

#### COMMONWEALTH OF AUSTRALIA

### Official Committee Hansard

# JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES

Reference: Statutory oversight of Australian Securities and Investments Commission

TUESDAY, 13 JUNE 2006

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## JOINT STATUTORY COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES

#### Tuesday, 13 June 2006

**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:** Mr Baker, Ms Burke, Senator Chapman, Senator Murray, Senator Sherry and Senator Wong

#### Terms of reference for the inquiry:

To inquire into and report on:

Statutory oversight of the Australian Securities and Investments Commission.

#### WITNESSES

COOPER, Mr Jeremy Ross, Deputy Chairman, Australian Securities and Investments	
Commission	1
LUCY, Mr Jeffrey John, Chairman, Australian Securities and Investments Commission	1

#### Committee met at 6.09 pm

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

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

**CHAIRMAN** (Senator Chapman)—I declare open this public hearing of the Joint Committee on Corporations and Financial Services. Today 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 committee is part of that oversight.

I welcome to the hearing Mr Jeffrey Lucy and Mr Jeremy Cooper, the Chairman and Deputy Chairman of ASIC, and other officers of ASIC. I remind all witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee; such action may be treated by the parliament as a contempt. It is also a contempt to give false or misleading evidence to a committee. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken, and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request, of course, may also be made at any other time. As official witnesses you will not be asked to give opinions on matters of policy. This prohibits only questions asking for opinions on matters on policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. I invite you to make an opening statement.

Mr Lucy—I do not wish to make a statement beyond referring to the committee that the Australasian Reporting Awards was completed last week and there were some 300 entries lodged, obviously of very high standard because the parties that lodged their applications consider they are eligible for some form of award. To reach gold level category, the report needs to be described as a model report that achieves overall excellence in annual reporting. Approximately 10 per cent of the people that lodged have received gold awards. I am proud to announce that, for the seventh year in succession, ASIC received a gold award for our annual report.

**Ms BURKE**—Congratulations. In a broad general sense, looking at issues of funding and staffing levels, Senate estimates were advised that you have had an increase in your funding. Will that go towards litigation costs or staffing costs, or a combination of both?

**Mr Lucy**—A combination of both is the correct answer.

**Ms BURKE**—Is it the case that you have been understaffed and underresourced to actually tackle some of the cases that you would seek to pursue?

**Mr Lucy**—No, that has not been our experience.

**Ms BURKE**—Then the increase in funding was sought by you for what reason?

Mr Lucy—The funding comes in several categories. Importantly, there is a funding of \$30 million per annum over four years which equals \$120 million. The purpose for that was to provide a background for what we described as litigation contingency. Previously, when we have needed money for significant matters, we have been obliged to approach the government. I must say that in every case the government supported us. In the year before, the 2005 financial year, the government indicated that they wanted that to be addressed further because they did not think that it was being dealt with in the most appropriate model. It was agreed during the intervening period that the best and most appropriate basis for dealing with this is to provide a background or backdrop for funding. There are some very precise governance conditions that we must meet to make sure that we are eligible to access it, but it does, in essence, give us access to another \$30 million of funding for enforcement related matters.

**Ms BURKE**—So, instead of every time you want to do an enforcement going cap in hand saying, 'This is what the costs are going to be,' you actually have a fund that you can draw upon.

**Mr Lucy**—Yes. Except that previously it has not been every time we needed to do it; it has really been the very large and significant matters where we have needed to have a special appropriation. This, by every expectation, will avoid a need for that in the future.

**Ms BURKE**—Have you done a forecast that you would be having more litigation into the future?

**Mr Lucy**—It is our expectation that we will continue to have growth in litigation; it is very difficult to foresee it.

**Ms BURKE**—There was an article in the *Sydney Morning Herald* on 22 April that ASIC prosecuted less than one per cent of breaches of Corporations Law reported by receivers and trustees in bankruptcy. Do you have a comment on that?

Mr Lucy—The difficulty with some of those statistics is that they are fairly unreliable. What the government has sought with this assetless administration is, where liquidators are currently not in a position to be able to complete their role as far as providing a report to ASIC regarding the background of what breaches might be, the opportunity for ASIC to fund those people. Previously we had a situation where liquidators may have made essentially uninformed observations; now they will be in a position to actually do the work to find out whether or not their observations are real live situations and real live problems. Firstly, we would expect the quality of referrals from liquidators to increase significantly. I would like to think that the liquidator will therefore, across Australia, make sure that they meet their obligation so that if there is mischief out there we hear about it. Part of the funding is that we are more robustly funded to take on those additional referrals.

Ms BURKE—Do you think that in some roles you need to be a bit more proactive in your litigation work? Westpoint is a case in point where there has been a bit of criticism that you did not act as quickly or as efficiently as could have been the case.

Mr Lucy—There are two points to your question: firstly, do I think that we could be more aggressive with our litigation? No, I do not. There is litigation in two categories, civil and criminal. Our dialogue with the DPP is effective. There is the right level of attention as to whether or not matters should be taken on criminally, so I think that is appropriately dealt with. Similarly, with the civil side of things, we have a success rate in the courts of some 97 per cent. We are very energetic with our investigations to make sure that if there are opportunities for prosecutions we will follow them through.

It is interesting that you refer to Westpoint in the manner that you suggested, where there is an implication of criticism. To some extent that was one of the major thrusts of our last meeting a fortnight ago in the Senate estimates. We really spent a fair bit of time providing some background to show that certainly that is not ASIC's view. Indeed, all the action that has been taken to date has been taken by ASIC. If you hark back to the responsibilities of the directors, the office bearers of the company, the third parties such as legal firms, auditors and so on, all the way along the line it has been ASIC that has been taking the action. We continue to have a matter before the court where we are waiting on a decision. Notwithstanding that situation, we took action in about October 2005 to have these companies wound up. In the press last week the auditors said that they advised us in December 2005 they felt there was an insolvency issue. We had acted by that time. We think that our action in respect of Westpoint is more than defensible; we think it has been appropriate.

Ms BURKE—I have to be honest: I did not read all the transcript from Senate estimates.

**CHAIRMAN**—We do not want duplication!

Ms BURKE—We do not want duplication, so I am not actually going there. My question was more in essence about the media reportage of it and how action is taken, whether it is something you instigate or it is brought to you by the liquidator or by somebody making a complaint. Using Westpoint as an example, given there are now so many mum and dad investors, as we keep referring to them, out there bleeding, at what point does someone act? Is that your responsibility? Is it the liquidator's responsibility? Is it the director's responsibility? As I am interpreting it, the media criticism seemed to be that ASIC waited too long to take action.

Mr Lucy—You suggested that we should not be preoccupied with Westpoint. In relation to something like that, unfortunately a lot of the media choose not to really get into the facts and do the full investigation. The point that you raise is a very important point. We do receive complaints. Some of the complaints are beyond our jurisdiction and, therefore, we would respond accordingly. Many of the complaints really do provide invaluable intelligence to us as to the sorts of mischief that can be going on, and we accumulate them and deal with them intelligently. If a name crops up more than once, then it starts to add weight as to the fact that there is something going on that perhaps needs to be more closely addressed.

We have also taken a number of administrative decisions within ASIC as to our structure. About a year ago we commenced a directorate called compliance, and that is now undertaking surveillance work right across our entire agency, from liquidators and auditors to holders of financial service licenses—the full gamut. There is a very close correlation between complaints coming in and the sorts of issues that have been raised and the surveillance activities. We have also taken the decision to give more enforcement teeth to our complaints area. Matters that are

more straightforward but not necessarily routine can be dealt with within the complaints area without necessarily having to be referred to the enforcement area. I think your point is very well made. Again, we are not acting from a position of being defensive but we do think there are opportunities for doing things better and that is what we are working to do.

**Ms BURKE**—Besides enforcement or litigation, when you get a complaint, what other avenues does ASIC use to deal with it, to stop the breach or to stop the action?

Mr Lucy—Frequently the best outcome is just picking up the phone. I will give you a public example so it will not embarrass anybody. Some months ago I received advice that one of the major banks had a problem that had been identified in lending to Indigenous communities particularly in the Northern Territory but also North Queensland. I rang the CEO—indeed, it was his first day at work—and his response was extremely positive. He recognised the urgency of the issue and within a few weeks the whole issue was tidied up totally to our satisfaction, to my expectation and totally to the satisfaction of the borrowers. In many instances, the complaints that are brought to our attention are caused through an inadvertent breach—or, where there is a breach, management does not know about it, and when they are advised of it they immediately address it.

Ms BURKE—Regarding Westpoint again—I have read all of the stuff on it today—there is an issue of how we actually advise investors. I keep saying to people, 'If I could legislate commonsense, I would be a happy woman but you cannot do it.' You put out press releases and you have done some shadow shopping but a lot of your press ends up in the *Financial Review*. That is not a criticism—it is just the area that picks it up. Not every investor—not even every financial planner—reads the *Financial Review*. How are we getting the message out there? As we are getting more and more people on stream with their super funds at their own disposal through super choice, how are we actually educating people not to blow their money in these investments? In this case it sounded reasonable and was sold as reasonable. How do we educate the public?

Mr Lucy—It is a very pertinent question and I think there are several layers to it. The first is the area of financial literacy. The government have undertaken a process where they are trying to specifically improve financial literacy in the community. That project is something for which ASIC and the ANZ Bank really were the germinators, and we are delighted that it has legs and is being carried forward. We have also looked very hard at the media communications. You are quite right: historically it has been in either the *Financial Review* or, if not, the financial press of something like the *Australian*. The mums and dads do not always read those sections of the newspaper. We have broadened that quite considerably into the *Telegraph*, some other sorts of media and also magazines. We now are doing a lot more by way of talkback radio, radio interviews per se and television to an extent. The balance is that we cannot oversell ASIC. We do not want ASIC to get to the point where people say, 'Goodness me, it's ASIC again in the press,' which reaches a point where it is a turn-off. We need to continue our currency and for people to continue to want to listen to our messages.

Our FIDO website, which is an excellent website, really provides incredibly important and useful information. The numbers of hits to that go up exponentially each year, so that is working. I think it is really just a matter of doing it better. We are looking at the possibility of doing some war stories. For example, it is one thing for me to say, 'Well, this is what you should avoid,' but

we think that there is a real benefit in having an investor who has been caught out saying, 'This is where I was caught out. This is the lesson for me.' We think that would be a very powerful message, so we are looking to do that in addition to the spokesperson saying things as well. It is something which is right in front of us all the time. We are looking at our media unit, not just for the sake of historical media announcements but again to try at every opportunity to put the extra flavour to it to say, 'Yes, we've jailed somebody' or 'Yes, we've sought to ban somebody,' but then the next side of the story is the consumer message about that. We really are looking at all dimensions.

**Ms BURKE**—Insofar as just monitoring where you are getting hits and feedback, have you got somebody tracking that to say, 'This has worked; this hasn't worked'?

**Mr Lucy**—Yes, I think that we do that quite intelligently. As a budget funded organisation spending taxpayers' money, we are very careful that we do not waste any money. We are also very careful that we apply the right amount of money in the right area. I think that we do give that the attention which it deserves. Having said that, it is a never-ending story to get the message out.

Ms BURKE—Besides the financial literacy task force—which I have some doubts about, but that is just me personally—are there other organisations you are working with outside that to actually spread the message?

**Mr Lucy**—Yes. We have a group that has been in existence as far as I can remember—we could give you the exact date that it commenced if you wish—called the Consumer Advisory Panel. Apart from our Executive Director of Consumer Protection, everybody is external. They come from the full spectrum of people that you would reasonably assume present consumer positions, and they give us invaluable feedback. We fund them to do research. That is very effective for us.

**Senator MURRAY**—As you know, I am a great fan of your press release service because I think it is very informative. Regarding those responsible for approving or encouraging unethical behaviour such as directors, accountants, lawyers, valuers and those sorts of people, do you have offenders lists?

**Mr Lucy**—No. Perhaps I was a bit quick: Jeremy has pointed out that we do have a list on our website.

**Mr Cooper**—There are two mechanisms for doing that. You can comprehensively search the website for whether somebody has been mentioned in one of our media releases.

**Senator MURRAY**—Does that not require you to type in the name?

Mr Cooper—It does.

**Senator MURRAY**—Then it requires the search engine to work.

**Mr Cooper**—We also have a specific list of people who we have banned. If you wanted to find out, for example, whether or not a financial advisor firstly had been licensed by us or, secondly and more importantly, had been banned by us, that is all there on the website.

**Senator MURRAY**—It seems to me that you should consider going further. For the period in which a person is prohibited from acting as a director, for the period under which somebody is banned or for the period under which a particular action has been taken, it would seem to me a list of names which is easily accessible would be of great assistance. That extends further to those lawyers, accountants or valuers who have been tied up in schemes which have been disallowed or have had the force of law attached to them. I am not suggesting you should become judge, jury and executioner; I am talking post facto or after a judgment has been made.

The professional damning of somebody who has had a conviction or a finding against them has a very salutary effect. The difficulty for anyone, including someone like me who watches all your stuff very carefully, is to remember names. I think investors, bankers and the general public themselves should be able to go straight to a list which would be alphabetically listed and say, 'Is this name there, and should that ring alarm bells with me?' There is no way that any person, apart from somebody with a prodigious memory, will remember that somebody three years ago had an eight-year penalty put on them.

**Mr Lucy**—Would you contemplate the listing of the name only during the currency of the ban?

**Senator MURRAY**—Yes, because you have to accept a rehabilitation process and that people learn their lesson. I think it would be against natural justice to carry it on afterwards.

**Mr Lucy**—I agree. We could have a look at that.

**Senator MURRAY**—It is not like the sex offenders' register where they are on there forever.

**Mr BAKER**—But if they are serial offenders, more than once, they should stay on.

**Mr Lucy**—In colour code.

**Mr BAKER**—That is right: red for danger.

**Mr Lucy**—We will have a look at that to the extent that there are legislative barriers. We will identify any and come back to you. We will certainly take that matter further.

**CHAIRMAN**—Can I ask some questions about the April discussion paper on conflicts of interest?

Mr Lucy—Yes, of course.

**CHAIRMAN**—You requested feedback on that by 9 June, which has passed. Have you had much feedback? What has been the general tone of the feedback?

**Mr Lucy**—Jeremy Cooper will respond to issues to do with that particular paper.

**Mr Cooper**—Yes, we have had quite a bit of feedback. Some participants have asked for a little bit of extra time, which we are perfectly happy to grant. We have had some face-to-face meetings, some informal discussions and quite a few written submissions.

**CHAIRMAN**—Are you getting feedback just from the peak bodies or are individual companies providing feedback?

**Mr Cooper**—Generally the peak bodies.

**CHAIRMAN**—Have you sought anything from the companies?

**Mr Cooper**—It was an open-ended invitation. Typically, where you have got a number of industry players who communicate their messages through to an industry body and that body then assimilates that information and presents us with one voice, it is a lot easier to manage than getting it from 20 different players. I think that is typically how they function.

**CHAIRMAN**—What is the process from here? You said that there is still some late feedback to come in beyond the closing date of last week.

**Mr Cooper**—The process is really to look at what we have got. In some cases I think people are suggesting additional scenarios that they would like dealt with. Given the cut-off was only on Friday, I must admit I have not had a full collation of all of the submissions. Certainly there have been people who have raised additional scenarios with us and made other suggestions. The feedback has generally been engaged and it has been positive.

**CHAIRMAN**—In the discussion paper you mention that the case studies in the paper will be included in policy statement 181 after this consultation process.

**Mr Cooper**—That is our current thinking: that, rather than create some additional document, we would have our views on conflicts in one location.

**CHAIRMAN**—What would be the practical effects of any additions to the policy statement? Are you able to advise on that?

Mr Cooper—One clear message we do have is that we do not think handling conflicts is a situation where the regulator issues endless prescriptive guidance so we end up with a book of 5,00 pages, you look up the conflict that you think you are involved with and, lo and behold, ASIC has set out a rule on that conflict. We are definitely not going to be doing that. We did think that there was a need to bring the high-level policy work down to a more recognisable level and deal with various little scenarios in each industry. We have found so far that has been fairly well received.

**CHAIRMAN**—The discussion paper covers three different service providers in discrete sections: the wholesalers, the retailers and the product issuers. Have you reached a view as to what constitutes the worst conflicts of interest across those groups?

**Mr Cooper**—The real work is when we have all the submissions. The next time we issue that document I think people are going to be looking for perhaps more commentary. The main thing

we wanted to do was to get the scenarios out, get people engaged with them and get some feedback. I think the ball is now back in our court to consider each conflict situation a bit more fully and have a little bit more of a think about what the answer is. I will not say that the document that went out was relatively superficial, but it did not spend a lot of time actually addressing the real answer on each particular conflict.

#### **CHAIRMAN**—Did the discussion paper arise at ASIC's initiative?

Mr Cooper—Yes, it did. It was an assessment of how we thought the industry was engaging with the issue. We got this regime on 1 January last year and we had preceded that with some relatively high-level policy work that followed on from international work that had been done by IOSCO, and that was the general way in which the UK and the US had approached the subject. A view developed within ASIC that perhaps it was a little bit too theoretical and that a lot of players in the financial services industry who were busily doing their work did not necessarily think it related to them. That is why we brought it down to the scenario level, and in some cases we even used funny names and so on to get people thinking about some of those things. So far, I think we have been reasonably successful.

**Senator SHERRY**—Regarding the conflicts paper, protection in Australia is mainly founded on disclosure. Is ASIC considering any options other than disclosure to eliminate or minimise conflict?

Mr Cooper—I guess there is disclosure, there is management and there is 'Don't do it.' In some cases, with the 'Don't do it' one, we are saying no amount of disclosure is going to solve this conflict.

**Senator SHERRY**—I assume there will be a paper issued some time in the future. Do you have any timeline for a response to the responses?

Mr Cooper—It depends on the number and the tone of the responses. If we are way out of alignment with what industry are sending in, that means we might have to have some workshops or some more discussions. If the responses are relatively straightforward, it is a matter of turning around the paper, seeing whether it is best to put it in with policy statement 181 or to have a standalone document, and move forward. I am afraid, given that the cut-off was only last Friday, I am just not in a position to say which one of those it is.

**Senator SHERRY**—The paper identified different types of conflict in different sectors. There is some overlap of conflicts, but would the response be a comprehensive attempt at various scenarios with answers to all the issues raised, or would it be a sector-by-sector, product-by-product approach?

**Mr Cooper**—At the moment it is seeking to be illustrative but not covering the field. Any attempt by us to have a guidebook on conflicts of interest to cover the myriad of different ways in which conflicts can come up would be quite a dangerous kind of a tool. It could be, 'This scenario wasn't in ASIC's illustrations; therefore, it must be all right.' I think it will stay as part of the canvas. It will never seek to cover all the different aspects, because there are obviously things that we have not covered in there.

**Senator SHERRY**—I would assume there would not be an all-embracing dictionary of conflict with response. It seems to me that that would be very difficult to do in one hit. There may be responses to different conflicts in different sectors over time.

**Mr Cooper**—I think that is true. There are probably conflicts illustrated in there that we would want to give people some time to think about. Then we would perhaps launch a particular campaign, which would be partly educative and partly by way of surveillance. There are quite a wide range of scenarios, but they are also of different dimensions. Some you read and think, 'Well, that is clearly something that has to be avoided.' Others are more subtle. Of course, as we learn things from time to time we can always update the scenarios. If there is some new difficulty that crops up, we can always issue another paper.

**Senator SHERRY**—But there is a limit to the issuing of papers.

Mr Cooper—True.

**Senator SHERRY**—At some point there is a decision, guidance note or whatever that will flow in respect of a particular area of conflict. Are you looking at any of the international work in managing conflicts in any particular sectors? If so, where?

Mr Cooper—Yes, we are. We are talking to the main jurisdictions about the approaches they have taken. We have a different type of regime here in Australia and this product, so far as we know, is unique. In other jurisdictions they have looked at specific areas. For example, research analysts were the direction of Wall Street and partly the UK. That was the core problem with conflicts. The CLERP 9 response put the obligation right across all sectors of the industry, which in fact is not mirrored elsewhere. This product seeks to articulate conflict scenarios right across all sectors in the style that we have done it. As far as we know, it is a unique product; whereas in the UK, for example, they have quite specific work being done on research analysts. We followed that model in 2004, putting out work that was specifically directed at analysts, but this product is quite different.

**Senator SHERRY**—I do have some more questions in different areas.

**CHAIRMAN**—I would like to ask some questions about last year's guide on super switching and the questions and answers that were in that guide. I would particularly like to go to the requirement for financial planners to investigate the from fund as well as the to fund, what your expectations are in that regard, what you see as the requirements in that regard and what the legislative basis for it is.

**Mr Lucy**—Again, Jeremy will deal with that particular area.

Mr Cooper—Since then we have come out with our shadow shopping work, and switching was something that was dealt with as part of that work. It was only one aspect of it because the shadow shopping report was looking at superannuation advice generally. We did find out some things about switching in that work. It is a very detailed piece of work, as you have probably seen. There is nearly 60 pages of data about what we saw. In relation to switching, we saw that, in 44 per cent of cases where people sought superannuation advice they were recommended to switch. We got quite detailed data on, if you were in a particular fund, the relative likelihood of

being advised to switch into another fund. Really, it does descend into quite a considerable amount of detail. I would have to say from this work and other anecdotal evidence that we are only some way along the path towards a situation where there is a uniform understanding of what the obligations are and uniform compliance. We still have further work to do in that area.

**CHAIRMAN**—You still have not really established what the requirements are.

**Mr Cooper**—We know what the requirements are. We told people about that this time last year, when choice was coming in. It is what is happening out in the field and how that is being interpreted.

**CHAIRMAN**—Can you outline what you see as the requirement to investigate the from fund and what the legislative basis for it is?

Mr Cooper—Where you are recommending a switch, you need to look at the existing arrangements that the customer has and assess the plusses and minuses of moving out of that product and into a new product. You need to explain those to the client and then include them in the statement of advice. The report that you were referring to, the super switching report, had some rather unhappy outcomes. For example, people had existing funds, where they had quite reasonable insurance, and through lack of care on the part of the adviser it was recommended that they move into another product. They either lost that insurance or ended up having to pay much more for it. We set all that out in that report. That is really a summary of the legal obligation. It makes perfect sense. If you are giving professional advice to someone about whether they should move out of a fund, it is not rocket science to expect that you would have a look at what fund they are already in and see how it stacks up with what you are recommending. It is that simple.

**CHAIRMAN**—Given that, as I understand it, most reputable licensees will not allow their planners to advise in any way on products that are not on their list, what happens if the from fund is not on the product list of a particular adviser? How do they then provide that advice? I think it is probably fair to say it is a good thing, from the point of view of reputable licensees, that they do not advise on products that are not on their list. Westpoint is a good case in point on that. If it is not on their list and therefore the licensee will not allow them to advise on it, how do they actually provide the advice?

**Mr Cooper**—The pure answer is that they do not. If you are blocked out on whether you can advise on the fund that they are in—other than in some fairly exceptional circumstances that are dealt with in the legislation, where for one reason or another you simply cannot get that information and you very clearly advise the client of that—the proper approach in that situation is that there is no advice. This is one of the big issues that we are in frequent discussions with industry players on.

**CHAIRMAN**—That would mean it is very difficult if not impossible for an adviser who is working from an approved product list to be able to recommend a switch.

**Mr Cooper**—It depends on what is on the list.

**CHAIRMAN**—What about in that scenario that I have painted?

**Mr Cooper**—Where the client's existing fund is not on the list, there are really two options. Actually, there is only one. I was going to say you could advise not to switch, but even then, if you do not know what the fund is about, that is difficult advice to give. Again, this is very much a core issue. Many approved product lists have a very wide number of funds on them; some of them do not. If the existing fund or the from fund—as they say in the trade—is not on the approved product list then the adviser is not in a position to advise to switch out of it.

**CHAIRMAN**—What is the implication of that for the government's choice policy?

**Mr Cooper**—It is a tension between a list of products, which is actually quite a sensible foundation. So long as it is not abused, it is a risk management tool. If I were a financial services licensee, I would want to know which products my authorised representatives were advising on and which ones they were not. If they want to advise people about moving out of a superannuation fund into another one, they need to make sure that the list is sufficiently broad. Otherwise, they are going to have a very small amount of work to do in that area.

**Senator MURRAY**—Mr Chairman, just for clarity. Mr Cooper, I find your answers confusing. It makes sense to me that if someone wants to switch from your approved list to a non-approved list you should not give advice. But, when someone wants to switch from a non-approved list to an approved list, it would seem sensible to me to give advice. The question is: how do you then get information on the non-approved list? To me, the answer is that every fund should in fact have a little set of details relative to their product which they could provide to someone, such as a planner, which says why you should move or why you should not move for each product.

**Mr** Cooper—That is precisely what we are working on with industry at the moment. For funds that are perhaps not in the retail sector or not well known, how can you provide a ready template of common information so that an adviser can make quick and reasonable inquiries about what the product is about and then get some specific details from the customer?

**Senator MURRAY**—Otherwise, it seems to me that you are unnaturally limiting the ability of someone to shop.

**Mr Cooper**—Yes and no. Do not forget that these approved product lists are no creature of legislation. They are not something that we regulate, they are not something that you find in the Corporations Act; they are just what people choose to do within their businesses.

**Senator SHERRY**—Isn't that a danger in itself? Effectively, it acts as a restraint of trade. It restrains competition, because a planner cannot recommend unless it is on the list. It does beg the question: why have an approved list in the first place? If, in the case of superannuation, the funds have been licensed—and we all know they are going through that process—why would you need a list? Once we finish the licensing process that APRA is just concluding, they will all have been relicensed. I am sure you are aware of the improved regulatory oversight. You have been through a process with super funds as well in your particular areas. Why would you need a list in the first place, given that licensing process?

**Mr Cooper**—Licensing is one part of it. There are other issues. What does the fund invest in? What do you end up with when you invest in the fund? ASIC considers that these approved

product lists are legitimate but there is a tension between having a list that is, as you say, overly restrictive and one that properly manages what the advisers are actually doing. We make no secret of the fact that that is an issue and it is something with which we are working with industry on right at the minute.

**Senator SHERRY**—Isn't this the difficulty? If someone goes to an adviser and the adviser cannot examine the from fund—when sufficient information might be accessible on the website; there are not that many of them now because, given the APRA licensing regime, the number has massively declined—isn't there a danger that it will become a restraint of trade, that it will be anticompetitive?

**Mr** Cooper—That is a little bit outside our bailiwick, but it is a conscious choice that the licensee makes. It prescribes what the approved list has on it and what it does not have on it.

**Senator SHERRY**—Conversely, isn't it dangerous too? Let us use as an example AMP, who touted last year they were putting some industry funds on their approved list. They have just taken them off. It seems to me that you can restrain what can be recommended by an approved list. That is true, isn't?

**Mr Cooper**—You can, yes.

**Senator SHERRY**—Isn't that restricting competition in a choice of fund superannuation environment, for example? If you can restrain what a planner can recommend on the list, it seems to me to be anticompetitive.

**Mr Cooper**—I guess these people are in business to make money, so it will be up to them to decide—

**CHAIRMAN**—Wouldn't it also be fair to say it is a consumer protection issue?

Mr Cooper—Yes.

**CHAIRMAN**—The list of approved products is products they have fully investigated.

**Mr Cooper**—It has a valid purpose. It can be misused but it does have a valid underlying purpose.

**Senator SHERRY**—It can be misused. We have APRA putting every super fund through the most rigorous relicensing process and the numbers have come down dramatically. What is the excuse for not having every superannuation fund licensed once it has been on that list? What is the difficulty for a licensee?

**Mr Cooper**—There is complexity. It is not just whether you have a license from APRA and one from us as well.

Senator SHERRY—I understand that.

**Mr Cooper**—It goes to what underlying funds there are and what the style of management is. There are all the difficulties you get into as to what is the product is. Licensees are entitled to say, 'We've got a responsibility to understand the product.' You cannot just say: 'Well look, this one has been licensed by APRA. Here you go.'

**Senator SHERRY**—Sure. What are their guidelines for examining? How do we know that a licensee is not saying, 'Oh well, I don't want that product on my list because they are not commission based,' for example, and refusing to examine it? How do we know that? How do we check that?

**Mr Cooper**—That is the sort of feedback that we get in our surveillance work and in the various work that we uncover.

**Senator SHERRY**—Isn't it in the hand of the licensee and the principal product provider to effectively determine what is on the list?

Mr Cooper—Yes, it is.

Senator SHERRY—Yes.

**CHAIRMAN**—Do you know how many of the major licensees have industry funds on their approved lists and to what extent they have them?

**Mr Cooper**—A lot of them do and some lists I have been shown have nearly 400 products on them. It is not just a single sheet of paper with 12 funds on it in a lot of cases. There is a very wide range as to what licensees are doing. As we put in the conflicts paper, the remuneration model at the moment often means that many financial advisers do not advise about industry funds. We are not making any secret of that.

**CHAIRMAN**—If they do not, it makes it very difficult for them to actually recommend a switch. If they do not have the industry funds on their lists and therefore cannot do the investigation—

**Mr Cooper**—Either way that is right. From or to, that is right.

**CHAIRMAN**—it is a catch 22, isn't it? That does have an impact on the choice regime.

Mr BAKER—On what Senator Sherry was saying: what does an employee do in this situation? He gains new employment and his new employer has a recommended list of superannuation funds that they contribute to and that they want the employee to be involved in. Say they have a reputable accounting firm, a planner or whoever they seek advice from, yet the employee is coming from a fund that is industry funded but is not on the recommended list in the marketplace. What happens? Where does the employee sit in that situation? Their fund is not on the recommended list, so therefore the planner, the accountant or whoever cannot give advice.

**Mr Cooper**—This is where the shift that is happening in the industry at the moment between, in effect, product related advice and fee for service really comes into being. If I am running a business that is predominately fee for service then I might be happy to have industry funds on

my approved product list and charge fees that I negotiate with my clients as and when the opportunity arises.

**Mr BAKER**—With all due respect, I think whether it is fee based or trail commission is irrelevant. If it is not on an approved list—

**Mr Cooper**—I am saying it would be on it. The logic is that the reason these funds are often not on approved lists is that the remuneration model currently does not work out. If they do not pay commissions, why would I recommend the fund? If I am in a fee for advice business, I am not fussed that there is an industry fund because I can say to the client, 'Well, look, I will charge you an hourly rate or a fee on some other basis and I will give you advice about the fund.'

**Mr BAKER**—That really is categorising all planners. Surely, from an ethics perspective, it is in the best interest of the planner to give their client the best advice. You are saying that unless it is commission based they are not going to recommend another fund.

**Mr Cooper**—We are not saying it is all planners. At the moment the industry is rapidly morphing into a different space. But there is no secret of the fact that the commission structure in its original form motivated planners to advise on products that paid a commission and that otherwise they would not get paid.

**Mr BAKER**—But there are different forms of commission to be paid: fee for service, trail commissions, up-front commissions.

**Mr Cooper**—As things currently stand, the industry funds do not pay any of those.

**Senator SHERRY**—Nor do public sector funds.

**Mr Cooper**—That is right.

**Mr BAKER**—Sure, but we are getting right off the track. We are talking about what happens if a particular fund is not on a recommended list. Where does the employee seek advice?

**Mr** Cooper—I am saying to you that that is a difficulty, but already the industry is racing towards a solution in creating a different fee model where people will be able to get that advice.

**CHAIRMAN**—Are you advocating a move to fee for service?

**Mr Cooper**—That is for the industry. In our shadow shopping work, we show that there is a fairly worrying correlation between commission models, conflicts and so on and advice that does not have a reasonable basis. We will leave it at that.

**Mr BAKER**—Given that Chris Pearce, the parliamentary secretary, has recently stated in speeches that the government is not going to legislate on this issue—a point that I think you have just acknowledged—why is ASIC attempting to regulate something the government has said it will not regulate?

**Mr Cooper**—It is very important to make a very—

**Senator SHERRY**—Because ASIC has the power to do it and it is crook.

**Mr Cooper**—No, no—clear distinction.

CHAIRMAN—Order!

**Mr Cooper**—The people who pay commissions are the people who make the products. The government has spoken in relation to whether or not those product issuers can pay commissions. The landscape is that they can pay commissions. Where we are coming from is how licensed advisers and their authorised representatives handle that scenario where they are advising on products where there are commissions being paid. That is an entirely different perspective. We are not seeking to regulate whether or not product issuers can pay commissions. We are looking at the conduct of people who give advice about those products—that is, at how they disclose their commissions, at whether they get bias from those commissions and at whether it makes them cut corners. That is what we see in the shadow shopping work.

**Mr BAKER**—But, surely, wouldn't that go to what Senator Sherry was proposing? APRA is going through a legislative process at the moment. If a licenser licensed these funds, any planner, accountant or whoever would have access to those particular funds. Couldn't they be on an approved product list because they have passed through the appropriate legislative process?

**Mr Cooper**—But, if I am giving advice about a product, I need to have fully read the product disclosure statement and I need to understand the management style, what underlying funds the money will be invested into and what the fees are. There is a massive amount of information, much more than just being licensed by APRA. To give proper advice about those products I really have to understand what they are, how they compare with other products and so on. It is quite legitimate for licensees and representatives to say, 'Well, look, I can't possibly advise about all the thousands of funds—'

**Senator SHERRY**—But there are not thousands. When the licensing is concluded, which will be very shortly, 99.9 per cent of people will probably be in 200 funds—if that. We are talking about a different world. I think.

**Mr Cooper**—Yes and no.

**Senator SHERRY**—Sorry—excluding self-managed super funds, which are not even in the picture in terms of the licensing regime.

**Mr Cooper**—But I think what we are not seeing is this. We talk about a fund that might be a master trust and then underneath that you have absolute myriad options and choices about what you can be in and so on. To give advice properly—and this even applies to industry funds—you need to know that. The products are actually relatively similar but they all have their own styles.

**Senator SHERRY**—There are differences.

**Mr BAKER**—Yes, within the role of the planner.

**Senator SHERRY**—What you are saying is that planners cannot have it both ways. They cannot have an open slather regime; if they want to pick the list and verify from the list.

**Mr Cooper**—There is a balance somewhere. There is definitely a balance somewhere.

**Senator SHERRY**—That is the difficulty.

**Mr Cooper**—Yes. Take a car. If I drove an exotic vehicle of some sort, some sort of strange European car, I could not take that car to every garage and say, 'Here, look, fix this car.' They might say, 'Look, we don't service those.' That is quite legitimate.

**Senator SHERRY**—But you are not paying commission every contribution day, in many cases! You raised an interesting issue, and we are going to come to the shadow shopping exercise in a bit more detail. Why is it that planners always get the brickbats? I am pretty tough on planners at times, but as you said earlier it is the product providers that provide the commission based product which they then have to sell.

Mr Cooper—Yes.

**Senator SHERRY**—Also, it seems to me reasonable that the compliance officers—the fastest growing profession in Australia at the moment—within a super fund would have some idea if there is misselling going on. Why should it just come back to the planner? It seems to me it is always the planner that cops the brickbat and not the compliance officer or even the product provider, who has designed it in the first place.

Mr Cooper—I am glad you raised that, because the whole tone of our shadow shopping work is not to hit the planners. On previous occasions I think it is fair to say some of the work has been directed at individual planners. This work is looking in entirely—well, not entirely—the other direction. It is looking at this. Who are the people who employ these planners and supervise them? Who are the licensees? What are they doing? Really, there is only a very concentrated number. If you took the four big banks and four other players in this work, you would have a considerable part of the market. The whole outcome of the shadow shopping work is not to go and punish a whole lot of planners but to speak to the licensees about the issues, to go through the report with them and to seek to improve the overall standard—rather than picking on planners.

**Senator SHERRY**—In terms of the internal operations, observations and compliance work within the product provider, what are they doing about issues relating to misselling? Are they contacting planners and saying, 'Look, you shouldn't be doing this'? Are they taking some sort of action?

**Mr Cooper**—They certainly are. That is a question that we ask them. We say: 'Look, hang on. We don't want to be doing these expensive surveillances and shadow shoppings forever. How come you people aren't finding some of these things out? Why are there differences?' I think we are getting closer; they are definitely getting the message. In this particular sector we are seeing very good levels of breach notification back to us under that new regime. I think we are definitely heading in the same direction there.

**Senator SHERRY**—In the survey, you did not name any companies. Why was that?

Mr Cooper—We design each one of these pieces of work on its own two feet. We sometimes borrow what we have done before, and we sometimes make decisions based on our impression of the industry at each particular time. We did not want this one to be yet another confrontation where ASIC seemed to be beating up on either individual planners or licensees. Even on the way the project was designed, we had to give undertakings of confidentiality to each one of the participants. We had in this survey over 300 people who actually were our real life guinea pigs. In order for us to do that, and also to get Roy Morgan's assistance, we had to assure each one of them that their affairs and the advice they had been giving had been kept confidential. That in itself very much pitched the way that this work was going to go forward. It was not going to be a name and shame exercise and it was not going to be a big enforcement exercise, where ASIC was getting out the big stick. Instead, it was going to be much more of a data capture on what exactly was happening. I think the way that the industry has actually responded to this work bears that out. It has had perhaps a much more constructive outcome than some of the other ones we have done.

**Senator SHERRY**—But isn't there a difficulty with that? The impression then is abroad that there is a problem in the entire industry. You are not naming anyone, when in fact the level of problem may be just concentrated in a couple of firms. I suspect it is across the entire industry, but anyway.

Mr Cooper—I do not think that is the case. I think it is very much a case of not just a few rotten apples that need to be weeded out of a system. What you clearly have here is a major cultural and legislative change that was put upon a particular industry. Just by passing legislation, you do not necessarily overnight change people's behaviour. I think this is not a case where ASIC has just got to weed out a couple of rotten apples and leave everybody else alone. It is the dead reverse.

**Senator SHERRY**—So, it is widespread? There are major players in the super industry identified in this, not by name obviously. It does include major players in the superannuation industry.

**Mr Cooper**—There were 102 licensees in this work.

**Senator SHERRY**—It does include major players?

Mr Cooper—Yes.

**Senator SHERRY**—At what point of time is the public entitled to know which of these major players has not adjusted to this new environment? Surely, at some point in time they are entitled to know.

**Mr Cooper**—Yes, and in other work we have certainly done that. It is just that the way this one was designed it was never going to lead to that outcome.

**Senator SHERRY**—That is the way you designed it, but that was not the case in the previous—

**Mr Cooper**—No. Again, depending on where things are—

**Senator SHERRY**—At some point in time, is the consumer not entitled to know that we have a player—player X—that is consistently misbehaving as against other players in the industry? Is the consumer not entitled to know that at some point in time?

**Mr Lucy**—As I mentioned earlier, we have a compliance directorate which is essentially involved in surveillance activity. To the extent that there are organisations to which you refer, it is reasonable to assume that we are carrying out surveillance on them. To the extent that there are outcomes as a result of that surveillance regarding poor activities or inappropriate activities, we will be making that very much a public outcome.

**Senator SHERRY**—That was going to be my next question. Are you following through on the individual cases identified, the one in five where you believe it was not or probably was not reasonable advice and corrective action is occurring?

Mr Cooper—Yes.

**Senator SHERRY**—What is the form of corrective action? Is it simply effectively restoring the status quo, whatever that is, or is there a warning given to the individuals or a penalty, or a mixture of all things?

Mr Cooper—There are a series of levels depending on the conduct identified. In the first instance we have written back to all of the 306 participants in the survey, we have sent them a copy of the report and we have invited each and every one of them to make a formal complaint to us. When I say 'formal', I mean any written complaint back to us saying: 'I didn't like the advice I got and I'd like to make a complaint. I'd like you, ASIC, to do something about it.' In a couple of specific cases—and I will not go into the details—we have actually sought to go back through Roy Morgan and get in touch with some of these consumers because we needed to warn them about some of the advice they had been given. We have written back to 88 of them. I am afraid this does descend into statistics and I will not make it too complex, but on certain levels we have written specifically back to licensees pointing out problems to them. There are others where we have said, 'The problems are more severe so we're going to need to talk to you more formally and get you to engage in some programs and feedback to us, get external audits and so on.' With two licensees we are doing what I would call major ongoing work to get things into shape. Other licensees have had notices to produce served on them. There is a considerable amount of ongoing work involved in working through all of this.

Senator MURRAY—It seems to me we have both major consumer issues, which you are dealing with, and competition issues. It almost requires you to have the ACCC second somebody to you who will oversee the competition area. I was reminded of what is known as the 'tied house issue' in competition law, where for many years there was great controversy over tied houses with particular liquor brands not allowing proper consumer choice. It was an issue of both choice for the consumer and competition. We almost have a tied house phenomenon here. I wonder whether you should not consider bringing in the ACCC to discuss some seminal competition issues with you or to second someone. Listening to you, you are quite properly concentrating on those areas which are your bailiwick, but they are inseparable from these other areas. I think that is a point that Senator Sherry picked on earlier.

**Senator SHERRY**—That is fine; you are going back through the cases that were identified and you are attempting to rectify. You surveyed 259 individual advisers, which is a small proportion. Presumably it was a representative proportion of industry?

Mr Cooper—Yes.

**Senator SHERRY**—It is representative of the advisers. How many advisers are now licensed—is it 15,000?

**Mr Cooper**—It is a bit tricky in the sense that the authorised representatives sit underneath the licensees. The actual number of licensees is a bit over 4,000, but the number of underlying representatives is much bigger.

**Senator SHERRY**—Do you have any idea about the number of advisers?

**Mr Cooper**—You are talking 25,000-plus.

**Senator SHERRY**—Let us say it is approximately 25,000. You surveyed 259, which is about one per cent. You have said it is a representative survey. So we have one per cent of advisers surveyed and one in five advices are either not or probably not reasonable. Because of the representative nature of the survey, we have not got a few hundred consumers who are being poorly dealt with, we have thousands of consumers out there for whom nothing is happening.

**Mr Cooper**—That is what the data would seem to suggest. Whatever the right number is—you say it is one in five; we call it 20 per cent—whether getting it down below 10 per cent is the right figure is very hard to determine.

**Senator SHERRY**—What is their comfort? What is their correction? They do not know they are being ripped off. I found it fascinating that in your survey your conclusion was that people did not know when they were getting a bad deal.

**Mr Cooper**—That is the case if you leave a dental surgery and your tooth is no longer hurting; that is all you know, you do not know whether you have been given good dental work or not. That is why you have gone to seek professional advice, and that is exactly why people who go to see a financial planner are there, because they need that person's advice. It is no surprise to us that if you do an exit interview, people do not know whether they have been given good advice or not.

**Senator SHERRY**—It was not a surprise to me either. We have X number of consumers out there who were not included in the shadow shopping exercise who have been ripped off, poorly advised.

**Mr Cooper**—We would say the advice they have been given lacks a reasonable basis in one in five cases. I will say that is considerably better than the previous work that we have done.

**Senator SHERRY**—That is not much solace to the one in five poor old consumers out there who were not included in the survey, which you say is representative. By my calculations there are thousands of people who have been poorly advised, which is to be pretty gentle with the

critique, who simply do not know and never will find out probably, or if they do find out it will be years hence. That is the difficulty.

**Mr Cooper**—We need to focus in a little on exactly what the problem is. Typically, what they have been given is a perfectly good product. We are not talking about people who have had money stolen from them or fraud or anything like that. We are basically in a territory where in one in five cases the standard problem is that they have been recommended a product that is actually more expensive in fee terms to them. There is nothing wrong with the product; it is just that they have been given a product that actually is more expensive in fee terms.

**Senator SHERRY**—That means in one case they are \$100,000 worse off. If it is not legalised theft, what is it?

**Mr Cooper**—That is hypothetical.

**Senator SHERRY**—No, you give real life examples of the effect of this. I actually thought it was very good.

**Mr Cooper**—We assume that all products have achieved the same investment return and then we say that the fees in the new product over time will chew up more of the investment return than in the old fund.

Senator SHERRY—But what assurance is that to an individual—

**Mr Cooper**—That is totally hypothetical.

**Senator SHERRY**—Sure. You are saying there is no theft and fraud involved. I actually think that was a really good aspect of the report. You have made reasonable assumptions about projecting forward the losses as a consequence of inappropriate advice, but what solace is it to an individual when they get to retirement, as the report finds, and find a net loss averaging \$37,000? If that is not theft, what is it?

**Mr Cooper**—I would not use those terms, but that is what the report—

**Senator SHERRY**—What is it then? If a person is missold a product on the basis of an inappropriate bit of advice and the outcome is that by the time they get to retirement the average loss is \$37,000—I think in one case it was over \$100,000—what is it if it is not theft? What is it—legal scamming?

**Mr Cooper**—We are not saying it is misselling.

**Senator SHERRY**—What is it?

**Mr Cooper**—We are just saying that it appears to us that there is not a reasonable basis for the advice.

**Senator SHERRY**—You can tell the poor punter, 'It's not a reasonable basis for advice, tough luck, you lost \$100,000.'

**Mr Cooper**—By doing this sort of work and getting these sorts of messages out there—and that is why we have written to all of these consumers—we may cause some people to consider their circumstances and take—

**Senator SHERRY**—Sure, you have written to the consumers you have identified through the survey, which is a very small number. In terms of the total number of consumers and the total number of advisers, it is a very small proportion.

**Mr Lucy**—This is alongside our compliance activities where our surveillance is of the major parts of the industry, covering thousands and thousands of consumers.

#### **Senator SHERRY**—Yes.

**Mr Cooper**—We have been beating the street getting this message out. We have been talking to both ends of the industry and hopefully some of the messages in here that you are talking about will actually get out there. We cannot be sitting at everybody's kitchen table every night telling them these things. We have to get the message out there somehow.

**Senator SHERRY**—I understand that, but your own survey showed—and it did not surprise me—that consumers are rarely able to detect bad advice. They are really in the hands of the planner in these cases, aren't they?

Mr Cooper—Yes.

**Senator SHERRY**—If they cannot detect bad advice—and there is a significant proportion, albeit a minority, of bad advice that has a significant adverse impact on super—what do we do about it?

**Mr Cooper**—Currently—this is only a relatively recent thing but again it is something we have done with super choice—there is fee information on nearly a thousand funds sitting on our website. If the one single message that got through to your average consumer from this was 'Gee, I wonder what fees I'm paying on my super fund' and got people actually thinking about these things, then we would have come a long way down the track.

**Mr BAKER**—Take a step back to what Senator Sherry was saying about the losses, the perceived losses, when comparing funds. Can you explain the basis of that calculation? I am a little confused . A balanced fund or a capital stable fund could have similar percentages, which they have to have within the asset allocation, but, depending on the fund managers, you could have completely different investments depending on what shares they invested in, what banks and what cash—

**Mr Cooper**—That is precisely what I was saying; it is hypothetical.

Mr BAKER—It is a long bow to—

**Mr Cooper**—It is not that long. Let's say that you were rich enough to invest in the entire market. Eventually the market returns to a particular level.

**Mr BAKER**—But you are saying 'the entire market'. I am just talking about fund manager against fund manager.

**Mr Cooper**—That is why I said it was hypothetical. Over time, investment returns do tend to balance out; diversification and time generally does that. We are saying that if you are paying twice the amount of fees in product A than you were in product B, you are going to end up worse off.

**Mr BAKER**—I just think it is a long bow because within the industry there are certain companies that you know do not invest in international funds within the company but they could be some of the highest performers in the cash area.

**Mr Cooper**—You are right, but let's talk about averages. Let's say I am in a fund that miraculously achieves the average return of all the super funds year after year after year. Also, let's say there are two of those sorts of funds, one has five per cent fees and the other one has 10 per cent fees. It is pretty clear which one you are going to be worse off in. That is all we are saying.

Mr BAKER—We can go back to your analogy with the motor vehicles which—

Mr Cooper—I did not think we wanted to go back to that one but no, that is all we are saying.

Mr BAKER—I am just saying that, in lots of ways within the market, that argument—

**Mr Lucy**—We have said that consistently.

**Mr BAKER**—Fees is one aspect.

Mr Lucy—It is a key ingredient but it is only one ingredient; the other side of it is the return. From time to time we go through periods, particularly with the industry, where they are very strong on commenting about their returns and how well they are doing and they will leave behind the other aspect of it. We are saying that parties need to look at both aspects of it. When we are looking at fees, we have to compare apples with apples. We cannot look at a comparison between two funds when one has a history of a much higher return; all we will try to do is to give a hypothetical example where, all other things being equal, a higher fee will disadvantage the consumer at the end of the day. I am not sure what else you can say.

**Mr BAKER**—Exactly. Moving forward, what can ASIC do to encourage licensees to move for a consistent fee for service across the board?

**Mr Lucy**—I think we have done a lot for that. Firstly, we are in regular contact with the CEOs of these organisations and many of them, particularly the banks and the major industry players, have moved away from commissions. It is not our expectation that they will move entirely away from commissions because there will always be some consumers that want to pay by way of commission. From our perspective, it is quite reasonable that commissions remain in the background. We are pleased to see that, on balance, the pendulum has moved so that there is now a greater willingness for the providers to sell on the basis of the fee for service rather than the commission. Again, what we are looking to see is competitive forces. For example, if a

particular bank moves away from commissions—and that is what attracts the consumers because they like that sort of a model—then the other players that are simply sitting there with a commission-only model are going to have to move, for competitive reasons. That is the very best model that you could get and it is happening.

**Mr BAKER**—Exactly.

**Senator SHERRY**—Is it? Where are the surveys on the money under management and the number of players that shows X amount is on fees for service, X amount is on commission, this is the situation today, that was the situation two years ago and that was the situation 10 years ago.

**Mr Cooper**—I cannot quite give you that. I can say that in the shadow shop, which was midlast year to a little bit after Christmas time, we found that 50 per cent of participants paid an upfront fee for the advice that they got on superannuation.

**Senator SHERRY**—Compared to what, historically?

Mr Cooper—Anecdotally, I think you would have to say it was a much, much lower figure.

**Senator SHERRY**—Can I suggest that you actually do a bit more than an anecdotal observation. I see a lot of talk, rhetoric and debate. Some people lead the debate in terms of moving out of commissions and others fiercely resist it; there is a real mixed debate.

**Mr Cooper**—There is.

**Senator SHERRY**—But what about looking at the evidence, the facts, and putting them on the table for the first time? I have not seen that.

**Mr Cooper**—I think the 50 per cent figure would surprise some people—that we have actually got so far down the fee for advice continuum already.

**Mr BAKER**—The issue is that if the planner is tied to the bank that has the licence, he can only advise on those products that licensee holds, whether it be fee for service or commission based. That is the dilemma out there in the marketplace.

**Mr Lucy**—It is, but again this is where nothing is quite as simple as when you look at things at first blush. There have been a number of instances in some of the major corporations when there has been a problem and they have reimbursed the client. Unilaterally they have reimbursed the client because their own integrity and their brand name is such that they would simply stand behind their client if there had been an inappropriate loss. How do you equate that in this sort of an equation?

**Senator SHERRY**—I remember one client who rang me regarding a major retail fund; it was on the John Laws show about two years ago. I just rang up the major retail fund and said, 'I'll give John Laws your name if you don't reimburse the client.' They did, but for every case you can deal with like that, there are many that are not dealt with.

**Mr Cooper**—In fairness to the industry, that is a particular experience that you have seen, but we do see many where the major institutions quickly and willingly get behind an issue and reimburse their clients.

Mr Lucy—It is a business decision.

**Mr Cooper**—Not everybody chooses to make such a business decision because they have other ulterior motives. Again, that is why it is very difficult to value these situations, because it may well be that that particular bank product might have been more expensive.

**Mr BAKER**—We want to move forward so we get that consistency.

**Mr Lucy**—Yes, you do. On the other hand, if you have too much consistency you do not have competition. I think there is a happy balance where you really want a fiercely independent and competitive marketplace out there. The Holy Grail from our perspective is the informed consumer.

**Mr BAKER**—Then the competition can come not with fees but on actual returns. You get consistency in the fees and then the competition in returns.

**Mr Lucy**—Net return is the real measure.

**CHAIRMAN**—Is it your assumption that funds that do not pay commission are superior to those that do?

Mr Lucy—No, I do not think you could generalise that. Our point with the commissions, and the real issue of the paper to which Jeremy is referring, is that it is a real wakeup call for the CEOs. If they choose to pay commissions, and they are entitled to do so, they need to know that there is a much higher likelihood that their staff, their employees, will be giving bad advice. That is a management issue for them. If they choose down the track to overlook that management and it comes up in our surveillance, then we will nail them.

**Senator SHERRY**—Let us say that is identified. We have already had a brief discussion that there is not just the planner, that there are compliance officers within the provider. Are you looking at this across the major providers—

Mr Cooper—Yes.

**Senator SHERRY**—to see whether they are actually improving their compliance?

Mr Lucy—Not all major providers, but we are looking at a couple in some detail.

**Senator SHERRY**—At some point in time, does a consumer not have a right to know who these major providers are? At some point, if they have not changed their behaviour, why should the consumer not know that ABC is a product provider that has consistently been giving poor advice?

**Mr Lucy**—Where we are at this point of time is that this exercise was done as an intelligence gathering exercise and an exercise to be constructive to move the industry along. Coupled with that, in 2006 we are undertaking a very high level of surveillance activity and to the extent that they need to, they will finish up with outcomes which will be made public.

**Senator SHERRY**—I have just one other issue relating to shadow shopping. Did you look at self-managed super funds?

Mr Lucy—Yes, and accountants.

**Senator SHERRY**—Were there any general observations about self-managed super funds?

Mr Cooper—It formed a very small part and statistically it almost did not show up. You would think to yourself, 'Why is that?' Then you would go back to some of our earlier work which has made it quite clear to the industry that where a superannuant has less than \$200,000, we are going to be really wanting to know why they have been recommending a self-managed super fund. When you think about how many superannuants have savings of that level you soon realise that out of a sample of 300-odd—

**Senator SHERRY**—You would not get many.

Mr Cooper—Correct.

**Mr BAKER**—Also, the penalties for failure for a self-managed super fund is basically that half of it is lost as a consequence; it is not—

**Mr Lucy**—The tax consequences for non-compliance—

**Senator SHERRY**—Where it is checked. The tax office have been pretty slack, I have to say.

**Mr Lucy**—There are the auditors first.

Senator SHERRY—I understand that.

**Mr Lucy**—These funds are obliged to be audited and the auditors have a very clear responsibility.

**Senator SHERRY**—Yes, the tax office, auditors. Have you seen the answers to questions on notice that the tax office provided me about the internal investment average balances in self-managed super funds?

Mr Lucy—No.

**Senator SHERRY**—I do not have it here, unfortunately. I just assumed that you would obtain the sort of information that I have asked for—

Mr Lucy—Our staff would, but you have directed the question to us and we have not seen it.

**Senator SHERRY**—I was astounded; 20 to 30 per cent of the members of self-managed super funds had less than \$200,000. That really did worry me when I saw it. It is not your responsibility; it is the tax office's responsibility. How do you get a grip on this, given your concerns about balances less than \$200,000 in self-managed super funds?

Mr Lucy—Again, you are right to say it is the tax office. Could I suggest that \$200,000 is a bare minimum for me to set up a self-managed fund, but for me to include my wife into it, there does not need to be another \$200,000. You have to amortise the return against the costs which include audit et cetera, so to add incremental members to the fund does not directly increase the asset pool that is required.

**Senator SHERRY**—The general data that the tax office has provided—it does not publish it in a general overview sense like the data we get from APRA or the work that you do—in terms of the investment mix, is very conservative.

**Mr Cooper**—Most work bears that out.

**Senator SHERRY**—There is a significant proportion of low balances and high fees.

**Mr Lucy**—High costs, as distinct from fees.

**Senator SHERRY**—It is a mixture of costs and fees; there is a difference. That is not directly your responsibility, except to the extent that a significant minority of moneys went through self-managed super funds into Westpoint. From what I have seen, these people were reasonably well informed in a lot of cases and just did not seem to appreciate what they were getting into.

**Mr BAKER**—Was there an initial lack of diligence on the part of the auditor KPMG in respect of Westpoint? Can you give us an update?

**Mr Lucy**—Perhaps you would be kind enough to rephrase the question because I was not quite sure of the context.

**Mr BAKER**—Where does KPMG sit in this issue? Can you confirm or deny that there was a total, a small amount or an initial lack of diligence on their part?

Mr Lucy—We are in a position where we have a very active investigation on foot in relation to Westpoint. We met your parliamentary colleagues 10 days ago and spoke in some detail about the history of Westpoint. As far as where we go in going forward, we indicated that we are investigating all circumstances dealing with Westpoint, including the role of directors, officers and third parties, including auditors. That is a matter that we are working on. We have it in front of us, but it is not appropriate to go into any particular detail.

**Mr BAKER**—Is there anything you can say about how we can move forward and prevent this type of thing happening in the future? What have we learnt at this stage from the situation?

**Mr Lucy**—It really is too early to tell what particular offences may or may not have been committed. Certainly we are communicating with the investors as openly as we possibly can be. We have a specific website set aside for Westpoint investors. There is due to be a second meeting

in Sydney of a core of representative investors, about 70 of them. My recollection is that is scheduled for 22 June. We will provide them a further update on where we are with our investigations, as appropriate. You will have read in the press that we have been extremely energetic in all sorts of areas, including bringing people back from the United States and other activities to try and protect the investors. It is an investigation that is receiving the due priority, the commission is engaged, and I am very comfortable that we are doing whatever we prudently can.

**Mr BAKER**—From a consumer's perspective or from a regulator's perspective, if you take the two approaches, and also obviously from the government's perspective, how can we identify that there are not other Westpoints out there?

Mr Lucy—I think there are couple of things, and again these are messages that we have been putting out as loudly as we possibly can. Firstly, people should be encouraged to deal with licensed advisers. There is a distinct advantage, in our view, in people dealing with licensed advisers; they have very clear responsibilities. Also, we are stressing to people that they need to take responsibility for their decisions. They need to have regard to risk and what they can afford to lose. They need to have regard to their own financial circumstances. They need to understand that it is a bit like the bull's eye in the centre. One can deposit money with an APRA regulated bank and the risk is absolutely minimal. The further you move out, the greater the level of risk. There is nothing wrong with undertaking risk as long as it is properly balanced with what you can afford and what your circumstances are as to whether or not you are employed or retired. It is a matter of balancing. In the case of financial advisers, those are exactly the responsibilities that they have—to know their client and to know their products. There needs to be the right legislative mix. It is a matter of making sure that those guys that are out there that are licensed are heeding their responsibilities.

**Mr BAKER**—Have you identified the number or the breakdown of licensed and unlicensed planners involved in this?

**Mr Lucy**—We are in the process of doing that. We have sought communications from essentially all of the investors. I cannot give you the number, but I can give you a statistic. Investors who total \$300 million in aggregate of investment out of about \$350 million to \$400 million have responded. We have a very high participation rate and we are in the process of collating that intelligence.

**Mr BAKER**—How do these clients get involved in unlicensed planners? Where do they seek these—

Mr Lucy—In the first instance it might be a friendship, Much of it is through ethnic groups where a particular circle, be it a religious circle or an ethnic circle, encourage their colleagues and friends to participate in this investment in which they have participated. It is human nature. When you come across your friends, they all say, 'I've come across this greatest lawyer or greatest accountant or greatest financial planner, you should all share in what I've found out.' It is just how the community seems to work.

**Mr BAKER**—From a regulatory perspective, that group is very difficult to regulate. The major concern would be the licensed planners who have gone against the recommended list and knew that what they were doing was purely for financial gain.

**Mr Lucy**—That is why we have made it very clear that the advisers are part of our investigation and we will follow that through with a great deal of detail.

**Senator MURRAY**—Have you checked with the tax office whereby any of these planners or advisers were also listed by the tax office under the mass marketed tax effective schemes investment? You might recall the settlement negotiated with the Senate and then carried through by the tax office that distinguished between sophisticated and unsophisticated investors and then identified the planners, accountants, lawyers and so on who had been involved in these things. It would be worth knowing if there were people who had been involved in both sets of activities,.

**Mr Lucy**—That did come up at the estimates, where we were asked whether or not there were any tax agents—

**Senator MURRAY**—By me.

**Mr Lucy**—That is a work in progress for us now.

Senator MURRAY—Good.

**Ms BURKE**—Is anything happening against the licensed planners who have given advice in this regard?

**Mr Lucy**—It really depends upon the outcome of our investigation. At the low level it would be a ban and at the high level it could be criminal prosecution.

Ms BURKE—Will that be investigated? Are you going to follow that path down to see if—

**Mr Lucy**—All of those areas will be investigated fully.

**Ms BURKE**—Regarding the commissions area and the fairly high commission that these planners were getting, both licensed and unlicensed, do you see a need to change that law or to beef up how commissions are described? I thought that magical 10 per cent to which you were getting was pretty huge anyway; most commissions are in the area of 1.5 per cent to three per cent on average.

Mr Lucy—There are a couple of ways of dealing with this, but firstly we need to recognise that like oils aren't oils, commissions aren't commissions. Quite appropriately there should be a higher level of commission for some products compared to simply getting something over the phone. I think that there is an argument to say to the industry that they should identify what they regard as a benchmark commission rather than us, a regulator, announce it. Then, in the disclosure statements, they should nominate to the extent that they move outside that band. For example, let us say the band is two per cent and your reference is 10 per cent, I would not say that is eight per cent; I would say that is five times higher.

**Senator SHERRY**—I have one aspect of Westpoint that I wanted to touch on briefly. Was the appointment of KordaMentha Receivers of Keypoint Developments Pty Ltd as liquidators an ASIC decision?

**Mr Lucy**—It is ultimately the court's decision but—

**Senator SHERRY**—You would be involved in the process?

Mr Lucy—Yes.

**Senator SHERRY**—An issue that I have had raised with me by a victim is whether KordaMentha also act for some of the financial institutions, the banks, that are owed money? Is that your understanding?

**Mr Lucy**—It would be my expectations, if not my understanding. There is a very small community of insolvency practitioners. You have a number of players that are already involved because of their other relationships with Westpoint, so they are obviously eliminated. Within that small community you have to deal with who is left.

**Senator SHERRY**—What about the potential conflict though where KordaMentha are acting for a bank who would be first mortgagees in most cases, I assume?

**Mr Lucy**—Probably a receiver, which would mean a floating charge. It may also mean that they have a specific charge but they would be in there as a receiver because of a floating charge.

**Senator SHERRY**—Whatever moneys flow or are left over, it is first mortgagee first, usually a bank, and then whatever is left—if there is anything left—goes to the consumer. Do you see any conflict with KordaMentha working in respect to the bank and also being the general receiver?

Mr Lucy—I will take that on notice because, for example, let us say company A and company B are both under the Westpoint family. I could imagine company A having a firm of receivers appointed and company B having that firm as liquidator, but I could not envisage company A having both the same firm acting as receiver and liquidator.

**Senator SHERRY**—What about where a liquidator is not able to obtain any assets; how do they get paid in those circumstances?

**Mr Lucy**—You then come back to the underlying basis for the assetless administration process. Where a liquidator is faced with essentially insufficient assets or, as you describe, no assets, then under the new regime they can come to us and we will fund them to do the reports.

**Senator SHERRY**—Could that happen in this case?

Mr Lucy—Yes.

**Mr BAKER**—That will follow what you do in the legal process. The major concern that I have is what other mezzanine type property developments are out there that have the potential to

cause just as much damage? How can we use this as an example of identifying what is happening out there?

Mr Lucy—One of the difficulties which we all face is that we have an open-ended appeal decision with the Western Australian Court of Appeal. Once that decision is finalised, then we can recommend to the government that they need to look at amendments; or, if the decision goes in our favour, then we do not need to worry about that. We are all up in the air over that particular issue.

**Mr BAKER**—Have you got ideas or interests in other plans that are currently out there?

**Mr Lucy**—Other entities? Yes, we have. We have several that we are engaging with very closely.

**Mr BAKER**—Very good; that is reassuring.

**Senator SHERRY**—I have just a couple of matters relating to banks—away from Westpoint and super for a moment. Has ASIC examined recently, and if so when, the internal disputes procedures of banks?

**Mr Lucy**—My recollection is that a similar question came up at estimates and we took that on notice.

**Senator SHERRY**—If it did it probably came from me, but I cannot recall getting into this area.

**Mr Lucy**—To the best of my recollection it did, including the issue of fees. We have that on notice. To the extent that you would like to expand on that with your own question on notice, we are happy to take it on board.

**Senator SHERRY**—Has ASIC done any work on bank lending practices, bank lending standards, of recent times? I know it is mainly an APRA area.

**Mr Lucy**—No. We have certainly looked at one bank on their lending practices to the Indigenous community.

Senator SHERRY—I recall that.

**Mr Lucy**—That was a particular vertical, but across the board, no.

**Mr Cooper**—Other than reverse mortgages.

Mr Lucy—Yes.

**Mr Cooper**—The point is that it is quite clearly off our patch in that credit is not a financial—

**Senator SHERRY**—What would you regard as being on your patch in respect to banks?

**Mr Cooper**—We have certainly looked at reverse mortgages, but there are various species of those. It is really the conduct aspect of it, which is what we have been given under the legislation.

**Senator SHERRY**—What about their internal dispute procedures? Every bank has their own internal consumer disputes mechanism and then there are, beyond that, other processes. Have you examined those recently?

**Mr Cooper**—Not as far as I am aware, but we can take that on notice. Again, I think you will find that they are off our patch.

Mr Lucy—It may be that I can help if we come back to that original question. It was asked by Senator Watson in February 2006, taken on notice and we provided the answers. When we met 10 days ago you had not received all the answers through the minister's office. I am not sure if that has been read.

**Senator SHERRY**—I am sure I have received them; I have not read them yet.

Mr Lucy—I think you will find that is where the answers are.

**Senator SHERRY**—Has ASIC got any particular budget allocation for resourcing of this area at the present time?

Mr Lucy—No, it is part of our general activity. It is not a specific priority budget funding.

**Senator SHERRY**—Is there any particular reason why it is not a specific priority? I get a lot of complaints about banks' activities. Whether they are legitimate complaints or not is another issue, but I do get quite a few issues referred to me about disputes with banks.

**Mr Lucy**—To the extent that it is conduct that the banks undertake that is within our responsibilities under the Corporations Law, that is not an area that we are particularly pressed over. It is not an area that is a regular occurrence under our complaints.

**Senator SHERRY**—Do you have any statistics on complaints in respect of banking activities?

**Mr Lucy**—We can take that on notice. It has been pointed out to me that it is in our answer that we have provided.

**Senator SHERRY**—I will have a look at those answers that you have on notice.

**Senator MURRAY**—I want to go to a later issue. I am very interested in Mr Wood's remarks. Are you happy to go there?

**Mr Lucy**—We certainly are.

**Senator MURRAY**—It is not an unusual occurrence that once somebody feels free of the constraints they were formally under, they are a little more open than they otherwise might have

been. We are dealing with an article in the *Australian Financial Review* of Thursday, 1 June 2006 by Mr Peter Wood, who is now a senior law school lecturer at Deakin University. As we all know, he was a former executive director, enforcement, at ASIC. He struck me as a reputable, ethical person of considerable integrity. He writes about the new memorandum of understanding with the Commonwealth Director of Public Prosecutions. If I were to be asked to give a single line summary of what I thought his article amounted to, it was that he was critical. Perhaps before I dig a little deeper you might care to give me your views as to his views as spelt out in that article.

Mr Lucy—The views that Peter Wood expressed are not consistent with the views of ASIC and I do not believe that they are consistent with the views of the Director of Public Prosecutions.

**Senator MURRAY**—Are they consistent with the views he expressed internally before or are these news to you?

Mr Lucy—There are a number of issues within his paper. The first issue is whether or not ASIC should have the right to take on a criminal proceeding as a result of our own determination; that has never been my view. My view is that the independence or the independent role of the Commonwealth Director of Public Prosecutions is extremely important. It is important for a number of reasons. One is that we have significant powers available to us in our investigation area. I think that if we had both those powers and also the power to undertake our own prosecution, then it may well be that parliament would look to minimise those powers, and I do not think that would be the right outcome. Of course, in essence, that clearly is a matter for government and for parliament as to how they balance those two priorities.

As far as the working relationship with the Commonwealth Director of Public Prosecutions, inevitably there is a level of tension. I think if there was no tension on either side there would be a risk that either we would not be providing enough referrals or they would not be providing their own level of scrutiny. They have a role to play and we think that role is played well. There is a very high level of ongoing communication. In the last fortnight, our commission met with the director and his most senior staff for essentially half a day, working through some very significant hands-on, practical issues, including the state based and regionally based types of issues that we have in front of us, the challenges which we see coming down the pipeline and the challenges that the director sees as far as meeting our requirements. I think that there is a very effective and high level of interaction between the two agencies. I think that the Australian public is well served.

**Senator MURRAY**—It seems to me that Peter Wood's article reflects a high level of frustration that he experienced during his time at ASIC. I will give you a quote from that article:

Events were heavily loaded against ASIC. It had a legislative duty to prosecute serious corporate crime but handed over responsibility for decision-making to the DPP. It would prosecute serious corporate crime only with the approval of the DPP.

... ... ...

So ASIC has signed up for more outsourcing of its prosecution decision making and has no indications, much less any guarantees, that the DPP will reduce the months of turnaround time for approval of charges. It is a disappointing result all round.

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Yet it doesn't have to be like this.

He is saying that the DPP is slow, inefficient and lacks promptness in responding to ASIC briefs. Because this function has been entirely delegated across, not always appropriately, according to Mr Wood's article, ASIC is losing the impact and the power of its investigations and recommendations to the DPP. What reflects on you, according to Mr Wood, is that you agree to the perpetuation of these sets of circumstances. What reflects on the DPP is that he allows these sets of circumstances to go on. If this was some outsider to whom we have not listened with respect and interest over many years, you might take a less than serious view, but this is almost like a former commissioner coming out and bagging a particular process. This is right at the crunch area of enforcement. What you have given me is a soothing response, but I do not feel soothed because the whistleblower is a person of repute.

**Mr Lucy**—Of course Peter, during his term, also had the opportunity to renegotiate an MOU if he chose to, but obviously he did not choose to. Certainly in my experience with ASIC, including my term as deputy chairman, I cannot think of one instance where ASIC had a view that a matter should be prosecuted and the DPP did not support that view. There are margins as to when we are in the process of an investigation, where we are, of necessity, in dialogue with the DPP, and where we look at what might be appropriate charges. Fundamentally, as to whether or not we have a view as to a prosecution and they have a different view, that has not been my experience at all.

**Senator MURRAY**—A numbers of people in ASIC, I presume including yourself, would have had a close and good relationship with Peter Wood. Has anyone from ASIC spoken to him since this article and said, 'Well, what was in your head?'

**Mr Lucy**—Spoken to me, yes.

**Senator MURRAY**—Why didn't you do something about it? What is your motive?'

Mr Lucy—The widely held view within enforcement, including by Jan Redfern, is that the relationship in the new MOU is entirely appropriate. Jan was fundamentally involved in the negotiation of the new MOU. One of our most senior people, a director of enforcement, was also involved in the negotiation of the MOU. It does provide us with the ability to be able to undertake more straightforward and almost routine enforcement matters without referral. The real key is that for the more significant issues which ASIC take, both at the commissioner level and at the senior management level, we are of the view that the referral to the DPP is entirely appropriate.

Ms BURKE—At one time we had a great discussion about Mr Vizard and the difficulties of the DPP in gathering information and all the rest of it. Would you say that the MOU has overcome some of the difficulties that have risen in that case?

Mr Lucy—The difficulties with that case were not so much related to any relationship issue between ASIC and the DPP; much of it was to do with the lack of understanding in the broad consumer land out there as to the fact that the DPP did have a role. The DPP formed the same view that our independent counsel formed—namely, that we would not be successful in a criminal prosecution.

**Ms BURKE**—Hypothetically, if you followed the line that Mr Wood put in his article, would that have resulted in a different outcome?

Mr Lucy—Only if our view had been different to the DPP's view, and in the case of Vizard it was identical. In the hypothetical, where we had a strong view that a matter should be pursued and the DPP took the view that it should not be pursued, the MOU provides mechanisms where that is brought to the chairman and to the director for communication. I have no expectation of it, but if I found myself in the position where the best advice that I had was that we should proceed and the director was of a contrary view, then I would elevate it. I do not have any expectation of that being the case, of all the experiences that I have had to date.

**Ms BURKE**—In most cases do you get that separate legal advice?

**Mr Lucy**—In many. I would not say 'most' because 'most' is a numeric sense. It is more the severity. Where a matter is significant, yes, we would almost invariably take independent senior counsel advice.

Ms BURKE—Nowadays in the MOU, if there is a difference of opinion, you then override—

**Mr Lucy**—It is elevated up to the two most senior office bearers.

**Ms BURKE**—Then you two get to slug it out?

Mr Lucy—Yes.

Senator MURRAY—This article from a person who held such a senior position with ASIC, as executive director of enforcement, essentially puts a negative perception on the new MOU. It says to us and to the world at large, 'Look, this thing is not going to solve the problem.' My interpretation is that this essentially says that the DPP does not give enough priority to your cases, is far too slow and is far too conservative. At the end of the article he gives the example of the Victorian WorkCover Authority, with a rapid fire investigation, trial and conviction over a few months. It ends with the point: there is a lesson there for ASIC, the Commonwealth DPP and the Australian Competition and Consumer Commission. What I put to you is this: if your reassurance to the committee turns out to be not well based and future cases emerge where, after an investigation, ASIC is seen not to have had an action pursued appropriately, rapidly, efficiently and effectively, instead of the focus being on the DPP—which it was with the Vizard case; more than on you—the focus will be on you because you have a warning from somebody who was formerly a very high officer of ASIC.

Mr Lucy—I accept that. I do not agree to the extent that that is a risk. Like anything in life there is always some risk out there, but the alternative is to give us the ability to be able to mount criminal action. That is a pretty serious decision. To counter the risk that Peter Wood has

contemplated and that you have articulated, would be to give us the rights to undertake a criminal action.

**Senator MURRAY**—Is there not a third way, and that is to toughen up the MOU? He says that one of the problems with the MOU is that it is still open-ended. Again I quote from the article:

'There are no time commitments beyond an undertaking by ASIC to "refer a brief of evidence to the CDPP in a timely manner", whatever that may mean.'

**Mr Lucy**—Again, the MOU is a principle document. Like any MOU, it is a non-binding document; it is there to set a level of principles. Underneath that are some working targets. For example, your colleague Senator Ludwig asked a number of questions, I presume, of the DPP.

**Senator MURRAY**—Could you give us the *Hansard* reference?

Mr Lucy—It is AT68. The first is the time taken by the DPP to bring charges—and these are dealing with years ended 2002, 2003, 2004 and 2005—has gone from 10 to nine to seven to six months. The time taken by the DPP to formally bring a matter to a conclusion over the same period was 14, 13, 11 and six months. The time taken by the DPP to return the brief for no further action was 13, 18, 10 and six months. That is consistent with our own experience that the DPP is receptive to the need to treat us as a core client and to provide proper turnaround and proper service.

**Senator MURRAY**—Will you be able to measure that in any way?

**Mr Lucy**—Yes, we measure it very closely. We have every matter that is referred to the DPP on a spreadsheet, and that is part of the regular monthly liaison. Our staff go through with their staff every matter that is in the pipeline with the DPP, be it a referral or an action that is under way. We have those in stark relief in front of us.

**Senator MURRAY**—My own experience of ASIC was like that of anyone; you are not free of criticism. Generally speaking, if you get into an investigation, you try and do it pretty thoroughly. It would be of tremendous harm both from a parliamentary and a community perspective if legislation which was set up for you to end or minimise common malfeasances in the corporate world were to falter because of a faulty relationship between yourselves and the prosecutors.

**Mr Lucy**—All that our commission can state to you is that if we felt that that was in any way likely then we would meeting with the government to press that very firmly. That is not our experience and it is not our expectation.

**Senator SHERRY**—I return to a question on notice relating to Westpoint applying for a licence. I refer to E43, question AT36. I asked whether they had applied for one and you said:

No, Westpoint Finance Pty Ltd held an Investment Adviser's licence ... from 27 June 1996 to 21 January 1999.

ASIC has no record of Westpoint Finance Pty Ltd ever making an application for an AFSL, however it was an Authorised Representative ... for CGU Insurance Ltd ... during the period 4 February 2004 to 14 July 2004.

As Westpoint was an authorised representative of CGU, could or did ASIC take any action against Westpoint at that time as an authorised representative of CGU?

**Mr Lucy**—Was that a question on notice 10 days ago or at some earlier time?

**Senator SHERRY**—This relates to the additional estimates of 16 February 2006. We got the answer in that batch last week and I have those in front of me.

**Mr Lucy**—I will have to take that question on notice. I am not aware of whether or not we looked at the CGU issue.

**Senator SHERRY**—According to ASIC's answer on notice, Westpoint Finance Pty Ltd were an authorised representative of CGU for a period of time. In those cases, can ASIC take action against the authorised representative because it was licensed through CGU?

**Mr Cooper**—In relation to what? We will have to take this on notice. It could well be that that licence was in order to advise about and sell CGU insurance to people who invested in real estate.

**Senator SHERRY**—Take that on notice. It does not make that clear.

Mr Cooper—It does not.

**Senator SHERRY**—Is this a possible loophole for an unlicensed adviser effectively to become licensed?

**Mr Cooper**—Again, taking it as a hypothetical question, no. The licensee takes full responsibility for what the authorised representative does, so we do not—

**Senator SHERRY**—Take a hypothetical: couldn't an entity that has been given an authorised representative's licence mislead a consumer by quoting the licence number but it is in fact very much restricted in the activity in which it can engage?

**Mr Cooper**—That is possible but you would not find too many licensees tolerating that.

**Senator SHERRY**—Anyway, have a look at those issues I have raised. There is another issue is relating to Westpoint. I put some questions on notice back in February and you provided me with a copy of a letter from Ian Campbell, the then parliamentary secretary, which he sent to the WA minister for consumer affairs, Mr Kobelke, on 3 February 2002 in respect of Westpoint. The letter from Senator Campbell to the minister in WA said:

Thank you for your letter of 21 August 2002 to the Treasurer concerning the use of mezzanine financing to raise funds for property development. I am responding on the Treasurer's behalf. You would be aware that the Australian Securities and Investments Commission, ASIC, especially through its Perth office, has been in regular contact with your department concerning this issue over a number of months. Further, upon receiving your letter, the Commonwealth Treasury also

raised your concerns with ASIC. ASIC advised the Treasury that it is carefully examining this issue and has been obtaining comprehensive legal advice on the regulatory status of these property financing schemes to which your letter referred.

It is still not entirely clear to me, from the answers provided, exactly what ASIC was doing at that time. What were you examining back in late 2002 and early 2003 to which the parliamentary secretary is referring?

Mr Lucy—My notes indicate that you are quite right: there was dialogue between the former Parliamentary Secretary to the Treasurer and the Hon. John Kobelke in Western Australia in early 2002 and also in about August-September 2002. We obtained senior counsel advice around that time as to what our jurisdictional options were, which led us to commence action in the Supreme Court of Western Australia in 2004.

**Senator SHERRY**—Wasn't an alternative to recommend to the government to change the law to make it clear at that time? You had received warnings in 2002; you received legal advice in early 2003—

Mr Lucy—At that stage both the minister in Western Australia and ASIC separately undertook consumer warnings as to the issues regarding promissory notes greater than \$50,000. Bearing in mind that the decision to deliberately carve out promissory notes greater than \$50,000 was a deliberate decision taken by parliament. That position existed. At that stage, as we have said in earlier forums, the complaints which we received were to do with the jurisdictional issues; they were not to do with business plan issue or business model issues. People were not suffering financial hardship at that time through their investments.

**Senator SHERRY**—That you knew of.

**Mr Lucy**—That we knew of.

**Senator SHERRY**—The letter from Senator Campbell says, 'If required, the government will consider any recommendations ASIC makes to improve consumer protection in this area.' Did ASIC seek at that time to change the law to take clear jurisdictional control of promissory notes?

**Mr Lucy**—No. We took the matter to court. At that stage you do not know whether or not the law needs changing until you test it in the court.

**Senator SHERRY**—You do; you can get legal advice.

**Mr Lucy**—We did. The legal advice was that we would be successful, and we were not fully successful.

**Senator MURRAY**—If you were successful then you would not need to change the law; that is your point?

**Mr Lucy**—Correct. Indeed, the whole Westpoint saga would have played out quite differently.

**Senator SHERRY**—Wouldn't it have been quicker to have sought to change the federal law back in early 2003? That would have been quicker in terms of a process to cover this, wouldn't it?

**Mr Lucy**—In hindsight. But again, typically, the way that parliament and the government of the day work is that it is an issue identified that is before the courts, so we wait for the courts to make it clear.

**Senator SHERRY**—But it was not before the courts at that moment. You apparently received advice that you did have jurisdiction—

**Mr Lucy**—As explained at Senate estimates, it was not clear-cut advice. It was advice that was quite complicated, it was really almost self-serving to get us to a point. Ultimately, that was not successful.

**Senator SHERRY**—I do not understand with respect to the activity that was occurring. If you had said to government, 'Look, we want this matter made very clear very quickly,' it seems to me reasonable and quite conceivable that such a change in the law would have got through the parliament by the end of 2003—it would not have been significant—and some people would have been saved a lot of grief.

**Mr Lucy**—Legislation cannot guarantee that there will not be failures. Parliament specifically, for whatever reason, chose to carve out the promissory notes of greater than \$50,000.

**Senator SHERRY**—After that there were warnings coming from the WA minister, the responsible minister, and the department, a number of warnings to the Treasurer, then referred to Senator Campbell, to ASIC direct nationally and to your local office, that there was a practical problem on the ground in WA.

Mr Lucy—Yes.

**Senator SHERRY**—The government was considering it. The parliamentary secretary's letter says: 'We have received advice from you, we have received advice from Treasury, and I expect to shortly receive advice from ASIC after they have fully considered the issue.' You were obviously considering it. The letter goes on to say:

If required, the government will consider any recommendation ASIC makes to improve consumer protection in this area.

Your preferred action was to take court action?

Mr Lucy—Correct.

**CHAIRMAN**—I will ask questions relating to a copy of a submission I have received to the Corporate and Financial Services Regulation Review of April 2006. I will get your response to some views that are expressed in the submission, which is from a small boutique financial adviser. To summarise the best I can without losing the sense of what he is saying, he says: 'Compliance under FSR has turned into a monster for small dealers. ASIC policy statements by

themselves are a forest of trees and there is a wealth of other compliance obligations and compliance burdens.' He then says: 'Form has become the requirement rather than substance. This is bad for consumers whose objective is good advice. Consumers want substance and not form.' He then goes on to say: 'The huge fundamental flaw in FSR compliance is that it is focused on process and not output. FSR seeks to regulate for good advice or at least regulate against bad advice. As FSR is constructed, the regulator could use FSR to focus on that objective but instead ASIC seeks to focus its regulatory activity on process and fails to focus on policing advice output.' What is your response?

Mr Cooper—We are just trying to guess the author! That is very familiar. Of course, it is a policy question. One of the clear messages we try to give is that it is not about paperwork. It should not be about large volumes of paper and process. Coming back to the legislation, the author of that is correct in the sense that the legislation does not actually impose that high a benchmark. When you look at the various elements of what an advisor has to do: the advisor has to know the product, know the client—you can scarcely think of a regulatory regime that would not require those things—and has to have a reasonable basis for giving advice that is appropriate for the client. That is a pretty low hurdle, not exactly a pole vault bar, that you have to jump over. In a sense the industry is lucky that the legislation does not say that you actually have to give good advice because I am not sure that we, as a regulator, are actually qualified to judge whether advice is good or not. I think that is a policy platform that obviously was not taken up by the government.

**CHAIRMAN**—He also says: 'The current system is very anti advice-focused advisers who tailor advice to individual clients and very pro the product distribution model of the big financial planning subsidiaries or the big product providers.'

**Mr Cooper**—I definitely know who the author is now!

Senator MURRAY—So do I!

**Mr Cooper**—Again there is an element of truth. We have to be realistic about the industry that is before us. A lot of times people say, 'Does ASIC want to restructure the industry?' The answer to that is no, we are working with the industry that we have got. There is no question that it was borne out of a product-producing and product-selling environment.

**Senator MURRAY**—One of the criticisms is not that ASIC have created this but that ASIC allowed it to be created. The lawyers and the funny fellows who thought they would create some obfuscation in this area in the companies developed these mountains of paper, I think quite cynically, in the hope that consumers would say, 'Oh that's all too hard,' push it aside and just look into the baby blues of the planner and say, 'Tell me what I should do.' I think there was a malicious element to it. Perhaps the criticism is that you did not punch hard enough quick enough to stop that practice mushrooming.

**Mr Lucy**—There has to be a dimension also that parts of the industry were also hoping to push back on parliament so that parliament would unbundle some of the legislative requirements.

**Senator MURRAY**—I think the criticism that you are responsible for the creation of these giant documents is often unfair. But the criticism that you moved a little slowly to rectify it might not be as unfair.

**CHAIRMAN**—Another representation I have received is from a person who is complaining about almost a doubling of the administration fee for members receiving allocated pensions from UniSuper. He says, in his case, the administration levy has gone from \$1,800 to some \$1,550 in addition to a further \$4,000 per annum in funds management and other administration charges. I think he has written to the board of trustees of UniSuper but without any favourable response. He is complaining that there is no machinery for hearing or investigating complaints on these sorts of issues. He says that in reality, any official or industry bodies are generally precluded from considering complaints on fees.

Mr Cooper—He is right in the sense that, if there has not been misleading conduct or lack of disclosure and so on, the fee itself is not something we can say is too high or not high enough. Having said that, that is why we have fee information on the website FIDO, where you can go and compare fees for over 1,000 funds now, and why we do some of the work about shadow shopping to look at correlations between fees and poor advice and so on. Taking the chairman's analogy of the bull's eye right at the centre of it, he is right: there is no mechanism where you can simply say, 'I want redress because these fees are too high.'

**CHAIRMAN**—So the advice to him would be to move his pension to a different fund.

Mr Cooper—Subject to getting good switching advice, yes.

**CHAIRMAN**—The other issue I wanted to raise was in relation to a company called S8 which is a major tourism company in Queensland that has been under investigation by the Queensland department of fair trade in relation to various allegations. The allegation that has been made to me is that S8 has not disclosed to investors in the company the fact that it is being investigated. Are you aware of that situation?

**Mr Lucy**—We would have to take it on notice. To the extent that the background is reliable, that may well be an event that they would have disclosed to us and we will tie the ends together.

**CHAIRMAN**—I understand the department of fair trade investigation has received some exposure in the Queensland media and also in the Queensland parliament.

**Senator MURRAY**—Senator Wong, are you going to be raising the issues of the new auditors enforcement area in your questions?

**Senator WONG**—Probably not.

**Senator MURRAY**—I have a single question in that area. As you know, the audit standards have now been made law.

Mr Lucy—In a few weeks.

**Senator MURRAY**—In a few weeks, yes. There have been some highly speculative, and perhaps hopeful, remarks from some people in the industry that this is going to see a 20 to 30 per cent increase in audit fees because there will be great compliance costs and they will have to pass them on. I saw that legislation, I am aware of what the audit standards do and I find that all highly overblown—and, if it were to occur, I would be alarmed. You may want to take my question on notice. Are you alert to the issue and, if you are alert to the issue, what will you do to monitor that kind of price gouging that may use this legislation as an excuse to achieve?

Mr Lucy—We are very much aware of the issue and our views are very similar to what I understand yours to be. We are undertaking ongoing surveillance of the auditing profession. We have indicated in previous forums that this financial year we are continuing our review of the big four and we are also now looking at second tier firms. To the extent that we have any suggestion of complaints of any attempt to gouge or inappropriately price audits, we will have regard to that. Ultimately, companies have the opportunity to look after themselves. Audits are, nevertheless, somewhat competitively priced, and there is a free market as far as the audit service is concerned.

Senator MURRAY—My concern is not the big consumer of audit services. I agree with you: they are big enough and ugly enough to look after themselves. My concern is small- to medium-sized entities might be conned that the changes to the law to make pre-existing audit standards—because it is largely that, with some modifications—enforceable at law result in such high compliance costs that they will need to pass them on. Therefore, small- and medium-sized entities that would not know how to counter that might be misled. I wonder if you are thinking of guidance notes or that sort of thing.

**Mr Lucy**—We will respond to any suggestion of that being played out in the marketplace, including through industry groups such as company directors and so on, to make sure that people understand that it would be quite mischievous for auditors to increase their fees on that basis. The other point is, as Jeremy has just pointed out to me, the ACCC, but I think that we would be alert to it well before the ACCC if we saw it coming through either complaints and/or from our surveillance activities.

**Senator WONG**—I would like to ask a couple of questions about the additional funding that you received in the most recent budget—\$30 million each year over the forward estimate period. Is that correct?

Mr Lucy—Yes.

**Senator WONG**—As I understand from the budget papers, that is additional to the additional funding you sought and received for James Hardie and HIH.

**Mr Lucy**—That is correct.

**Senator WONG**—What will this be used for? In particular I would like to know what 'exceptional matters of significant public interest' means. That is the way in which the budget papers describe the use of these funds.

Mr Lucy—It is difficult to know how this is going to play out. There are a number of requirements that need to be met before we can access those. The first difference between the way that we have looked at these issues in the past, compared to going forward, is that the calculation of cost includes our own investigation cost as well as enforcement activity costs. To the extent that our accumulated cost exceeds \$1.5 million, we are able to access that fund. There are other certain particulars that we need to address to satisfy ourselves—for example, the community interest issue.

**Senator WONG**—Regarding the calculation of costs, one of the requirements in terms of accessing the fund is that your investigation costs exceed \$1.5 million.

Mr Lucy—All costs, the agency costs, which includes our investigation not just our enforcement costs.

**Senator WONG**—What was the previous position?

**Mr Lucy**—Previously it was just essentially enforcement costs.

**Senator WONG**—Where did you fund investigation previously?

**Mr Lucy**—Out of our business as usual funding. Take Westpoint: if Westpoint reached the point where—

**Senator WONG**—When you said previously 'just enforcement', you were referring to what?

Mr Lucy—HIH—

Senator WONG—HIH and James Hardie?

Mr Lucy—Correct. OneTel—

**Senator WONG**—So the additional allocation for HIH and James Hardie that you sought in the budget process was for enforcement costs.

Mr Lucy—Correct.

**Senator WONG**—And you had to fund all investigation internally?

**Mr Lucy**—Yes, to the extent that there was investigation work in those, it was funded with our business as usual—

**Senator WONG**—As I recall, your previous evidence was that there was quite a lot of investigation costs, which is why you went back to the government.

**Mr Lucy**—Yes. To the point that our costs or our outlays exceed \$1.5 million and subject to the chairman of ASIC being satisfied that the criteria, including the public interest criteria, have been met we are able to draw against that funding amount.

**Senator WONG**—Up to \$30 million?

**Mr Lucy**—In aggregate \$30 million per annum.

**Senator WONG**—In aggregate what? All investigation—

**Mr Lucy**—No, there can be no single investigation/enforcement outcome that can exceed \$20 million. The overall cap is \$30 million, but for an individual matter the cap is \$20 million.

**Senator WONG**—Does that include enforcement and investigation costs?

Mr Lucy—Yes.

**Senator WONG**—What was HIH in total—enforcement and investigation?

**Mr Lucy**—I think the aggregate funding for enforcement is \$28.2 million.

**Senator WONG**—That does not include investigation.

Mr Lucy—Correct.

Senator WONG—So, in fact—

Mr Lucy—Having said that, the investigation—

**Senator WONG**—Let me finish, Mr Lucy. If the threshold or the limit is \$20 million for any investigation or enforcement, HIH would be patently over that limit?

Mr Lucy—To the extent that you relate to the \$20 million, that is quite right. The point that I was trying to get in quickly on is that our investigation costs in HIH were minimal because of the referral from the royal commission. Having set the parameters in place—the \$20 million and the \$30 million—that still does not prohibit ASIC going back for specific funding. This is an attempt to provide some machinery where the normal course of investigation and enforcement activities undertaken by us does not need to be referred back on a yearly basis to the government.

**Senator WONG**—Which is what you have had to do to date.

Mr Lucy—Correct.

**Senator WONG**—The normal course of investigation and enforcement had to go back to government for additional funding.

**Mr Lucy**—For significant items, yes, we have.

**Senator WONG**—This is significantly more than you received for HIH, OneTel and James Hardie.

**Mr Lucy**—Significantly more?

**Senator WONG**—Yes.

**Mr Lucy**—In aggregate, that is four years times \$30 million.

**Senator WONG**—For James Hardie you did not get anywhere near \$30 million.

Mr Lucy—No.

**Senator WONG**—In 2005-06 you got \$3.4 million for James Hardie and \$3.9 million for OneTel. In 2003-04 I think you got \$17.5 million in total for HIH, and then another supplementary funding of \$2.5 million the year preceding that. Is that right?

**Mr Lucy**—Truthfully, I was not as well prepared for this meeting as I was for Senate estimates. My reading of the HIH is that funding for '03-04 was \$17.5 million and '04-05 was \$10.7 million, which in aggregate is \$28.2 million. We then went to the government to say that we wanted that spread over three years and not two. The same total is \$28.2 million, but the allocation was \$8 million in '03-04, \$8.658 million in '04-05 and \$11.54 million in this financial year.

**Senator WONG**—This is quite a significant increase in funding, up 25 per cent on your existing budget allocation for 2006-07 as against the previous financial year. I think it is an average of 23 per cent over subsequent years against the previous forward estimate period.

**Mr Lucy**—It is a significant amount.

**Senator WONG**—You have said this enables you to go back to the government for your normal enforcement processes.

Mr Lucy—No—

**Senator WONG**—Sorry, this prevents you from having to go back. I am interested in finding out what haven't you been doing before this \$30 million was allocated? If you need it now, presumably there were things you previously needed it for.

**Mr Lucy**—No, previously what we required funding for we either took out of our business as usual allocation or we sought specific funding.

**Senator WONG**—What did you divert funds from through your business as usual? What got fewer resources in order to fund these activities?

Mr Lucy—The agency is involved in a myriad of activities, from the collection of revenue to the maintenance of a database, to consumer protection issues, to enforcement. It is not a matter of saying what did we not do; it is a matter of how the commission allocated the priorities across the budget. I cannot speak for previous commissions, but the commissions that I have been involved in have always felt and remain comfortable that the allocation of funding that we have

given to enforcement has been necessary and sufficient for enforcement to do what it needs to do.

**Senator WONG**—Hang on, Mr Lucy—with respect, you cannot have it both ways. You have a 25 per cent increase in your funding for your normal enforcement activities. You have said to me, 'We've previously covered that either by going to government for additional enforcement funding on a number of large cases, and our investigation and other additional enforcement funding was allocated from business as usual.' Which were the areas that you de-prioritised?

Mr Lucy—Again we perhaps need to address your underlying premise. You are assuming that \$30 million is a calculated figure, which is how you are arriving at your 25 per cent increase. That is not the case at all. The government had the option of saying, 'Okay, we'll give you an uncapped, unlimited amount for enforcement and that might amount to'—

**Senator WONG**—It is too much, is it, Mr Lucy?

Mr Lucy—Who knows? We do not know. The alternative is that they could have made it uncapped and we might have drawn down \$10 million. There was dialogue between Treasury and the Department of Finance and Administration as to whether or not it should be capped. If it was to be capped, and one could understand the governance reasons for it to be capped, then I expect that they went through the process to say, 'Let's make it a significantly large amount so that we actually deal with the issue.'

**Senator WONG**—What did you ask for?

**Mr Lucy**—Our initial approach was that we felt that it should be uncapped, that it should be a contingency fund of whatever was required for us to access. That was initially approved but then the view came back on the governance grounds that that was not prudent. The figure that was put to us was \$30 million, and we accepted it.

**Senator WONG**—How much more did you ask for for HIH than you got?

**Mr Lucy**—I would have to take that on notice but, to the best of my knowledge, for all of those matters, whatever we have sought, we have received.

**Senator WONG**—You initially asked for an uncapped amount, and they came back with \$30 million.

**Mr Lucy**—It was not as quick as you describe it but, yes, that was the essential outcome.

**Senator WONG**—I am sure it was a lengthy process. It is a bit confusing. On the one hand you say, 'Don't look at a 25 per cent figure, because that is only the notional amount,' then on the other hand you say, 'We actually wanted an uncapped amount.'

**Mr Lucy**—That is right.

**Senator WONG**—I will come back to my original question: what were the business as usual operations which had to be de-prioritised in order to enable investigation of a number of these major cases such as HIH?

**Mr Lucy**—I come up with the same answer: I do not believe that there were any matters which we should have been undertaking that we were not because of our funding.

**Senator WONG**—It is a magic pudding, is it, Mr Lucy?

Mr Lucy—It is a matter of having a budget and operating within that budget by making allocations. The point with the \$30 million figure was very much also to do with the fact that, as an independent agency, we thought it was desirable for us to be able to fund our own issues without having to go to the government to seek funding.

**Senator WONG**—Let us turn it around. What is the additional work you say you will now be doing?

**Mr Lucy**—We have noticed an increasing demand on our enforcement resources, and our expectation is that these will continue to increase. If we look at the pipeline that we have in front of us, we have substantial matters on foot and we have substantial matters potentially in the background and these will be very resource consuming.

**Senator WONG**—You are not able to tell me, through your reallocation of priorities, which of the business as usual areas you diverted resources from in order to manage, for example, HIH, OneTel and James Hardie?

**Mr Lucy**—No, but we received funding for the enforcement work for that.

**Senator WONG**—But not investigation.

**Mr Lucy**—All of our investigation work has historically been part of our business as usual activity.

**Senator WONG**—I am not clear. If you get a 25 per cent increase in funding, surely you should be telling me, 'We're going to be doing a lot more work.'

**Mr Lucy**—I think that we moved away from that 25 per cent figure.

**Senator WONG**—Yes, because you wanted an uncapped amount!

**Mr Lucy**—I do not know if it is 25 per cent or one per cent or none.

**Senator WONG**—But you sought an uncapped amount.

**Mr Lucy**—It is hypothetical.

**Senator WONG**—No, it is in the budget papers.

**Mr Lucy**—The \$30 million of course is in the budget papers; to the extent that we draw down on it is entirely hypothetical.

**Senator WONG**—What will public interest be? What is the criteria?

**Mr Lucy**—We have not dealt with that at the commission level. One would look at examples of Westpoint to say, 'Is that a matter of public interest?' Clearly it is.

**Senator WONG**—Who is determining it? Is it the government or ASIC?

**Mr Lucy**—Me, ASIC, the commission. For example, there are activities such as section 50 recoveries which we could undertake that might be quite expensive. Quite properly we should determine whether or not indeed it is in the public interest for us to undertake that.

**Senator WONG**—Are you going to put those into some guidelines? Will there be guidelines associated with the drawdown of funds that flesh out this statement in the budget papers, 'exceptional matters of significant public interest'?

**Mr Lucy**—There is a flip side to that. Clearly we are going to have some guidelines. To the extent that we do not want the people who we are litigating against to be able to use those guidelines against us, I am not sure that is particularly constructive.

**Senator WONG**—How can they use them against you?

Mr Cooper—By only being a little bit naughty and coming under the radar.

**Senator WONG**—There are two things here. You are not only going to enforce using these funds, are you?

Mr Cooper—Of course not.

**Senator WONG**—So, Mr Cooper, your position is untenable, because people are not going to not be naughty because you might go to Treasury for the additional \$30 million as opposed to doing your current enforcement activities. Surely this is not just a discretionary decision for you, Mr Lucy, without any kind of clear criteria. Is ASIC going to develop internal guidelines that set out what an exceptional matter of significant public interest would be?

**Mr Lucy**—Clearly we will. We have not reached a decision as to whether we will make it publicly available, for example, on our website.

**Senator WONG**—When will you develop them?

Mr Lucy—It does not kick in until July and then we need to reach the threshold.

**Senator WONG**—What do you mean? Do you mean on the \$1.5 million?

Mr Lucy—Yes. It is something that is in front of us. We have had quite a level of discussion internally including, for example, our business planning within the enforcement directorate, as to how we are going to account for costs and those sorts of things. There is quite a bit that is in front of us but we are working on it.

**Senator WONG**—I am sure at the next estimates we will be keen to see what these guidelines are.

Mr Lucy—Good.

Senator WONG—I had a discussion with Mr Cooper about the business judgment rule at Senate estimates. I do not propose to go back over it other than to say there is one area that I do want to address, and that is looking more closely at Mr Pearce's discussion paper. The business judgment rule which is flagged—and I place it no higher than that—is not the limited BJR which was referred to in Mr Beerworth's submission about which Mr Cooper answered questions before this committee. It is in fact a far broader BJR which would have the effect of making any obligation under the Corporations Law subject to a business judgment rule, including the duty not to trade whilst insolvent. Does ASIC have a view about enforcement difficulties which may arise from allowing the existing duties in the Corporations Law to be affected to such a degree?

**Mr Cooper**—The proposal that has been put forward is no more than that. It is merely a brief statement of a hypothetical, possible proposal to amend the act. Given that the business judgment rule has a number of elements to it, including that you have to be acting in good faith and so on, our position is one of agnosticism, if you like. We simply do not see how it would actually function. That is not surprising in the sense that a proposal like that is a complex thing that needs to be worked through. The consultation paper is nothing more than a series of proposals, and we are looking forward to understanding how a proposal like that might work.

**Senator WONG**—There is one thing I do not understand. You were quite fulsome in your opposition to a suggestion that section 181 have a business judgment rule added to it, and I actually accept the evidence on that. It seems to me reasonably cogent. What is flagged—and I accept it is only a proposal but you are the enforcers—is a far wider business judgment rule to all duties in the Corporations Law. If you see enforcement difficulties arising from a specific amendment to section 181, including a business judgment rule, surely when it comes to enforcement you would have even greater concerns about a business judgment rule which applied across the entirety of the duties in the Corporations Law?

**Mr Cooper**—Yes, if there is a suggestion that it is somehow wider. You explained quite rightly that the proposal is that it apply to more situations but, if there is a suggestion that the rule itself is somehow different, our position is that we do not support that.

**Senator WONG**—Again this is only in the proposal, but the rule sets out four components: the director has to act in a bona fide manner, within the scope of the corporation's business, reasonably and incidentally to the corporation's business, and for the corporation's benefit. It does not include, for example, what is in the current BJR at 180, that a director should not have a material dual personal interest in the subject matter of the judgment. I would have thought ASIC would have some concerns about a business judgment rule which enabled directors who had a clear personal interest in the decision they made to be not barred from utilising that defence.

**Mr Cooper**—That is one aspect of it. A material personal interest is actually quite a high threshold. When you think of the myriad decisions that a board of directors make, it is not common for such a high threshold to have been reached. It is much more than having an interest in it. A material personal interest is actually quite a large hurdle to jump over.

**Senator WONG**—You are comfortable with it being removed?

Mr Cooper—Again, you are asking me policy questions about an as yet—

**Senator WONG**—Frankly, you put a very clear policy view—one I happen to agree with—in previous evidence. I am asking you essentially the same set of questions.

**Mr Cooper**—Not really. We came along to a specific hearing about corporate responsibility. Here you are asking me to comment on effectively what might be a government law reform proposal.

**Senator WONG**—Ignore the government law reform. Would you have any enforcement concerns if there were a business judgment rule which applied to every duty in the Corporations Law?

**Mr Cooper**—Yes, for the same reasons as we said at the other hearing.

**Senator WONG**—There are defences as to insolvent trading which exist in the statute. Has ASIC been asked to advise on or have you turned your mind to how the BJR would interact with the existing specific defences in the Corporations Law?

**Mr Cooper**—This is a perfect example of just the sorts of machinery questions that we would need to go through in working out whether something like this would—

**Senator WONG**—Have you been asked for advice?

**Mr Cooper**—Not yet, no.

**Senator WONG**—Have you been asked for advice as to the enforcement impact of anything in the discussion paper?

**Mr Cooper**—Not that I am aware of, but we could take that one on notice.

**Senator WONG**—Does ASIC have a view about the possibility of a single director company by resolution disapplying some of the director's duties provisions in the Corporations Law?

**Mr Cooper**—I think it would be fair to say that we simply do not understand what is the underlying motivation for that proposal.

**Senator WONG**—It is sort of like a personal contracting out of the act, is it not?

**Mr Cooper**—We do have some reservations about it. The paper is a collection of proposals, some of which have been put forward by interested parties and some of which are government proposals. We will wait and see.

**Senator WONG**—I am glad Mr Lucy nodded when I commented on personal contracting out. I understand that Senator Murray has already dealt with the MOU issue, so I will not retraverse that. Mr Lucy, in the context of this hearing I want to draw your attention to a question on notice, AT20, that you responded to through the additional estimates in relation to the history of the section 19 issue.

Mr Lucy—Yes.

**Senator WONG**—When you went back to Treasury and asked about the ability to improve your powers.

Mr Lucy—I do recall that discussion.

**Senator WONG**—The answer to the question on notice is, 'A history of a request to Treasury to amend the ASIC Act to enable ASIC to compel a person to provide a witness statement in certain circumstances was not raised at the PJC hearings in September 2005.' I did ask you specifically whether we could have a copy of the proposed amendments and I also want to know the history of the request to Treasury and the process of that. Could you take that on notice in this hearing?

Mr Lucy—We will.

**Senator WONG**—I do have a question about the Vizard matter, which has been in the press a little. I note there are no current charges or any suggestion of that other than what has been in the media at this stage.

**Mr Lucy**—That is correct.

**Senator WONG**—As I understand it, what is being suggested is a possible inconsistency between the facts agreed with ASIC and the evidence given in a previous criminal trial. Is that correct, Mr Cooper?

Mr Cooper—It is.

**Senator WONG**—When ASIC prepared the statement of agreed facts with Mr Vizard in the context of the insider trading matter, did ASIC turn its mind to what evidence had previously been given by Mr Vizard in the context of the earlier criminal proceedings?

Mr Lucy—We considered all matters of which we were aware, yes.

**Senator WONG**—Was that a matter of which you were aware?

Mr Lucy—Yes.

**Senator WONG**—Did ASIC have any concern in putting that statement of agreed facts before the court in the insider trading case that there might have been an inconsistency between that evidence and the evidence that Mr Vizard had given previously?

**Mr Lucy**—The evidence that we put was to do with director's duties as distinct from insider trading. The evidence was put forward to the court in a manner that the court required.

**Senator WONG**—That is not really an answer to my question.

**Mr Lucy**—To the extent that there were any inconsistencies, that is not a matter for ASIC to follow through. That is properly a matter for the Victorian police.

**Senator WONG**—No, but you put forward a statement of agreed facts on the basis of which a guilty plea was entered and submissions were made as to what penalty should be in place. Surely it is incumbent upon ASIC to ensure that the facts put forward were facts that could be relied on by the court. Surely it was incumbent on you to look at whether that statement of agreed facts was consistent or not with previous evidence given by the defendant.

**Mr Lucy**—We might in part take this on notice. Our anxiety is that we do not say anything that might prejudice the Victorian police. To the extent that there was material in the background that we might have considered, which I think is the real thrust of your point, we should take that aspect of it on notice.

**Senator WONG**—I want to know, when you were preparing the statement—whatever facts went before the court in the Vizard matter to which ASIC was a party—whether regard was had to evidence previously given by Mr Vizard—

Mr Lucy—Understood.

**Senator WONG**—and whether you turned your mind to the issue of any possible inconsistency.

**Mr Lucy**—Understood, and we will take that on notice.

**Senator WONG**—What has ASIC's involvement been in terms of the current or possible investigation of Mr Vizard about which there has been some media attention?

**Mr Lucy**—What has been our involvement with the Victorian police?

Senator WONG—Yes.

**Mr Lucy**—I would rather take that on notice.

**Senator WONG**—Can I ask why? We do not have a current matter before the courts, do we? It may well be that you are being quite prudent, Mr Lucy, but I just wonder if you can clarify your concerns.

Mr Lucy—I am prepared to make a comment in relation to that, but I would prefer to read it to make sure that I do not stray. The answer is, yes, we have provided assistance to the Victorian police in their investigation and we provided, at their request, the agreed statement of facts that was provided by us to the court in our proceedings. Whether or not that assists in proving perjury is a matter for time to tell. We have assisted the Victorian police in the manner that I have outlined.

**Senator WONG**—Are you still taking on notice, despite that answer, my question about to what extent regard was had at the time the facts were prepared?

Mr Lucy—Yes, I am.

**Senator WONG**—There has been some reporting of possible litigation by the HIH liquidator against FAI's insurance advisers. Has ASIC received any report from the liquidator in relation to the HIH matter dealing with this issue? What has ASIC's involvement been?

**Mr Lucy**—No, I do not believe that is the case. Certainly, in the last 12 months it has not been brought to the attention of the HIH board.

**Senator WONG**—Not the HIH board; you mean ASIC?

Mr Lucy—Yes, the ASIC HIH board.

**Senator WONG**—Your internal board dealing with this issue?

Mr Lucy—Correct.

**Senator WONG**—So you have had no involvement in or knowledge of Mr McGrath's claim against FAI Insurance?

**Mr Lucy**—I am sure that there is dialogue at officer level as to what he is doing but as far as making any formal representations to ASIC are concerned, no, he has not, to the best of my knowledge.

**Senator WONG**—Has any investigation been conducted or material provided by ASIC?

**Mr Lucy**—I would have to take that on notice, because that would be almost certainly historical as distinct from current.

**Senator WONG**—This is all historical—this is all past behaviour.

**Mr Lucy**—Of course, but to the extent that there has been any assistance in the provision of information that would have been historical.

**Senator WONG**—Perhaps you could take that on notice. What is the time frame on the statutory oversight for the provision of answers taken on notice?

**CHAIRMAN**—We can set a date.

**Senator WONG**—Have we done that?

**CHAIRMAN**—Not yet.

**Senator WONG**—I guess we will do that tomorrow.

**CHAIRMAN**—We have received correspondence from Mr Russell Philp regarding the adequacy of Meat and Livestock Australia's communication with its members and relevant stakeholders. You are probably aware that MLA is a producer owned body that funds research—

**Mr Lucy**—Like you, we received that today also and so we are looking at that. Therefore, if we take it on notice we will be able to respond to you.

**CHAIRMAN**—Sure. Also, you published in May 2006 the consultation paper *Review of policy statement 160: time-sharing schemes*, with certain proposals. Have you had any response so far to those proposals and, if so, what?

Mr Lucy—I will have to take it on notice.

**Senator MURRAY**—Can you add to that the time line in which you intend to come to a view on it?

**CHAIRMAN**—Do you consider that an extended cooling-off period will overcome the problems associated with pressure selling?

**Mr Lucy**—I think that is all part of the same issue so we will roll that into it.

**CHAIRMAN**—Do you propose to deal with the problems of disclosure highlighted in our report on time share that we tabled in September last year?

**Mr Lucy**—Again, we need to roll that into the answer to the question on notice.

**CHAIRMAN**—As there are no further questions, I declare the meeting closed. Mr Lucy and Mr Cooper, thank you very much for your attendance at this committee hearing.

## Committee adjourned at 9.04 pm