



1 COMMONWEALTH OF AUSTRALIA

2 **Official Committee Hansard**

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4 **JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL**
5 **SERVICES**

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

8 **TUESDAY, 13 JUNE 2006**

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

Tuesday, 13 June 2006

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

26 **Members in attendance:** Mr Baker, Ms Burke, Senator Chapman, Senator Murray, Senator Sherry and Senator
27 Wong

28 **Terms of reference for the inquiry:**

29 To inquire into and report on:

30 Statutory oversight of the Australian Securities and Investments Commission.

31

WITNESSES

32 **COOPER, Mr Jeremy Ross, Deputy Chairman, Australian Securities and Investments**

33 **Commission..... 1**

34 **LUCY, Mr Jeffrey John, Chairman, Australian Securities and Investments Commission 1**

35 **Committee met at 6.09 pm**

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

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

39 **CHAIRMAN (Senator Chapman)**—I declare open this public hearing of the Joint Committee
40 on Corporations and Financial Services. Today the committee is conducting a public hearing into
41 the Australian Securities and Investments Commission. Under section 243 of the Australian
42 Securities and Investments Commission Act 2001, the Joint Committee on Corporations and
43 Financial Services is required to oversee the functioning of ASIC. This committee is part of that
44 oversight.

45 I welcome to the hearing Mr Jeffrey Lucy and Mr Jeremy Cooper, the Chairman and Deputy
46 Chairman of ASIC, and other officers of ASIC. I remind all witnesses that, in giving evidence to the
47 committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or
48 disadvantage a witness on account of evidence given to a committee; such action may be treated by
49 the parliament as a contempt. It is also a contempt to give false or misleading evidence to a

50 committee. If a witness objects to answering a question, the witness should state the ground upon
51 which the objection is taken, and the committee will determine whether it will insist on an answer,
52 having regard to the ground which is claimed. If the committee determines to insist on an answer, a
53 witness may request that the answer be given in camera. Such a request, of course, may also be
54 made at any other time. As official witnesses you will not be asked to give opinions on matters of
55 policy. This prohibits only questions asking for opinions on matters on policy and does not preclude
56 questions asking for explanations of policies or factual questions about when and how policies were
57 adopted. I invite you to make an opening statement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

116 It is interesting that you refer to Westpoint in the manner that you suggested, where there is an
117 implication of criticism. To some extent that was one of the major thrusts of our last meeting a

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

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

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

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

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

144 We have also taken a number of administrative decisions within ASIC as to our structure. About
145 a year ago we commenced a directorate called compliance, and that is now undertaking surveillance
146 work right across our entire agency, from liquidators and auditors to holders of financial service
147 licenses—the full gamut. There is a very close correlation between complaints coming in and the
148 sorts of issues that have been raised and the surveillance activities. We have also taken the decision
149 to give more enforcement teeth to our complaints area. Matters that are more straightforward but
150 not necessarily routine can be dealt with within the complaints area without necessarily having to be
151 referred to the enforcement area. I think your point is very well made. Again, we are not acting from
152 a position of being defensive but we do think there are opportunities for doing things better and that
153 is what we are working to do.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

221 **Mr Cooper**—It does.

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

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

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

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

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

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

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

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

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

246 **Mr Lucy**—In colour code.

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

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

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

252 **Mr Lucy**—Yes, of course.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

289 **Mr Cooper**—The real work is when we have all the submissions. The next time we issue that
290 document I think people are going to be looking for perhaps more commentary. The main thing we
291 wanted to do was to get the scenarios out, get people engaged with them and get some feedback. I
292 think the ball is now back in our court to consider each conflict situation a bit more fully and have a
293 little bit more of a think about what the answer is. I will not say that the document that went out was
294 relatively superficial, but it did not spend a lot of time actually addressing the real answer on each
295 particular conflict.

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

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

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

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

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

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

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

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

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

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

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

339 **Mr Cooper**—True.

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

343 **Mr Cooper**—Yes, we are. We are talking to the main jurisdictions about the approaches they
344 have taken. We have a different type of regime here in Australia and this product, so far as we
345 know, is unique. In other jurisdictions they have looked at specific areas. For example, research
346 analysts were the direction of Wall Street and partly the UK. That was the core problem with

347 conflicts. The CLERP 9 response put the obligation right across all sectors of the industry, which in
348 fact is not mirrored elsewhere. This product seeks to articulate conflict scenarios right across all
349 sectors in the style that we have done it. As far as we know, it is a unique product; whereas in the
350 UK, for example, they have quite specific work being done on research analysts. We followed that
351 model in 2004, putting out work that was specifically directed at analysts, but this product is quite
352 different.

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

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

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

360 **Mr Cooper**—Since then we have come out with our shadow shopping work, and switching was
361 something that was dealt with as part of that work. It was only one aspect of it because the shadow
362 shopping report was looking at superannuation advice generally. We did find out some things about
363 switching in that work. It is a very detailed piece of work, as you have probably seen. There is
364 nearly 60 pages of data about what we saw. In relation to switching, we saw that, in 44 per cent of
365 cases where people sought superannuation advice they were recommended to switch. We got quite
366 detailed data on, if you were in a particular fund, the relative likelihood of being advised to switch
367 into another fund. Really, it does descend into quite a considerable amount of detail. I would have to
368 say from this work and other anecdotal evidence that we are only some way along the path towards
369 a situation where there is a uniform understanding of what the obligations are and uniform
370 compliance. We still have further work to do in that area.

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

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

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

377 **Mr Cooper**—Where you are recommending a switch, you need to look at the existing
378 arrangements that the customer has and assess the plusses and minuses of moving out of that
379 product and into a new product. You need to explain those to the client and then include them in the

380 statement of advice. The report that you were referring to, the super switching report, had some
381 rather unhappy outcomes. For example, people had existing funds, where they had quite reasonable
382 insurance, and through lack of care on the part of the adviser it was recommended that they move
383 into another product. They either lost that insurance or ended up having to pay much more for it. We
384 set all that out in that report. That is really a summary of the legal obligation. It makes perfect sense.
385 If you are giving professional advice to someone about whether they should move out of a fund, it is
386 not rocket science to expect that you would have a look at what fund they are already in and see how
387 it stacks up with what you are recommending. It is that simple.

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

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

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

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

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

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

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

411 **Mr Cooper**—It is a tension between a list of products, which is actually quite a sensible
412 foundation. So long as it is not abused, it is a risk management tool. If I were a financial services
413 licensee, I would want to know which products my authorised representatives were advising on and

414 which ones they were not. If they want to advise people about moving out of a superannuation fund
415 into another one, they need to make sure that the list is sufficiently broad. Otherwise, they are going
416 to have a very small amount of work to do in that area.

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

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

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

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

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

441 **Mr Cooper**—Licensing is one part of it. There are other issues. What does the fund invest in?
442 What do you end up with when you invest in the fund? ASIC considers that these approved product
443 lists are legitimate but there is a tension between having a list that is, as you say, overly restrictive
444 and one that properly manages what the advisers are actually doing. We make no secret of the fact
445 that that is an issue and it is something with which we are working with industry on right at the
446 minute.

447 **Senator SHERRY**—Isn't this the difficulty? If someone goes to an adviser and the adviser

448 cannot examine the from fund—when sufficient information might be accessible on the website;
449 there are not that many of them now because, given the APRA licensing regime, the number has
450 massively declined—isn't there a danger that it will become a restraint of trade, that it will be
451 anticompetitive?

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

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

458 **Mr Cooper**—You can, yes.

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

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

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

465 **Mr Cooper**—Yes.

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

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

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

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

475 **Senator SHERRY**—I understand that.

476 **Mr Cooper**—It goes to what underlying funds there are and what the style of management is.

477 There are all the difficulties you get into as to what is the product is. Licensees are entitled to say,
478 'We've got a responsibility to understand the product.' You cannot just say: 'Well look, this one has
479 been licensed by APRA. Here you go.'

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

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

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

488 **Mr Cooper**—Yes, it is.

489 **Senator SHERRY**—Yes.

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

492 **Mr Cooper**—A lot of them do and some lists I have been shown have nearly 400 products on
493 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
494 range as to what licensees are doing. As we put in the conflicts paper, the remuneration model at the
495 moment often means that many financial advisers do not advise about industry funds. We are not
496 making any secret of that.

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

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

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

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

507 therefore the planner, the accountant or whoever cannot give advice.

508 **Mr Cooper**—This is where the shift that is happening in the industry at the moment between, in
509 effect, product related advice and fee for service really comes into being. If I am running a business
510 that is predominately fee for service then I might be happy to have industry funds on my approved
511 product list and charge fees that I negotiate with my clients as and when the opportunity arises.

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

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

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

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

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

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

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

530 **Mr Cooper**—That is right.

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

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

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

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

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

543 **Mr Cooper**—It is very important to make a very— **Senator SHERRY**—Because ASIC has the
544 power to do it and it is crook.

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

546 **CHAIRMAN**—Order!

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

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

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

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

569 a different world, I think.

570 **Mr Cooper**—Yes and no.

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

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

577 **Senator SHERRY**—There are differences.

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

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

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

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

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

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

591 **Mr Cooper**—Yes.

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

597 **Mr Cooper**—I am glad you raised that, because the whole tone of our shadow shopping work is

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

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

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

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

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

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

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

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

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

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

644 **Mr Cooper**—Yes.

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

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

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

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

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

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

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

663 **Mr Cooper**—Yes.

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

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

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

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

695 **Mr Cooper**—Yes.

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

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

700 representatives is much bigger.

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

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

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

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

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

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

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

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

724 **Senator SHERRY**—That is not much solace to the one in five poor old consumers out there who
725 were not included in the survey, which you say is representative. By my calculations there are
726 thousands of people who have been poorly advised, which is to be pretty gentle with the critique,
727 who simply do not know and never will find out probably, or if they do find out it will be years
728 hence. That is the difficulty.

729 **Mr Cooper**—We need to focus in a little on exactly what the problem is. Typically, what they
730 have been given is a perfectly good product. We are not talking about people who have had money

731 stolen from them or fraud or anything like that. We are basically in a territory where in one in five
732 cases the standard problem is that they have been recommended a product that is actually more
733 expensive in fee terms to them. There is nothing wrong with the product; it is just that they have
734 been given a product that actually is more expensive in fee terms.

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

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

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

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

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

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

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

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

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

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

756 **Senator SHERRY**—What is it?

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

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

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

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

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

769 **Senator SHERRY**—Yes.

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

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

777 **Mr Cooper**—Yes.

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

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

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

791 cash—

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

793 **Mr BAKER**—It is a long bow to—

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

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

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

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

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

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

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

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

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

812 **Mr BAKER**—Fees is one aspect.

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

820 of the day. I am not sure what else you can say.

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

823 **Mr Lucy**—I think we have done a lot for that. Firstly, we are in regular contact with the CEOs of
824 these organisations and many of them, particularly the banks and the major industry players, have
825 moved away from commissions. It is not our expectation that they will move entirely away from
826 commissions because there will always be some consumers that want to pay by way of commission.
827 From our perspective, it is quite reasonable that commissions remain in the background. We are
828 pleased to see that, on balance, the pendulum has moved so that there is now a greater willingness
829 for the providers to sell on the basis of the fee for service rather than the commission. Again, what
830 we are looking to see is competitive forces. For example, if a particular bank moves away from
831 commissions—and that is what attracts the consumers because they like that sort of a model—then
832 the other players that are simply sitting there with a commission-only model are going to have to
833 move, for competitive reasons. That is the very best model that you could get and it is happening.

834 **Mr BAKER**—Exactly.

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

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

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

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

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

846 **Mr Cooper**—There is.

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

849 **Mr Cooper**—I think the 50 per cent figure would surprise some people—that we have actually

850 got so far down the fee for advice continuum already.

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

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

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

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

866 **Mr Lucy**—It is a business decision.

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

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

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

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

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

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

879 **Mr Lucy**—No, I do not think you could generalise that. Our point with the commissions, and the

880 real issue of the paper to which Jeremy is referring, is that it is a real wakeup call for the CEOs. If
881 they choose to pay commissions, and they are entitled to do so, they need to know that there is a
882 much higher likelihood that their staff, their employees, will be giving bad advice. That is a
883 management issue for them. If they choose down the track to overlook that management and it
884 comes up in our surveillance, then we will nail them.

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

888 **Mr Cooper**—Yes.

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

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

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

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

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

900 **Mr Lucy**—Yes, and accountants.

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

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

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

909 **Mr Cooper**—Correct.

910 **Mr BAKER**—Also, the penalties for failure for a self-managed super fund is basically that

911 half of it is lost as a consequence; it is not—

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

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

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

915 **Senator SHERRY**—I understand that.

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

917 responsibility.

918 **Senator SHERRY**—Yes, the tax office, auditors. Have you seen the answers to questions on

919 notice that the tax office provided me about the internal investment average balances in self-

920 managed super funds?

921 **Mr Lucy**—No.

922 **Senator SHERRY**—I do not have it here, unfortunately. I just assumed that you would obtain

923 the sort of information that I have asked for— **Mr Lucy**—Our staff would, but you have directed

924 the question to us and we have not seen it.

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

929 **Mr Lucy**—Again, you are right to say it is the tax office. Could I suggest that \$200,000 is a bare

930 minimum for me to set up a self-managed fund, but for me to include my wife into it, there does not
931 need to be another \$200,000. You have to amortise the return against the costs which include audit
932 et cetera, so to add incremental members to the fund does not directly increase the asset pool that is
933 required.

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

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

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

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

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

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

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

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

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

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

958 **Mr Lucy**—It really is too early to tell what particular offences may or may not have been
959 committed. Certainly we are communicating with the investors as openly as we possibly can be. We

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

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

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

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

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

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

992 **Mr Lucy**—In the first instance it might be a friendship, Much of it is through ethnic groups
993 where a particular circle, be it a religious circle or an ethnic circle, encourage their colleagues and
994 friends to participate in this investment in which they have participated. It is human nature. When

995 you come across your friends, they all say, 'I've come across this greatest lawyer or greatest
996 accountant or greatest financial planner, you should all share in what I've found out.' It is just how
997 the community seems to work.

998 **Mr BAKER**—From a regulatory perspective, that group is very difficult to regulate. The major
999 concern would be the licensed planners who have gone against the recommended list and knew that
1000 what they were doing was purely for financial gain.

1001 **Mr Lucy**—That is why we have made it very clear that the advisers are part of our investigation
1002 and we will follow that through with a great deal of detail.

1003 **Senator MURRAY**—Have you checked with the tax office whereby any of these planners or
1004 advisers were also listed by the tax office under the mass marketed tax effective schemes
1005 investment? You might recall the settlement negotiated with the Senate and then carried through by
1006 the tax office that distinguished between sophisticated and unsophisticated investors and then
1007 identified the planners, accountants, lawyers and so on who had been involved in these things. It
1008 would be worth knowing if there were people who had been involved in both sets of activities,.

1009 **Mr Lucy**—That did come up at the estimates, where we were asked whether or not there were
1010 any tax agents—

1011 **Senator MURRAY**—By me.

1012 **Mr Lucy**—That is a work in progress for us now.

1013 **Senator MURRAY**—Good.

1014 **Ms BURKE**—Is anything happening against the licensed planners who have given advice in this
1015 regard?

1016 **Mr Lucy**—It really depends upon the outcome of our investigation. At the low level it would be
1017 a ban and at the high level it could be criminal prosecution.

1018 **Ms BURKE**—Will that be investigated? Are you going to follow that path down to see if—

1019 **Mr Lucy**—All of those areas will be investigated fully.

1020 **Ms BURKE**—Regarding the commissions area and the fairly high commission that these
1021 planners were getting, both licensed and unlicensed, do you see a need to change that law or to beef
1022 up how commissions are described? I thought that magical 10 per cent to which you were getting
1023 was pretty huge anyway; most commissions are in the area of 1.5 per cent to three per cent on
1024 average.

1025 **Mr Lucy**—There are a couple of ways of dealing with this, but firstly we need to recognise that
1026 like oils aren't oils, commissions aren't commissions. Quite appropriately there should be a higher
1027 level of commission for some products compared to simply getting something over the phone. I
1028 think that there is an argument to say to the industry that they should identify what they regard as a
1029 benchmark commission rather than us, a regulator, announce it. Then, in the disclosure statements,
1030 they should nominate to the extent that they move outside that band. For example, let us say the
1031 band is two per cent and your reference is 10 per cent, I would not say that is eight per cent; I would
1032 say that is five times higher.

1033 **Senator SHERRY**—I have one aspect of Westpoint that I wanted to touch on briefly. Was the
1034 appointment of KordaMentha Receivers of Keypoint Developments Pty Ltd as liquidators an ASIC
1035 decision?

1036 **Mr Lucy**—It is ultimately the court's decision but—

1037 **Senator SHERRY**—You would be involved in the process?

1038 **Mr Lucy**—Yes.

1039 **Senator SHERRY**—An issue that I have had raised with me by a victim is whether
1040 KordaMentha also act for some of the financial institutions, the banks, that are owed money? Is that
1041 your understanding?

1042 **Mr Lucy**—It would be my expectations, if not my understanding. There is a very small
1043 community of insolvency practitioners. You have a number of players that are already involved
1044 because of their other relationships with Westpoint, so they are obviously eliminated. Within that
1045 small community you have to deal with who is left.

1046 **Senator SHERRY**—What about the potential conflict though where KordaMentha are acting
1047 for a bank who would be first mortgagees in most cases, I assume?

1048 **Mr Lucy**—Probably a receiver, which would mean a floating charge. It may also mean that they
1049 have a specific charge but they would be in there as a receiver because of a floating charge.

1050 **Senator SHERRY**—Whatever moneys flow or are left over, it is first mortgagee first, usually a
1051 bank, and then whatever is left—if there is anything left—goes to the consumer. Do you see any
1052 conflict with KordaMentha working in respect to the bank and also being the general receiver?

1053 **Mr Lucy**—I will take that on notice because, for example, let us say company A and company B
1054 are both under the Westpoint family. I could imagine company A having a firm of receivers
1055 appointed and company B having that firm as liquidator, but I could not envisage company A
1056 having both the same firm acting as receiver and liquidator.

1057 **Senator SHERRY**—What about where a liquidator is not able to obtain any assets; how do they
1058 get paid in those circumstances?

1059 **Mr Lucy**—You then come back to the underlying basis for the assetless administration process.
1060 Where a liquidator is faced with essentially insufficient assets or, as you describe, no assets, then
1061 under the new regime they can come to us and we will fund them to do the reports.

1062 **Senator SHERRY**—Could that happen in this case?

1063 **Mr Lucy**—Yes.

1064 **Mr BAKER**—That will follow what you do in the legal process. The major concern that I have is
1065 what other mezzanine type property developments are out there that have the potential to cause just
1066 as much damage? How can we use this as an example of identifying what is happening out there?

1067 **Mr Lucy**—One of the difficulties which we all face is that we have an open-ended appeal
1068 decision with the Western Australian Court of Appeal. Once that decision is finalised, then we can
1069 recommend to the government that they need to look at amendments; or, if the decision goes in our
1070 favour, then we do not need to worry about that. We are all up in the air over that particular issue.

1071 **Mr BAKER**—Have you got ideas or interests in other plans that are currently out there?

1072 **Mr Lucy**—Other entities? Yes, we have. We have several that we are engaging with very
1073 closely.

1074 **Mr BAKER**—Very good; that is reassuring.

1075 **Senator SHERRY**—I have just a couple of matters relating to banks—away from Westpoint
1076 and super for a moment. Has ASIC examined recently, and if so when, the internal disputes
1077 procedures of banks?

1078 **Mr Lucy**—My recollection is that a similar question came up at estimates and we took that on
1079 notice.

1080 **Senator SHERRY**—If it did it probably came from me, but I cannot recall getting into this area.

1081 **Mr Lucy**—To the best of my recollection it did, including the issue of fees. We have that on
1082 notice. To the extent that you would like to expand on that with your own question on notice, we are

1083 happy to take it on board.

1084 **Senator SHERRY**—Has ASIC done any work on bank lending practices, bank lending
1085 standards, of recent times? I know it is mainly an APRA area.

1086 **Mr Lucy**—No. We have certainly looked at one bank on their lending practices to the
1087 Indigenous community.

1088 **Senator SHERRY**—I recall that.

1089 **Mr Lucy**—That was a particular vertical, but across the board, no.

1090 **Mr Cooper**—Other than reverse mortgages.

1091 **Mr Lucy**—Yes.

1092 **Mr Cooper**—The point is that it is quite clearly off our patch in that credit is not a financial—

1093 **Senator SHERRY**—What would you regard as being on your patch in respect to banks?

1094 **Mr Cooper**—We have certainly looked at reverse mortgages, but there are various species of
1095 those. It is really the conduct aspect of it, which is what we have been given under the legislation.

1096 **Senator SHERRY**—What about their internal dispute procedures? Every bank has their own
1097 internal consumer disputes mechanism and then there are, beyond that, other processes. Have you
1098 examined those recently?

1099 **Mr Cooper**—Not as far as I am aware, but we can take that on notice. Again, I think you will
1100 find that they are off our patch.

1101 **Mr Lucy**—It may be that I can help if we come back to that original question. It was asked by
1102 Senator Watson in February 2006, taken on notice and we provided the answers. When we met 10
1103 days ago you had not received all the answers through the minister's office. I am not sure if that has
1104 been read.

1105 **Senator SHERRY**—I am sure I have received them; I have not read them yet.

1106 **Mr Lucy**—I think you will find that is where the answers are.

1107 **Senator SHERRY**—Has ASIC got any particular budget allocation for resourcing of this area at
1108 the present time?

1109 **Mr Lucy**—No, it is part of our general activity. It is not a specific priority budget funding.

1110 **Senator SHERRY**—Is there any particular reason why it is not a specific priority? I get a lot of
1111 complaints about banks' activities. Whether they are legitimate complaints or not is another issue,
1112 but I do get quite a few issues referred to me about disputes with banks.

1113 **Mr Lucy**—To the extent that it is conduct that the banks undertake that is within our
1114 responsibilities under the Corporations Law, that is not an area that we are particularly pressed over.
1115 It is not an area that is a regular occurrence under our complaints.

1116 **Senator SHERRY**—Do you have any statistics on complaints in respect of banking activities?

1117 **Mr Lucy**—We can take that on notice. It has been pointed out to me that it is in our answer that
1118 we have provided.

1119 **Senator SHERRY**—I will have a look at those answers that you have on notice.

1120 **Senator MURRAY**—I want to go to a later issue. I am very interested in Mr Wood's remarks.
1121 Are you happy to go there?

1122 **Mr Lucy**—We certainly are.

1123 **Senator MURRAY**—It is not an unusual occurrence that once somebody feels free of the
1124 constraints they were formally under, they are a little more open than they otherwise might have
1125 been. We are dealing with an article in the *Australian Financial Review* of Thursday, 1 June 2006
1126 by Mr Peter Wood, who is now a senior law school lecturer at Deakin University. As we all know,
1127 he was a former executive director, enforcement, at ASIC. He struck me as a reputable, ethical
1128 person of considerable integrity. He writes about the new memorandum of understanding with the
1129 Commonwealth Director of Public Prosecutions. If I were to be asked to give a single line summary
1130 of what I thought his article amounted to, it was that he was critical. Perhaps before I dig a little
1131 deeper you might care to give me your views as to his views as spelt out in that article.

1132 **Mr Lucy**—The views that Peter Wood expressed are not consistent with the views of ASIC and
1133 I do not believe that they are consistent with the views of the Director of Public Prosecutions.

1134 **Senator MURRAY**—Are they consistent with the views he expressed internally before or are
1135 these news to you?

1136 **Mr Lucy**—There are a number of issues within his paper. The first issue is whether or not ASIC
1137 should have the right to take on a criminal proceeding as a result of our own determination; that has
1138 never been my view. My view is that the independence or the independent role of the
1139 Commonwealth Director of Public Prosecutions is extremely important. It is important for a
1140 number of reasons. One is that we have significant powers available to us in our investigation area.
1141 I think that if we had both those powers and also the power to undertake our own prosecution, then
1142 it may well be that parliament would look to minimise those powers, and I do not think that would
1143 be the right outcome. Of course, in essence, that clearly is a matter for government and for
1144 parliament as to how they balance those two priorities.

1145 As far as the working relationship with the Commonwealth Director of Public Prosecutions,
1146 inevitably there is a level of tension. I think if there was no tension on either side there would be a
1147 risk that either we would not be providing enough referrals or they would not be providing their
1148 own level of scrutiny. They have a role to play and we think that role is played well. There is a very
1149 high level of ongoing communication. In the last fortnight, our commission met with the director
1150 and his most senior staff for essentially half a day, working through some very significant hands-on,
1151 practical issues, including the state based and regionally based types of issues that we have in front
1152 of us, the challenges which we see coming down the pipeline and the challenges that the director
1153 sees as far as meeting our requirements. I think that there is a very effective and high level of
1154 interaction between the two agencies. I think that the Australian public is well served.

1155 **Senator MURRAY**—It seems to me that Peter Wood’s article reflects a high level of frustration
1156 that he experienced during his time at ASIC. I will give you a quote from that article:

1157 Events were heavily loaded against ASIC. It had a legislative duty to prosecute serious corporate crime but handed over
1158 responsibility for decision-making to the DPP. It would prosecute serious corporate crime only with the approval of the DPP.

1159

1160 So ASIC has signed up for more outsourcing of its prosecution decision making and has no indications, much less any
1161 guarantees, that the DPP will reduce the months of turnaround time for approval of charges. It is a disappointing result all
1162 round.

1163

1164 Yet it doesn’t have to be like this.

1165 He is saying that the DPP is slow, inefficient and lacks promptness in responding to ASIC briefs.
1166 Because this function has been entirely delegated across, not always appropriately, according to Mr
1167 Wood’s article, ASIC is losing the impact and the power of its investigations and recommendations
1168 to the DPP. What reflects on you, according to Mr Wood, is that you agree to the perpetuation of
1169 these sets of circumstances. What reflects on the DPP is that he allows these sets of circumstances

1170 to go on. If this was some outsider to whom we have not listened with respect and interest over
1171 many years, you might take a less than serious view, but this is almost like a former commissioner
1172 coming out and bagging a particular process. This is right at the crunch area of enforcement. What
1173 you have given me is a soothing response, but I do not feel soothed because the whistleblower is a
1174 person of repute.

1175 **Mr Lucy**—Of course Peter, during his term, also had the opportunity to renegotiate an MOU if
1176 he chose to, but obviously he did not choose to. Certainly in my experience with ASIC, including
1177 my term as deputy chairman, I cannot think of one instance where ASIC had a view that a matter
1178 should be prosecuted and the DPP did not support that view. There are margins as to when we are in
1179 the process of an investigation, where we are, of necessity, in dialogue with the DPP, and where we
1180 look at what might be appropriate charges. Fundamentally, as to whether or not we have a view as
1181 to a prosecution and they have a different view, that has not been my experience at all.

1182 **Senator MURRAY**—A numbers of people in ASIC, I presume including yourself, would have
1183 had a close and good relationship with Peter Wood. Has anyone from ASIC spoken to him since this
1184 article and said, ‘Well, what was in your head?’

1185 **Mr Lucy**—Spoken to me, yes.

1186 **Senator MURRAY**—Why didn’t you do something about it? What is your motive?’

1187 **Mr Lucy**—The widely held view within enforcement, including by Jan Redfern, is that the
1188 relationship in the new MOU is entirely appropriate. Jan was fundamentally involved in the
1189 negotiation of the new MOU. One of our most senior people, a director of enforcement, was also
1190 involved in the negotiation of the MOU. It does provide us with the ability to be able to undertake
1191 more straightforward and almost routine enforcement matters without referral. The real key is that
1192 for the more significant issues which ASIC take, both at the commissioner level and at the senior
1193 management level, we are of the view that the referral to the DPP is entirely appropriate.

1194 **Ms BURKE**—At one time we had a great discussion about Mr Vizard and the difficulties of the
1195 DPP in gathering information and all the rest of it. Would you say that the MOU has overcome
1196 some of the difficulties that have risen in that case?

1197 **Mr Lucy**—The difficulties with that case were not so much related to any relationship issue
1198 between ASIC and the DPP; much of it was to do with the lack of understanding in the broad
1199 consumer land out there as to the fact that the DPP did have a role. The DPP formed the same view
1200 that our independent counsel formed—namely, that we would not be successful in a criminal
1201 prosecution.

1202 **Ms BURKE**—Hypothetically, if you followed the line that Mr Wood put in his article, would
1203 that have resulted in a different outcome?

1204 **Mr Lucy**—Only if our view had been different to the DPP’s view, and in the case of Vizard it
1205 was identical. In the hypothetical, where we had a strong view that a matter should be pursued and
1206 the DPP took the view that it should not be pursued, the MOU provides mechanisms where that is
1207 brought to the chairman and to the director for communication. I have no expectation of it, but if I
1208 found myself in the position where the best advice that I had was that we should proceed and the
1209 director was of a contrary view, then I would elevate it. I do not have any expectation of that being
1210 the case, of all the experiences that I have had to date.

1211 **Ms BURKE**—In most cases do you get that separate legal advice?

1212 **Mr Lucy**—In many. I would not say ‘most’ because ‘most’ is a numeric sense. It is more the
1213 severity. Where a matter is significant, yes, we would almost invariably take independent senior
1214 counsel advice.

1215 **Ms BURKE**—Nowadays in the MOU, if there is a difference of opinion, you then override—

1216 **Mr Lucy**—It is elevated up to the two most senior office bearers.

1217 **Ms BURKE**—Then you two get to slug it out?

1218 **Mr Lucy**—Yes.

1219 **Senator MURRAY**—This article from a person who held such a senior position with ASIC, as
1220 executive director of enforcement, essentially puts a negative perception on the new MOU. It says
1221 to us and to the world at large, ‘Look, this thing is not going to solve the problem.’ My
1222 interpretation is that this essentially says that the DPP does not give enough priority to your cases, is
1223 far too slow and is far too conservative. At the end of the article he gives the example of the
1224 Victorian WorkCover Authority, with a rapid fire investigation, trial and conviction over a few
1225 months. It ends with the point: there is a lesson there for ASIC, the Commonwealth DPP and the
1226 Australian Competition and Consumer Commission. What I put to you is this: if your reassurance to
1227 the committee turns out to be not well based and future cases emerge where, after an investigation,
1228 ASIC is seen not to have had an action pursued appropriately, rapidly, efficiently and effectively,
1229 instead of the focus being on the DPP—which it was with the Vizard case; more than on you—the
1230 focus will be on you because you have a warning from somebody who was formerly a very high
1231 officer of ASIC.

1232 **Mr Lucy**—I accept that. I do not agree to the extent that that is a risk. Like anything in life there
1233 is always some risk out there, but the alternative is to give us the ability to be able to mount criminal
1234 action. That is a pretty serious decision. To counter the risk that Peter Wood has contemplated and
1235 that you have articulated, would be to give us the rights to undertake a criminal action.

1236 **Senator MURRAY**—Is there not a third way, and that is to toughen up the MOU? He says that
1237 one of the problems with the MOU is that it is still open-ended. Again I quote from the article:

1238 ‘There are no time commitments beyond an undertaking by ASIC to “refer a brief of evidence to the CDPP in a timely
1239 manner”, whatever that may mean.’

1240 **Mr Lucy**—Again, the MOU is a principle document. Like any MOU, it is a non-binding
1241 document; it is there to set a level of principles. Underneath that are some working targets. For
1242 example, your colleague Senator Ludwig asked a number of questions, I presume, of the DPP.

1243 **Senator MURRAY**—Could you give us the *Hansard* reference?

1244 **Mr Lucy**—It is AT68. The first is the time taken by the DPP to bring charges—and these are
1245 dealing with years ended 2002, 2003, 2004 and 2005—has gone from 10 to nine to seven to six
1246 months. The time taken by the DPP to formally bring a matter to a conclusion over the same period
1247 was 14, 13, 11 and six months. The time taken by the DPP to return the brief for no further action
1248 was 13, 18, 10 and six months. That is consistent with our own experience that the DPP is receptive
1249 to the need to treat us as a core client and to provide proper turnaround and proper service.

1250 **Senator MURRAY**—Will you be able to measure that in any way?

1251 **Mr Lucy**—Yes, we measure it very closely. We have every matter that is referred to the DPP on
1252 a spreadsheet, and that is part of the regular monthly liaison. Our staff go through with their staff
1253 every matter that is in the pipeline with the DPP, be it a referral or an action that is under way. We
1254 have those in stark relief in front of us.

1255 **Senator MURRAY**—My own experience of ASIC was like that of anyone; you are not free of
1256 criticism. Generally speaking, if you get into an investigation, you try and do it pretty thoroughly. It
1257 would be of tremendous harm both from a parliamentary and a community perspective if legislation
1258 which was set up for you to end or minimise common malfeasances in the corporate world were to
1259 falter because of a faulty relationship between yourselves and the prosecutors.

1260 **Mr Lucy**—All that our commission can state to you is that if we felt that that was in any way
1261 likely then we would meeting with the government to press that very firmly. That is not our
1262 experience and it is not our expectation.

1263 **Senator SHERRY**—I return to a question on notice relating to Westpoint applying for a licence.
1264 I refer to E43, question AT36. I asked whether they had applied for one and you said:

1265 No, Westpoint Finance Pty Ltd held an Investment Adviser’s licence ... from 27 June 1996 to 21 January 1999.
1266 ASIC has no record of Westpoint Finance Pty Ltd ever making an application for an AFSL, however it was an Authorised

1267 Representative ... for CGU Insurance Ltd ... during the period 4 February 2004 to 14 July 2004.

1268 As Westpoint was an authorised representative of CGU, could or did ASIC take any action against
1269 Westpoint at that time as an authorised representative of CGU?

1270 **Mr Lucy**—Was that a question on notice 10 days ago or at some earlier time?

1271 **Senator SHERRY**—This relates to the additional estimates of 16 February 2006. We got the
1272 answer in that batch last week and I have those in front of me.

1273 **Mr Lucy**—I will have to take that question on notice. I am not aware of whether or not we looked
1274 at the CGU issue.

1275 **Senator SHERRY**—According to ASIC's answer on notice, Westpoint Finance Pty Ltd were an
1276 authorised representative of CGU for a period of time. In those cases, can ASIC take action against
1277 the authorised representative because it was licensed through CGU?

1278 **Mr Cooper**—In relation to what? We will have to take this on notice. It could well be that that
1279 licence was in order to advise about and sell CGU insurance to people who invested in real estate.

1280 **Senator SHERRY**—Take that on notice. It does not make that clear.

1281 **Mr Cooper**—It does not.

1282 **Senator SHERRY**—Is this a possible loophole for an unlicensed adviser effectively to become
1283 licensed?

1284 **Mr Cooper**—Again, taking it as a hypothetical question, no. The licensee takes full
1285 responsibility for what the authorised representative does, so we do not—

1286 **Senator SHERRY**—Take a hypothetical: couldn't an entity that has been given an authorised
1287 representative's licence mislead a consumer by quoting the licence number but it is in fact very
1288 much restricted in the activity in which it can engage?

1289 **Mr Cooper**—That is possible but you would not find too many licensees tolerating that.

1290 **Senator SHERRY**—Anyway, have a look at those issues I have raised. There is another issue is
1291 relating to Westpoint. I put some questions on notice back in February and you provided me with a
1292 copy of a letter from Ian Campbell, the then parliamentary secretary, which he sent to the WA
1293 minister for consumer affairs, Mr Kobelke, on 3 February 2002 in respect of Westpoint. The letter

1294 from Senator Campbell to the minister in WA said:

1295 Thank you for your letter of 21 August 2002 to the Treasurer concerning the use of mezzanine financing to raise funds for
1296 property development. I am responding on the Treasurer's behalf. You would be aware that the Australian Securities and
1297 Investments Commission, ASIC, especially through its Perth office, has been in regular contact with your department
1298 concerning this issue over a number of months. Further, upon receiving your letter, the Commonwealth Treasury also raised
1299 your concerns with ASIC. ASIC advised the Treasury that it is carefully examining this issue and has been obtaining
1300 comprehensive legal advice on the regulatory status of these property financing schemes to which your letter referred.

1301 It is still not entirely clear to me, from the answers provided, exactly what ASIC was doing at that
1302 time. What were you examining back in late 2002 and early 2003 to which the parliamentary
1303 secretary is referring?

1304 **Mr Lucy**—My notes indicate that you are quite right: there was dialogue between the former
1305 Parliamentary Secretary to the Treasurer and the Hon. John Kobelke in Western Australia in early
1306 2002 and also in about August-September 2002. We obtained senior counsel advice around that
1307 time as to what our jurisdictional options were, which led us to commence action in the Supreme
1308 Court of Western Australia in 2004.

1309 **Senator SHERRY**—Wasn't an alternative to recommend to the government to change the law
1310 to make it clear at that time? You had received warnings in 2002; you received legal advice in early
1311 2003—

1312 **Mr Lucy**—At that stage both the minister in Western Australia and ASIC separately undertook
1313 consumer warnings as to the issues regarding promissory notes greater than \$50,000. Bearing in
1314 mind that the decision to deliberately carve out promissory notes greater than \$50,000 was a
1315 deliberate decision taken by parliament. That position existed. At that stage, as we have said in
1316 earlier forums, the complaints which we received were to do with the jurisdictional issues; they
1317 were not to do with business plan issue or business model issues. People were not suffering
1318 financial hardship at that time through their investments.

1319 **Senator SHERRY**—That you knew of.

1320 **Mr Lucy**—That we knew of.

1321 **Senator SHERRY**—The letter from Senator Campbell says, 'If required, the government will
1322 consider any recommendations ASIC makes to improve consumer protection in this area.' Did
1323 ASIC seek at that time to change the law to take clear jurisdictional control of promissory notes?

1324 **Mr Lucy**—No. We took the matter to court. At that stage you do not know whether or not the law
1325 needs changing until you test it in the court.

1326 **Senator SHERRY**—You do; you can get legal advice.

1327 **Mr Lucy**—We did. The legal advice was that we would be successful, and we were not fully
1328 successful.

1329 **Senator MURRAY**—If you were successful then you would not need to change the law; that is
1330 your point?

1331 **Mr Lucy**—Correct. Indeed, the whole Westpoint saga would have played out quite differently.

1332 **Senator SHERRY**—Wouldn't it have been quicker to have sought to change the federal law
1333 back in early 2003? That would have been quicker in terms of a process to cover this, wouldn't it?

1334 **Mr Lucy**—In hindsight. But again, typically, the way that parliament and the government of the
1335 day work is that it is an issue identified that is before the courts, so we wait for the courts to make it
1336 clear.

1337 **Senator SHERRY**—But it was not before the courts at that moment. You apparently received
1338 advice that you did have jurisdiction—

1339 **Mr Lucy**—As explained at Senate estimates, it was not clear-cut advice. It was advice that was
1340 quite complicated, it was really almost self-serving to get us to a point. Ultimately, that was not
1341 successful.

1342 **Senator SHERRY**—I do not understand with respect to the activity that was occurring. If you
1343 had said to government, 'Look, we want this matter made very clear very quickly,' it seems to me
1344 reasonable and quite conceivable that such a change in the law would have got through the
1345 parliament by the end of 2003—it would not have been significant—and some people would have
1346 been saved a lot of grief.

1347 **Mr Lucy**—Legislation cannot guarantee that there will not be failures. Parliament specifically,
1348 for whatever reason, chose to carve out the promissory notes of greater than \$50,000.

1349 **Senator SHERRY**—After that there were warnings coming from the WA minister, the
1350 responsible minister, and the department, a number of warnings to the Treasurer, then referred to
1351 Senator Campbell, to ASIC direct nationally and to your local office, that there was a practical
1352 problem on the ground in WA.

1353 **Mr Lucy**—Yes.

1354 **Senator SHERRY**—The government was considering it. The parliamentary secretary's letter
1355 says: 'We have received advice from you, we have received advice from Treasury, and I expect to

1356 shortly receive advice from ASIC after they have fully considered the issue.’ You were obviously
1357 considering it. The letter goes on to say:

1358 If required, the government will consider any recommendation ASIC makes to improve consumer protection in this area.

1359 Your preferred action was to take court action?

1360 **Mr Lucy**—Correct.

1361 **CHAIRMAN**—I will ask questions relating to a copy of a submission I have received to the
1362 Corporate and Financial Services Regulation Review of April 2006. I will get your response to
1363 some views that are expressed in the submission, which is from a small boutique financial adviser.
1364 To summarise the best I can without losing the sense of what he is saying, he says: ‘Compliance
1365 under FSR has turned into a monster for small dealers. ASIC policy statements by
1366 themselves are a forest of trees and there is a wealth of other compliance obligations and
1367 compliance burdens.’ He then says: ‘Form has become the requirement rather than substance. This is bad for
1368 consumers whose objective is good advice. Consumers want substance and not form.’ He then goes on to say: ‘The
1369 huge fundamental flaw in FSR compliance is that it is focused on process and not output. FSR seeks to regulate for good
1370 advice or at least regulate against bad advice. As FSR is constructed, the regulator could use FSR to focus on that
1371 objective but instead ASIC seeks to focus its regulatory activity on process and fails to focus on policing advice output.’
1372 What is your response?

1373 **Mr Cooper**—We are just trying to guess the author! That is very familiar. Of course, it is a
1374 policy question. One of the clear messages we try to give is that it is not about paperwork. It should
1375 not be about large volumes of paper and process. Coming back to the legislation, the author of that
1376 is correct in the sense that the legislation does not actually impose that high a benchmark. When you
1377 look at the various elements of what an advisor has to do: the advisor has to know the product, know
1378 the client—you can scarcely think of a regulatory regime that would not require those things—and
1379 has to have a reasonable basis for giving advice that is appropriate for the client. That is a pretty low
1380 hurdle, not exactly a pole vault bar, that you have to jump over. In a sense the industry is lucky that
1381 the legislation does not say that you actually have to give good advice because I am not sure that we,
1382 as a regulator, are actually qualified to judge whether advice is good or not. I think that is a policy
1383 platform that obviously was not taken up by the government.

1384 **CHAIRMAN**—He also says: ‘The current system is very anti advice-focused advisers who
1385 tailor advice to individual clients and very pro the product distribution model of the big financial
1386 planning subsidiaries or the big product providers.’

1387 **Mr Cooper**—I definitely know who the author is now!

1388 **Senator MURRAY**—So do I!

1389 **Mr Cooper**—Again there is an element of truth. We have to be realistic about the industry that is
1390 before us. A lot of times people say, ‘Does ASIC want to restructure the industry?’ The answer to
1391 that is no, we are working with the industry that we have got. There is no question that it was borne
1392 out of a product-producing and product-selling environment.

1393 **Senator MURRAY**—One of the criticisms is not that ASIC have created this but that ASIC
1394 allowed it to be created. The lawyers and the funny fellows who thought they would create some
1395 obfuscation in this area in the companies developed these mountains of paper, I think quite
1396 cynically, in the hope that consumers would say, ‘Oh that’s all too hard,’ push it aside and just look
1397 into the baby blues of the planner and say, ‘Tell me what I should do.’ I think there was a malicious
1398 element to it. Perhaps the criticism is that you did not punch hard enough quick enough to stop that
1399 practice mushrooming.

1400 **Mr Lucy**—There has to be a dimension also that parts of the industry were also hoping to push
1401 back on parliament so that parliament would unbundle some of the legislative requirements.

1402 **Senator MURRAY**—I think the criticism that you are responsible for the creation of these giant
1403 documents is often unfair. But the criticism that you moved a little slowly to rectify it might not be
1404 as unfair.

1405 **CHAIRMAN**—Another representation I have received is from a person who is complaining
1406 about almost a doubling of the administration fee for members receiving allocated pensions from
1407 UniSuper. He says, in his case, the administration levy has gone from \$1,800 to some \$1,550 in
1408 addition to a further \$4,000 per annum in funds management and other administration charges. I
1409 think he has written to the board of trustees of UniSuper but without any favourable response. He is
1410 complaining that there is no machinery for hearing or investigating complaints on these sorts of
1411 issues. He says that in reality, any official or industry bodies are generally precluded from
1412 considering complaints on fees.

1413 **Mr Cooper**—He is right in the sense that, if there has not been misleading conduct or lack of
1414 disclosure and so on, the fee itself is not something we can say is too high or not high enough.
1415 Having said that, that is why we have fee information on the website FIDO, where you can go and
1416 compare fees for over 1,000 funds now, and why we do some of the work about shadow shopping to
1417 look at correlations between fees and poor advice and so on. Taking the chairman’s analogy of the
1418 bull’s eye right at the centre of it, he is right: there is no mechanism where you can simply say, ‘I
1419 want redress because these fees are too high.’

1420 **CHAIRMAN**—So the advice to him would be to move his pension to a different fund.

1421 **Mr Cooper**—Subject to getting good switching advice, yes.

1422 **CHAIRMAN**—The other issue I wanted to raise was in relation to a company called S8 which is

1423 a major tourism company in Queensland that has been under investigation by the Queensland
1424 department of fair trade in relation to various allegations. The allegation that has been made to me is
1425 that S8 has not disclosed to investors in the company the fact that it is being investigated. Are you
1426 aware of that situation?

1427 **Mr Lucy**—We would have to take it on notice. To the extent that the background is reliable, that
1428 may well be an event that they would have disclosed to us and we will tie the ends together.

1429 **CHAIRMAN**—I understand the department of fair trade investigation has received some
1430 exposure in the Queensland media and also in the Queensland parliament.

1431 **Senator MURRAY**—Senator Wong, are you going to be raising the issues of the new auditors
1432 enforcement area in your questions?

1433 **Senator WONG**—Probably not.

1434 **Senator MURRAY**—I have a single question in that area. As you know, the audit standards
1435 have now been made law.

1436 **Mr Lucy**—In a few weeks.

1437 **Senator MURRAY**—In a few weeks, yes. There have been some highly speculative, and
1438 perhaps hopeful, remarks from some people in the industry that this is going to see a 20 to 30 per
1439 cent increase in audit fees because there will be great compliance costs and they will have to pass
1440 them on. I saw that legislation, I am aware of what the audit standards do and I find that all highly
1441 overblown—and, if it were to occur, I would be alarmed. You may want to take my question on
1442 notice. Are you alert to the issue and, if you are alert to the issue, what will you do to monitor that
1443 kind of price gouging that may use this legislation as an excuse to achieve?

1444 **Mr Lucy**—We are very much aware of the issue and our views are very similar to what I
1445 understand yours to be. We are undertaking ongoing surveillance of the auditing profession. We
1446 have indicated in previous forums that this financial year we are continuing our review of the big
1447 four and we are also now looking at second tier firms. To the extent that we have any suggestion of
1448 complaints of any attempt to gouge or inappropriately price audits, we will have regard to that.
1449 Ultimately, companies have the opportunity to look after themselves. Audits are, nevertheless,
1450 somewhat competitively priced, and there is a free market as far as the audit service is concerned.

1451 **Senator MURRAY**—My concern is not the big consumer of audit services. I agree with you:
1452 they are big enough and ugly enough to look after themselves. My concern is small- to
1453 medium-sized entities might be conned that the changes to the law to make pre-existing audit
1454 standards—because it is largely that, with some modifications—enforceable at law result in such
1455 high compliance costs that they will need to pass them on. Therefore, small- and medium-sized

1456 entities that would not know how to counter that might be misled. I wonder if you are thinking of
1457 guidance notes or that sort of thing.

1458 **Mr Lucy**—We will respond to any suggestion of that being played out in the marketplace,
1459 including through industry groups such as company directors and so on, to make sure that people
1460 understand that it would be quite mischievous for auditors to increase their fees on that basis. The
1461 other point is, as Jeremy has just pointed out to me, the ACCC, but I think that we would be alert to
1462 it well before the ACCC if we saw it coming through either complaints and/or from our surveillance
1463 activities.

1464 **Senator WONG**—I would like to ask a couple of questions about the additional funding that you
1465 received in the most recent budget—\$30 million each year over the forward estimate period. Is that
1466 correct?

1467 **Mr Lucy**—Yes.

1468 **Senator WONG**—As I understand from the budget papers, that is additional to the additional
1469 funding you sought and received for James Hardie and HIH.

1470 **Mr Lucy**—That is correct.

1471 **Senator WONG**—What will this be used for? In particular I would like to know what
1472 ‘exceptional matters of significant public interest’ means. That is the way in which the budget
1473 papers describe the use of these funds.

1474 **Mr Lucy**—It is difficult to know how this is going to play out. There are a number of
1475 requirements that need to be met before we can access those. The first difference between the way
1476 that we have looked at these issues in the past, compared to going forward, is that the calculation of
1477 cost includes our own investigation cost as well as enforcement activity costs. To the extent that our
1478 accumulated cost exceeds \$1.5 million, we are able to access that fund. There are other certain
1479 particulars that we need to address to satisfy ourselves—for example, the community interest issue.

1480 **Senator WONG**—Regarding the calculation of costs, one of the requirements in terms of
1481 accessing the fund is that your investigation costs exceed \$1.5 million.

1482 **Mr Lucy**—All costs, the agency costs, which includes our investigation not just our enforcement
1483 costs.

1484 **Senator WONG**—What was the previous position?

1485 **Mr Lucy**—Previously it was just essentially enforcement costs.

1486 **Senator WONG**—Where did you fund investigation previously?

1487 **Mr Lucy**—Out of our business as usual funding. Take Westpoint: if Westpoint reached the point
1488 where—

1489 **Senator WONG**—When you said previously ‘just enforcement’, you were referring to what?

1490 **Mr Lucy**—HIH—

1491 **Senator WONG**—HIH and James Hardie?

1492 **Mr Lucy**—Correct. OneTel—

1493 **Senator WONG**—So the additional allocation for HIH and James Hardie that you sought in the
1494 budget process was for enforcement costs.

1495 **Mr Lucy**—Correct.

1496 **Senator WONG**—And you had to fund all investigation internally?

1497 **Mr Lucy**—Yes, to the extent that there was investigation work in those, it was funded with our
1498 business as usual—

1499 **Senator WONG**—As I recall, your previous evidence was that there was quite a lot of
1500 investigation costs, which is why you went back to the government.

1501 **Mr Lucy**—Yes. To the point that our costs or our outlays exceed \$1.5 million and subject to the
1502 chairman of ASIC being satisfied that the criteria, including the public interest criteria, have been
1503 met we are able to draw against that funding amount.

1504 **Senator WONG**—Up to \$30 million?

1505 **Mr Lucy**—In aggregate \$30 million per annum.

1506 **Senator WONG**—In aggregate what? All investigation—

1507 **Mr Lucy**—No, there can be no single investigation/enforcement outcome that can exceed \$20

1508

1509 million. The overall cap is \$30 million, but for an individual matter the cap is \$20 million.

1510 **Senator WONG**—Does that include enforcement and investigation costs?

1511 **Mr Lucy**—Yes.

1512 **Senator WONG**—What was HIH in total—enforcement and investigation?

1513 **Mr Lucy**—I think the aggregate funding for enforcement is \$28.2 million.

1514 **Senator WONG**—That does not include investigation.

1515 **Mr Lucy**—Correct.

1516 **Senator WONG**—So, in fact—

1517 **Mr Lucy**—Having said that, the investigation—

1518 **Senator WONG**—Let me finish, Mr Lucy. If the threshold or the limit is \$20 million for any

1519 investigation or enforcement, HIH would be patently over that limit?

1520 **Mr Lucy**—To the extent that you relate to the \$20 million, that is quite right. The point that I was
1521 trying to get in quickly on is that our investigation costs in HIH were minimal because of the
1522 referral from the royal commission. Having set the parameters in place—the \$20 million and the
1523 \$30 million—that still does not prohibit ASIC going back for specific funding. This is an attempt to
1524 provide some machinery where the normal course of investigation and enforcement activities
1525 undertaken by us does not need to be referred back on a yearly basis to the

1526 government.

1527 **Senator WONG**—Which is what you have had to do to date.

1528 **Mr Lucy**—Correct.

1529 **Senator WONG**—The normal course of investigation and enforcement had to go back to
1530 government for additional funding.

1531 **Mr Lucy**—For significant items, yes, we have.

1532 **Senator WONG**—This is significantly more than you received for HIH, OneTel and James
1533 Hardie.

1534 **Mr Lucy**—Significantly more?

1535 **Senator WONG**—Yes.

1536 **Mr Lucy**—In aggregate, that is four years times \$30 million.

1537 **Senator WONG**—For James Hardie you did not get anywhere near \$30 million.

1538 **Mr Lucy**—No.

1539 **Senator WONG**—In 2005-06 you got \$3.4 million for James Hardie and \$3.9 million for
1540 OneTel. In 2003-04 I think you got \$17.5 million in total for HIH, and then another supplementary
1541 funding of \$2.5 million the year preceding that. Is that right?

1542 **Mr Lucy**—Truthfully, I was not as well prepared for this meeting as I was for Senate estimates.
1543 My reading of the HIH is that funding for '03-04 was \$17.5 million and '04-05 was \$10.7 million,
1544 which in aggregate is \$28.2 million. We then went to the government to say that we wanted that
1545 spread over three years and not two. The same total is \$28.2 million, but the allocation was \$8
1546 million in '03-04, \$8.658 million in '04-05 and \$11.54 million in this financial year.

1547 **Senator WONG**—This is quite a significant increase in funding, up 25 per cent on your existing
1548 budget allocation for 2006-07 as against the previous financial year. I think it is an average of 23 per
1549 cent over subsequent years against the previous forward estimate period.

1550 **Mr Lucy**—It is a significant amount.

1551 **Senator WONG**—You have said this enables you to go back to the government for your normal
1552 enforcement processes.

1553 **Mr Lucy**—No—

1554 **Senator WONG**—Sorry, this prevents you from having to go back. I am interested in finding out
1555 what haven't you been doing before this \$30 million was allocated? If you need it now, presumably
1556 there were things you previously needed it for.

1557 **Mr Lucy**—No, previously what we required funding for we either took out of our business as
1558 usual allocation or we sought specific funding.

1559 **Senator WONG**—What did you divert funds from through your business as usual? What got
1560 fewer resources in order to fund these activities?

1561 **Mr Lucy**—The agency is involved in a myriad of activities, from the collection of revenue to the
1562 maintenance of a database, to consumer protection issues, to enforcement. It is not a matter of
1563 saying what did we not do; it is a matter of how the commission allocated the priorities across the
1564 budget. I cannot speak for previous commissions, but the commissions that I have been involved in
1565 have always felt and remain comfortable that the allocation of funding that we have given to
1566 enforcement has been necessary and sufficient for enforcement to do what it needs to do.

1567 **Senator WONG**—Hang on, Mr Lucy—with respect, you cannot have it both ways. You have a
1568 25 per cent increase in your funding for your normal enforcement activities. You have said to me,
1569 'We've previously covered that either by going to government for additional enforcement funding
1570 on a number of large cases, and our investigation and other additional enforcement funding was
1571 allocated from business as usual.' Which were the areas that you de-prioritised?

1572 **Mr Lucy**—Again we perhaps need to address your underlying premise. You are assuming that
1573 \$30 million is a calculated figure, which is how you are arriving at your 25 per cent increase. That is
1574 not the case at all. The government had the option of saying, 'Okay, we'll give you an uncapped,
1575 unlimited amount for enforcement and that might amount to'—

1576 **Senator WONG**—It is too much, is it, Mr Lucy?

1577 **Mr Lucy**—Who knows? We do not know. The alternative is that they could have made it
1578 uncapped and we might have drawn down \$10 million. There was dialogue between Treasury and
1579 the Department of Finance and Administration as to whether or not it should be capped. If it was to
1580 be capped, and one could understand the governance reasons for it to be capped, then I expect that
1581 they went through the process to say, 'Let's make it a significantly large amount so that we actually
1582 deal with the issue.'

1583 **Senator WONG**—What did you ask for?

1584 **Mr Lucy**—Our initial approach was that we felt that it should be uncapped, that it should be a
1585 contingency fund of whatever was required for us to access. That was initially approved but then the

1586 view came back on the governance grounds that that was not prudent. The figure that was put to us
1587 was \$30 million, and we accepted it.

1588 **Senator WONG**—How much more did you ask for for HIH than you got?

1589 **Mr Lucy**—I would have to take that on notice but, to the best of my knowledge, for all of those
1590 matters, whatever we have sought, we have received.

1591 **Senator WONG**—You initially asked for an uncapped amount, and they came back with \$30
1592 million.

1593 **Mr Lucy**—It was not as quick as you describe it but, yes, that was the essential outcome.

1594 **Senator WONG**—I am sure it was a lengthy process. It is a bit confusing. On the one hand you
1595 say, ‘Don’t look at a 25 per cent figure, because that is only the notional amount,’ then on the other
1596 hand you say, ‘We actually wanted an uncapped amount.’

1597 **Mr Lucy**—That is right.

1598 **Senator WONG**—I will come back to my original question: what were the business as usual
1599 operations which had to be de-prioritised in order to enable investigation of a number of these major
1600 cases such as HIH?

1601 **Mr Lucy**—I come up with the same answer: I do not believe that there were any matters which
1602 we should have been undertaking that we were not because of our funding.

1603 **Senator WONG**—It is a magic pudding, is it, Mr Lucy?

1604 **Mr Lucy**—It is a matter of having a budget and operating within that budget by making
1605 allocations. The point with the \$30 million figure was very much also to do with the fact that, as an
1606 independent agency, we thought it was desirable for us to be able to fund our own issues without
1607 having to go to the government to seek funding.

1608 **Senator WONG**—Let us turn it around. What is the additional work you say you will now be
1609 doing?

1610 **Mr Lucy**—We have noticed an increasing demand on our enforcement resources, and our
1611 expectation is that these will continue to increase. If we look at the pipeline that we have in front of
1612 us, we have substantial matters on foot and we have substantial matters potentially in the
1613 background and these will be very resource consuming.

1614 **Senator WONG**—You are not able to tell me, through your reallocation of priorities, which of
1615 the business as usual areas you diverted resources from in order to manage, for example, HIH,
1616 OneTel and James Hardie?

1617 **Mr Lucy**—No, but we received funding for the enforcement work for that.

1618 **Senator WONG**—But not investigation.

1619 **Mr Lucy**—All of our investigation work has historically been part of our business as usual

1620 activity. **Senator WONG**—I am not clear. If you get a 25 per cent increase in funding, surely you

1621 should be telling me, ‘We’re going to be doing a lot more work.’

1622 **Mr Lucy**—I think that we moved away from that 25 per cent figure.

1623 **Senator WONG**—Yes, because you wanted an uncapped amount!

1624 **Mr Lucy**—I do not know if it is 25 per cent or one per cent or none.

1625 **Senator WONG**—But you sought an uncapped amount.

1626 **Mr Lucy**—It is hypothetical.

1627 **Senator WONG**—No, it is in the budget papers.

1628 **Mr Lucy**—The \$30 million of course is in the budget papers; to the extent that we draw down on
1629 it is entirely hypothetical.

1630 **Senator WONG**—What will public interest be? What is the criteria?

1631 **Mr Lucy**—We have not dealt with that at the commission level. One would look at examples of
1632 Westpoint to say, ‘Is that a matter of public interest?’ Clearly it is.

1633 **Senator WONG**—Who is determining it? Is it the government or ASIC?

1634 **Mr Lucy**—Me, ASIC, the commission. For example, there are activities such as section 50

1635 recoveries which we could undertake that might be quite expensive. Quite properly we should
1636 determine whether or not indeed it is in the public interest for us to undertake that.

1637 **Senator WONG**—Are you going to put those into some guidelines? Will there be guidelines
1638 associated with the drawdown of funds that flesh out this statement in the budget papers,
1639 ‘exceptional matters of significant public interest’?

1640 **Mr Lucy**—There is a flip side to that. Clearly we are going to have some guidelines. To the
1641 extent that we do not want the people who we are litigating against to be able to use those guidelines
1642 against us, I am not sure that is particularly constructive.

1643 **Senator WONG**—How can they use them against you?

1644 **Mr Cooper**—By only being a little bit naughty and coming under the radar.

1645 **Senator WONG**—There are two things here. You are not only going to enforce using these
1646 funds, are you?

1647 **Mr Cooper**—Of course not.

1648 **Senator WONG**—So, Mr Cooper, your position is untenable, because people are not going to
1649 not be naughty because you might go to Treasury for the additional \$30 million as opposed to doing
1650 your current enforcement activities. Surely this is not just a discretionary decision for you, Mr Lucy,
1651 without any kind of clear criteria. Is ASIC going to develop internal guidelines that set out what an
1652 exceptional matter of significant public interest would be?

1653 **Mr Lucy**—Clearly we will. We have not reached a decision as to whether we will make it
1654 publicly available, for example, on our website.

1655 **Senator WONG**—When will you develop them?

1656 **Mr Lucy**—It does not kick in until July and then we need to reach the threshold.

1657 **Senator WONG**—What do you mean? Do you mean on the \$1.5 million?

1658 **Mr Lucy**—Yes. It is something that is in front of us. We have had quite a level of discussion
1659 internally including, for example, our business planning within the enforcement directorate, as to
1660 how we are going to account for costs and those sorts of things. There is quite a bit that is in front of

1661 us but we are working on it.

1662 **Senator WONG**—I am sure at the next estimates we will be keen to see what these guidelines
1663 are.

1664 **Mr Lucy**—Good.

1665 **Senator WONG**—I had a discussion with Mr Cooper about the business judgment rule at Senate
1666 estimates. I do not propose to go back over it other than to say there is one area that I do want to
1667 address, and that is looking more closely at Mr Pearce's discussion paper. The business judgment
1668 rule which is flagged—and I place it no higher than that—is not the limited BJR which was referred
1669 to in Mr Beerworth's submission about which Mr Cooper answered questions before this
1670 committee. It is in fact a far broader BJR which would have the effect of making any obligation
1671 under the Corporations Law subject to a business judgment rule, including the duty not to trade
1672 whilst insolvent. Does ASIC have a view about enforcement difficulties which may arise from
1673 allowing the existing duties in the Corporations Law to be affected to such a degree?

1674 **Mr Cooper**—The proposal that has been put forward is no more than that. It is merely a brief
1675 statement of a hypothetical, possible proposal to amend the act. Given that the business judgment
1676 rule has a number of elements to it, including that you have to be acting in good faith and so on, our
1677 position is one of agnosticism, if you like. We simply do not see how it would actually function.
1678 That is not surprising in the sense that a proposal like that is a complex thing that needs to be
1679 worked through. The consultation paper is nothing more than a series of proposals, and we are
1680 looking forward to understanding how a proposal like that might work.

1681 **Senator WONG**—There is one thing I do not understand. You were quite fulsome in your
1682 opposition to a suggestion that section 181 have a business judgment rule added to it, and I actually
1683 accept the evidence on that. It seems to me reasonably cogent. What is flagged—and I accept it is
1684 only a proposal but you are the enforcers—is a far wider business judgment rule to all duties in the
1685 Corporations Law. If you see enforcement difficulties arising from a specific amendment to section
1686 181, including a business judgment rule, surely when it comes to enforcement you would have even
1687 greater concerns about a business judgment rule which applied across the entirety of the duties in
1688 the Corporations Law?

1689 **Mr Cooper**—Yes, if there is a suggestion that it is somehow wider. You explained quite rightly
1690 that the proposal is that it apply to more situations but, if there is a suggestion that the rule itself is
1691 somehow different, our position is that we do not support that.

1692 **Senator WONG**—Again this is only in the proposal, but the rule sets out four components: the
1693 director has to act in a bona fide manner, within the scope of the corporation's business, reasonably
1694 and incidentally to the corporation's business, and for the corporation's benefit. It does not include,

1695 for example, what is in the current BJR at 180, that a director should not have a material dual
1696 personal interest in the subject matter of the judgment. I would have thought ASIC would have
1697 some concerns about a business judgment rule which enabled directors who had a clear personal
1698 interest in the decision they made to be not barred from utilising that defence.

1699 **Mr Cooper**—That is one aspect of it. A material personal interest is actually quite a high
1700 threshold. When you think of the myriad decisions that a board of directors make, it is not common
1701 for such a high threshold to have been reached. It is much more than having an interest in it. A
1702 material personal interest is actually quite a large hurdle to jump over.

1703 **Senator WONG**—You are comfortable with it being removed?

1704 **Mr Cooper**—Again, you are asking me policy questions about an as yet—

1705 **Senator WONG**—Frankly, you put a very clear policy view—one I happen to agree with—in

1706 previous evidence. I am asking you essentially the same set of questions.

1707 **Mr Cooper**—Not really. We came along to a specific hearing about corporate responsibility.
1708 Here you are asking me to comment on effectively what might be a government law reform
1709 proposal.

1710 **Senator WONG**—Ignore the government law reform. Would you have any enforcement
1711 concerns if there were a business judgment rule which applied to every duty in the Corporations
1712 Law?

1713 **Mr Cooper**—Yes, for the same reasons as we said at the other hearing.

1714 **Senator WONG**—There are defences as to insolvent trading which exist in the statute. Has
1715 ASIC been asked to advise on or have you turned your mind to how the BJR would interact with the
1716 existing specific defences in the Corporations Law?

1717 **Mr Cooper**—This is a perfect example of just the sorts of machinery questions that we would
1718 need to go through in working out whether something like this would—

1719 **Senator WONG**—Have you been asked for advice?

1720 **Mr Cooper**—Not yet, no.

1721 **Senator WONG**—Have you been asked for advice as to the enforcement impact of anything in
1722 the discussion paper?

1723 **Mr Cooper**—Not that I am aware of, but we could take that one on notice.

1724 **Senator WONG**—Does ASIC have a view about the possibility of a single director company by
1725 resolution disapplying some of the director's duties provisions in the Corporations Law?

1726 **Mr Cooper**—I think it would be fair to say that we simply do not understand what is the
1727 underlying motivation for that proposal.

1728 **Senator WONG**—It is sort of like a personal contracting out of the act, is it not?

1729 **Mr Cooper**—We do have some reservations about it. The paper is a collection of proposals,
1730 some of which have been put forward by interested parties and some of which are government
1731 proposals. We will wait and see.

1732 **Senator WONG**—I am glad Mr Lucy nodded when I commented on personal contracting out. I
1733 understand that Senator Murray has already dealt with the MOU issue, so I will not retrace that.
1734 Mr Lucy, in the context of this hearing I want to draw your attention to a question on notice, AT20,
1735 that you responded to through the additional estimates in relation to the history of the section 19
1736 issue.

1737 **Mr Lucy**—Yes.

1738 **Senator WONG**—When you went back to Treasury and asked about the ability to improve your
1739 powers.

1740 **Mr Lucy**—I do recall that discussion.

1741 **Senator WONG**—The answer to the question on notice is, 'A history of a request to Treasury to
1742 amend the ASIC Act to enable ASIC to compel a person to provide a witness statement in certain
1743 circumstances was not raised at the PJC hearings in September 2005.' I did ask you specifically
1744 whether we could have a copy of the proposed amendments and I also want to know the history of
1745 the request to Treasury and the process of that. Could you take that on notice in this hearing?

1746 **Mr Lucy**—We will.

1747 **Senator WONG**—I do have a question about the Vizard matter, which has been in the press a
1748 little. I note there are no current charges or any suggestion of that other than what has been in the
1749 media at this stage.

1750 **Mr Lucy**—That is correct.

1751 **Senator WONG**—As I understand it, what is being suggested is a possible inconsistency
1752 between the facts agreed with ASIC and the evidence given in a previous criminal trial. Is that
1753 correct, Mr Cooper?

1754 **Mr Cooper**—It is.

1755 **Senator WONG**—When ASIC prepared the statement of agreed facts with Mr Vizard in the
1756 context of the insider trading matter, did ASIC turn its mind to what evidence had previously been
1757 given by Mr Vizard in the context of the earlier criminal proceedings?

1758 **Mr Lucy**—We considered all matters of which we were aware, yes.

1759 **Senator WONG**—Was that a matter of which you were aware?

1760 **Mr Lucy**—Yes.

1761 **Senator WONG**—Did ASIC have any concern in putting that statement of agreed facts before
1762 the court in the insider trading case that there might have been an inconsistency between that
1763 evidence and the evidence that Mr Vizard had given previously?

1764 **Mr Lucy**—The evidence that we put was to do with director's duties as distinct from insider
1765 trading. The evidence was put forward to the court in a manner that the court required.

1766 **Senator WONG**—That is not really an answer to my question.

1767 **Mr Lucy**—To the extent that there were any inconsistencies, that is not a matter for ASIC to
1768 follow through. That is properly a matter for the Victorian police.

1769 **Senator WONG**—No, but you put forward a statement of agreed facts on the basis of which a
1770 guilty plea was entered and submissions were made as to what penalty should be in place. Surely it
1771 is incumbent upon ASIC to ensure that the facts put forward were facts that could be relied on by the
1772 court. Surely it was incumbent on you to look at whether that statement of agreed facts was
1773 consistent or not with previous evidence given by the defendant.

1774 **Mr Lucy**—We might in part take this on notice. Our anxiety is that we do not say anything that
1775 might prejudice the Victorian police. To the extent that there was material in the background that

1776 we might have considered, which I think is the real thrust of your point, we should take that aspect
1777 of it on notice.

1778 **Senator WONG**—I want to know, when you were preparing the statement—whatever facts
1779 went before the court in the Vizard matter to which ASIC was a party—whether regard was had to
1780 evidence previously given by Mr Vizard—

1781 **Mr Lucy**—Understood.

1782 **Senator WONG**—and whether you turned your mind to the issue of any possible inconsistency.

1783 **Mr Lucy**—Understood, and we will take that on notice.

1784 **Senator WONG**—What has ASIC's involvement been in terms of the current or possible
1785 investigation of Mr Vizard about which there has been some media attention?

1786 **Mr Lucy**—What has been our involvement with the Victorian police?

1787 **Senator WONG**—Yes.

1788 **Mr Lucy**—I would rather take that on notice.

1789 **Senator WONG**—Can I ask why? We do not have a current matter before the courts, do we? It
1790 may well be that you are being quite prudent, Mr Lucy, but I just wonder if you can clarify your
1791 concerns.

1792 **Mr Lucy**—I am prepared to make a comment in relation to that, but I would prefer to read it to
1793 make sure that I do not stray. The answer is, yes, we have provided assistance to the Victorian
1794 police in their investigation and we provided, at their request, the agreed statement of facts that was
1795 provided by us to the court in our proceedings. Whether or not that assists in proving perjury is a
1796 matter for time to tell. We have assisted the Victorian police in the manner that I have outlined.

1797 **Senator WONG**—Are you still taking on notice, despite that answer, my question about to what
1798 extent regard was had at the time the facts were prepared?

1799 **Mr Lucy**—Yes, I am.

1800 **Senator WONG**—There has been some reporting of possible litigation by the HIH liquidator
1801 against FAI's insurance advisers. Has ASIC received any report from the liquidator in relation to
1802 the HIH matter dealing with this issue? What has ASIC's involvement been?

1803 **Mr Lucy**—No, I do not believe that is the case. Certainly, in the last 12 months it has not been
1804 brought to the attention of the HIH board.

1805 **Senator WONG**—Not the HIH board; you mean ASIC?

1806 **Mr Lucy**—Yes, the ASIC HIH board.

1807 **Senator WONG**—Your internal board dealing with this issue?

1808 **Mr Lucy**—Correct.

1809 **Senator WONG**—So you have had no involvement in or knowledge of Mr McGrath's claim
1810 against FAI Insurance?

1811 **Mr Lucy**—I am sure that there is dialogue at officer level as to what he is doing but as far as
1812 making any formal representations to ASIC are concerned, no, he has not, to the best of my
1813 knowledge.

1814 **Senator WONG**—Has any investigation been conducted or material provided by ASIC?

1815 **Mr Lucy**—I would have to take that on notice, because that would be almost certainly historical
1816 as distinct from current.

1817 **Senator WONG**—This is all historical—this is all past behaviour.

1818 **Mr Lucy**—Of course, but to the extent that there has been any assistance in the provision of
1819 information that would have been historical.

1820 **Senator WONG**—Perhaps you could take that on notice. What is the time frame on the statutory
1821 oversight for the provision of answers taken on notice?

1822 **CHAIRMAN**—We can set a date.

1823 **Senator WONG**—Have we done that?

1824 **CHAIRMAN**—Not yet.

1825 **Senator WONG**—I guess we will do that tomorrow.

1826 **CHAIRMAN**—We have received correspondence from Mr Russell Philp regarding the

1827

1828 adequacy of Meat and Livestock Australia's communication with its members and relevant
1829 stakeholders. You are probably aware that MLA is a producer owned body that funds research—

1830 **Mr Lucy**—Like you, we received that today also and so we are looking at that. Therefore, if we
1831 take it on notice we will be able to respond to you.

1832 **CHAIRMAN**—Sure. Also, you published in May 2006 the consultation paper *Review of policy*
1833 *statement 160: time-sharing schemes*, with certain proposals. Have you had any response so far to
1834 those proposals and, if so, what?

1835 **Mr Lucy**—I will have to take it on notice. **Senator**

1836 **MURRAY**—Can you add to that the time line in

1837 which you intend to come to a view on it?

1838 **CHAIRMAN**—Do you consider that an extended

1839 cooling-off period will overcome the

1840 problems associated with pressure selling? **Mr Lucy**—I think that is all part of the same issue so we

1841 will roll that into it. **CHAIRMAN**—Do you propose to deal with the problems of disclosure

1842 highlighted in our

1843 report on time share that we tabled in September last year? **Mr Lucy**—Again, we need to roll that

1844 into the answer to the question on notice. **CHAIRMAN**—As there are no further questions, I

1845 declare the meeting closed. Mr Lucy and

1846 Mr Cooper, thank you very much for your attendance at this committee hearing.

1847

Committee adjourned at 9.04 pm