



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL  
SERVICES

**Reference: Statutory oversight of Australian Securities and Investments  
Commission**

WEDNESDAY, 9 NOVEMBER 2005

CANBERRA

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

**Wednesday, 9 November 2005**

**Members:** Senator Chapman (*Chair*), Ms Burke (*Deputy Chair*), Senators Brandis, Murray, Sherry and Wong and Mr Baker, Mr Bartlett, Mr Bowen and Mr McArthur

**Members in attendance:** Senators Chapman, Murray, Sherry and Wong and Mr Baker and Ms Burke

**Terms of reference for the inquiry:**

To inquire into and report on:

Annual review of the Australian Securities and Investments Commission

**WITNESSES**

**COLLIER, Prof. Berna, Commissioner, Australian Securities and Investments Commission ..... 1**  
**COOPER, Mr Jeremy, Deputy Chairman, Australian Securities and Investments Commission ..... 1**  
**LUCY, Mr Jeffrey, Chairman, Australian Securities and Investments Commission..... 1**



**Committee met at 7.04 pm**

**COLLIER, Prof. Berna, Commissioner, Australian Securities and Investments Commission**

**COOPER, Mr Jeremy, Deputy Chairman, Australian Securities and Investments Commission**

**LUCY, Mr Jeffrey, Chairman, Australian Securities and Investments Commission**

**CHAIRMAN (Senator Chapman)**—I declare open this public hearing of the Parliamentary Joint Committee on Corporations and Financial Services. Tonight the committee is conducting a public hearing into the Australian Securities and Investments Commission, under section 243 of the Australian Securities and Investments Commission Act 2001. The Joint Committee on Corporations and Financial Services is required to oversee the functioning of ASIC. This hearing is part of that oversight.

I welcome to the hearing Mr Jeffrey Lucy, Mr Jeremy Cooper and Professor Berna Collier and other officers of ASIC. As official witnesses you will not be asked to give opinions on matters of policy and will be given reasonable opportunity to refer questions to your minister. You should note that the evidence given to this committee is protected by parliamentary privilege, but I remind you that the giving of false or misleading evidence to the committee may constitute contempt of the parliament.

The committee prefers that all evidence be given in public. However, if you are asked questions which you feel cannot be answered in public, please advise the committee of the reason you feel unable to answer and the question may be deferred until the hearing convenes in camera—you may request such a move in camera. Evidence given during that in camera session should not be disclosed outside of the hearing. To eliminate any doubt, I advise you that during any in camera session you are still entitled to all of the protection provided by parliamentary privilege, with the additional protection of nonpublication of evidence.

The committee intends to report to the parliament on the performance of ASIC before the conclusion of the current parliamentary year. We therefore need within two weeks answers to any questions taken on notice.

Is it the will of the committee that 23 November 2005 be established as the due date for answers to questions taken on notice tonight? There being no objection, that is so ordered.

Mr Lucy and your colleagues, if you desire to do so, I invite you to make an opening statement.

**Mr Lucy**—Thank you, Chairman. We do not wish to make an opening statement as this is a follow-on from the previous meeting.

**CHAIRMAN**—Then we will proceed to questions. Senator Wong, you have some questions? I have some questions, and I think Mr Baker has some questions. Perhaps you could start with your questions for a while, and then we will share the time around a bit.

**Senator WONG**—Sure. I am going to swap with Senator Sherry at some point, so I will try and get through mine as quickly as possible. Can I ask first in relation to the questions on notice: Mr Lucy, what was the difficulty in providing them promptly?

**Mr Lucy**—There was not a difficulty in providing them promptly.

**Senator WONG**—I am sorry. I thought I read in the estimates *Hansard* that there was actually a view from ASIC that you did not want to provide them before this hearing.

**Mr Lucy**—That was not a problem. Firstly, we sought to clarify with Senator Sherry that the estimates hearing was a separate meeting to the PJC meeting, which was quickly agreed. Confusion arose because this is a reconvening of the earlier adjourned meeting, and we were working on the basis that we would wait to receive all questions on notice and provide one series of responses. When Senator Sherry indicated that he would prefer that we provided responses, if at all possible, before tonight's meeting, we agreed with that and have done so.

**Senator WONG**—Have the answers to these questions on notice been provided to the minister's office prior to providing them to the committee?

**Mr Lucy**—No.

**Senator WONG**—Has there been discussion with the minister's offices regarding the content of the answers to the questions on notice?

**Mr Lucy**—No.

**Senator WONG**—Are there any outstanding answers to questions on notice?

**Mr Lucy**—Senator Murray, I think, provided five questions last Thursday. I was not able to speak with him but I spoke to his office today and I indicated to him that we were not in a position to provide answers to those for tonight.

**CHAIRMAN**—These were questions?

**Mr Lucy**—They were out-of-session questions that were provided to us last week.

**CHAIRMAN**—In relation to this hearing?

**Mr Lucy**—I presume so, Chairman.

**Senator WONG**—Chair, I understand Senator Murray will be attending this hearing at some point.

**CHAIRMAN**—The secretary has just clarified it for me. They were forewarning of questions or issues that he wanted to raise at this hearing. They were not formal questions that he expected an answer to prior to the hearing.



**Mr Lucy**—Right.

**Senator WONG**—There was one answer to a question on notice I wanted to clarify. This is in relation to the discussions with ministers or ministerial officers in relation to the Telstra investigation. The answer to the question on notice is in relation to a dinner to which he referred Mr Lucy, and the answer indicated that the issue of Telstra was not referred to by—I presume that ‘b’ is meant to be ‘by’—either the minister or Mr Lucy. At the hearing in September you did give evidence that there was an off-the-cuff comment in respect of Telstra. Do I assume, therefore, that that was not made by either the minister or yourself? I am just trying to clarify the relationship.

**Mr Lucy**—Senator, I think I you are referring to 9.8: ‘The decision to investigate Telstra was made. No contact with ministers or ministerial offices by the deputy chairman, Commissioner Collier or executive director.’ That excluded me. We then went on to say that the ASIC chairman had contact with Minister Brough and the Treasurer at an FSAC dinner that previous evening.

**Senator WONG**—Yes.

**Mr Lucy**—I guess consistent with what was established—

**Senator WONG**—At which the issue of Telstra was referred to—and I assume ‘b’ should be ‘by’—neither by the minister nor by Mr Lucy.

**Mr Lucy**—Correct.

**Senator WONG**—I refer you to *Hansard*, page 39. Your answer was:

I attended a dinner last evening with a number of people, including the Treasurer, his Assistant Treasurer, his parliamentary secretary and others, in front of a group of business persons, and there was an almost off-the-cuff comment in respect of Telstra, to which I did not respond.

I asked by whom and you said you could not recall.

**Mr Lucy**—That is right.

**Senator WONG**—You do not know if it was raised by the Treasurer, the parliamentary secretary or the Assistant Treasurer?

**Mr Lucy**—I am sure that it was not raised by the Treasurer, the parliamentary secretary or the Assistant Treasurer.

**Senator WONG**—Can I ask you what the status is of the investigation into Telstra’s disclosure of market-sensitive information to the government, but not to the market

**Mr Lucy**—The basis under which we are investigating Telstra in respect of its continuous disclosure obligations is continuing, and we would expect to conclude our investigation within the next three weeks.

**Senator WONG**—Within the next three weeks?

**Mr Lucy**—Yes.

**Senator WONG**—Do you propose to make that public?

**Mr Lucy**—Yes. I cannot quickly imagine a circumstance where the conclusion would not be made public.

**Senator WONG**—I am sorry?

**Mr Lucy**—I cannot imagine a circumstance where it would not be made public.

**Senator WONG**—Have you determined any course of action as a result of those investigations?

**Mr Lucy**—No. It is still an open matter.

**Senator WONG**—Have any parliamentarians been interviewed in the course of those investigations?

**Mr Lucy**—Whom we interview is a matter which we do not disclose during the course of an investigation.

**Senator WONG**—Could you disclose it after the investigation is concluded?

**Mr Lucy**—Potentially, but not necessarily, particularly if the people that we interviewed were not ultimately relevant to the investigation.

**Senator WONG**—I am sorry?

**Mr Lucy**—We would certainly not identify the people that we have interviewed if they were not ultimately decided as being relevant to the investigation.

**Senator WONG**—So, you would determine who you told the public you interviewed?

**Mr Lucy**—Yes; if we chose to.

**Senator WONG**—Yes, that is what I mean: you would determine whether you would or not, and who you would disclose you had interviewed.

**Mr Lucy**—Yes.

**Senator WONG**—On what basis would you make that decision, Mr Lucy?

**Mr Lucy**—It depends upon whether or not their participation is relevant to the investigation.

**Senator WONG**—If they have been interviewed, obviously it has been relevant enough for an interview.

**Mr Lucy**—Not necessarily. It may well be that their participation is very much a side aspect of an investigation. The difficulty we would have in identifying everybody that we interviewed is that there is some element of reputation that goes with such a course. We would be very careful to see whether we need to identify them.

**Senator WONG**—Do you mean from that, reputation would be a relevant factor to whether or not you would actually disclose to the public whether or not you had interviewed someone?

**Mr Lucy**—I think that the purpose for interviewing is to obtain whatever information is necessary to complete a thorough investigation. Part of that involves people coming forward and volunteering information if they are aware that we are investigating. We want to provide an environment where people feel free to come forward. By naming people that we speak to in any and every investigation, that may well work against that premise.

**Senator WONG**—This may be a question for you. There has certainly been some discussion in the business sections of a couple of the newspapers about the effect of the Telstra Corporation Act, and in fact whether that protects Telstra, and potentially government, from breaches of disclosure. Do you have a view about that issue?

**Mr Lucy**—That is not an act that ASIC administers or has responsibility for. We have a very clear focus on the responsibilities of Telstra and its officers, including directors, to the ASIC Act.

**Senator WONG**—I may not be being very fair to you Mr Lucy. I think perhaps it is a legal argument. I am happy to leave that. I just thought if the legal argument were correct it would obviously materially affect the investigation, but I think the suggestion is that the provisions of the Telstra Act actually alter the duties and obligations on Telstra directors in the circumstances of where they have briefed government ministers. I am asking if there has been any legal advice taken on that issue, and whether ASIC has a view. If you do not, I am not going to press it.

**Mr Lucy**—I think it is our preliminary view that that has no relevance.

**Senator WONG**—When do we look to a public release of the conclusions in relation to this report?

**Mr Lucy**—I would like to think within three weeks. It is dependent upon whether or not we are able to proceed in the manner which we would like, because there are some instances where we are not entirely in control of the agenda, but we are certainly—

**Senator WONG**—What do you mean?

**Mr Lucy**—Well because there are third parties involved.

**Senator WONG**—Who are the third parties involved?

**Mr Lucy**—Again, that is not a matter that I wish to discuss openly, but there are—

**Senator WONG**—Well we can move in camera. I do not understand. I am asking you about an inquiry; you are saying some third party is controlling when ASIC can release its report.

**Mr Lucy**—Our investigation is thorough and it needs to be comprehensive. In that regard we need to ensure that all areas are considered, that we speak with people that are necessary to speak with and, in some instances, it is necessary to speak with people more than once. We are relying, to some extent, on others making themselves available for us to speak with. To that extent, we are not entirely in control of the timeline.

**Senator WONG**—Is the timing of the release of this report something you have discussed with the Treasurer's office?

**Mr Lucy**—Categorically no.

**Senator WONG**—Or the Prime Minister's office?

**Mr Lucy**—No.

**Senator WONG**—Any ministerial office?

**Mr Lucy**—No.

**Senator WONG**—We are looking at three weeks, depending on the third parties, whose identities you are not going to disclose?

**Mr Lucy**—That is correct.

**Senator WONG**—Can I clarify in relation to these third parties—is this because you need to reinterview them or because they have some role in determining when ASIC releases its report?

**Mr Lucy**—I can categorically state it is not the latter.

**Senator WONG**—It probably comes to no surprise to you Mr Lucy that I am going to ask you about Sausage Software.

**Mr Lucy**—Yes.

**Senator MURRAY**—The Senate has been described as a sausage machine.

**Senator WONG**—Yes, we are all into sausages at the moment. This obviously was a matter that has been raised in the media and I am not going to comment on the veracity or otherwise of that, I am in no position to do that, but I am interested in knowing whether or not the trading of shares in this company by the parties was a matter considered in the context of the Vizard investigation.

**Mr Lucy**—ASIC has received a one-page document from the *Sun-Herald* relating to the share trading that occurred more than five years ago. The document contains no information that

connects the identified persons, firstly, to one another, other than the fact that they reside in Melbourne, or to Sausage Software, Solution 6, Telstra or Mr Vizard. There is no information that identifies whether any of the identified persons possessed any inside information, or had access to inside information. At this stage there is insufficient information to believe that trading identified by the *Sun-Herald*, I beg your pardon the *Herald Sun*, constitutes insider trading. ASIC though is continuing to assess the information.

**Senator WONG**—I will come back to the use of the verb assess as oppose to investigate, but actually the question I asked you Mr Lucy was whether the trading of shares in Sausage Software by other parties was a matter that was investigated in the context of the investigation into Mr Vizard.

**Mr Lucy**—In relation to the investigation of Vizard, we concentrated our review of trades in respect of his own activities and those of companies associated with him, not other parties.

**Senator WONG**—Would it be correct to say that the trading of shares in that company by other parties was not a matter investigated in the context of the Vizard investigation?

**Mr Lucy**—Correct.

**Senator WONG**—Other than the assessment of the information provided by the *Herald Sun*, have you investigated or are you currently investigating any other trading of shares in that company?

**Mr Lucy**—As you may recall, an investigation is a formal step that needs to be taken by ASIC—

**Senator WONG**—Correct.

**Mr Lucy**—when we have reasonable suspicion that a contravention has occurred, and at this stage we have not elevated that to an investigation.

**Senator WONG**—Is there anyone looking into it to determine whether or not it would reach the status of investigation?

**Mr Lucy**—Yes there is.

**Senator WONG**—Is there a person in your compliance branch, or how is the assessment or consideration of the information proceeding?

**Mr Lucy**—You are quite correct, it is within our national assessment area and they are considering the material, including that provided by *Herald Sun*.

**Senator WONG**—Are they interviewing persons?

**Mr Lucy**—Not at this stage.

**Senator WONG**—Are they doing anything other than having read the *Herald Sun* document and then deciding there was nothing further to do?

**Mr Lucy**—No, they are looking at things more broadly than that, and in particular, you would imagine that we would have quite a bit of information in hand already to do with Sausage Software, so there is information already in our possession which we are aligning with that provided by the *Herald Sun*.

**Senator WONG**—What is asserted in the article is allegedly irregular trades in Sausage Software stock between 5 March and 20 March of this year. Was there any advice or referral from the ASX in relation to trading irregularities in that period?

**Mr Lucy**—To the best of my knowledge no, but I will take that on notice to be absolutely sure.

**Senator WONG**—Has that aspect of the allegations been raised with the ASX? Presumably that is something that one could actually determine.

**Mr Lucy**—Clearly the ASX have been involved in this from day one, so that is why I am reasonably sure that there have not been any other references, but I would like to take it on notice to be sure.

**Senator WONG**—When you say the ASX has been involved from day one, are you talking about the Vizard investigation?

**Mr Lucy**—Yes.

**Senator WONG**—I am happy for you to take on notice whether there was a—is the technical term referral from the ASX with the trading?

**Mr Lucy**—Yes.

**Senator WONG**—The referral from the ASX in relation to the period in which there are alleged irregularities in the—

**Mr Lucy**—I understand and will come back to you on that.

**Senator WONG**—I do want to ask some brief questions about trading irregularities. Can you tell me how many trading irregularities were referred by the ASX to ASIC in the year to date?

**Mr Lucy**—I will take that on notice.

**Senator WONG**—Are you able to give me some indication of how this process works? I am not quite sure other than at a theoretical level how it works where there is a share trade irregularity, does the ASX have a threshold or set of parameters under which it chooses whether or not something is referred to ASIC and is there then a set of guidelines about how those are dealt with?

**Mr Lucy**—Yes, indeed. Might I suggest that, if you wish to, I am sure that the ASX—

**Senator WONG**—I am actually going down there Mr Lucy, thank you. I am happy to have this discussion with them but I am interested from the ASIC point of view.

**Mr Lucy**—I understand. Firstly, there is a formal protocol that operates between the ASX and ASIC that deals with referrals. Our people are in regular contact with the ASX parties, almost daily but certainly regular contact with that group. Inevitably there are referrals that do not amount to anything, but all referrals are taken seriously by ASIC and are reviewed and if necessary elevated to an investigation.

**Senator WONG**—Okay, and is that protocol public?

**Mr Lucy**—Certainly our MOU is public.

**Senator WONG**—This is, sorry—

**Mr Lucy**—I will need to take on notice whether or not the protocol itself is a public document.

**Senator WONG**—Could you on notice provide a copy of the MOU and the protocol to the committee?

**Mr Lucy**—Yes.

**Senator WONG**—Could you provide the number of referrals in the financial year 2004-05 and in the previous two years and then tell me which of those became investigations.

**Mr Lucy**—Yes.

**Senator WONG**—Is that information difficult to obtain?

**Mr Lucy**—No. It would take a little bit of time but it is not difficult.

**Senator WONG**—I do not want to name particular companies, but there are a number of instances of fairly high share trades—certainly well beyond daily averages—that have been provided to me by various people and are on the public record. The only reason I am not naming the company is because I do not think it is appropriate in a public hearing to do so. I am interested in what triggers an ASIC investigation? For example, would trading in a volume 115 times the annualised daily turnover generally be something you would investigate?

**Mr Lucy**—Not necessarily, because again there need to be grounds. There might be legitimate reasons why there is a spike in activity. A spike does not automatically indicate that there has been any inappropriate trades.

**Senator WONG**—Sure, but presumably you would try and confirm some basis or some reason for the spike?

**Mr Lucy**—Certainly, and I think that it is also fair to say that there are particular times in a company's reporting period where we would be more conscious as to whether or not there was particularly high trading activity.

**Senator WONG**—Does ASIC have a view about the extent of insider trading activity in Australia?

**Mr Lucy**—It is very difficult to have a view as to the extent of it. It is certainly something which we think is very important to address and to regulate, and, if necessary, to investigate and prosecute because it can cause significant damage to confidence in the market. It also of course provides the opportunity for some to profit against their fellow Australians. Clearly that is totally unacceptable, but it is very difficult to respond to the question as to the extent that it is carried out.

**Senator WONG**—What is the basis on which you decide whether or not you will investigate? Take the example I raised with you: if information is provided to you that a company is trading at 150 times its annualised daily turnover—it is a reasonably significant spike but possibly for quite legitimate reasons—on what basis do you determine whether you investigate the matter further?

**Mr Lucy**—The information that we receive from the ASX is more than just that there was a particularly high level of trading in relation to company X at a certain time. It typically involves the identity of the parties et cetera and therefore we see whether or not there is any apparent motive and/or connection between the parties that are doing the trade and the parties that are connected with the company or officers et cetera. There is an intelligent application of consideration as to whether or not there looks to be something that is suspicious.

**Senator WONG**—Is the analysis that is undertaken, or the basis on which such a decision is made, set out in the protocol, or is there some other documentation that outlines the way ASIC approaches these decisions?

**Mr Lucy**—No. The decision is ours. The matters that need to be referred are set out in the protocol, but the ultimate decision as to whether or not the matter is taken to investigation is a matter for ASIC. For example, at the moment, as Jeremy Cooper has advised me, we have two matters on the go that fit within the classification that you are describing.

**Senator WONG**—What I am interested in is how ASIC determines what your procedures are. If a matter is referred, what are your procedures to determine whether you investigate it further?

**Mr Lucy**—I will take that on notice, but you would understand that typically we would be anxious for that not to be commonly known, because fairly obviously we would not want the basis under which we decide to investigate or not to exercise to be widely known.

**Senator WONG**—True, but that puts us in an invidious position. We, as parliamentarians, have people who might put views to us about the way in which ASIC is conducting its approach to investigating insider trading activity. If you then say to me, 'I can't tell you how I do it because I do not want other people to know'—and I understand there is an argument there—



where do we, as members of parliament, then go with it, as the committee that is charged with the oversight of ASIC?

**Mr Lucy**—I respect that, and we will take it on notice and respond as fully as we can.

**Ms BURKE**—Mr Chairman, I have to leave to speak in the House and I probably will not be able to get back, but I want to put it on the record that I have some questions to put on notice at the end of the hearing. My apologies, but it is one of those evenings.

**CHAIRMAN**—Thank you.

**Senator WONG**—I have more questions, but I am happy to flick to another senator if you think that is appropriate, Mr Chairman.

**CHAIRMAN**—I have some questions that I can proceed with.

**Senator SHERRY**—Could I just get something clarified first, Chair? Was the document that was circulated to the secretary—the report on the switching—publicly released?

**Mr Lucy**—No.

**CHAIRMAN**—So that is private. I have some questions in relation to the issue of the listing of persons barred from managing companies. The *Age* reported on 18 October that Mr Stephen O'Neill, who had been jailed in 2001 for fraud and other offences, had managed the failed Money for Living company while banned from corporate activity. He claims not to have understood that the ban was in effect because he made a search on ASIC's register of barred persons and found that he was not listed. I understand that ASIC has advised that its register only lists persons who are barred by specific court decisions or by ASIC itself, and those who are automatically barred under section 206B of the Corporations Act are not listed on the register due to the cost and difficulty of maintaining such a full list. The particular difficulty is that the ban for persons jailed for the relevant offences commences upon their release from prison rather than upon their conviction. Obviously there are some complexities there, but are they insurmountable? Can I ask which categories of people do appear on ASIC's list of persons barred from managing corporations?

**Mr Lucy**—Chairman, I will ask Jeremy Cooper to respond, if I may.

**Mr Cooper**—Senator, certainly your summation of the situation is correct. The people that are on our register are people that we ban, or where we have taken proceedings against people. That enables us to administer a very accurate register of who, by our action, has been disqualified. The difficulty with the automatic banning under section 206B, is that not only does it apply when the person is released, but it also even applies to overseas convictions. Our internal view is that we do not have the power to create such a register but, even if we did, it would be a sizeable task to administer such a register.

**CHAIRMAN**—Have you pursued any informal means of keeping such a register?

**Mr Cooper**—When we get information, we do have an internal register, but given that that has no statutory force we do not publicise it. We certainly use it in our business, but it is not public.

**CHAIRMAN**—Does this mean that there maybe a number of company managers who are in fact banned but ASIC is not aware of that, or of their company activity, until perhaps a company collapses?

**Mr Cooper**—That is a possibility.

**CHAIRMAN**—Is there anything we can do on the legislative front to overcome this problem? Is there any advice you might give?

**Mr Cooper**—The problem is that a state jurisdiction might take, say, fraud proceedings against someone—let us not name the state but it is in a particular state or territory—and that information just does not get back to ASIC. It may relate to something that is not naturally a corporations matter. You would need cooperation from the states, but I imagine there would be a mechanism whereby you could do that.

**CHAIRMAN**—Would that be advantageous?

**Mr Cooper**—It would.

**CHAIRMAN**—I turn to issues of insolvent trading. On 14 October—it was in the *Australian*, I think—ASIC reported that it was increasing its surveillance of companies who may be trading while insolvent, on the basis that a spike of insolvencies was expected to accompany the high price of petrol and transport. Has that expected outcome occurred yet?

**Mr Lucy**—Perhaps I will lead off, if I may, because I was the person who made that comment. One of the activities which we have undertaken over the last year and a half, which we think has been extremely successful, is our National Insolvency Coordination Unit. The process that they undertake is to try and identify companies that are appearing to be in distress. We then attend those companies—and I must say that that also includes a number of publicly listed companies—and have dialogue to see whether or not the directors are fully aware of their responsibilities and whether or not action needs to be taken to perhaps preserve the rights of the employees and creditors, but certainly in some cases to recapitalise the companies. In looking at what companies might be in distress, we certainly look at industries that might be materially adversely affected by market conditions. We have identified the potential for high fuel and therefore energy and transport costs to be affecting some industries more than others. NICU have regard to that when they identify companies that might be in distress.

**CHAIRMAN**—Will you be in a position to report the outcomes of your surveillance?

**Mr Lucy**—Yes. We do that on a regular basis.

**CHAIRMAN**—Also on insolvency, you would be aware that the government has now responded to our committee's report *Corporate insolvency laws: a stocktake*.

**Mr Lucy**—Yes.

**CHAIRMAN**—I think there were 14 majority recommendations and two minority recommendations, to which the government's response was that the recommendations were a matter for ASIC, and in fact they were recommendations to ASIC rather than the government. Can I ask whether ASIC intends to respond to those recommendations and, if so, when that response might be made available?

**Prof. Collier**—Sorry, you are talking about the response to the parliamentary committee inquiry?

**CHAIRMAN**—Yes.

**Prof. Collier**—Are you talking about the PJC inquiry report in relation to insolvency or the proposals which have recently been announced by the parliamentary secretary in relation to insolvency reform?

**CHAIRMAN**—No, our committee's report which had a number of recommendations, which were recommendations to ASIC, because that was within their area of responsibility.

**Prof. Collier**—Yes, of course. My understanding is we will be responding to that and I will follow it up when we return to the office.

**CHAIRMAN**—Thank you. You have provided us with a report on the superannuation switching advice—

**Senator MURRAY**—Sorry, before you move on. As you know, I have been pressing this point on insolvency for a long time so I am very pleased that the government has responded. You have answered the chairman in the positive about ASIC responding. Have you a feeling as to when you will respond to us?

**Prof. Collier**—That is something we will take up when we get back to the office. However, I think that our response will be minimal, given that the government has, in the intermediate time, responded with proposals for reform, which, on my understanding, it proposes to enact next year.

**Senator MURRAY**—Except that the chairman correctly itemised the government's response to our report's recommendations as merely saying, with respect to a large number of items, that effectively it is up to ASIC to respond.

**Prof. Collier**—Yes.

**Senator MURRAY**—I presume I can speak for the chairman on this basis. We naturally would not expect you to respond prior to knowing the government's response, because obviously you would coordinate it.

**Prof. Collier**—Yes.

**Senator MURRAY**—I am aware that you have started action on quite a few of those items anyway.

**Prof. Collier**—Yes.

**Senator MURRAY**—It is not as if it is dead but from our perspective, in terms of our parliamentary responsibilities, we need to be able to marry the two together.

**Prof. Collier**—Yes.

**Senator MURRAY**—Even if your response is in the block like manner which the government uses—it does not write at length—my view is you should respond sooner rather than later.

**Prof. Collier**—Yes, Senator. We can undertake that we will respond sooner rather than later, although it is very difficult for me on the spot to give a date, but we will expedite a response.

**Senator MURRAY**—Thank you.

**CHAIRMAN**—You have circulated to the committee a report to us on your superannuation switching advice surveillance. Are you happy for that document to be tabled?

**Mr Cooper**—Yes.

**CHAIRMAN**—There being no objection it is so ordered. Are you able to tell me the final cost of the switching survey?

**Mr Cooper**—We would have to take that one on notice. We just do not have that data to hand.

**CHAIRMAN**—Do you know what is the expected cost of the current shadow shopping survey?

**Mr Cooper**—Yes we do. Because that is outsourced that is easy. It is in the region of \$250,000.

**CHAIRMAN**—It is \$250,000—the shadow shopping?

**Mr Cooper**—Yes, and we were specifically funded for that.

**Mr Lucy**—That does not include our own costs; those are the external costs.

**CHAIRMAN**—I understand that you are taking action against 17 of the 19 financial planning dealer groups as a result of the super switching surveillance.

**Mr Cooper**—Yes, but ‘action’ means a range of things.

**CHAIRMAN**—Yes. I note that from having perused the report. How many of the actions that you are taking are based on consumer complaints?

**Mr Cooper**—Only one licensee was in the surveillance because of consumer complaints.

**CHAIRMAN**—Right. I assume that the principal purpose of this is to protect consumers and to prevent consumers from being hurt.

**Mr Cooper**—This was a specific test of how the industry was going at a particular time on switching. The shadow shopping that is on at the moment is more of a classic consumer protection exercise, but they are both pointing in that direction, yes.

**CHAIRMAN**—On 27 October in *Money Management* there is a quote from ASIC saying: ‘The real guts of the super switching enforcement isn’t about complex legal criteria. There is a lot of talk about section this and section that of the Corporations Act but the results of the stuff we are complaining about are basic things that really harm the consumer.’ I am just wondering how that matches with the fact that only one consumer complaint forms the basis of the actions you are taking against the dealer groups?

**Mr Cooper**—There might only be one consumer complaint, but in the examples we have given in this report it is fairly clear to us that in many of these cases the clients came out second best. Whether they actually know that, of course, is the \$64 question. When you go to a trusted adviser, you expect that that person is going to give you the right advice. A lot of the time you will not know whether in fact you are being given good advice.

**CHAIRMAN**—Would you see the purpose of your super switching surveillance exercise as, in a sense, preventative rather than responding to customer complaints?

**Mr Cooper**—Partly, yes. It is educative. This is a new regime. It has partly an enforcement flavour but not entirely, so it is preventative, it is educative and there is an obvious enforcement element in it as well.

**CHAIRMAN**—It has been suggested to me that some of ASIC’s publicly released facts on the financial services industry may not be correct. Again, in part, this relates to the super switching surveillance exercise, about which there have been a number of public statements from ASIC, and publicly quoted examples. It has been suggested to me that some of those publicly quoted examples were not factually correct and have done damage to the industry. Are you aware of that concern?

**Mr Cooper**—I am aware of the general way in which the industry responds to our surveillance reports, yes.

**CHAIRMAN**—Have there been errors in public statements made?

**Mr Cooper**—Not that I am aware of.

**CHAIRMAN**—In the publicly released information, was checking done with the licensee before public statements were made?

**Mr Cooper**—Certainly. This material is built from the surveillance, which involves gathering files and looking at the statements of advice. I guess that is what surveillance is about: it is going and looking at the documents and being thorough.

**CHAIRMAN**—Were then the conclusions that you reached discussed with the licensees prior to any public release of the information?

**Mr Cooper**—I am not quite sure what you mean by ‘public release’. The only public release I am aware of is the transcript, where we were asked specific questions in this committee and we answered in a very general way about some of the issues that had been uncovered in the surveillance. We did not identify who those people were—of course that goes into *Hansard* and is then sometimes repeated by journalists—but I am not aware of any public statements; certainly nothing has been released by us to that extent.

**CHAIRMAN**—Okay. I might move to Senator Murray for a while.

**Senator MURRAY**—I am not going to be long. Thank you for your responses to the questions we put to you, Mr Lucy. With respect to those questions that you have not yet had the opportunity to answer, and I accept they are quite difficult ones to deal with, do you have a date or a time by which you expect to be able to answer them?

**Mr Lucy**—Firstly, let me assure you that they will be dealt with at the earliest possible time.

**Senator MURRAY**—Good.

**Mr Lucy**—My recollection is that we received them late last week. That is certainly when I saw them. Would two weeks be satisfactory?

**Senator MURRAY**—I cannot speak for the chairman, because he probably has a date in mind by which questions should come back, but from my perspective it would be.

**Mr Lucy**—Thank you.

**CHAIRMAN**—We resolved, I think, 23 November.

**Senator MURRAY**—23 November. Excellent. I want to ask a question about your response to question 6. As you know I am solutions orientated, and you have said that there was one possible reform issue that will alleviate the DPP’s difficulties in dealing with reluctant witnesses, and this was in relation to the CAMAC report and the Vizard case and all the intersecting issues arising out of that. You said there that an amendment to section 49 of the ASIC Act to enable ASIC to require certain witnesses to provide a statement in an admissible form would achieve this and is supported by the DPP. It would not be news to you that there is some reluctance in Treasury to tinker too much with this area of law. It occurs to me there might be a halfway house between what you and the DPP are recommending, in that it would be as you recommend but you would be required to get the approval of a court to do it. In other words, you would be permitted in law but you would have to go and make the particular case to a judge, and that of course would deal with the reasonable circumstances issue.

**Mr Lucy**—Yes.

**Senator MURRAY**—In some circumstances, it is reasonable for a witness not to cooperate and in other circumstances it is not. You cannot really cover that situation in black letter law. If there is reluctance to address this issue, does that kind of halfway house appeal to ASIC?

**Mr Lucy**—Yes. Obviously, I would want to make sure that our people in the enforcement area have the opportunity to fully consider and tease out your suggestion, but superficially it does appeal.

**Senator MURRAY**—The reason I raise it is that I am still concerned that, despite the law changes, it remains terribly difficult for ASIC to nail people for insider trading.

**Mr Lucy**—Yes.

**Senator MURRAY**—I think the law should give you every opportunity whilst protecting the rights of citizens.

**Mr Lucy**—What you propose provides what might well be a sensible outcome that looks after both interests.

**Senator MURRAY**—I offer it as an idea which occurred to me and, if you are able to advise the committee whether you thought it worth while, it might be something you can discuss with Treasury at some future date, and no doubt you would.

**Mr Lucy**—Yes.

**Senator MURRAY**—Thank you. The other matter I wanted to raise briefly with you is the matter of the barring of directors from continuing to manage companies or be involved in the way they were before. As you know I am an assiduous reader of your press releases.

**Mr Lucy**—It keeps you busy, no doubt.

**Senator MURRAY**—That is right. Despite their number, I like your system, frankly, of keeping people advised, so I remain a supporter. Others might not be.

**Mr Lucy**—We, as a commission, take the view that we need to be as transparent as possible, and that is part of that process.

**Senator MURRAY**—I think, by and large, it works. As a result of watching them, quite often I form the view that the punishment is relatively light for the crime. You have been under the new regimes for some time: is there a process for a systemic review internally after a certain period to see whether the penalties are appropriate and that it is having the right sort of deterrent effect? I am not always convinced that that is so.

**Mr Lucy**—I can respond that the commission considered that very issue this week, and there is work being undertaken within ASIC to consider the whole area of penalties. Ultimately of

course it is a matter for parliament; but, to the extent that we can put our own views on to the table, that might be valuable and we are looking to do exactly that.

**Senator MURRAY**—I am particularly concerned by substantive breaches of directors' duties—particularly in cases where that brings into risk relationships with suppliers or employees or the tax office, that sort of thing. I have a feeling that simply banning or barring people for a number of years is not always sufficient punishment.

**Mr Lucy**—We have sympathy for that general view. It is a complex area. The parliament has, in a number of instances, already increased penalties quite materially. Yes, we think this is an issue that ASIC should consider, and we are considering it, and we will be making a submission.

**Senator MURRAY**—Thank you.

**Mr BAKER**—Are you aware of an article in the 25 August 2005 edition of *Money Management*—I am just following Mr Cooper from previous questions—where an ASIC official said of financial planners 'I just don't trust them'?

**Mr Lucy**—Yes I am.

**Mr BAKER**—You are? Is it the case that these comments were made during a public presentation at a conference?

**Mr Lucy**—Yes, it was.

**Mr BAKER**—Do you think that this displays an objective view of one of the industries that ASIC regulates?

**Mr Lucy**—I was disappointed that the comments were made. I have had quite detailed discussions with the person that made them. I have also satisfied myself as to the context in which those comments were made. They were made within a technical session that was very much a session designed for open dialogue. It was organised by CPA Australia. I have had communications from the chairman of that session, and I have also had communications from another party that I think spoke immediately before our staff member. We certainly do not condone the comments. They are not consistent with the views expressed publicly by the commission, and I am confident that there will not be a repeat of such comments.

**Mr BAKER**—Would it be reasonable if the financial planning industry thought that ASIC had an antifinancial planning perspective when ASIC officials make comments such as those above?

**Mr Lucy**—It was an official, and we had very quick dialogue with the Financial Planning Association, both at chairman and CEO level, and I believe that we satisfied both persons quickly that we were dissatisfied—we were not willing to condone or support the comments made. I believe that the Financial Planning Association has accepted those advances put forward by me.

**Mr BAKER**—From a general public perspective, when the whole financial sector reads those types of comments and when there is no rebuttal publicly, what other view could the financial



sector have or arrive at that that is not a general view of ASIC when one considers that the person concerned, Ms Grant, is representing ASIC? Whether you want to call it a public forum or not, that is a very technical fine line to draw, a very thin bow to draw.

**Mr Lucy**—I understand your point. I think that we would say that the comments were made significantly out of context, because certainly the people I have spoken to that were at that session did not draw the same inference that some of the media have tried to present. Indeed, our people were under the impression that there was no media present. It was a robust program. There was the opportunity for good solid discussion from the regulator, the adviser, accountants and so on, and it was in that sort of a forum that the comment was made. I am not excusing it, and I am not defending it, but it has been taken out of context, and it has been blown out of all proportion. We followed it up very quickly with discussions with the Financial Planning Association, and I believe that they have accepted our version.

**Mr BAKER**—The concern I have is that it is not that she said, ‘I have major concerns’ or ‘I am concerned about this particular financial sector.’ ‘I just don’t trust them’—I fail to understand how that can be taken out of context.

**Mr Lucy**—I was not there at the session, fairly obviously. As I said, I have spoken to the chairman of the session. I at least communicated with him, and also with the person that spoke before, and neither of them drew the same level of anxiety that has been presented in the media. It was a personal view. It was a view that was not supported before, and has not been supported after, by the commission. Indeed, public utterances by the commission very strongly support the fact that we have a very good working relationship with the financial planning profession. We work very hard to maintain that relationship. This was an unfortunate detraction as regards that relationship, but I think that in the overall context it is minor.

**Mr BAKER**—Is Ms Grant still an assistant director in the compliance area?

**Mr Lucy**—Yes.

**Mr BAKER**—Does she still deal with financial planners?

**Mr Lucy**—Yes.

**CHAIRMAN**—Can I just follow up. Given that you say her statement was not consistent with ASIC policy, and she is employed under the Public Service Act, have you satisfied yourself that she was not in fact in breach of the Public Service Act?

**Mr Lucy**—I did not look at it from that perspective, frankly, and therefore I would need to provide a response on notice. My point in having a discussion with her was twofold: firstly, to make sure I was fully aware of the facts—and therefore to get her perspective—and, secondly, to follow that through with a very clear communication of my views on this. I was fully satisfied that she was being open with me and I remain fully satisfied that, on reflection, she understood the severity of her comment and the importance of it. I am confident it will not be repeated.

**CHAIRMAN**—Thanks.

**Mr BAKER**—You were saying before, Mr Cooper, that you were only aware of one media statement.

**Mr Cooper**—One public statement about those issues, yes.

**Mr BAKER**—Very recently—and frequently—ASIC has been in the media presenting the financial planning industry in a very negative light. I give you two examples: a *Financial Review* article entitled ‘Planners lashed over bad advice’ and a *Sydney Morning Herald* article entitled ‘Time to toe the line’. Could you advise the committee if ASIC has ever been associated with a positive, rather than a negative, article about financial planners? I am not just talking recently; I am talking over the last six months, 12 months, two years, three years.

**Mr Cooper**—We certainly have that on our agenda. This issue about coming up with some positive news about financial planners is certainly something we are aware of and are working on. There are examples. So we are mindful of that situation. I should also say that we do not control the way in which journalists write articles about these issues. I think it is fair to say that the angle taken in a lot of the more recent articles is certainly not governed by us.

**Mr BAKER**—Over the last few months, a search of the media has flagged 179 hits of you being in the media. Do you believe that this is excessive?

**Mr Cooper**—We certainly knock back—there was a piece in the *Australian Financial Review* today where we have knocked back participating yet again as concerns financial planners. It is a very topical issue—it is something the media are constantly asking us about—and of course when we came and appeared before this committee the matters go straight into *Hansard* and it fuels further interest. I certainly would not say it is excessive. We are in a very ambitious and important program with the implementation of FSR and super choice. They are difficult matters and, as I say, they are very noisy.

**Mr BAKER**—Could you explain the relationship that you have with the FPA, when you are talking about surveys, and with the dealers themselves? All that is seen in the media seems to be directed at the planners, not at the licensed dealers that supposedly regulate the planners they are employing.

**Mr Cooper**—I am not sure I understand the question. What relationship do we have with the dealer groups?

**Mr BAKER**—Yes, and also the FPA as an association.

**Mr Cooper**—Let us start with the FPA first. We have a very close working relationship with the FPA. I meet with them every few weeks. As the chairman just explained, we had a special meeting with them after the comments to which you have been referring. We have an excellent working relationship—it is just that we are dealing with very difficult issues. I am currently participating with the FPA in their work on conflicts principles. I have been to two meetings on that, with a range of planners and dealers across the landscape, and those meetings have been very fruitful. Again, we cannot control the way the media paint these things. Naturally there is tension around producing reports, like the one we have been asked to produce this evening, but we will continue to work closely with them. As I possibly said at estimates last time or possibly

to this committee—I am not sure—it is not a matter of declaring war on financial planners; it is a matter of working with the organisations and the dealers groups to get proper outcomes on these issues.

**Mr BAKER**—Can you explain what you are actually doing to achieve that?

**Mr Cooper**—Yes.

**Mr BAKER**—From an educational perspective.

**Mr Cooper**—This calendar year we have produced, in consultation with the FPA and many other participants, the switching question and answer guide. In conjunction with nearly all the interested parties in the industry, we produced the example statement of advice. There are many examples where we are working very closely with the industry to try and get the right outcomes.

**Mr BAKER**—Do you believe that the actual financial planning industry should exist?

**Mr Cooper**—Well, that is really not for me to say. That is a matter of personal opinion. It does exist. We regulate it and that is the environment we are working in.

**Mr BAKER**—I suppose I am just trying to appreciate, from your perspective—probably I could say 100 per cent of when ASIC is in the media it is negative, negative, negative, and I am just wondering if you can actually give some examples of some positive outcomes.

**Mr Lucy**—Chairman, perhaps I could at least give one. When we met at the last meeting, I think on 30 September, in my opening address in respect of financial service regulation and so on, I referred to the financial planning industry and commented: ‘There are many instances of companies, large and small, with approaches that are quite outstanding.’ We frequently and generally say that the overwhelming majority of business, including the financial planning business, including business more generally, is doing the right thing, is complying with the law. We repeatedly state that comment. That is our experience and it is our view. Indeed, ironically, in some areas we are criticised for having that view.

**Mr BAKER**—I must not have seen those articles, Mr Lucy.

**Senator SHERRY**—Good news does not get reported.

**Mr BAKER**—It just would be refreshing to see, one would say, a balance out there within the financial planning sector when we can get 179 hits of negative things from Mr Cooper. That is the general feeling of that industry within the financial sector of that industry.

**Mr Lucy**—We recognise that and we also very much appreciate the importance of confidence. The market does need to have confidence.

**Mr BAKER**—That was going to be my next question.

**Mr Lucy**—Yes.

**Mr BAKER**—People are continually saying to me about Mr Cooper with 179 hits, that the confidence within industry with the people that are doing the right thing—and if there was a more balanced approach—okay, negative, but also positive—because it is creating a lot of angst within people that do deal with reputable financial planners.

**Mr Cooper**—We have described our program as a journey. We are on a journey. It is quite a difficult journey but I can assure you that, notwithstanding the large number of hits of negative comments, we are working very closely with the industry. We have very good personal relationships with the people involved in it. Very recently I have written to both IFSA and the FPA, in friendly terms, outlining some of the things that we think the industry should be doing. The letter is constructive and has been well received by those bodies. I agree with Senator Sherry's comment. The good news just does not get reported. The salacious news is that it is all a disaster and that ASIC is going to put everyone in jail, and that is the sort of material that unfortunately you are going to read about. Even when we do something positive like put out the statement of advice, we get criticised. It is a tough business. They are the conditions in which we work.

**Mr Lucy**—Chairman, might I add one further comment, and perhaps use this as an example. This was a paper that Professor Collier presented to IFSA in October this year, and the concluding comments were:

Before I finish, may I repeat: ASIC is not 'out to get' the advice industry. ASIC's focus is on your industry's outcomes, not its structure. The industry deserves credit for its increasing professionalism; however, there is room for improvement. We are keen to continue to work with industry to improve standards where necessary.

I think that those comments, frankly, fairly reflect the approach which we are taking.

**Mr BAKER**—Sure.

**CHAIRMAN**—Mr Cooper, you suggested earlier that the media coverage in relation to the super switching issues and the like arose out of our previous hearing. I have just had the chance to look at a couple of articles that Mr Baker referred to, and they look to me as if they were a direct product of interviews. Is that true?

**Mr Cooper**—We get called by journalists all the time to discuss these issues. We do talk to journalists, and that is a very important part of our work, but the proposition you were putting to me was that we had been making incorrect factual statements in a public way, and I disagree with that.

**CHAIRMAN**—Are you aware of concern within the industry itself about the negative perception that appears to be developing through the media?

**Mr Cooper**—Certainly; it is a constant issue. People say, 'Why can't ASIC identify good planners and good news?' As I say, we have that as a project. It is very difficult, of course, for a regulator to endorse or approve a particular advice provider or a particular advice. There are all sorts of issues arising out of that, but nonetheless we are looking at that as an idea.

**Mr Lucy**—I think very much our focus on the shadow shopping will be to feature and highlight the good aspects that are showing through that, and not just simply concentrating on anything that might need to be addressed.

**Mr Cooper**—I will add that one of the articles that you will have seen was a piece that I wrote for the *Age*, specifically clarifying that we were not out to get planners and that we were seeking to address issues in a constructive way, for the very reasons that you are raising with us.

**Senator MURRAY**—Let me tell you that somebody must be, though.

**Mr BAKER**—The point I would like to put to you is that some of the concerns are that the planners are the messengers. It is the dealer groups that should be regulating within their own industry, and all that seems to be seen in the media is the planner, the planner, the planner. Would you agree it would be good business, when you have identified these shortcomings, that that is corrected internally with the actual dealer and the planner themselves, instead of portraying the whole industry by a few bad eggs in the packet?

**Mr Cooper**—We certainly are dealing with it from both ends. There are relatively few financial players within the industry who control a very large number of the so-called dealer groups and financial planners. Certainly we do concentrate on that end of it as well.

**Mr Lucy**—To that end, for example, in around the May to July period, I visited all CEOs of all the large industry organisations and very much put to them that the culture within the organisation and the success of FSR and super choice was very much their responsibility. As a regulator we are always there after the event. Certainly my appreciation is that the CEOs are fully aware of that responsibility. Going forward, again we have regular dialogue with CEOs pointing out to them, as best we are able to, any behavioural issues we see that might be comparable between one organisation and another. We do very definitely have a high level of dialogue at the CEO level, as well as with the financial planner.

**Mr BAKER**—We would all agree that we want to get rid of the bad ones, for sure, but the concern is that the whole industry is being painted as something that you would certainly stay away from. It would just be refreshing to see something positive.

**CHAIRMAN**—Mr Baker one more, then Senator Sherry.

**Mr BAKER**—Can you advise the committee on the progress of the current shadow shopping survey started in July? The press release said in April that it would be concluded by the end of the year.

**Mr Cooper**—That was our plan. Unfortunately, this is consistent with general information about switching that the number of people genuinely seeking switching advice is much lower than had been estimated. Our pipeline of live consumers moving through with whom we are undertaking the survey is actually lower than we had anticipated. Currently we do not have anything like a statistical sample or things that we can talk about. I can say on balance that the shadow shopping is ongoing, and unfortunately, while we earlier had thought that a December report would be likely, it is more likely now to be February, solely because we are just getting fewer people through the system.

**Mr BAKER**—Who was actually conducting the survey?

**Mr Cooper**—It is Roy Morgan. It has been outsourced. That was the way that it was done.

**Mr BAKER**—Is that the same Roy Morgan that the *Bulletin* no longer uses because of its inadequacies?

**Mr Lucy**—That who no longer uses?

**Mr BAKER**—The *Bulletin*.

**Mr Cooper**—I have read that. I would not know what the ins and outs of that are.

**Mr BAKER**—The logical next question is: how credible would that be?

**Mr Cooper**—Well we certainly believe them to be credible. We got opinions from them as to the veracity of the sample. It was in a tender process and we have no reason to question either their selection or the work they have done.

**CHAIRMAN**—You mentioned earlier, in response to Mr Baker on this, that there were not a lot of people seeking switching advice. Is it true that in fact you have had some difficulty getting the requisite 300 people to participate in the survey?

**Mr Cooper**—Not some difficulty Senator. It has just been slower than we had originally budgeted. We had to estimate how many people we thought we would get over a particular period, and it has merely been lower than estimated.

**CHAIRMAN**—Is there any danger of abandoning objectivity in sample selection as a result of that?

**Mr Cooper**—No. We are very mindful of making sure that it is a proper outcome.

**CHAIRMAN**—Okay, thank you.

**Senator SHERRY**—I have some questions on your document, but I just want to conclude on an issue that I raised in an earlier part of the hearing, I think it is technically, in your response to question 12, where I sought clarification about the press release that was sent out and on which the *Financial Review* published an article on 1 April.

**Mr Lucy**—Yes.

**Senator SHERRY**—My question went to asking about the press release: it and the charges laid against the planner did not contain any quantum of money, specifically \$140,000, which you have acknowledged is correct.

**Mr Lucy**—Yes.

**Senator SHERRY**—I then asked whether the \$140,000 figure, where it came from, was it leaked by ASIC. You have come back to us and said ‘ASIC did not leak any information to the AFR or any other media outlet about the prosecution of Mr Moore. After the media release was issued the AFR asked ASIC what ASIC alleged to be the total of superannuation money involved in the transactions that are the subject of the charges. ASIC supplied that information to the AFR.’ Can I put to you that it is unreasonable to provide a journalist, selectively, with additional information that is not in the charge sheet or the charges laid or the press release? I am not concerned about treatment of the media; I am actually concerned about the treatment of Mr Moore. In fact I was taken aback, not that you denied there was a leak, that you frankly admitted you gave the information to the AFR. Why do you think it was reasonable to have done that to this individual in those circumstances?

**Mr Lucy**—Well I do not think that any of the three of us can really respond to that because we were not a party to the discussions. It is not uncommon that journalists would speak to either our media unit or others within ASIC seeking clarification of issues, and in this case, in an endeavour to provide a clarification that amount was disclosed. I do understand your point certainly, but I guess the point we were trying to make was that it was not some surreptitious back of the truck type leak. It was in direct answer to a question.

**Senator SHERRY**—Well in fact I was a bit more taken aback that you admitted, not you personally, but ASIC admitted they actually gave the information to the media, because as I said, I would contend it is inappropriate. If you wish to clarify, then there should have been a clarifying media release rather than clarification in the form of what is a very significant issue, the quantum of money, to one journalist. Good on her for asking, but it just seems to me unreasonable in the sense that Mr Moore received significant adverse coverage as a consequence of the journalist asking a question, and that information being supplied selectively.

**Mr Lucy**—Senator, we would literally get dozens of these sorts of enquiries each day.

**Senator SHERRY**—Well I will leave that one there.

**Senator MURRAY**—I am sure the answer is yes, but the question is whether you have protocols and training to ensure that such information, which should not be divulged, is kept to yourselves and other information is properly packaged.

**Mr Lucy**—I think the answer is yes and yes. We are scrupulous as far as making sure that people do not make inappropriate or unauthorised comments on behalf of ASIC.

**Senator SHERRY**—Firstly, can I thank you for providing this *Report to the Parliamentary Joint Committee on late 2004 (and early 2005) superannuation switching advice surveillance*. I would congratulate you on the vigilance with which you have provided this material. Could I concur with Mr Cooper—I think it was you—who said that any reasonable person reading these examples would come to the conclusion that the advice given was inappropriate. I would concur with your observation. Frankly, I am pretty appalled at what is occurring in the case of these real life examples that you have outlined, obviously with names changed and institutions changed.

It is an issue that Mr Baker raised earlier, in terms of your surveillance, we have the planners and we have the dealer groups with their compliance officers. What onus are you putting on the

dealer group as the ‘employer’, whether it is direct or indirect, and their compliance officers? What onus are you putting on them in terms of these sort of exercises as distinct from the individual planner—where is the balance? Can I just say that I agree with Mr Baker on one issue. I think the focus is correct in terms of the criticisms, but I agree, I think the focus is weighted to the planners rather than a bit more balanced and putting a bit more pressure on the dealer groups and the compliance officers, who after all are getting all the information that you are looking at. To conclude the second part of the question, have you actually gone to a dealer group with a compliance officer and disciplined, to any sort of degree, their activity in failing to perhaps oversight or supervise a particular planner?

**Mr Cooper**—Certainly the focus of the work that comes out of this is against the licensee, the person holding the licence. If you take for example the so-called compliance action that we take against—and this one is public because there was a media release on it—Bridges Financial Services, that looked at the licence holder. It was all about getting an external auditor. We put the questions to them and it is then a question of them improving procedures. In this case it was in relation to what was in their statements of advice in relation to super switching, and that external auditor then audits the fact that there has been proper training, and that there is compliance over a one-year period. The focus is very much on the dealer group, or the licence holder.

**Senator SHERRY**—Again, in part I agree with Mr Baker and the chair, do you think that that is the focus of your media critique, if I could use that word? Where you make a media critique, and I think that is perfectly legitimate, I do not criticise you for that, do you think that more focus could be put on the distinction? I accept it is hard. The average reader I think would find it difficult to distinguish, but could you put more focus, in a sense, on the employer and the licence holder and the compliance officer? The concern I do have is that it generally tends to come across as ‘the planner’ all the time.

**Mr Cooper**—I accept that that is valid. It is hard to control, but we can certainly take that on board.

**Senator SHERRY**—The chair raised a question earlier which I think is an interesting one. He asked you how many of the findings that you have made, and you have detailed some of them here, were as a result of specific consumer complaint coming to you. You indicated there was one. Yet, when I read through these examples they are truly shockers. As I said, I think any reasonable person would come to the conclusion that it is not just poor advice, it is a blatant rip-off.

**Senator MURRAY**—They should go to jail.

**Senator SHERRY**—Why is it, then, that in the real-life case studies—which are absolutely appalling—in the recommendations given, only one consumer complained? What is the answer? Why are consumers not coming to you and saying, ‘Look, I have been ripped off’?

**Mr Cooper**—Maybe I did not explain it quite well enough. Of the 20 licensees that we show you in the table, one of them is there because of quite a number of complaints in relation to that licensee.

**Senator SHERRY**—Yes.



**Mr Cooper**—As to whether there have been specific individual complaints—do not forget we found these matters ourselves—whether there were contemporaneous complaints coming into ASIC from those people, I do not know.

**Senator SHERRY**—Can I give you a suggestion. Do you think it is because a considerable portion of the community do not have adequate financial literacy levels?

**Mr Cooper**—I think that would be a big factor. I am not necessarily making a connection here, but one of the stark things about the examples we have given is just how many people were on what, by any standards, are low incomes.

**Senator SHERRY**—Yes, that did strike me when I was looking through the case studies. If I could just go to a couple of these case studies. In example 2, Mr Smith recommended TPD cover of \$250,000 and switching from fund 1, which had lower admin fees, nil establishment fees and contribution fees. Is it the case that whomever gave the advice in this case was effectively using the higher level of death insurance available in the fund to effectively entice the person out of the fund they were already in, even though it had higher fees and charges?

**Mr Cooper**—That is hard to say, to attribute a motivation. The thing that struck us was just the relatively sizeable amount of insurance that was recommended compared to the person's position. But as to what was actually going on in the respective minds of the players, I am not sure I can comment.

**Senator SHERRY**—Let us look at example 3, the case of Anne and Michael Stevens. I find this fascinating because exit fees are not supposed to exist any more. Anne was recommended to roll \$6,110 she had in fund 1 into fund 2. The termination cost was \$882.37, the entry fee for fund 2 was \$274.95. So, the total cost of the roll-over was \$1,157.32, or 19 per cent of the value of her fund. These entry and exit fees were disclosed. What does that indicate about the disclosure? Did they understand? Did they read the consequences of the entry and exit fees?

**Mr Cooper**—Again, I cannot look into their state of mind.

**Senator SHERRY**—No, but you could have asked them—they had obviously got the disclosure document—whether they were able to identify the entry and exit fees.

**Mr Cooper**—The nature of the surveillance does not, at this stage, and for the purposes of giving you this report, actually involve interviewing the clients.

**Senator SHERRY**—Would you intend to interview the clients to try and identify what are the fundamental issues here, whether it is misleading or simply inadequate financial literacy?

**Mr Cooper**—That work could certainly be done in this context, and in others. It would also depend on which of these would end up in enforcement actions, and certainly in that case I think there would be substantial interviews about what was said and when, and who said what and so on. So, that would come out in those sorts of interviews.

**Senator SHERRY**—Just on the selection for the surveillance, I assume it was random selection of the licensees and representatives?

**Mr Cooper**—It was, bar the one I mentioned, where we put the person in the sample because of complaints.

**Senator SHERRY**—If it was random selection, and assuming that it is representative of the industry, looking at the recommendations of related party fund, the equity conflict, there is a real problem here, is there not?

**Mr Cooper**—There are problems. You have to remember, of course, that this was 12 months ago, and so the level of awareness of these issues was certainly less than we would hope is the case now.

**Senator SHERRY**—I think it was Mr Lucy who made the earlier comment that as the regulator we are always after the event. Is it not true that what you are effectively trying to do is identify and resolve problems after they have occurred?

**Mr Cooper**—In part, although the survey was undertaken in the lead-up to super choice, which commenced on 1 July. Although these are 261 real files, the real underlying purpose of this work is to guide industry as a whole as to what the issues are, where they are going to have to improve and how we are going to be assisting in that process. Whilst it is slightly retrospective in relation to these examples, I think the discussion that we are having with you now and the fact that this document will become public and will be discussed mean that people will know what the issues are. It will be forward looking in that respect, over a much wider number of licensees and planners than are involved here.

**Senator SHERRY**—I suppose what I am getting at is this: this will hit the media—not tomorrow, because it is too late—and there will be significant media coverage of this document; London to a brick, I am sure of it. Anyone who reads this would be truly very worried about some of the activity that is going on. My concern is this: do we have a regulatory structure, as distinct from the surveillance and enforcement which you are carrying out, that can prevent this sort of behaviour? It is not occurring beforehand. It seems to me that you are playing catch up, and to some extent attempting, by fear, to highlight issues and get the industry worried. There are a few people worried; I know that. You are tending to do this after the event by fear, when it seems to me that the appropriate way is to come up with a set of regulatory structures and regulations that would minimise this type of behaviour.

**Mr Cooper**—FSR was on the table for two years and discussed for many years before that. It came into operation in March 2004, and this survey was done at the end of 2004. Certainly none of this stuff should have been that much of a surprise. Having said that, of course FSR was a bold measure and in many ways a lot of financial planners were moved, by legislation, effectively out of a sales culture into an advice one. That is why we call this a journey. We have not arrived yet. We are hoping to maintain some balance so this work is not all about fear. We do receive a lot of pressure to produce enforcement outcomes so we have to keep a balance between the educative and the prescriptive and the enforcement, and that is the exercise we are on.

**Senator SHERRY**—In reading this, in looking at these statistics, would not the average person be worried if they go directly to a fund for advice or if they go to a planner for advice? Would you not be worried about the independence and the best advice that you would receive, on the back of this sort of research and outcome?

**Mr Cooper**—Concerned perhaps. Do not forget there were a total of 261 files looked at and we have given seven unflattering examples, so you need to keep it in perspective. You need to remember that this work was done nigh on 12 months ago.

**Senator SHERRY**—Just to clarify that. In example 7, adviser 1 recommended six of his clients. Is that treated as one file or is that actually six different files?

**Mr Cooper**—That one is probably six different files.

**Senator SHERRY**—We are looking at 12 files, not seven?

**Mr Cooper**—Yes, I think you are probably right there.

**Senator MURRAY**—I am almost concerned that you might be going the other way, being afraid to frighten the horses, because when you read the second and third columns, it says, 'Equity conflict on percentage of recommendations to related party fund.' The actual values and ethics that that exposes are pretty poor—people are persisting in switching to funds in which they got a major benefit.

**Mr Cooper**—I guess that is just how the industry is structured. The solution to that issue is disclosure and management of conflict, but that is just how the industry was structured then. Even since then, there has been, from the industry itself, a lot of analysis of this. Again, in today's *Financial Review*, Kerrie Kelly, the chief executive of the FPA, talked openly about a whole different structure whereby the client decides the level of fees and how those fees are to be paid. There are good stories out there.

**Senator MURRAY**—I am sure there are, but taking item 1, licensee no. 1, it says 98 per cent of 709 recommendations were to a related party fund, and under compliance findings it says 'Disclosure—inadequate switching disclosure'. I do not have a problem with a bloke making a buck if he has disclosed it. That is not an issue; he is entitled to do that. But the problem is with no disclosure. In item 5, 99 per cent—it might as well be 100 per cent—of 1,320 recommendations and compliance with open findings, item 4 of the compliance findings, says 'Disclosure—general switching disclosure inappropriate'. That is just bad ethics on a wholesale basis.

**Senator SHERRY**—That is 99 per cent of 1,320 recommendations. That is a staggeringly high figure. As you say, we do not have an independent advice system, do we? We have a system based on disclosure and best interests of the client.

**Mr Cooper**—About 70 per cent of the industry is housed within what you might call product issuers and that is where you get the conflict problem.

**CHAIRMAN**—Is this a problem that has arisen out of the structure consequent on the FSR reforms, in that under the new legislation it is very difficult for someone to be a multi-agent?

**Mr Cooper**—No, it is not—

**CHAIR**—Because of the joint and several liability issues that we have discussed earlier when we were dealing with the legislation?

**Mr Cooper**—The reasons are economic. It was decided by the industry in the early nineties that the way to build a financial services business was to own a distribution network. That is using a sales language rather than an advice language. You have your own dealer groups, and the ownership mechanisms are varied, but ultimately you end up with the result that you make fund management product and then you have a group of people who can sell it for you.

**CHAIR**—There are still a significant number of people who wanted to remain multi-agents and have found that very difficult because of the joint and several liability and the unwillingness of the product issuers to accept that.

**Mr Cooper**—I think the industry is, to use an expression, morphing quite quickly in the direction of providing freer choice. We are seeing approved product lists free up so that, for example, some dealer groups have approved product lists with 400 or 500 different products on them, and many of them are not from the parent company. Similarly, with the platform concept, while a product itself—and there are issues with that—underneath the platform often is an open architecture where the client can select any number of different products. So there are solutions in the pipeline to many of these issues.

**Senator SHERRY**—Mr Lucy may want to comment on this as well because he has got a significant degree of liaison regarding these issues in other jurisdictions in other countries. How can we have best advice to the client, independent advice, when a significant proportion of the advice givers are directly employed by a financial institution and/or receive a commission payment for part or all of their product? How can you have best advice to the client and independent advice in those circumstances?

**Mr Cooper**—I think our position is that the people in those structures are under more of a challenge than not. What we really were looking at in our switching report is what advice do you get about a switch. If you were not complying with the various requirements, if you were not getting that right, and you were recommending product that was in-house, it kind of doubles up the problem. There is certainly no question about that. On the other hand, there is no reason why proper advice cannot be given in an in-house situation, particularly where we have the approved product lists that now include a whole range of other products.

I should also point out that, in these statistics, we are treating a platform as a financial product. If an in-house adviser says, 'I think you should be in our platform for administration purposes. It is all very convenient, you will pay a fee for it, but underneath that you have an infinite range of selections that you can make that are not necessarily our products at all,' this surveillance will show that as a conflicted and related party recommendation. That is an important thing to remember—that underneath platforms might be all manner of different investments that the client selected.

**Senator SHERRY**—Do you have any comment to make about this, Mr Lucy? This is a major issue in most countries in terms of the independence, distribution, selling and recommendation of financial products of any description.

**Mr Lucy**—I guess the important point to make is that the industry is alive to the issue. They are well aware of it. One of the areas that perhaps has not been discussed is the requirement for companies to disclose any breaches to us. We watch that very carefully because that is a very important level of intelligence which we gather, to the extent that there are clusters, you get similar issues being presented, and the fact that we have different profiles coming from different organisations. That again is very useful as far as our intelligence is concerned. As Jeremy has said, we are seeing quite a level of move in the industry itself. Some of the major players are reviewing the manner in which commissions or fees are paid to consultants. There is a lot happening, and in almost every instance what is happening is very much a positive for the industry.

**Senator SHERRY**—This industry argued for super choice. That was their official policy. The planners wanted super choice. Do you think it is reasonable in those circumstances, and given past malpractice where it has occurred, for you to continue to undertake the level of surveillance that you are currently conducting in those circumstances?

**Mr Lucy**—Are you suggesting that we are doing too much or too little?

**Senator SHERRY**—I think you have got it about right actually. With one or two little exceptions—the one we talked about earlier, which I think was unreasonable—I think you have got it about right.

**Mr Lucy**—Again, as Jeremy has said, this really is being approached in a number of areas. One is, firstly, to make sure that the industry understands our expectation of them, and I think that we have met that. Secondly, as far as the consumers are concerned, we and the Taxation Office have worked tirelessly to ensure that the message is getting out to consumers. I think we have been effective in that. There are many, many items of correspondence in all sorts of languages which I think have been well communicated. We have been communicating with employers and making sure that they understand their responsibilities, and are communicating adequately with employees. I think that Jeremy is right: this is a journey that everybody has a responsibility towards. We are one of the four legs to the stool. We appreciate our responsibility and we are anxious to make sure that our presence is known.

**Senator SHERRY**—Perhaps I will put the question another way. Do you think it was reasonable that at least some planners, and I think a minority, thought it was going to be business as usual once super choice came in, in terms of some of their less ethical practices prior to the introduction of super choice?

**Mr Lucy**—I think that inevitably where there is any change, not all the incumbent parties that are within the industry necessarily fully understand the consequences of the change. This is the point that Mr Baker has been making—that is, the attitude of the industry itself. We do not have concern at that level. We fully accept that the industry appreciates their responsibility.

These corporations in many instances have paid very significant amounts of money through investments to establish their structures. They are very anxious about their reputation. There is a high level of tension and competitiveness between the industry funds and the retail funds; that is healthy. There is a lot out there that is very positive for the industry and for consumers more generally.

**Senator SHERRY**—Could I just come to another area of possible surveillance. I just want to clarify what is happening. By the way, my comments about getting it just about right related to the surveillance activity. Were any accountants included in this switching surveillance?

**Mr Cooper**—I would probably have to take that on notice. You will be familiar with the structure; sometimes you will have a financial planning licensee attached to—I think the answer to that is yes, but I could not say for certain.

**Senator SHERRY**—Okay, could you take it on notice.

**Mr Cooper**—You said previously that it was random. It was random, but contrived in the sense that we wanted to make it representative, so that we had some independently owned financial planners, people who dealt with self-managed funds, industry and so on, and I am pretty sure there is an accountant one.

**Senator SHERRY**—Representatively random.

**Mr Cooper**—Representative, indeed. I can take on notice specifically how many of these were accounting.

**Senator SHERRY**—Okay. Thank you for that. I was a little mystified by a press release—I forget which accounting organisation it was; there were two accounting organisations.

**Mr Lucy**—I think there were three.

**Senator SHERRY**—Okay. You are certainly more expert in that area than I am. There was a press release from one of the accounting organisations last week with a proposal for best practice superannuation advice. Are you familiar with that? I have not got it here with me.

**Mr Lucy**—I think it was CPA Australia, if I recall.

**Senator SHERRY**—The reason I was puzzled by it was that I thought that accountants did not give financial advice; they give tax advice.

**Mr Lucy**—There are a number that are licensed. In that environment, my recollection is that they were specific about that, because I think they described themselves as CPA FPs, financial planners. I think they specifically identified themselves as such.

**Senator SHERRY**—My understanding is that, where accountants advise a client to establish a DIY fund, that is exempt from FSR at the present time?

**Mr Lucy**—Yes.

**Senator SHERRY**—That is on the basis that accountants argue they are not providing financial planning but tax advice?

**Mr Lucy**—I think they have argued long and hard with parliament, I guess.

**Senator SHERRY**—Not with the parliament. I think it is an executive decision rather than a parliamentary decision. My recollection of FSR was that they were supposed to be covered.

**CHAIRMAN**—I know this committee has recommended they have a limited carve-out.

**Senator WONG**—It is all Chappy's fault!

**Senator MURRAY**—I will put it on record that I supported it.

**Senator SHERRY**—Sorry, so you agree they should be covered?

**Senator WONG**—No.

**CHAIRMAN**—They should be carved out to a certain level of advice.

**Senator MURRAY**—Just in terms of structure.

**Mr Cooper**—They cannot advise you what has to be in the fund.

**CHAIRMAN**—They cannot advise on investment. They can advise on structure.

**Senator MURRAY**—But Labor were concerned about it.

**Senator SHERRY**—We do not agree with it.

**Senator MURRAY**—Exactly.

**Senator SHERRY**—As a regulator, do you believe this is a desirable regulatory structure—that accountants in some areas providing financial planning are not covered by FSR? Is this satisfactory?

**Mr Cooper**—That is a sort of policy and opinion question.

**CHAIRMAN**—I think your question is straying into policy areas, Senator Sherry.

**Senator SHERRY**—Who is checking? Who is doing the surveillance, the switching advice type surveillance, of accountants in respect of DIY superannuation funds?

**Mr Cooper**—We certainly are, and we have been very public that that is very much on our patch. The key message here, and it is one we are always happy to get across, is that even though you are working within the exemption, you do not have a licence, you are still covered by the ASIC Act in relation to misleading advice, which is a very broad concept. If you are over-emphasising the value of having a DIY fund, or in any way being misleading, that is very much on our patch.

**Senator SHERRY**—That is good. I think we have had a discussion about this before. If that is the case, why should they be exempt from FSR disclosure? It seems to me they are actually at

a disadvantage. They are not required to disclose as per FSR, but you are still regulating them in terms of the surveillance and shadow shopping exercises.

**Mr Cooper**—That really is a policy question. It is a structure we can live with; we are administering it. Happily, the figures that we are getting on DIY funds is that the number of them being produced on a net basis is going down.

**Senator SHERRY**—That is another issue. In your work with accountants and DIY superannuation funds, where you acknowledge you have done and you are doing some work, do you have any data on typical fee structures?

**Mr Cooper**—We do. We are doing work. We do have some internal work on that.

**Senator SHERRY**—Will you be sharing that with us?

**Mr Cooper**—We will indeed, yes.

**Senator SHERRY**—And the public at large?

**Mr Cooper**—We have a fairly advanced draft report on how much it does cost to run a DIY fund.

**Senator SHERRY**—You are doing a lot of work, checking up on some planners. They have to comply with FSR, and there is a lot of contention about the costs associated with FSR, and yet accountants, it seems to me, doing very similar type activity, do not have the same cost structure in terms of FSR.

**Mr Cooper**—If they are really in the FSR game then they have to be licensed. The empirical data we have is that the number of accountants who are unlicensed and operating on a meaningful scale in giving very limited advice about superannuation, and you have to be very careful to make sure that you are operating within those exemptions, is relatively modest.

**Senator SHERRY**—Let us take an accountant who recommends to a client to establish a DIY super fund. How do they disclose the fees? Let us say that it is \$2,000 or \$3,000 to set up, which is pretty common from what I have been told. Where do they disclose the fees to the client?

**Mr Cooper**—They would be governed by the normal rules that relate to professional accountants.

**Senator SHERRY**—That is right, but are they covered by FSR disclosure?

**Mr Cooper**—If they stay within the exemption, no, but as I have said, they are governed by a range of other tools, such as our misleading power and so on.

**Senator SHERRY**—Sure, but they are not covered by the same disclosure. If you are an average punter who goes to a planner, and the planner says, 'Retail fund ABC. Under FSR I have to disclose my fees, it is there in big bold letters,' two per cent or whatever it is. If you go to an accountant and he says, 'Right, set yourself up for life, do your own thing, DIY,' the accountant



does not have to show that prospective client the fees in the same way that the planner has had to.

**Mr Cooper**—That is true, although as a matter of contract, if the accountant is going to get his fees the client has to know what they are. Part of the problem with FSR is that the fees are so complex and charged by so many different players that that is why disclosure is even more important in a real FSR context than it is when you go and see your accountant. It is just between you and the accountant.

**CHAIRMAN**—Fee for service.

**Mr Cooper**—Whereas with FSR you have fees. As we all know, that is the big problem. It is very hard to know.

**Senator MURRAY**—The first question is: are you getting complaints from lots of DIY operators that they were misled or were not properly informed as to the fee structure?

**Mr Cooper**—No, we are not.

**Senator MURRAY**—Because that would tell you whether there is a problem.

**Mr Cooper**—No, we were very concerned about the DIY market leading up to super choice, but certainly the empirical data we have does not cause us to have those concerns.

**Mr BAKER**—In a basic, normal structure, a planner that is doing the right thing is required to do anything up to a 70- or 80-page financial plan. I think what Senator Sherry is getting at is the documentation that is required—and there is nothing more complex at times than a DIY superannuation scheme—and how are they regulated? Is it just two or three pages and they do the figures? Who actually regulates?

**Mr Cooper**—If you have an accountant working within the exemption, that accountant is governed by the professional rules. If they were producing a trust deed, which is another product which is quite common in the financial landscape, that would be governed by the same rules as the professional standards that govern accountants.

**CHAIRMAN**—It is only the structure that an unlicensed accountant can advise on, isn't it?

**Mr Cooper**—Correct.

**CHAIRMAN**—Once the structure is set up and it gets to the investment—if you are seeking advice on an investment it has to be through a licensed person, or else you make your own investment decisions without advice.

**Mr Cooper**—Correct.

**Senator SHERRY**—Just so that I am clear on this and the committee is clear: you will be conducting shadow shopping exercises with respect to accountants and DIY products.

**Mr Cooper**—Shadow shopping is about people seeking advice on super switching, so that would be the licensed—

**Senator SHERRY**—In the circumstances, wouldn't an accountant be giving that in respect of DIY funds? Say I am in a retail fund or an industry fund and I toddle along to the accountant. The accountant says, 'Here's the tax advice for the year'—and I have had it done to me—'And, by the way, would you like a DIY fund?' I say, 'No thanks, I'm in one of the world's best DB funds,' and he understands me. However, the average punter gets propositioned by an accountant on a regular basis about DIY and about switching.

**Mr Cooper**—If it is switching the accountant needs a licence. Shadow shopping is not looking at the organisations; it attaches itself to the consumer. Once the consumer satisfies the research house that they are a genuine super switching advice consumer, we follow that consumer through whatever experience they go through.

**Senator SHERRY**—Where someone switched to a DIY from a retail or an industry fund, you will be surveying that area?

**Mr Cooper**—We will pick that up. In fact, I should point out that the very first and most significant enforcement outcome out of this switching surveillance was in the DIY. That was the super retrieval services. We discovered they were unlicensed.

**Senator SHERRY**—I am still concerned that the planner has to issue 100 pages of stuff under FSR, the disclosure—

**Mr Cooper**—You know what I am going to say about that, don't you?

**Senator SHERRY**—Yes, I do, and I still do not think it is good enough, but it is coming down. For the planners there is all of this paperwork and cost—to comply they have costs in the order of hundreds of dollars—and the accountant does not have to do it, under FSR.

**Mr Cooper**—Specifically no, but they have their professional standards and overheads and so on. It may not be comparable but I would say it would be fairly close.

**CHAIRMAN**—Are we not dealing with two different animals here? In a sense, you could have a DIY fund and the investment could still be in an industry fund, couldn't it? The DIY is the holding structure; it is not the investment.

**Senator SHERRY**—Or a retail fund. This is what worries me, and you would be paying a lot more for it. What would be the sense of being in a DIY fund and holding the assets in a retail fund or an industry fund? You would be paying double fees. It happens.

**Senator MURRAY**—No, but you might have other assets.

**CHAIRMAN**—You might have other assets in there as well, over which you want to retain control.

**Mr BAKER**—Property, shares.

**Senator SHERRY**—Turning to Money for Living: I know there is work going on in terms of prosecutions. I do not want to go to the specifics. It seems to me that equity withdrawal type arrangements for retirement which are pitched at retirees and based on assets, your home, are now much more common place. Does ASIC have any general concerns about the regulatory structures and the rules that apply in this area, because I think it is a real biggie for potential mis-selling over time. Do you have any observations to make about this sector?

**Professor Collier**—Senator, I am happy to answer that briefly. We are looking at this area. We are in the process of finalising a report, which will be coming out very shortly.

**Senator SHERRY**—Will that go to the issues of parameters and regulatory structure?

**Professor Collier**—It will be looking at the practices in the area and forms of regulation.

**Senator SHERRY**—Thanks for that. I have just one other issue—that is, online calculators. Has ASIC been examining the online calculators to see whether they are accurate within reasonable parameters?

**Mr Cooper**—We have.

**Senator SHERRY**—What is your conclusion?

**Mr Cooper**—We said quite publicly that we thought that, because of the variables that are able to be put into calculators, there seemed to be an unacceptable range. We had a very vanilla scenario of a particular worker at a particular age who had a particular amount of savings. We projected that to retirement age and then we went around to all of the web site calculators that were available—this is in a super context—and came up with a very wide range of the net present value of the terminal benefit. It was something like from \$200,000 to \$300,000 to \$700,000. We sought to get the industry to produce proper standards and to make sure that assumptions were clearly articulated. We are not seeking to ban them, because we think they are an inevitable part of the landscape, but we need to bring about a broad change in behaviour so that there are recognised standards. The best outcome would be that the industry get together a code of conduct on what is acceptable. We have a discussion proposal that is being considered at the moment.

**Senator SHERRY**—If you identify a calculator that you think is inaccurate, and it is based on reasonable assumptions and there are actuarial people who can give parameters or set parameters, have you removed any from the web?

**Mr Cooper**—We certainly have in relation to mortgage brokers—a very large number of them—because there was a misleading feature that applied right across the board.

**Senator SHERRY**—What about super calculators? I ask this because it is quite important in the context of super choice. There does not seem to be a lot of it happening yet, but to the extent to which people do it, the calculator does become quite a key element in decision making.

**Mr Cooper**—It does. The answer to that is that, to my knowledge, we have not identified a single calculator that is out and out misleading, but we found it unacceptable that there was such

a wide range that consumers would find it difficult to understand what all the different assumptions were, particularly when there was a non-standardised way that those assumptions were disclosed and so on. It is an industry-wide problem, rather than a specific one.

**Senator SHERRY**—You have your own calculator, don't you?

**Mr Cooper**—We do.

**Senator SHERRY**—I have not looked at it yet, but I understand you have one. When you are making assessments about what is and what is not broadly acceptable, do you take actuarial advice or other expert advice on the parameters?

**Mr Cooper**—I could take that on notice and get the specific answer to that, but we did put quite a lot of work into the analysis. I think we also consulted APRA on the validity of the assumptions and so on.

**Senator SHERRY**—Do you not think it would be reasonable that we could have a common standard for calculators—a projection type mode—actuarially approved, whether by APRA, ASIC, the Government Actuary or whoever?

**Mr Cooper**—That would certainly be our preferred outcome.

**Senator SHERRY**—Are you aware that this is what the UK government actuary does? It seems to work with minimal contention in the UK.

**Mr Cooper**—I guess another important plank is that it remain general advice, and not specific to a particular product.

**Senator SHERRY**—Yes, as long as it is clear it is a forecast, and that it is over time and not a guarantee. I think that seems to be a major point of misunderstanding by people who are not aware of the issues.

**Senator WONG**—Regarding the shadowy figures, or the third parties to whom you were referring before—I was being facetious obviously about the shadowy figures—who have some involvement or have some relevance as to whether or not you release the full report and when, are you able to indicate into what category they fall? Are they potential witnesses, are they people assisting with inquiries? I do not think it is unreasonable for some indication to this committee about—

**Mr Lucy**—I think potential witnesses would be more likely.

**Senator WONG**—Is that correct?

**Mr Lucy**—Yes.

**Senator WONG**—Therefore, after you have determined to release the report, presumably they may be able to be identified?

**Mr Lucy**—Yes.

**Senator WONG**—Can I go to audit independence. I notice that Ms O'Donnell has commented, I think it was last week, on conflicts of interest et cetera—disclosures—in the major audit firms. One of the issues identified was differing standards of requirements of staff in how to handle potential financial interests in audited companies or audit clients. Is there some standard or procedure or guideline that ASIC believes is appropriate?

**Mr Lucy**—I think it is important to start this discussion by acknowledging that we did not find any problems.

**Senator WONG**—I am not suggesting that, Mr Lucy. In fact, I think the press suggest, essentially—and I am happy to put this on the record—that firms had policies about the holding of a financial interest in audit clients and some had higher standards than others. Essentially, you are described as saying that ASIC had found no major breaches of the Corporations Law but there were certain improvements that you suggested should be made.

**Mr Lucy**—Yes.

**Senator WONG**—What I am asking is: what are those improvements, particularly in relation to the policies relating to financial interests being held in audit clients?

**Mr Lucy**—Some of the firms adopt a process which essentially meets the United States requirements of Sarbanes-Oxley, whereas some other firms adopt an approach which is very much styled to the Australian regime. Immediately there is a difference.

**Senator MURRAY**—Which is the tougher?

**Mr Lucy**—They are not necessary tougher; they are different. In some instances they might be described as more onerous. One of the issues which we are looking to see improved is the documentation and, I guess, the audit trail—how potential conflicts are recorded—and the culture within the firm to ensure that not only is there a process for such recording but also there is a process for ongoing checking to make sure that there is a reliability factor.

**Senator WONG**—How are you approaching that? Are you going to provide some advice?

**Mr Lucy**—We have.

**Senator WONG**—You have.

**Mr Lucy**—This is, of course, in respect of last year.

**Senator WONG**—Sure.

**Mr Lucy**—Which is for four firms only.

**Senator WONG**—I want to go to the second tier later.

**Mr Lucy**—There were debriefing meetings held at the conclusion of each series of inspection, and also an individual letter was written to each individual firm that identified firm specific issues. Therefore, our level of communication—indeed for each individual firm—as quite high.

**Senator WONG**—I am not necessarily interested in knowing specifically which firm had what issue, but what I would be interested in knowing is what are the issues raised across the sector. I do not know whether, on notice, you want to provide that advice, or if you want to provide the letters but mask the identifying aspects.

**Mr Lucy**—I would like to take that on notice.

**Senator WONG**—Sure.

**Mr Lucy**—My preference would be to do the former.

**Senator WONG**—Were you consulted by the Financial Reporting Council in relation to the review of audit independent standards?

**Mr Lucy**—We provided our report to the Financial Reporting Council.

**Senator WONG**—Which report?

**Mr Lucy**—The report that I believe has been tabled publicly. That is the Auditor Independence Inspection Program dated September 2005.

**Senator WONG**—Can you table that?

**Mr Lucy**—Yes. It is already a public document, but I am happy to table it.

**Senator WONG**—You provided that to the FRC, and then what occurred?

**Mr Lucy**—Their responsibility is to report to parliament, which they did, and on their reporting to parliament we then released our report.

**Senator WONG**—I understand that the FRC has indicated an intention to review audit independent standards.

**Mr Lucy**—Yes.

**Senator WONG**—Particularly to see if they are overly prescriptive. Was that decision taken as a result of ASIC's advice?

**Mr Lucy**—I cannot speak for the FRC.

**Senator WONG**—Did you provide advice that the standards are overly prescriptive?

**Mr Lucy**—There is a high level of communication and dialogue between ASIC and the FRC. Indeed, our chief accountant in ASIC is on the FRC, so there would be ongoing dialogue and advice.

**Senator WONG**—Did you provide advice, or did you profess the opinion, that the standards are overly prescriptive?

**Mr Lucy**—I would have to take that on notice. That is not my expectation, but I would—

**Senator WONG**—I would have to say it is not how the press reads it in terms of ASIC's views about how auditors are doing and what could be done better. But is that a position ASIC holds?

**Mr Lucy**—Just to clarify my understanding of what you are putting: is it that ASIC is suggesting—

**Senator WONG**—I am asking; I am not putting it, Mr Lucy. In fact, what I am actually saying to you is that it appears to me, from what is in the press—obviously that is not necessarily a determinant—and from what you have said, that it is not the position ASIC have taken. I am asking: is it the case or is it not the case that ASIC have put a view to the FRC that the standards are overly prescriptive?

**Mr Lucy**—I do not believe that we have put that view.

**Senator WONG**—From your experience—at least with the big four—and the report to which you referred, my impression of how it has been reported is that essentially the audit firms were complying reasonably well, other than on the issue of the policies perhaps differing somewhat.

**Mr Lucy**—I think that is a fair summation, yes.

**Senator MURRAY**—But some members of those audit firms do find it overly prescriptive, which you would expect, because they have moved from a low regulation situation to a higher regulation situation.

**Mr Lucy**—Yes. I think that is true, but very definitely the tone at the most senior levels within these firms is very supportive to the regime. They have an expectation that there will be total compliance within the firm, so that again is very reassuring to us.

**Senator WONG**—You would describe it as being supportive or cooperative around the regime, rather than being antagonistic towards it?

**Mr Lucy**—Yes, I would.

**Senator WONG**—Just let me know when the second-tier auditing firms will be—

**Mr Lucy**—We have commenced. We are doing it across Australia, because as I am sure you would appreciate, the second-tier firms are typically not single firms. With the second-tier firms we are not able to visit one office as a representative office and so we recognise that. For

example, looking at Senator Murray, I can say, for example, that we are visiting Perth and we are meeting with firms in Perth in the second-tier area.

**Senator MURRAY**—All of which I suspect I know.

**Mr Lucy**—I expect that is the case.

**Senator WONG**—That is not hard to guess, I suppose. The opinion that the FRC profess that your organisation's power of inspection in relation to audit firms needs to be clarified, is that an issue that was discussed with you before the FRC put that view in its—

**Mr Lucy**—It was not discussed with me, Senator, no.

**Senator WONG**—Do you think your powers in that regard need to be clarified?

**Mr Lucy**—No, that is not my view.

**Senator WONG**—Are you aware of the Treasury paper which includes proposals for changes to your inspection powers?

**Mr Lucy**—No, I am not.

**Senator WONG**—It has not been discussed with you?

**Mr Lucy**—No.

**Senator WONG**—Can I ask you to take on notice, in relation to our insolvency laws report from this committee, that there are a range of recommendations to which the government responds on both the majority—

**CHAIRMAN**—We have already raised that.

**Senator WONG**—Thank you. Are you going to reply?

**Mr Lucy**—Yes.

**Senator WONG**—I want to ask briefly about stapled security arrangements in the property trust sector.

**Mr Lucy**—Did you say 'social security'?

**Senator WONG**—Stapled, not social. That is my other portfolio, Mr Lucy. I am sure you do not want to talk about welfare changes. It is about stapled security arrangements in the property trust sector. There have been a number of commentary pieces—I think Mr Cooper knows what I am talking about; unit trusts essentially—in the financial press, and I put it no higher than that, expressing some concern about the use of these trust structures. I suppose that is the way to describe them. Is this an issue on ASIC's radar?



**Mr Cooper**—Not in the way that it has been conveyed in the press, although, having said that, we do have a wider concern about the use of very complex structures that are then sold to retail investors, and stapling forms part of that. The stapling structure per se has been around for some time. It is substantially a matter of producing pre tax yield in certain situations within the tax rules. As I say, ASIC does not have a concern per se about stapling.

**Senator WONG**—I have to say that I cannot recall the legal consequences which flow, but is it the case that under a unit trust structure there would be any differential in terms of the regulatory requirements or the regulatory framework associated with such a structure?

**Mr Cooper**—Yes, oddly enough, it is quite a bit higher in the sense that in a listed situation it is a listed managed investment scheme, it is a trust, so there are all of the fiduciary responsibilities of the responsible entity, trust law concepts and so on. It is not a low road in terms of regulation; it is a high road.

**Senator WONG**—In terms of accounting standards, are there differential requirements? For example, payment of dividends from debt?

**Mr Cooper**—Certainly, the rules about payment of dividends out of profits do not necessarily apply to trusts. Again, they have their own accounting concepts and so on, but none of those are really new issues.

**Senator WONG**—Previously we tangentially touched upon the director share trading issue. With respect to your campaign, as I think it was described in the *Financial Review*, a ‘crackdown on share trades by directors after finding widespread breaches of the law including persistent delays in disclosing trading activities’, can you tell me what you are doing there?

**Mr Cooper**—In a sense this is old news, in that back in 2001 we had a similar campaign with the ASX and we targeted over 80 directors in that campaign. It looks like the message has not been widely received, so we will work closely together with the ASX to enforce. We have had the education phase. We have gone out and said: ‘This situation is unacceptable and we’re not going to tolerate it.’ Going forward, we will simply work through a process of taking action against people who cannot abide by the rules.

**Senator WONG**—Can you clarify it in a bit more detail than that.

**Mr Cooper**—It is a breach, it is a clear-cut—

**Senator WONG**—I understand that. I am talking about what your activities are going to be.

**Mr Cooper**—It is fairly simple. A director undertakes a trade; you either report within the time frame or not. ASX will then tell us the names of the people who have not complied, and we will go from there.

**Senator WONG**—But isn’t that occurring already?

**Mr Cooper**—I imagine it is, yes. To the extent to which people are breaching the provisions, we are gathering names and we will be taking action.

**Senator WONG**—You have about six cases, according to the *Financial Review*, but that may not be accurate.

**Mr Cooper**—I honestly do not know if that is—I would be surprised if that information is accurate because I do not think anyone from ASIC would be talking to them.

**Senator WONG**—What I am not clear on is what you are doing differently to what you were doing before.

**Mr Cooper**—Nothing much, in the sense that we have done this before, as I say, back in 2001 and in instances where it comes to our attention. This is going to be a concentrated program because the level of non-compliance was unsatisfactory.

**Senator WONG**—Are you able to offer an explanation as to why that is the case?

**Mr Cooper**—Not without speculating. It does seem surprising. It is an important issue. Directors trading in shares in their own companies is important. It is an important disclosure matter. It does not matter what time of the year it takes place; it is always relevant to know what directors are doing with their own shares.

**Senator WONG**—You said you have done a bit of communication through the ASX, so when are you likely to move to a stronger compliance approach?

**Mr Cooper**—I would think from that point onwards.

**Senator WONG**—When was that?

**Mr Cooper**—Within the last month.

**Senator SHERRY**—Chair, I forgot to ask one question earlier. It is only one question.

**CHAIRMAN**—Okay.

**Senator SHERRY**—Just coming back to these case studies, I refer to example 4, Mr Jim Barlow. Jim Barlow was in a so-called old employer fund 1 plan. He was recommended to switch to a new employer fund 1 plan. I am assuming that is the same fund?

**Mr Cooper**—So we understand, yes.

**Senator SHERRY**—He was recommended to switch within the same plan, and got charged a three per cent entry fee for going into the new fund—is that right?

**Mr Cooper**—At the planner level, yes, but I think when we talked to the product issuer it is a different story. So far, without going into too many of the specifics, it appears that the motivation has been to sheet the trail commissions in his direction.

**Senator SHERRY**—Isn't this prima facie theft? There is absolutely no identified benefit.

**CHAIRMAN**—You are saying the fee was not actually charged to the client?

**Mr Cooper**—I think the ultimate outcome will be that if there has been a fee charged at the planner level that will be reimbursed to the client.

**CHAIRMAN**—But the conduct?

**Mr Cooper**—Yes, the conduct of the planner does seem to be—I would not use the word theft—

**Senator SHERRY**—I said prima facie theft. What is the planner's explanation for charging a three per cent entry fee when there was no entry to a new fund?

**Mr Cooper**—Again, because this is a surveillance and any particular one of these could move along to the enforcement phase then we would not really want to go into the specific details of what the planner—

**Senator SHERRY**—On the enforcement, presumably some matters at least identified will be settled by restitution or correction, without formal prosecution?

**Mr Cooper**—Correct.

**Senator SHERRY**—Will you be able to provide an update about matters settled in that way, and how they are settled, as distinct from prosecution? You will announce a prosecution.

**Mr Cooper**—Yes, we can do that.

**Senator SHERRY**—Thanks.

**CHAIRMAN**—I think Senator Wong has indicated she will put some questions on notice. Can I ask one question before we wrap up. Earlier in some of the discussion there was reference to ensuring that consumers got the best advice. Do you have a benchmark by which you determine what is the best advice?

**Mr Cooper**—No, we do not. I think the requirement is that they get appropriate advice that has a reasonable basis. I guess we are always very clear to make sure that we are not second guessing the efficacy of the advice from an investment point of view. All of these issues are actually, we say, breaches of duty and situations where the adviser has not done the right thing. Whether or not an advice to take a particular product against another particular product is good or not is really not our purvey at all. We are not second guessing them or pretending that we are investment advisers. We really should not be in that space, and we are at great pains to not be there.

**CHAIRMAN**—Your interest is in ensuring that all of the relevant facts are taken into account and the law is complied with in the giving of advice?

**Mr Cooper**—It is partly process, but it is about whether there is a reasonable basis and whether the advice is appropriate—because that is what the law says. It certainly does not have

to be the best advice. I guess the point is that it is a relatively modest standard. The law does not say that you have to give the best advice; it just says that you have to give appropriate advice taking into account the client's circumstances. You need to have a reasonable basis and it needs to be appropriate.

**Senator SHERRY**—Can I outline a hypothetical situation in terms of you not getting into the investment advice area. An individual in, say, their 20s has \$50,000 in a super fund, a retail or industry fund or whatever, in the recommended switch the fees are broadly similar, but the recommended switch was into a fund that was bonds only, with a lower rate of return over the longer term, which I think any reasonable person judging investment advice would conclude. For whatever reason that happened, wouldn't you have to get into the issue of what is investment advice?

**Mr Cooper**—Only if there was not a reasonable basis on the face of the advice. If you successfully trade bond instruments you can make more money than pretty well any other investment. It is always difficult for us. It is only where that recommendation is made, it looks a bit odd on the face of it and there does not seem to be a reasonable basis that the ASIC light lights up. We certainly do not get into value judgements on particular investments where there appears to be a reasonable basis put forward.

**Senator SHERRY**—Do you accept that this is not an easy call to make?

**Mr Cooper**—I certainly do.

**CHAIRMAN**—As I indicated, Senator Wong is putting some questions on notice and Ms Burke was going to put some questions on notice. That certainly concludes the questions from the committee this evening. I thank you, Mr Lucy, Mr Cooper and Professor Collier, for your cooperation and your ready responses to the questions that have been asked.

**Prof. Collier**—Thank you.

**Committee adjourned at 9.25 pm**