p>22 "Adjudications set out a summary of the advertiser's 23 response to the complaint."</p> <p>24 And that's all. There's also then a system of 25 independent review and you explain that someone who's</p> <p style="text-align: center;">Page 101</p>	<p>1 investigation procedure?</p> <p>2 A. The judgment is ours, that's the first important point 3 to make.</p> <p>4 Q. Yes.</p> <p>5 A. The general rule of thumb is if the issue is relatively 6 minor and clearcut, then we'll be minded to try to 7 resolve it informally, and paragraph 24 explains other 8 circumstances that might affect our decision as to 9 whether to attempt to resolve a case informally or 10 whether it ought to be resolved formally. I'm happy to 11 go into the detail, if you'd like.</p> <p>12 Q. On the second page -- well, paragraph 24 is on two pages 13 but on the second page, page 6, the set of criteria, the 14 decision to resolve cases informally is likely only to 15 be taken in certain circumstances and you set out 16 certain criteria which you apply?</p> <p>17 A. That's right.</p> <p>18 Q. Is there a risk that informality can lead to 19 complacency?</p> <p>20 A. I think if we weren't to apply the criteria as they're 21 written, if we weren't to get the balance right, then 22 yes, I think there would be that risk. As with all of 23 these things, it is a question of a balance. We now 24 resolve more cases informally than we resolve formally, 25 but in 2010 we still formally investigated and publicly</p> <p style="text-align: center;">Page 103</p>
<p>1 not happy can request a review by the independent review 2 of the ASA adjudications, currently Mr Phillips, who can 3 refer cases back to the council including with his 4 recommendation on changes to the council's original 5 decision.</p> <p>6 Is there anything else, before I come to touching on 7 broadcast complaint handling procedures and 8 non-broadcast complaint handling procedures, is there 9 anything you'd like to add to that summary?</p> <p>10 A. Only one thing and that's you referred to the fact in 11 3.2.5 that we -- that our action led to 2,226 ad 12 campaigns being amended or withdrawn. The majority of 13 those were as a result of the 25,000, just over, 14 complaints about the just over 1,300 ads, but 15 a significant number of them, around 850 of them in 16 2010, were the result of monitoring and compliance 17 action that's summarised in 3.2.11.</p> <p>18 Q. Yes. I want to ask you about broadcast complaint 19 handling procedures. Behind tab 14 you'll find the 20 guidance on this. If I can ask you about first of all 21 informal or formal investigation procedures, 22 paragraph 24 onwards, there's a choice between a formal 23 or informal investigation procedure. Can you assist us 24 with the differences between why one would choose 25 a formal and why one would choose an informal</p> <p style="text-align: center;">Page 102</p>	<p>1 adjudicated on over 600 cases. I think the number for 2 informal cases is over 1,000, which gives you a rough 3 idea of the ratio between the two.</p> <p>4 We have a responsibility to make sure that we don't 5 unintentionally and inadvertently send a message to the 6 advertising business that they can get away with it and 7 just agree to provide an assurance and promise not to do 8 it again and hope that the ASA will resolve it 9 informally and try that time and time again, which is 10 why one of the criterion is if there's a pattern of 11 unwillingness or inability to comply with the code, if 12 there have been more than a certain number of informal 13 resolutions in the previous period, these are factors 14 that we weigh up. We will have to weigh them up in 15 conjunction with an assessment of how frequently the 16 company advertises.</p> <p>17 Of course a big advertiser producing many, many ads, 18 spending an awful lot of money on ad space and ad 19 airtime is of course going to attract more complaints 20 and just the law of probability tells you is going to be 21 subject to more problems over a period of time because 22 of human error and so on, so we need to take that into 23 account, but the criteria are important and if we're 24 consistent in applying them, there ought not to be that 25 problem.</p> <p style="text-align: center;">Page 104</p>

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<p>1 Q. Can I turn to two final paragraphs of this -- maybe                  2 three final paragraphs of this guidance. Paragraph 35                  3 on remedial action. Remembering that we are dealing                  4 with broadcast advertising cases which have the                  5 co-regulatory model with Ofcom. You say that if the ASA                  6 adjudicates that a breach has occurred but no referral                  7 to Ofcom is appropriate, then the letter of notification                  8 will inform parties of the necessary remedial action.                  9 Have you told us everything that you want to about the                  10 particular sanctions that the ASA can impose without                  11 referring to Ofcom?                  12 A. Yes, although the sanctions that I referred to earlier                  13 are principally, not exclusively, non-broadcast.                  14 Q. That's what I thought.                  15 A. The power of referral to Ofcom is not to be                  16 underestimated. This is a licence-based regulatory                  17 regime and broadcasters really do not want to lose their                  18 licence. Ed Richards referred to it in his testimony as                  19 being akin to the end of the world and it really is. So                  20 that does, I think without much doubt, make it easier                  21 for us to secure compliance on the broadcast side than                  22 it sometimes is on the non-broadcast side.                  23 Q. Paragraph 41 describes Ofcom sanctions. If obviously                  24 you think sanctions in a broadcast case should be                  25 imposed beyond your powers you can refer to Ofcom. How</p> <p style="text-align: center;">Page 105</p>	<p>1 A. It doesn't happen very often, but it does happen. It                  2 tends to happen with very, very small companies who are                  3 determined to carry on regardless. It often happens,                  4 actually, when people feel very, very passionately about                  5 what they're advertising, particularly if they're                  6 advertising a cause or an idea, and those -- advertising                  7 of that type of thing is covered by the non-broadcast                  8 advertising code, so you can imagine the circumstances.                  9 It might be a local campaign group who are campaigning                  10 against a proposed wind farm development and feel                  11 extremely strongly about the issue, and have put                  12 together a campaigning advertising leaflet and are                  13 handing it out in the neighbourhood, and it's sometimes                  14 difficult to enforce the advertising code against                  15 parties like that and we obviously have to weigh up in                  16 extreme circumstances whether or not it's worth us                  17 continuing to pursue it, given the size of the problem.                  18 Q. Does the Authority have a preference for co-regulation                  19 or self-regulation? Would it like to move, for example,                  20 to a model where it was consistently a co-regulator or                  21 self-regulator? Or does the current system work well,                  22 in your view?                  23 A. I think it works well. One of the real advantages of                  24 the ASA system is the way it's evolved. You only have                  25 to look beneath the surface at this, at first sight,</p> <p style="text-align: center;">Page 107</p>
<p>1 do you decide something is appropriate for referral?                  2 A. Yes, the MOU between us and Ofcom goes into it in                  3 detail. It sets out four or five circumstances where                  4 I might want to refer a broadcaster to Ofcom. Let me                  5 see whether I can find them. It's on page 14,                  6 MOD100008684.                  7 LORD JUSTICE LEVESON: "Fails to comply fully and promptly                  8 with a decision of the ASA, fails to comply fully and                  9 promptly with a reasonable request of BCAP, demonstrates                  10 a repeated disregard for decisions of the ASA or                  11 reasonable requests of BCAP, and commits one or more                  12 code breaches of sufficient seriousness to warrant in                  13 ASA's opinion a statutory sanction."                  14 Thank you.                  15 MS PATRY HOSKINS: Can I move on to non-broadcast handling                  16 procedures fairly briefly. There's also a decision on                  17 whether there's a formal or informal investigation,                  18 where it's more serious in general terms there will be                  19 a formal investigation. Again there's an independent                  20 review but here there's not necessarily a statutory                  21 backstop to whom the ASA can refer to this case unless                  22 of course it falls within the CPRs and BPRs. To what                  23 extent do you find that you lack ultimate authority in                  24 those cases when you can't refer it to a statutory                  25 regulator?</p> <p style="text-align: center;">Page 106</p>	<p>1 very complicated mix of different models within an                  2 over-arching model to see that it must be the product of                  3 a substantial amount of evolution over quite a long                  4 period of time responding to the different circumstances                  5 that apply in different areas, and trying to find the                  6 right checks and balances or incentives that work.                  7 I think we have a good record of doing that and                  8 maybe we will come on in a minute to talking about the                  9 recent changes to the ASA system whereby we've extended                  10 the non-broadcast code to cover a lot more advertising                  11 online, particularly on websites, where we've had to                  12 think really quite deeply about new sanctions that might                  13 work in that area because that's one area where there is                  14 no media middleman. Advertisers who are making claims                  15 about their own goods and services on their own websites                  16 are not going through a media gatekeeper, for want of                  17 a better word, so we have to find something, some                  18 leverage that can be applied against those who are                  19 incapable or unwilling to comply with the code.                  20 LORD JUSTICE LEVESON: And?                  21 A. The first of the three new sanctions that we've                  22 developed and have started using is an enhanced                  23 name-and-shame sanction. We have a section that's very                  24 well flagged on the ASA website that's called                  25 "Non-complying Digital Advertisers", and if companies</p> <p style="text-align: center;">Page 108</p>

<p>1 refuse to comply, then we highlight them on that list.  2 The threat of that sanction has already worked in  3 a significant number of cases and has resulted in  4 internet advertisers making changes to their websites  5 that they were initially reluctant to make. I think  6 there are 12 companies listed at the moment.  7 The second of the new sanctions is to ask the search  8 engines, who are now part of the ASA system, they are  9 members of the Internet Advertising Bureau, which sits  10 on the Committee of Advertising Practice, to ask the  11 search engines to suspend any paid ads that link through  12 to the bit of the website where the claims is that are  13 in breach of the code are appearing, and again that's  14 been used, I think, eight times since our remit  15 extension in March last year, so eight times in just  16 under a year, and has proved effective.  17 The final of the three new sanctions for this online  18 space is where we might run our own paid search campaign  19 highlighting the non-compliance of a particular  20 advertiser.  21 We are fortunate in being a reasonably well-known  22 regulator. Our website is linked to by a lot of other  23 organisations and it is very frequently visited and  24 consequently our ads appear quite high up search  25 rankings. Our adjudications automatically appear quite</p> <p style="text-align: center;">Page 109</p>	<p>1 They will also act on obviously problematic ads  2 which are drawn to our attention, either as a result of  3 complaints we've received, where it would, in our view,  4 be wrong for us to investigate, which might take some  5 time, and allow an ad that is blatantly in breach of the  6 code to carry on appearing, so they might step in and  7 take immediate compliance action there.  8 They will undertake what we call sector compliance.  9 If the ASA has adjudicated against a company and the  10 company says, not unreasonably, "It's a fair cop but  11 everyone else in my sector is doing exactly the same  12 thing", we take that seriously, it's not right that  13 there shouldn't be a level playing field, and so the  14 monitoring and compliance team may well undertake sector  15 compliance and get in touch with the other companies,  16 draw to their attention the appropriate adjudication and  17 ask them for an assurance that they'll make changes to  18 their ads. Those are some the cases in which we carry  19 out this sort of activity.  20 Q. We've just been discussing the problem of -- one of the  21 problems of convergence. We've discussed the document  22 at tab 7, "Extending the digital remit of the CAP code".  23 You've explained that. Is there anything else that  24 you'd like to say about convergence?  25 A. Only that it's been, in my opinion, the biggest and most</p> <p style="text-align: center;">Page 111</p>
<p>1 high up search rankings, so this can a powerful  2 sanction.  3 MS PATRY HOSKINS: For your note, sir, there is a document  4 behind tab 7 a document entitled "Extending the digital  5 unit of the CAP code", which deals with all this in  6 considerable detail, and new sanctions are described at  7 4.7 onwards.  8 LORD JUSTICE LEVESON: Thank you.  9 MS PATRY HOSKINS: So you can read that in your own time.  10 I'll come on now to monitoring and compliance.  11 Lord Smith says in his statement that you don't just  12 wait for complaints to come in, you also place  13 a significant emphasis on conducting a substantial  14 monitoring programme. To what extent does the ASA  15 collectively ensure that there is compliance of the code  16 rather than sit back and wait for complaints and how  17 does it do that?  18 A. There are a number of different ways. We have two  19 compliance and monitoring teams and they carry out  20 surveys of potentially problematic areas -- we tend to  21 focus in on sectors or issues where we know there are  22 problems -- and they will look at a large sample of ads  23 and ascertain the compliance rate, but they will also  24 pursue advertisers who have published ads who appear to  25 break the rules.</p> <p style="text-align: center;">Page 110</p>	<p>1 important change to the ASA system since we took on  2 responsibility for regulating broadcast ad regulation in  3 late 2004 and it's led to a huge increase in our  4 workload.  5 The reason for that is not hard to see. It matters  6 to people. A lot of people, the vast majority of whom  7 are members of the public, are at the very least  8 spending a lot of time looking at websites even if they  9 are not necessarily buying goods and services through  10 websites and they don't want to be misled particularly  11 by advertising that appears on those websites in the  12 same way they don't want to be misled by ads they see  13 anywhere else. So there's a real demand for that and  14 it's actually been an operational challenge for us  15 because of the huge workload. We wonder whether it  16 might be a jurisdictional challenge in a sense that it's  17 not always easy to draw dividing lines between  18 advertising claims on companies' own websites and other  19 content.  20 We spent a lot of time thinking about that in the  21 run-up to the extension of our remit back in March last  22 year. In fact, that hasn't proved to be the bugbear  23 that we feared it might be.  24 Q. The fact that you've been able to deal with that so  25 seamlessly and effectively, as I'm sure you have, is</p> <p style="text-align: center;">Page 112</p>

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<p>1 that an advantage of self-regulation? Would that have  2 been equally easy in a possible statutory regulation,  3 with a statutory system in place?  4 A. I think that is an advantage of self-regulation, yes.  5 Q. Finally, section 5 of this statement, you are asked  6 about your views on strengths and weaknesses of the ASA  7 system and you explain at 5.1 that in fact the system is  8 often considered by policymakers as an example of best  9 practice regulation and you explain that through your  10 set-up and the way you exercise your functions you're  11 able to meet the 10 best practice features of  12 advertising self-regulation as defined by the European  13 Advertising Standards Alliance and you set out what they  14 are.  15 I take it those are your submissions on the  16 strengths of the Advertising Authority model. Is there  17 anything you would want to add to those strengths?  18 A. No, I don't think so.  19 Q. Are there any particular lessons that you think might be  20 learned from the ASA model that could be applied to  21 other -- that might be of interest or relevance to the  22 Chairman in the context of this particular Inquiry?  23 A. Other than looking at what we regard as the important  24 component parts of advertising self-regulation and  25 inviting you to draw any conclusions that you might want  Page 113</p>	
<p>1 to draw from those, no, not really. I certainly  2 wouldn't presume to know what might be the best model  3 for press regulation. There are undoubtedly  4 similarities between the work that the PCC does and the  5 work that the ASA does and there are similarities  6 between the press and the advertising business, but  7 there are a whole host of very important differences  8 too.  9 MS PATRY HOSKINS: Of course. Mr Parker, thank you very  10 much, those are my questions.  11 LORD JUSTICE LEVESON: Thank you. Mr Parker, thank you very  12 much indeed and I thank you and Lord Smith for the  13 statement that you made and the work you've done to put  14 it all together. Thank you very much.  15 A. Thank you.  16 LORD JUSTICE LEVESON: Right, 10 o'clock.  17 (5.00 pm)  18 (The hearing adjourned until 10 o'clock the following day)  19  20  21  22  23  24  25  Page 114</p>	

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