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Reference: Statutory oversight of Australian Securities and Investments Commission

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JOINT STATUTORY COMMITTEE ON

CORPORATIONS AND FINANCIAL SERVICES

Tuesday, 12 June 2007

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

Members in attendance: Senators Bernardi, Chapman, Murray and Sherry and Ms Burke

Terms of reference for the inquiry:

To inquire into and report on:

Statutory oversight of the Australian Securities and Investment Commission

WITNESSES

COOPER, Mr Jeremy Ross, Deputy Chairman, Australian Securities and Investments Commission..... 1

D'ALOISIO, Mr Tony, Chairman, Australian Securities and Investments Commission 1

Committee met at 4.40 pm

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

D'ALOISIO, Mr Tony, Chairman, Australian Securities and Investments Commission

CHAIRMAN (Senator Chapman)—I declare open this public hearing of the Parliamentary Joint Committee on Corporations and Financial Services. The committee is conducting a hearing into the Australian Securities and Investments Commission. Under section 243 of the Australian Securities and Investments Commission Act 2001, the Joint Committee on Corporations and Financial Services has a statutory requirement to oversee the functioning of ASIC. This hearing is part of that oversight. I welcome to the hearing Mr Tony D'Aloisio and Mr Jeremy Cooper as well as other members and observers from ASIC.

May I remind all witnesses that in giving evidence to this committee, they are protected by parliamentary privilege. This gives special rights and immunities to people who appear before committees. People must be able to give evidence without prejudice to themselves. Any act which disadvantages a witness as a result of evidence given to a committee may be treated by the parliament as a contempt. It is also a contempt to give false and misleading evidence to a committee. Parliament has resolved that an officer of a department of the Commonwealth should not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. If the witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may, of course, be made at any other time. Do you wish to make an opening statement?

Mr D'Aloisio—At today's hearing we will be represented by me and by Jeremy Cooper. Commissioner Jeffrey Lucy has asked me to apologise. Mr Lucy, with my approval, is overseas on ASIC business. At a recent Senate estimates committee hearing we tabled three documents for that committee: a statement of priorities of ASIC going forward and update statements on Fincorp, ACR and Westpoint. Those statements are available to any member of the committee. It would not be my intention to go through those statements again as we went through them at Senate estimates, but clearly if members of the committee would like copies of them, they are available.

CHAIRMAN—Thank you. We will proceed to questions.

Senator SHERRY—I will start with two banking issues. The committee has had correspondence—not matters I have raised in estimates for which I have received correspondence but correspondence to this committee. The first related to the conduct of Rabobank and the provision of bank statements to Mr Parker. ASIC advised the committee, in response from the last oversight hearing, that it was not currently conducting an investigation into Rabobank. Does ASIC have anything further to report on this matter?

Mr Cooper—I can give you a bit of an overview of the landscape but I should reaffirm that position: it appears that whatever issues Mr Parker had with Rabobank have now been resolved, much along the lines of what we said before—namely, in matters like this, unless there is a systemic problem or something else that is wrong, an isolated instance that has been resolved will not necessarily lead to us doing anything further. This is true particularly in this instance, where Rabobank was signed up to the 1993 Code of Banking Practice but not a more recent version. The 1993 code required bank statements to be provided every six months but because this was a loan account and not a bank deposit account, the view is that a loan account is not covered by that provision. The Corporations Act 2001 deals with deposit accounts that are financial products but does not deal with the reverse. In other words, an account where you owe the bank money and not vice versa is not a financial product and therefore the statutory provision does not apply—the statutory provision being section 1017D(2), that requires a statement every 12 months. The situation in relation to Rabobank having breached anything was unclear. As I say, it seems that the dispute between Mr Parker and Rabobank has been resolved. That is the update on that matter.

Senator SHERRY—I understand that the dispute has been resolved, but I want to be clear on ASIC's power. You referred to the banking code of conduct of 1993, which I am aware Rabobank are not signatories to, if I can use that description.

Mr Cooper—They are not signatories to the new 2004 code, but they did sign up to the 1993 code, which said they had to give statements every six months. The view taken about that is that it only relates to deposit accounts where the bank owes you money and not to a mortgage account, where you owe the bank money. That is the view about that particular provision in the 1993 code.

Senator SHERRY—Accepting that view on the face of it, what power, if any, does ASIC have? Let us assume the dispute had not been resolved and one of the main elements was the provision of bank statements, what power would ASIC have, if any?

Mr Cooper—It has the ASIC Act powers to act on misleading or deceptive conduct or unconscionability, so it would have to form the view that that conduct somehow was misleading or deceptive or unconscionable.

Senator SHERRY—Would you consider it unconscionable not to provide bank statements when asked by a customer?

Mr Cooper—There is disputed evidence about exactly what was and was not provided. We probably accept that it seems that a less than satisfactory amount of information passed between the bank and Mr Parker, but there is a dispute about exactly what that was. It seems hard to conclude that it has satisfied the unconscionability test.

Senator SHERRY—Regarding the updated banking code of conduct of 2004, I understand that Rabobank are not signatories. I think you provided me with a list of eight banks which are not signatories.

Mr Cooper—We might have done that under notice, yes.

Senator SHERRY—I do not have it with me. As I understand it, there are a couple of banks at least on that list that you would not classify as having significant domestic transactions, and we have discussed that. How do we go about, if we can, enforcing banks to adhere to or sign the banking code of conduct?

Mr Cooper—I guess that is a policy question because it is not a current legal requirement.

Senator SHERRY—It is not a legal requirement?

Mr Cooper—No.

Senator SHERRY—A bank does not have to adhere? That is what I am trying to get to.

Mr Cooper—Correct.

Senator SHERRY—Effectively you cannot require them to.

Mr Cooper—No, we certainly cannot. We are not a core bank regulator for Australia.

Senator SHERRY—No, I understand that.

Mr Cooper—Secondly, the important thing to remember about this case is that it was not a consumer loan, so the Uniform Consumer Credit Code did not apply. This was effectively a business loan so it was outside the state-based consumer provisions as well.

Senator SHERRY—I want to be clear on this as well; I am interested in these jurisdictional issues; I am trying to pin down what is ASIC's responsibility and what is not. Is it your argument that it is not covered by state-based or Commonwealth-based regulatory—

Mr Cooper—Yes, this point is not specifically relevant to ASIC having power or not having power, but if you look at the overall regulatory map, the uniform credit code offers some protections for consumer loans; it is a uniform state-based system. This was outside that as well, so whatever protection that would ordinarily have provided, had it been a consumer loan, was not applicable in this case.

Senator SHERRY—If it falls outside of ASIC's responsibilities and state responsibilities and the bank is not a signatory to the 2004 code of conduct, where would a consumer go? It seems to me that consumers have a bit of a problem.

Mr Cooper—It is not quite that bleak. The internal and external dispute resolution systems would still apply, notwithstanding all of those special situations in this case.

Senator SHERRY—I was going to come to the internal/external dispute issues later. A second case was referred to the joint committee that specifically went to National Australia Bank's alleged failure to provide bank statements to a Ms Fouzia Safetli. Do you have any information on that dispute?

Mr Cooper—I do.

Senator SHERRY—The National Australia Bank, from memory, are signatories to the 2004 code of conduct?

Mr Cooper—Yes; this is a matter at which we are currently looking. In broad terms it relates to an assertion by a guarantor—a relatively elderly guarantor who has not got a good grasp of English—that the nature and effect of the guarantee were not properly explained to her some years ago. That guarantee secured substantial business loans. There were two guarantees. We are currently speaking to both the bank and the Safetlis about that at the moment.

Senator SHERRY—As far as ASIC is concerned, that is the matter of contention?

Mr Cooper—It is more complicated than that because also relevant to this case is a Federal Court order going right back to 2001 which was obtained at a time when the ACCC had jurisdiction over this area and not ASIC. The matter does have a degree of history to it, the suggestion being perhaps that the bank did not follow effectively the framework established by the 2001 order.

CHAIR—Have you any information to the effect that the issue of the provision or non-provision of bank statements relates to the guarantor's request for bank statements; that the bank obviously had to get the agreement of the customer themselves before they could provide those bank statements to the guarantor and that there was some delay in getting that approval from the customer?

Mr Cooper—I do not believe that goes to what is complained of here. That may be a collateral problem, but I am not aware that bank statements were in issue. This is more along the lines of the well-known Armadio High Court case, which established the ground rules for situations where people have limited English skills and the obligations that banks have in those kinds of situations. It does not strike me that bank statements were a problem at all in this case.

Senator SHERRY—I raised an issue at estimates hearings last week. I have raised it both at estimates and here at joint committee on previous occasions, but I have not received any detailed response. The issue is the internal disputes mechanisms within banks, in this case, and within insurance companies, superannuation funds, et cetera. Can you give me any update—I have raised it before on a couple of occasions and have not received anything in any detail—about the operation of these internal disputes processes, their efficacy, timeliness, and the manner in which they deal with disputes?

Mr Cooper—Yes, I can. We take quite a bit of notice of how financial services licensees discharge these obligations and run their internal dispute resolutions schemes because it is a key part of having a licence that you have one. The statistic I have is that in 70 per cent of cases where we are undertaking a review or doing surveillance of a licensee, we will specifically look at the internal dispute resolution system; that is an important statistic.

Senator SHERRY—Frankly, that is not telling me much at all. What is the statistic contained within that general statement?

Mr Cooper—I am sure we can find that. There will be a statistic, so we can provide that for you.

Senator SHERRY—Specifically, when has ASIC examined the operations of internal disputes processes in the four major banks? When was the last time they were looked at in terms of their operational process?

Mr Cooper—I cannot answer that specifically but again we can take it on notice and give you the data on that.

Senator SHERRY—I have raised this issue on at least two or three previous occasions. I do not seem to be getting a clear, definitive, statistical, factual response about when ASIC looked at the efficacy and the operation of internal disputes processes in any leading Australian bank—or in any other bank for that matter.

Mr Cooper—Yes, we can certainly get that data. We have looked at this subject in relation to unit pricing errors and so on, but you need to remember that we have a very good line into ASIC in relation to complaints. When consumers are not getting what they want from internal dispute resolution, there is the external process and there is complaining to us, and our data is not showing over-the-odds levels of complaints about internal dispute resolution procedures, particularly with the majors. It is a key part of our surveillance, it is a key part of having a licence from us, but it is not flashing a red light, particularly because the next step from internal dispute resolution is generally to external. In the Safetli case, of course, it is way over the limit of $280,000; it is a matter of some millions, so it clearly is above the external dispute resolution threshold.

Mr D'Aloisio—Senator Sherry, you asked this very question at the last Senate estimates meeting. We are working on the answer, which we took on notice. I apologise that we have not had the answer back to you today, but we definitely will have the answer to you.

Senator SHERRY—I would not expect you to respond today to the questions I put at estimates last week; you may have been able to in some other areas. It is just that I have raised this issue with your predecessor, Mr Jeffrey Lucy, on at least one or two other occasions. I looked back through the transcript before today's hearing. I want to get to the external disputes procedure in a moment in respect to banks, but you said 'particularly with the majors', which seemed to imply that you had observed something with the non-majors.

Mr Cooper—No, what I was saying there was that my impression is that in financial services where you have a very large brand to protect there is a pretty strong correlation between having that brand and wanting to resolve complaints. That is a pretty broad generalisation, but I think the data bears that out. I think what you are asking, Senator, is for ASIC's view on the robustness of these internal dispute processes based on the reviews that we have done. You are looking for factual information about what we have done and what we have concluded.

Senator SHERRY—Correct.

Mr D'Aloisio—That is something that we will provide.

Senator SHERRY—Thank you. I have asked on two or three previous occasions and I would like to know when such surveillance examination was carried out. I do not seem to be getting an answer. Now I have a question regarding the external disputes process. I noticed that the

Banking and Financial Services Ombudsman has a jurisdictional limit of $280,000. It is unindexed but it did go from $180,000 to $280,000. A house loan would today commonly exceed $280,000; do you think that the $280,000 limit in itself is sufficient in those sorts of circumstances?

Mr Cooper—You are asking me a policy opinion. I can answer it this way: we get a lot of noise about the $100,000 in the Financial Industry Complaints Service. I hear what you are saying.

Senator SHERRY—I have not got to FICS yet.

Mr Cooper—The average Australian home loan is about $225,000, so what you are saying seems right. Interestingly, to my knowledge there is very, very little noise about that limit being too low.

Senator SHERRY—I accept that, but there would be a lot of housing loans well in excess of $280,000 if the average is $225,000 or thereabouts. I just make that point.

Mr Cooper—That may be so, but typically your dispute will not amount to the entire quantum of your loan. It will be 'You've got my interest wrong', or 'My credit card statement is wrong', et cetera. You will rarely see the size of a mortgage governing the claim or dispute that might come up. I think that is probably the explanation.

Senator SHERRY—To be fair, at least they have increased their jurisdictional limit from $180,000 to $280,000.

Mr Cooper—I think that will be the answer.

Senator SHERRY—What authority, if any, do you have over the operational parameters of the Banking Ombudsman?

Mr Cooper—I am not sure I understand the question.

Senator SHERRY—Do you have any influence over their operational parameters?

Mr Cooper—No; we approved the scheme. We have certain policy statements and guidelines as to how the scheme is set up, but it is relatively broad based, it is principles based, so we do not, for example, have the ability to tell them what their monetary limits should be or order them around. We do not have any jurisdiction in that regard.

Senator SHERRY—Indirectly at the end of the day you tick it off?

Mr Cooper—Yes, the scheme itself; that is right.

Senator SHERRY—You might have a look at this. I went to the website for the Banking Ombudsman, and you go through a series of questions to determine jurisdiction—you may or may not be aware of this. One of the difficulties with this approach is that there would be a significant group of consumers who could not use the website. Putting that issue aside, for those

who can, you go through the nature of the complaint to determine jurisdiction before you get to the end point and you then move directly to the Banking Ombudsman. Question 7 says, for example, 'Is your dispute about a general practice or policy of a financial service provider?' If you answer yes to that, effectively you cannot go any further because it says it is not a Banking Ombudsman jurisdiction. My question is: whose jurisdiction would it be if you cannot get past question 7? If the answer is 'Yes, it is a general practice or policy of a financial service provider,' where would you go?

Mr Cooper—I have not been to that website and I am not entirely clear. Presumably the question is built around trying to work out whether you have a dispute or not.

Senator SHERRY—Yes, within their jurisdiction.

Mr D'Aloisio—It does not follow from the way the question is answered, does it, that there would be a dispute between them? It is talking about a general complaint about policy as distinct from your individual rights, if I heard you correctly.

Senator SHERRY—If you answer 'Yes' to that question, you effectively cannot go any further with the Banking Ombudsman.

Mr D'Aloisio—In other words, it is not a specific dispute between you and the bank.

Senator SHERRY—Yes, so if a consumer has a dispute about a general practice or policy of the financial services provider, where would they then go?

Mr D'Aloisio—That would depend on whether rights would be affected. If there were no rights affected, it is just a policy matter—a general matter that you would probably say is a matter of coming to politicians and parliament to get the law changed.

Senator SHERRY—General practice?

Mr D'Aloisio—In our case you would go to the FIDO website to talk to ASIC about whether some right or remedy is available to you under more general law. You could go through state authorities, consumer protection bodies, to see if some right could be affected.

Senator SHERRY—Then question 8 says 'Does your dispute relate to the exercise of commercial judgment by a financial service provider—for example, a decision to decline a loan application?' If you answer yes to that, again it is not in the Banking Ombudsman's jurisdiction.

Mr Cooper—Yes, I see what you are getting at. Can we have a look at that?

Senator SHERRY—There would be other places you could go but perhaps it highlights the difficulty of a number of different types of dispute processes for different issues in financial services. Related to disputes processes, we discussed FICS. You have perhaps a more direct input into the FICS guidelines and parameters?

Mr Cooper—No, we would be closer jurisdictionally to FICS than to the BFSA, for example. What is happening in FICS is our core business, whereas our connection to banking services is

more remote. In terms of the actual nature of our connection with the scheme itself it is exactly the same; we have the broad policy statements, the broad principles of how you work a scheme like this and then we approve the scheme and that is it.

Senator SHERRY—We have discussed how the upper limit of $100,000 of FICS has been under review for some time. Do you have any update on how that has been progressed?

Mr Cooper—Not since we last spoke.

Senator SHERRY—I am asking it at every committee meeting. Do you have an indication of when we are likely to get an update of it?

Mr Cooper—No, we can take that one on notice and let you know.

Senator SHERRY—There are other Westpoint issues I was going to raise. Specifically in relation to FICS, their 6 June 2007 release is headlined 'FICS panel makes three Westpoint determinations':

'FICS Chief Executive Alison Maynard said: "In these cases, the FICS panel upheld the complaints and has ordered the financial service provider to make payment to the consumer. These are the first cases that were resolved via a determination by the FICS Panel." '

Are you aware of any specific jurisdictional difficulties in FICS's ability to handle the Westpoint disputes generally or specifically?

Mr Cooper—No, absent the Deakin's court case, it seems that it is functioning properly.

Senator SHERRY—Except for the limit, which has effectively excluded a number of people.

Further on in the release it says 'To date FICS has already resolved 32 Westpoint cases through negotiated settlement, worth $1.8 million.' Then it says 'FICS has received 378 written complaints from consumers since the Westpoint group collapsed in 2006. Of these written complaints, 230 have progressed to investigation and represent $10.6 million in lost consumer funds.' The point in highlighting those figures is: 32 cases were settled for $1.8 million and 230 cases are being investigated—we do not know the outcome yet—representing $10.6 million. It struck me that this is only $12.4 million out of a lot of money in the Westpoint case. Do you have any response to that observation? In Westpoint we are dealing with up to hundreds of millions of dollars.

Mr D'Aloisio—It may still be early days in the sense that liquidators and parties are still working through what the likely payouts may be. You also have to establish whether bad advice had been given in order to make claims. It may be too early to be drawing conclusions from those statistics.

Senator SHERRY—It seems to me pretty reasonable to conclude now that if FICS has cases totalling $12.4 million at this point in time before it, some resolved but most still being worked through, FICS is not going to resolve the bulk of the question mark over moneys?

Mr D'Aloisio—You would have thought that, as a matter of principle, it would not be the case. You would have to establish that you went into it with bad advice, for example. It may not be in all cases you would do that, so you would naturally have thought that FICS is not going to determine all losses, so to speak.

Senator SHERRY—It is only going to be a small part of the losses, is it not?

Mr D'Aloisio—If those stats are right, yes.

Senator SHERRY—That is from their 6 June media release.

Mr D'Aloisio—It is still early days. The liquidators are still doing a lot of work. We are still trying to get a handle on what the total compensation is going to be. I suspect there might be a number of investors waiting for the outcome of that before making decisions on what they are going to do in relation to claims, and against whom. They no doubt will be looking at claims of third parties as well. I think it has a way to go.

Senator SHERRY—I accept that, but in reality FICS is only dealing with a relatively small proportion. You have common law actions—where that goes, we do not know—and the bankruptcy proceedings, which will return X amount in the dollar, whatever that is. But the jurisdiction of FICS is confined to a small minority of the effective moneys that have been lost.

Mr D'Aloisio—It would only be a minority if you say they do not have claims. We do not know at this stage how many people would have claims.

Senator SHERRY—We have the jurisdictional limit of the $100,000; that is obvious. But would it not puzzle the consumer that effectively the majority of complaints, both number and quantum, in respect to Westpoint cannot be resolved by FICS? You and I understand those reasons, but the average consumer would not understand them?

Mr D'Aloisio—You mean in the sense that they do not have a ready party to go to because they feel they may have a bad investment?

Senator SHERRY—Yes.

Mr D'Aloisio—I am not sure. I think it is there. Part of it may be the extent to which it is known to be there. I also would not mind having a look at what the average investment in Westpoint was. From memory, I think it was about $50,000 or $60,000. On its face it does not exceed the fixed limit, as an average, but I accept that there would obviously be a lot above $100,000. I would like to look at your point more closely in terms of the facts before concluding that there is something wrong with the FICS system based on the Westpoint case.

Senator SHERRY—FICS has clear jurisdictional limits. The $100,000 limit is clearly a jurisdictional limit, but there are other people—other victims of Westpoint, if we can put it that way—who cannot go to FICS because their claim is just outside the jurisdiction of FICS. That is the reality of it.

Mr D'Aloisio—That is where we are saying we are working with the liquidators and looking at third party actions and other claims so we can assist people and maximise the pool. At the end of the day our objective is to see how big the pool can be so that people who have lost money can claim. Whether that pool is by sale of assets, whether it is by freezing order, whether it is by taking third party action, class actions and so on, you are looking at an armoury of potential remedies to bring to bear to maximise the pool that is available for those investors.

Senator SHERRY—Sure, I accept that, but as they say in their press release, where a consumer can go to FICS, it is a strong alternative to taking court action. It is low cost and it is relatively timely in the sense that it is going to resolve disputes. That seems to me to be an advantage, but it is not available to a significant proportion of consumers who have lost money through Westpoint.

Mr D'Aloisio—Its availability has to be determined by having a claim that fits within its jurisdiction.

Senator SHERRY—Yes, but a lot of consumers are elderly. We have discussed the average age. I think it is 60, and certainly there are many over that. Some of these people may die before their claim is settled in a common law action or before the whole thing is wound up, or they may not have the resources for legal action. That is the reality, is it not?

Mr D'Aloisio—There is a risk of that. Our approach has been to try to broaden as much as possible and in the shortest possible time the pool of funds that could be available under all the Westpoint schemes and to actively assist, where we can, with the FICS claims. We see that as just another part of the armoury of trying to maximise a return for the investors.

Senator SHERRY—The point I am driving at is that consumers like a relatively simple, cost-effective and timely armoury. FICS is available for some, but not for others.

Mr D'Aloisio—I think you would only get to that point if you had some sort of strict liability notion or something because you still have to prove claim. Whatever jurisdiction—whether it is court, FICS, third party actions or whatever—there would still need to be proof of some sort of fault or some sort of system where people have lost money because of an act or omission. Certainly that is going to be the thing that limits or increases the time it takes to resolve these issues. I do not think it is the structure of the systems themselves.

Senator SHERRY—In terms of the structure of the systems themselves, one of the obvious difficulties is the lack of or underinsurance, PI insurance, by some planners where planners were involved.

Mr D'Aloisio—Also, if planners go into bankruptcy themselves, the insurance proceeds are not available to the investors but tend to be available to all general creditors. There are limits like that in the system.

Senator SHERRY—Off the back of the Westpoint experience, I noticed in *Money Management* that a leading insurance company is now refusing to provide PI insurance.

Mr D'Aloisio—There was a newspaper report on that and I have asked our people to have a look at whether there is a basis for that or whether it might have been a misreporting.

Senator SHERRY—Whether it is factual or not, it does raise the worry that, when the PI insurance regime for planners is partly finalised—it is not going to be completely finalised by 1 January—we will have sufficient insurers in the market to provide it.

Mr D'Aloisio—Again, you can only go on the general approach. Certainly PI insurance as a general rule is available; there is a market for it both here and overseas. We would need to look at where this example was a decision made for commercial reasons—if indeed it was made—because they wanted to focus on other business, as distinct from it being a reaction to a concern on a number of claims that may be coming forward. I do not have information on that at the moment.

Senator SHERRY—No, I accept that. I am drawing your attention to the issue that there may be a potential problem through some insurers who currently provide not being willing to provide in the PI regime come 1 January. One other individual letter the committee has received concerned a Ms Berryl Glasson about Reward Insurance Limited, and it goes back a long way, 2001-02. A response from Mr Greg Tanzer was forwarded to the committee on 17 May. Is there anything else ASIC wants to add to that, which was the third case drawn to our attention?

Mr Cooper—No, only to say that this is a very long and ongoing matter. A number of assertions have been put to us, but when we look into each case, it does not appear to be supported by evidence or it is outside our jurisdiction. This matter has also involved APRA, as you are probably aware, revocation of licences and questions put to APRA at recent estimates hearings. Our position is that if other matters need to be brought to our attention, then so be it, but at the moment, having looked into a number of these allegations, it just does not appear that there is anything further for us to do.

Senator SHERRY—What is the status of Reward Insurance Limited at the moment? Do they still operate?

Mr Cooper—No. I believe APRA has revoked their insurance authorities. This has been recently confirmed. I think that is the position with the company itself.

Senator SHERRY—I have some other issues.

Senator MURRAY—When Mr Tanzer sent his comments to the Chair on 17 May 2007, the allegation was that ASIC has failed to act on complaints by three lawyers regarding Messrs Murray Nugent, Bill Szuch and Reward, lodged in 2005. Like the good lawyer he is, Mr Tanzer wrote: ASIC neither confirms nor denies the existence, content or substance of complaints received from members of the public, including those received from third parties such as yours.

That is all very well but tells us nothing. He could have been a little more forthcoming to us. If ASIC have looked at this matter and have deemed—for whatever reasons, valid or otherwise—that there is nothing more you can do about it and people want to complain about that, they can go to the Administrative Appeals Tribunal, and say that ASIC failed to carry out its duties. Or they could go to a court and argue a mandamus, could they not?

Mr Cooper—That would be skipping one important first base, which is the Ombudsman, because it is free.

Senator MURRAY—They can go to the Ombudsman. All three of those are available to them, are they not?

Mr Cooper—Correct; I think the Ombudsman is the first place to go. We get many complainants like this who are just not happy with the response they have got, and the Ombudsman looks at it afresh and often enters into correspondence with us. That would be the first base. The other one you mentioned, the writ of mandamus, is pretty esoteric, but certainly the AAT would be a possible place for them to go.

Senator MURRAY—In mandamus you have to argue that there is a case. Lawyers—which is who we are discussing here, the three lawyers complaining—have the means and the ability to do that. We are receiving wads of material from these aggrieved citizens—I assume they are citizens—and there is nothing we can do about it.

Mr D'Aloisio—Is this generally?

Senator MURRAY—No, with respect to this issue. We are receiving lots of emails. By 'we' I mean lots of parliamentarians. I know of committee members, obviously, but I also know of other parliamentarians who are receiving them, with all the attachments. These people are very irritated by these events. In that environment, has ASIC said to these people: 'We can't find any grounds for your case; however, if you are dissatisfied with the way we are dealing with it, these are the routes you can go'? We have just discussed those three routes. Have you done that?

Mr Cooper—That wrap-up, if you like, is the standard way that we respond to anybody. When we are telling someone that we are not going to take action in relation to their complaint, there is a very nicely written great big bit of text that says, 'You can go to the Ombudsman. If you don't like that, you can do this' and so on. As the regulator, we feel it is our duty to explain to people all the other avenues they can take. As a direct result of that, we probably get a lot more business going to the Ombudsman than we would otherwise get, but that is all part of the accountability. Although I cannot answer specifically—and we can certainly get this for you—that is our standard way of responding.

Senator MURRAY—I would like a specific answer, if you would not mind.

Mr Cooper—Certainly.

Senator MURRAY—That is helpful because I can foresee that the chair will have to respond to these people.

Mr D'Aloisio—We will give you the wording that we use as well.

Senator MURRAY—Thank you.

Senator SHERRY—I am not sure we should give you the wording of how they describe ASIC in certain cases.

Mr Cooper—We have heard it all before.

Mr D'Aloisio—I am happy to receive it.

Senator MURRAY—You have mentioned that APRA has a role, and that is covered in Mr Tanzer's letter. You cannot speak for them but, if they were aggrieved with APRA's dealing with the matter, they have the same three avenues to pursue, do they not?

Mr Cooper—I could not answer it as confidently as I can in the case of ASIC, but I would be surprised—

Senator MURRAY—It would seem logical.

Mr Cooper—Exactly the same avenues were not available.

Mr D'Aloisio—We can answer that as well.

Senator MURRAY—All right. The key point emerging from this for me is the statement by Mr Tanzer in this letter which follows the second section, which was about whether it was illegal for the insurance to be written. The key thing he said is, 'For that reason it does not appear Reward was under any legal prohibition from writing builders warranty insurance during the period referred to by Ms Glasson.' That is quoted from this letter. The way I take that is that, whilst you might complain about the insurance, that it was legally written was not an issue. That is the correct assumption?

Mr Cooper—Yes.

CHAIRMAN—Has the matter of Lana McLean and the Commonwealth Bank of Australia been drawn to your attention?

Mr Cooper—It has.

CHAIRMAN—Have you looked at any of the issues and the outcomes of that?

Mr Cooper—This is not unlike the Rabobank matter in substance in that it is a business loan. It goes back quite a number of years and the matter has already been litigated with the Commonwealth Bank back in 2001. There is a court judgement in the matter. For that reason in particular, ASIC does not feel that it should get involved into effectively an historical civil dispute that has already been looked at by a superior court. Again, this is coming at it from the systemic view rather than getting involved in individual civil disputes. If ASIC got involved in every civil dispute that it was invited to get into, it simply would run out of resources. In the absence of evidence from our complaint system and our general surveillance work that there was some sort of systemic problem, in view of the age of this matter, the fact that it was a business loan—and we talked about that, the jurisdictional settings, it is the same as in Rabobank—we do not propose to take any further action in relation to this matter unless we have some new evidence or something we do not know was brought to our attention.

CHAIRMAN—You have not specifically looked as to whether the allegation that CBA has or has not provided a continuous statement of account is valid?

Mr Cooper—We have previously responded to questions on notice about CBA and whether there was some sort of systemic failure to give bank statements; that was back in the estimates hearing of May last year. As I say, although it has been very recently in the press, this is a very old matter and it has been looked at by a court.

Senator MURRAY—As an aside, a remark with respect to the previous issue with Senator Sherry, if the people concerned with the Reward matter remain unhappy with regulators and do not get resolution from the AAT or from wherever else, their ultimate area to resolve their concerns has to be the courts. That is why the courts exist; that is correct, is it not?

Mr Cooper—Ultimately that is right. It sometimes becomes a question of standing: what connection to the matter do they have, are they a bystander or do they have some real legal claim. Quite often ASIC is partly the victim of its own success. Because we can and do take actions in a lot of cases, people believe that in their case we must be able to do something and they continue to make assertions and allegations and so on. It is very difficult for them to accept sometimes that there is not evidence or not jurisdiction or what have you.

Senator SHERRY—We touched on this last week at estimates, but I wanted to develop a couple of aspects regarding the PI insurance regime that is to be introduced. As part of that consultation has ASIC received any information as to how many, if any, licensees will be unable to obtain professional indemnity insurance?

Mr D'Aloisio—Not that I am aware, not at this point. We will be issuing a consultation paper when the regulations are released and as part of that consultation process we will get a better feel. We have also commissioned a report which we have referred to as the Alan Mason report, which we will also be making available at the time we consult. That report takes an overview of the PI industry. As part of that process, we will get a much better feel for what is adequate and what is going to be available. Also I think we discussed at Senate estimates the issue of how we can assist with pushing some form of industry based, industry standard policies to assist. We will get a better fix on that within probably six to nine months. We probably will not have that for 1 January 2008.

Senator SHERRY—That was one of the reasons for asking the question that concerned me because the regime is supposed to start on 1 January. Whenever we get the regulations we will see, but there are some quite complex issues here that could pose some difficulty. When is Mr Mason's report due?

Mr D'Aloisio—I think the report is available, or is written. We are proposing to release it as part of the consultation paper because we feel that there are a number of issues in there. We feel that by putting the consultation paper and the report together that will give a pretty good picture rather than doing them separately. It is work in progress on our part, but he has written his report.

Senator SHERRY—Fine; that was going to be my next question, whether it would be publicly released, and you are saying it will be.

Mr D'Aloisio—Yes, it will be.

Senator SHERRY—I am not trying to tie you to a specific date, but about when do you anticipate we will see this?

Mr D'Aloisio—A lot of work has been going on in our place and, as soon as the regulations are released and so on, I think probably within a very short time after we have had a chance to have a good look at that against the consultation paper, we will put it out. We were hoping, I think, that a rough timetable was that we would be doing consultations by the end of September.

Senator SHERRY—Even then, it is not going to be finalised by 1 January? I think you indicated at estimates last week there are going to be some issues that will inevitably not be finalised by 1 January.

Mr D'Aloisio—We are planning on the basis that we would issue our policy statement on what adequate arrangements would be, ahead of 1 January so people can comply. We are working to that timetable.

Senator SHERRY—On all matters?

Mr D'Aloisio—Yes, on all matters.

Senator SHERRY—We will have a fully operational, comprehensive PI insurance regime by 1 January?

Mr D'Aloisio—We will do our best.

Senator SHERRY—That seems to be slightly contradictory given your earlier response.

Mr D'Aloisio—I am sure you understand that we have got to get the regulations and the consultation process, but, absent any sort of major new issue that emerges, our people have been doing quite a lot of work on making sure that we have a system that can work by 1 January. Absent any sort of major new issue, yes, that is the target date. Not just the target date—that is what we want to achieve and that is what we will push our resources to achieve.

Senator SHERRY—It is not your fault, but it will be five and a half years on from when this matter was first considered, as I understand. When I say 'it is not your fault', not you personally, it is not ASIC's fault.

Mr D'Aloisio—I think the important thing is these adequate arrangements are in place and then let us just see how they work.

Senator SHERRY—I agree, but five and a half years has been a long time coming.

Mr D'Aloisio—I cannot answer that.

Senator SHERRY—Can you, Mr Cooper?

Mr Cooper—It is substantially—

Senator SHERRY—As I say, I am not criticising ASIC in this area. It has been well thought out but not concluded process, has it not? Five and a half years to get some decent PI insurance.

Mr Cooper—I think everybody accepts that there was a market failure right at the time that this was intended to be wheeled in, we had the collapse of HIH and a real sorting out in the PI market. That state of affairs existed for some time.

Senator SHERRY—I accept that that is an explanation for part of the delay, but I suspect that this has been brought to a head by Westpoint, has it not?

Mr Cooper—No, I do not think that is right. I think this has been a solution—

Senator SHERRY—What has brought this to a head, then?

Mr Cooper—I think for some time the government has been working on this solution. Certainly since I have been at ASIC, I can recall that this issue has been worked on and has come to fruition now and will come in on 1 January.

Senator SHERRY—I know. I can recall it being worked on too, as you can, for five and a half years. I mean, turn it up. I am not criticising ASIC. Five and a half years is a long time, notwithstanding the HIH collapse.

ACTING CHAIR (Ms Burke)—In relation to the coming to the head of Westpoint, it is not just Westpoint, we have got Westpoint, Fincorp and ACR with very similar profiles of investors going in, different schemes and different business models. There is a whole lot of people out there who are now screaming that if their advisers had had professional indemnity insurance, they might have been covered and might have been getting back some of their dough. Come 1 January it will be too late for these groups of investors. Have you done any looking into the profile of the investors going into these groups, what was the logic behind these business models and why so many people have been caught out? Have you done a bit of an analysis of the three of them all at once, overall, given the similarity in the people going in and being caught out by it?

Mr D'Aloisio—We are in the process of doing that. We are doing the analysis. It is interesting that, in the case of Westpoint, a lot of the investment was through financial advisers and planners; in Fincorp, from what we have seen so far, there were very few planners; ACR, we have not got a picture on as yet. In answer to your question, yes, we are looking very closely at what was the investor profile, but more importantly we are also looking at what motivated the decision, what were the decision points; the extent and role advertising played; advice, where they sought the advice, where they did not; how they characterised an unlisted, unrated debenture, unsecured note compared to a term deposit; was there confusion. There are a number of behavioural things that we are looking at as part of, as I said at Senate estimates, this whole retail investor section. I think the cases that we have had have certainly led us to say that we have got to make this a real priority for ASIC, and have done so. That analysis to which you have referred is quite important. We started that process and we are working as quickly as we

can to get the results and then feed them in, in terms of lessons for investors in investor education programs and so on, going forward.

ACTING CHAIR—That was going to be my next question. Given the similarity of profile of these individuals, and I am sure all of us have dealt with individuals who are now suffering greatly—I have a whole lot of people who are in conflict with Centrelink over Fincorp because they are saying, 'You actually have this money,' and they are saying, 'No, I don't anymore' and Centrelink are saying, 'Oh yes, you do, until they are wound up.' There is an interesting dichotomy between what you can get in Centrelink benefits versus what they say you have invested somewhere that you know you are not going to see again, or at best you are going to see 30 cents if you have a secured note. There are all those sorts of things going on. We are all dealing with these individuals in this respect. The interesting factor for me is that they are all fairly similar individuals who had a slight bit of money and they thought that these were risk-free investments. They actually have said that to me, 'I looked at the Fincorp prospectus.' They bring it in, they show it to you, it all looks good, it all turns out these are people who look at the markets and do these things. 'It was not an excessive return, so I thought I wasn't going into anything'—as one of them continually says, 'I wasn't doing a pyramid, I wasn't being greedy.' I am really interested as to what information we actually need to give to the investing public so that they do not get caught; or, if that is the situation, what can we do?

Mr D'Aloisio—I think it is a much more complex issue, and I am not saying that because I am on this side of the table—it just is. The approach we have taken is to really look at the role of the trustees, the role of the issuers themselves, the investor education, the advertising, the business models that are used by the issuers of these debentures; the whole picture. When you stand back and look at it, you ask yourself, 'How can such a large group of investors go into what are unrated, unlisted securities when in actual fact you could probably put your money in other things?' We are trying to get to the bottom of that, but in a way that we are looking at the trustees, the issuers themselves, the advertisers and the investors. I think it is very much a work in progress for us at the moment. Over the next few months I think we will be able to answer your question a lot clearer and hopefully we will be making a lot more information available to those investors or potential investors as to simple things such as risk allocation in your portfolio and differences between listed and unlisted debentures, rated and unrated debentures, the difference between a term deposit and an unsecured note. I think there is a lot of work there that ASIC has been doing and we would certainly want to do a lot more over the next few months.

ACTING CHAIR—Have you looked at the overall aspect of the business model insofar as is it flawed or was it inherently corrupt?

Mr D'Aloisio—There is no evidence of the latter. I think we need to analyse the business models and work with the experts and also the trustees. At the heart of it, in terms of the investment and what they do, these business models are inadequately capitalised in terms of promoters themselves on the face of it and in terms of the capital they have got so that, when they run into a slight problem, it actually gets magnified and can lead to difficulties. I think the business model itself has to be stress-tested, but what we do not want to do is to fall into making a mistake of overreacting and then there are a lot of probably very valid and proper investments and raising of capital out there that we then have an implication for and cause a run-on. We have to be quite careful about how we go forward on analysing this business model and trying to pinpoint if it has a flaw.

Senator MURRAY—Surely the answer is that the business model can be valid, but if the people driving it are amoral or have bad ethics, then they can turn a good business model into a bad outcome. It is a bit like a motor car: you put a lunatic in a motor car and they can do all sorts of things; put a good driver in and it is perfectly safe.

Mr D'Aloisio—I think if you can identify fraud it makes that issue right, but I think in this case we have no indications of that.

Senator SHERRY—In respect of Westpoint or the other two?

Mr D'Aloisio—We have no indication in all three. There are serious matters in Westpoint, yes. I stand to be corrected, that is correct. Certainly in relation to Fincorp and ACR, nothing at this point.

ACTING CHAIR—We have had this discussion before about Westpoint regarding the notion of do you wind it up or do you allow it to continue so that the investors may actually realise the outcome of their investment. Do you stand back and make that assessment, or will that be part of the investigation? A lot of Westpoint people said, 'If you let it run its course, we actually would have got our money back.' The other two, that has not been the lay of claims, but yes.

Mr D'Aloisio—I will talk generally rather than specific cases because we are still investigating and looking into the cases. The difficulty is to let them run on, because you have rollovers and redemptions as people go; people could have got out and then do not because you have got an issue about 'Do you let them run on or do you stop them?' It is a difficult judgment to make. At the end of the day it is really for the directors of these companies to make those decisions. Indeed, in ACR it was the directors in the end who made the decision that they could not actually continue on with the company and put in voluntary administrators. In Fincorp they did the same. I think it would be difficult for ASIC to have to make that call because you are then being set up that you know how these investments work and that you have actually expertise, then you can predict the sale price of units in a development in two or three years time. It is really the people running these things, the directors who have to make those sorts of judgements.

Senator SHERRY—At estimates I touched on, as I had done at previous hearings both of this committee and estimates this point: do you have any update on the three or four retail funds unidentified in the action that ASIC was taking against them, that is the AMP exercise, or the AMPEU?

Mr Cooper—We did take a question on notice on that topic.

Mr D'Aloisio—We have got that on notice and we will come back to you.

Mr Cooper—Yes, we have done considerable work putting that together. That will come to you further.

Senator SHERRY—No, I did not expect you to have the details. I just thought if you had it, well done.

Mr Cooper—It is well and truly in hand, yes.

Senator SHERRY—In respect of the AMP matter, who has been appointed as the arbitrator?

Mr Cooper—Deloittes, if memory serves me correctly.

Senator SHERRY—Do ASIC have ongoing meetings with them about progress that is being made?

Mr Cooper—We do, that is part of how the EU works; it is a matter of seeing whether progress is being made and deadlines are being met and so on.

Senator SHERRY—At some point in time it will be finalised. Presumably there will be some sort of report that will come to you about finalisation?

Mr Cooper—Yes, there will.

Senator SHERRY—Will that be made public?

Mr Cooper—I do not think it will, not as a matter of course. We may choose to share some of the high level principles with the market, but I do not think it is intended that that report be made public, no.

Mr D'Aloisio—We would have to examine very closely the sort of market sensitive information and so on.

Senator SHERRY—There might be non-market information that is useful from a public policy perspective.

Mr D'Aloisio—From the point of view of things that could come out of it that could be of more general use, we could look at that, but we would have to be very careful about the actual information about the company itself.

Senator SHERRY—Do we have a date for the next shadow shopping exercise?

Mr Cooper—No, we do not.

Senator SHERRY—Is it intended to carry out another one?

Mr Cooper—I do not think a decision has been made one way or the other.

Mr D'Aloisio—No, it is work in progress.

Senator MURRAY—I just want to ask you briefly about valuers. As you know we had a discussion at estimates about it and I have done a little bit of digging; I am still wanting to do more. I have a note here that in 1926 the Commonwealth Institute of Valuers was established and that was then changed to the Australian Property Institute. It is a national body with over 7,500

members, so there is a professional institute. I am interested in comparing their regulatory oversight with that of auditors. Mr Cooper, you will remember, Mr D'Aloisio perhaps not as easily, that auditors' roles were very carefully examined within this parliament. The Joint Committee of Public Accounts and Audit produced a report, No. 291 by memory, but do not hold me to that. This committee looked at the matter and of course the government eventually produced legislation to ensure that auditors contributed to the health and integrity of our system at large as well as the companies for which they were auditing. I think it was a very effective process, but there was an intense examination of these issues prior. I am concerned that valuers have been left out of the loop a bit and yet they are enormously important to, for instance, the integrity of accounts on properties and that is why we are discussing them. Is ASIC intending to do any examination on the overall regulatory regime of valuers and establish where there are any shortcomings? I am asking you that question in the general sense and also arising out of the analysis that you are doing of these three major collapses.

Mr D'Aloisio—I think at this stage the approach has certainly been and will be to really focus on these three cases to see what we learn from that. Certainly at our level we have not then gone further. We are not trying to anticipate the results of the discussions that we have with them in relation to these three cases to see whether they raise any broader issues that we would need to look at. I think we need to be careful that we do not start drawing conclusions that there might be systemic industry-wide issues here. We certainly want to look at these cases a lot closer.

Senator MURRAY—Yes, except the experience of the eighties and the resulting court cases resulted in general community concern about the efficacy, the strength of regulation of auditors and the statutory requirements over them and their self-regulation. That did not imply that they were all a bunch of crooks, because they were not; it implied there were problems. As a consequence we now have a much more rigorous regime. I am not asserting that 7,500 valuers are a lot of dodgy people because that would be untrue, but I sense that the same issues that were apparent in the eighties with accountants and auditors, and valuers I might say, are still around in respect of valuers.

Mr D'Aloisio—I take that on board as we go down the path of talking to the valuers about property investments in particular.

Senator MURRAY—I have tracked this sort of stuff for a long, long time and would ask you to be sensitive in that area. Really the issues are as they were with auditors: are their professional association's self-regulatory mechanisms strong, is the regulatory oversight from a statutory point of view sufficient, and so on. I would expect those questions would automatically arise in some of the discussions you would have. I do not want to pre-judge the issue, but my sense of things is it is not equivalent and maybe it should be.

Senator SHERRY—As we touched on in estimates, the difficulty is that valuers are state regulated. I do not know what are the regimes, frankly, from state to state, and what is the level of efficacy of the regimes. Inevitably whoever you get to do the work will have to liaise with different state jurisdictions on their approach to valuers. Also I do not know whether there is a national professional organisation for valuers. I assume there is.

Senator MURRAY—Yes, there is. My intention in raising this as a policy person, a legislator, is that if ASIC arrive at a view that the area needs to be looked at better, then obviously you

would be in a position to say to the federal government, 'This is an area which deserves further examination.' That is why I want to raise it with you.

Mr Cooper—If I can come at it from a slightly different way, our work when we issued our debenture industry report, if you like, in early 2005 was that there was a problem with valuations, but it comes from a slightly different angle than criticising the way they regulated it. It was saying that one of the core issues of these business models is greenfields developments where a debenture issuer might buy rural land for a few million dollars, get some plans and get development approval and then they get a valuation which is on an as completed basis but suddenly shows that the property is worth $80-$90-$100 million more and it is the regulation around that that we identified as being a real issue. That is the so-called equity that these issuers play with. When the times get tough, of course, that equity is not there.

Senator MURRAY—I have been very impressed by the way our general concerns about auditing and insufficient professionalism were addressed and I think we have a much more robust regime now.

Senator SHERRY—Again we touched on this at last estimates regarding the solicitors mortgage trustee in Tasmania where there are question marks over the valuation. I have to say, to be frank, even though ASIC now have regulatory oversight and the schemes are being wound up and compensation paid to a significant degree, I am still not clear what happened at the state jurisdictional level in terms of investigating the valuations that were provided, around which there were significant question marks.

Mr D'Aloisio—At the end of the day valuers will be applying accounting standards that apply across Australia, so it is not a state accounting standard, and as Mr Cooper says, the issue in property development is very much about valuation as is or valuation as if complete, how the two valuations are arrived at and how they are disclosed in the documents to the retail investors. I would like to have a good look at that before drawing any conclusions about this whole industry and this whole area. We note what Senator Murray says, but we have to be careful that we are not unnecessarily affecting a profession.

Senator SHERRY—In Tasmania, for example, there is a valuers registration board; you have to be formally registered, but I have no idea what level of oversight that involves. I am sure there is a professional organisation but I do not know what level of oversight that involves. Anyway, we will obviously hear some more on this issue. A critical element of the efficacy of the structures is outside your remit; it is not an area ASIC has got?

Mr D'Aloisio—You mean the valuation?

Senator SHERRY—The valuation.

Mr D'Aloisio—I am not sure in this sense that disclosure is the key to the regime. It is with a narrow remit to ensure that there is proper disclosure about how valuations are arrived at, the principles that are applied, the assumptions. Really, at the end of the day that is the information that is vital to the investor. I think we have stepped back a little bit in the three-point plan that I talked about at Senate estimates; getting the investors to ask the right questions about the business models and the valuations is just as critical to actually understand an as is or as if

complete valuation and what are the risks. As valuations, they tell you quite a lot. An as if valuation says basically, 'If this organisation is wound up today instead of getting back $200 million, you might only get back $100 million' because they have not completed the projects, but if all goes well and they have the cash, et cetera, investors get back their full money plus interest. The disclosure regime does work, I think, in that regard.

Senator SHERRY—I know what you are going to attempt and we have talked about it, but how far can you go down to the actual valuers themselves to determine whether there is a reasonable valuation?

Mr D'Aloisio—I think you can. If our investigations, for example, in a particular matter were to show that valuations were conducted properly, I would have thought, as part of the powers that ASIC has, we could take action.

Senator SHERRY—What if the valuations were not? There is a certain amount of subjectivity involved, I would have thought.

Mr D'Aloisio—It is no different, is it, to getting legal advice or accounting advice or financial advice. You get advice in all sorts of ways in relation to a transaction. The key is, has that advice been given properly or is it negligent, is there an act or omission, has there been a problem?

Senator SHERRY—There is a certain amount of subjectivity about a property valuation as indeed there probably is about a valuation of any commercial enterprise.

Mr D'Aloisio—I think when you look at court systems and experts coming in and giving valuations, they are providing valuations to courts and other processes all the time, and courts, for example, would look at the qualifications of an expert valuer and decide whether or not the individual is an expert. Having decided that, the assumptions behind a particular valuation would be tested, as would the various principles, and courts would certainly reach a view that you can rely on experts. As a profession and as a way of assisting business, it has got judgement in it, in the sense that an expert has to make a judgement, but I do not know that that is any more or less subjective than a judgement about whether or not you have a particular illness, whether or not a lawyer would advise you to take a particular course of action or not, whether an auditor would ask you to treat something in a particular way. The judgement that is required, I would have thought, is similar to judgements that are required in other professions.

Senator SHERRY—The point I was getting to was can you go to a valuer formally and question their valuation in the Westpoint or Fincorp or Australian Capital Reserve context? You can go perhaps to the trustee or to the company and say—

Mr D'Aloisio—Do you mean ASIC?

Senator SHERRY—Yes.

Mr D'Aloisio—We would have to go through the trustee, through the company, through the directors or through the prospectus, that is correct. Clearly the prospectus is the quickest way and we could look at that. That is not all that different to a lot of other situations where we would go through trustees, the company, the directors and so on.

Senator SHERRY—Just a couple of matters on Fincorp specifically. My understanding is that Fincorp was split into two main entities: Fincorp Investments, which raised the money from the investors, and Fincorp Property, which borrowed the money to invest in the property developments. Is that your understanding?

Mr D'Aloisio—Yes, I think there were a number of property companies. There was a principal, Fincorp Investments Limited, that was the finance arm, if you like, and then it lent that money to a number of other companies that then did the property development.

Senator SHERRY—Do you know whether the trustee in that case, Sandhurst Trustees, inspected the financial records of the investment entity which raised money for investors or the Fincorp Property entities? My understanding is that they looked at the records of Fincorp Investments but not the records of the Fincorp entity.

Mr D'Aloisio—The main asset of Fincorp Investments Limited would have been the loans receivable from the various companies to which it had on-lent. Certainly in the accounts of that finance arm, judgements would have had to be made as to whether those loans were recoverable or were impaired in any way.

Senator SHERRY—By the trustee?

Mr D'Aloisio—It would have to be by the directors of that company. The trustee would certainly look at that as would ASIC as part of the prospectus oversight. The advice throughout that process I think was that those loans were not impaired and, indeed, I think in May 2006 or about that time, ASIC negotiated or asked that Fincorp obtain an independent expert review of that loans receivable account. The loans receivable account was confirmed; in other words, it was not impaired.

Senator SHERRY—By whom?

Mr D'Aloisio—By an independent expert that was retained. In that process, in order to form a view as to whether or not loans are impaired—and again I am not a valuer and this is one of the issues we would want to look at—you would have had to form some view about the ability of the companies in the group, the borrowers if you like, to repay. To form that view you would have had to look at the valuations and the investments, the investment profile and the underlying business case that those companies had.

Senator SHERRY—My question went to the role of whether or not the trustees, in this case Sandhurst, carried out such a comprehensive evaluation or inspection, however we want to term it.

Mr D'Aloisio—We will, as our own investigation into this, learn a lot more about that. The trustee could have relied on the Fincorp Investments Limited accounts. The reports in those accounts show that those loans were not impaired. It should have been able to have satisfied itself from that disclosure whether or not there was any impairment. Whether it then went further and that and talked about the group, I do not know; that would be something that would come through in our investigations.

Senator SHERRY—Obviously there is some way to go in that investigation. If it is not going to be specifically addressed at some point in time to this committee or estimates, you could just note it as whether or not that happened, because I am led to believe that it did not happen. If it did or it did not happen: if you could check on that.

Mr D'Aloisio—Yes.

Senator SHERRY—Going back, the three-element plan that you outlined last week, do you have any timetable beyond that which you set out?

Mr D'Aloisio—I said I wanted to give that plan six to 12 months before making a judgement as to whether any other action was needed. We are really working as a priority within the next six to 12 months.

Senator SHERRY—Have you had any discussions with Treasury about this plan?

Mr D'Aloisio—No, not at this point.

Senator SHERRY—Have you had any discussions with any government ministers about the plan?

Mr D'Aloisio—No; we have made the plan available and we have disseminated it widely to this committee, Senate estimates, Treasury and the parliamentary secretary. Subsequent to that, since we met at Senate estimates, no, I have not had any discussions.

Senator SHERRY—It was only the last week, I know, but are there any specifics about the staffing and who is heading it up; those sorts of issues?

Mr D'Aloisio—No, I think the team, headed by Jennifer O' Donnell, has started. In fact, we have had two meetings. We are now in the process of bringing in outside experts and we will then start the process of talking to trustees, to valuers and so on. The planning stage has well and truly commenced, but I do not have any deliverables.

Senator SHERRY—How do you intend to do it? You have Jan Redfern, but she has obviously got her general other work to do. Is there going to be a—

Mr D'Aloisio—No, there are two teams. Jan is in charge of the investigation team in Fincorp. She is also in charge of Westpoint and I have freed her up from a number of other duties. Jennifer O'Donnell is in charge of the three-point plan which is referred to in Fincorp, which is wider than just Fincorp, and I have freed her up from other duties so that she has the capacity to do that. The team that has been put on it have similarly been freed up from other duties to make sure that we can concentrate on this.

ACTING CHAIR—Do you envisage any other corporations being looked at in this investigation? Have you just narrowed it to the three that have happened or have you actually said, 'There might be other business models out there that mirror these and are set up for a fall as well'?

Mr D'Aloisio—No; you are seeing what you are learning from this. There is a backward looking part, if you like, but it is actually very much about what you do in this sector of the market. This is a sector of the market that we have said is about $8 billion; it is about 83 unlisted, unrated issues. We want to get very much to the forward-looking aspects of it as quickly as we can. We are looking at what we learn from it. Obviously in the investigations and other things that need to occur we are making sure that we maximise the amount that is available for the investors that have gone into it, but it is also very much forward-looking, about this sector of the market which has obviously caused concerns to the retiree group, if you like, that segment. There is actually then a broader plan. I think it has alerted us to the fact that we need to put more resources into the whole of the retail investment area because of the amount of wealth now that retirees have and the sophisticated nature of a number of other products to which retail investors are getting access. I think what we are saying is there may be other issues out there that the current good market is not showing up as a problem, but may well show up as a problem. Again, I do not have a lot of specifics around that and I do not want to pick on any particular new product, because it is not fair, but there is enough in what we have seen that we think that is a priority area for ASIC over the next year or two.

Senator SHERRY—I do not want to give you priorities, but I will pick up one area: these reverse mortgage products. It seems to me there are some issues around reverse mortgages.

Mr D'Aloisio—I think in the reverse mortgage area, people have done a lot of very good work through the FIDO website and really drawing attention to the potential disclosure and other issues with the reverse mortgages. We agree; the first stage has been about that. The next stage for us on that is to really look at the underlying business models, how they work, the assumptions, because, as you know, the reverse mortgage depends on a lot of assumptions about the future in terms of interest rates and valuations, and the capitalising of interest and interest on interest. I think our learning on that is improving and I think the next stage of that exercise for us is to get very much into the business models behind it. We intend to wrap reverse mortgages into the overall retail focus that I talked about earlier.

Senator SHERRY—You have touched on some of the areas that concern me, but probably an area where it is difficult for you to do anything about it, I suspect, is the commissions, the sales incentives. This is a significant space for mortgage brokers now. Planners tend not to have got heavily involved; I know there is a bit more activity. We shadow shop for super but we are not shadow shopping for reverse mortgages. It seems to me that there are a similar set of issues about which you cannot shadow shop for, unless planners were moving into the space in a significant way, which as I understand they are not yet. Do you accept you have some limitations in terms of the commission activity and the distribution?

Mr Cooper—Not entirely. We have done quite a bit of work. We issued quite a useful report last year, we have taken enforceable undertaking action against one issuer, and I think only as recently as last week we put out a release warning about other practices that we had seen, particularly in the way that these products are advertised. A classic reverse mortgage is not a pure financial product, as we know; we have probably talked about this before. Certainly under the ASIC Act we regulate the conduct and it would be open to us to make it part of our business plan to look at, as we have been doing, the practices around them. Even though we do not directly regulate the mortgage brokers, we do have jurisdiction about how they behave, whether

they are engaging in misleading or deceptive conduct and so on. We certainly would be able to work in that area.

Senator MURRAY—Do you have jurisdiction from your consumer perspective?

Mr Cooper—Yes, that is really what I am saying.

Senator MURRAY—That pretty well lets you into everything because a reverse mortgage is another product which you are concerned with as a—

Mr Cooper—It is a financial product for the ASIC Act, but not our big act, if you like.

Senator MURRAY—Yes.

Mr D'Aloisio—Again, as an instrument it has some real value and obviously investors and consumers see merit in it. The challenge for us, in addition to the disclosure, is to challenge the underlying assumptions, to ensure that those going into it actually know what those risks are going to be in 10, 15, 20 years time. That is the hard part in these sorts of products.

Mr Cooper—The key problem for us is that our data shows that the average age of a reverse mortgagor is 74; now there is a new term for you, reverse mortgagor.

Senator MURRAY—There is an issue attached to that. As far as I am aware, there is no requirement in lending like that, that the reverse mortgagor has a will or has, for instance, provision for providing a power of attorney in appropriate circumstances where they might be incapacitated or of reduced ability. What worries me is that people enter into these when they are much more competent and yet the realisation of the deal when they are 84 or 94 is when they are less competent.

Mr D'Aloisio—I think that would apply also to investments generally in that class. What we are saying is that a properly planned retiree, in addition to getting proper advice on diversification of risk or of reverse mortgages and how they work, would also think through, if they have a myriad of trusts or other entities, how they would be dealt with on death. I think that is a much broader problem of capacity in terms of medical powers of attorney as opposed to an ordinary power of attorney. It is a broader issue that is out there, I think.

Senator MURRAY—Except a bank or a financial institution that provides such a product and has the interests of the consumer or their client at heart, you would hope, would foresee such problems and design the product to ensure that risk is covered off more fully, yet I do not know that to be the case.

Mr D'Aloisio—I cannot comment on specifics. I do not know, but I would have thought you are getting to the issue of, 'Do you know the consequence of the reverse mortgage and how it would work if you die in 10 or 15 or 20 years time?'

Senator MURRAY—Let me give you a counter-example, if I may. It is almost universal practice, as I understand, for someone taking out a mortgage to take out insurance, so you have mortgage insurance. That is designed to cover off risk so that some poor soul who gets run over

by a bus does not leave his wife or her husband carrying the can when they are not an income earner. That to me is good prudential behaviour which also has the interests of the client at heart, and of course it assists the financial institution. I am not quite sure where we can go with this sort of thing, but I think that from a consumer perspective people need to be more alert to those risk covering areas, which I assume is one of the reasons why you raised the reverse mortgage issue.

Senator SHERRY—Yes, in fact, it would be hard to insure it, would it not? Because the event is known; you are going to die.

Senator MURRAY—Exactly, so you cannot insure, but the insurance that you do need is a will.

Senator SHERRY—But you could argue that a reverse mortgage is a form of insurance.

Senator MURRAY—Except that disposal of the property can get tricky and there is the issue of the power of attorney which is necessary when you are incapacitated, but you might still be capable of living in a house.

Senator SHERRY—That is the first time I had heard of that average age you just mentioned, 74. You would have to assume that if the average is 74, there are a fair number of people older than 74 and therefore a greater likelihood of issues around incapacity.

Mr Cooper—It is simple mathematics. You and I would not be able to get a reverse mortgage because of the maths.

Senator SHERRY—I have to pay the current one off before I get to the point where I want to reverse it.

Mr Cooper—That is what does concentrate the market in that age group. The other measure that lenders impose is that they will only lend you a fraction, typically 25 per cent, of what they think the home is worth.

Proceedings suspended from 6.25 am to 6.36 pm

Senator SHERRY—The thing you gave me, Mr Cooper, I was not aware of the 74 average age. Is that a result of the studies that have been done? I have not read it publicly in anything I have seen.

Mr Cooper—I can find out for you, Senator. It is just a number that is sort of in my grey matter. Whether it is an ASIC number or comes from somewhere else, we can get that for you.

Senator SHERRY—I suspect that one of the other profiles of this group is that they are much less likely to have other assets. It would seem to me reasonably rational.

Mr Cooper—We infer from the entry into the arrangement that liquidity was becoming an issue.

Senator SHERRY—Yes. It is just interesting. I would be interested if you could provide any sort of profile background that you have of this group. Just take this on notice.

Mr D'Aloisio—It would also be interesting to see if post 1 July being able to access super much more directly that you have been able to date would make a difference to the demand of that product. I just do not know. There may have been some restrictions in relation to being able to access your superannuation that may have caused—

Senator SHERRY—There is not.

Mr D'Aloisio—No, there will not be after 1 July.

Senator SHERRY—No, that is right.

Mr D'Aloisio—The question is whether it has an impact on demand for the product.

Senator SHERRY—Yes; it could work both ways. Conceivably some people may draw a large amount of their super down, because there is no maximum limit under the new rules. There are minium draw-downs but no maximum. That may lead some people to enter into a reverse mortgage product later or perhaps earlier depending on the extent of the behavioural change.

Mr D'Aloisio—I think we should look at that.

Senator SHERRY—I am not actually suggesting we look at it. I just think it is an interesting point you raise. In some ways it is not dissimilar to the issue that we discussed at estimates with the rise of lump sums, defined contribution moneys that are more widely available to a greater number of people. ASFA today released some research on average super savings and what struck me was it was relatively low. If you look at the breakdown, I think the majority of males had less than the low 80s and for females it was only about 34, 35. The quantum and the spread was up on 20 years ago for obvious reasons. Certainly anecdotally some of the people drawn to Westpoint, Fincorp and ACR are from this group of people for whatever reasons.

Just reflecting on what you said last week about the three-point plan you outlined, it does put you on the spot, Mr Cooper. It is all very well for Mr D'Aloisio, who is new to the job, but why has ASIC not done this before?

Mr D'Aloisio—I think in fairness this has been misunderstood. This is the product of ASIC and its team in terms of what we have learned from the past. It is not a 'D'Aloisio plan'; it is building on experience from the past and something I think we all really landed on and said, 'When you look at this market we probably need to do a lot more than we have done.' Certainly what was encouraging when coming in was the work that ASIC had done in the high yield area and in the areas drawing attention to these sorts of issues going back over five or six years. In a sense like reverse mortgages. They actually foresaw there could be problems. A lot of credit does need to go in that area.

Senator SHERRY—I think you are probably being too modest. What worries me, and I suppose it is difficult for you to respond, but you may wish to, is to what extent is your plan

driven by you as an individual when it is the culture of the organisation as a whole that should drive the plan and the response.

Mr D'Aloisio—I think I can say in the time that I have been doing this and the way that the organisation is embracing the need to improve, as the chairman of the organisation I see it as very encouraging in going forward with ASIC. Indeed it is something that I have said to the staff and when people have asked me, that I think ASIC has a quality and commitment in the approach. Like all organisations, the real test is even if you are doing well, how you actually improve in what you are doing and how you set your sights in terms of understanding where changes are occurring in the market so as to anticipate them. I think that will be the real test for us and the culture in ASIC over the next period.

Senator SHERRY—I suppose what worries me, to the degree it occurs, is that a response plan is based on a new head of an organisation, when in fact the approach should be already embedded in the organisation.

Mr Cooper—When we spoke last time here we took Fincorp as an example. I responded to the assertion that ASIC had really sat on its hands and done nothing about Fincorp and the next thing we know Fincorp collapsed. The reality could be nothing further from that. We identified problems with Fincorp from very, very early days. We took it to court. We forced Fincorp to remedy its advertising. We actually achieved a refund payable to investors under the 2004 prospectus, which is the first time that has ever been done. The plan is a well articulated pulling together of things that have been on foot for some time.

Senator SHERRY—I do not lay all the problems as ASIC's. I have actually been in a position of defending you and Mr Lucy on some occasions from what I have considered to be both personal and unreasonable criticism which I do not think advances the issues when that occurs. You touched on the active interventions and there were nine or 10 in the same respect to Fincorp. As you say, you actually went to five stop orders and refunded money on one occasion. Given that history or pattern that emerged in the case of Fincorp, do you think under current law there was anything more you could have done? Is the current law sufficient to be effective, when you are faced with a pattern or a history of that type?

Mr D'Aloisio—I stand by what I said at estimates, because I have looked at the issue of whether we need additional powers. I would like us to go with this three-point plan for the next 12 months before forming any view about whether additional powers are needed. I certainly have not come to that conclusion in looking at this with the benefit of hindsight as an outsider and a new chairman

Senator SHERRY—With Fincorp, and you laid it out I thought in terms of the time line and each intervention when it occurred, but there was a clear pattern there of ASIC intervening but it seemed to me at some point disaster was going to occur but you could not ultimately stop that disaster.

Mr D'Aloisio—I think, Senator, you are using hindsight there to real advantage. I am not being critical in the sense that I understand it is a hindsight issue, but on each occasion where the stop order or interim stop order was put in place the organisation took action to remedy the issue. ASIC were made comfortable and they went forward. We need to accept that these investments

take place over a long period of time. I think what we have been seeing in that sort of chain as we approached the end has prompted us to raise the question asking if there is a flaw in this business model that we have not picked up earlier and let us look at it. Whether if there is a flaw in this business model, could we have picked it up earlier, that is a big call to make.

Senator SHERRY—But you obviously had picked it up. Over a period of years on your time line you had approximately 10 occasions but five stop orders. Surely there is a point, one or two interventions, stop orders, and you think there is a pattern starting to emerge here whenever that was, 18 months or a year ago. You keep doing it, stop orders and interventions over a fair amount of time. It must beg the question, this cannot keep going on and on. At some point the end is going to come.

Mr D'Aloisio—If you made a call and were wrong in the sense of closing it down, let us say after the fourth or fifth in your nine example and the valuations at that point would have been as is valuations, the judgement you would have needed to make is whether the investors would have at that point received more or less than if the projects had continued on and they had remedied the particular disclosure issue that you were concerned about. It is a difficult judgement to make.

Mr Cooper—I think also you are blending disclosure with solvency. They had absolutely a pattern of poor disclosure. We were on them regarding their documents and their advertising, but to suggest that immediately translates to solvency, which is of course the shut-down power, it does not connect.

Senator SHERRY—It may have done that but it certainly suggests to me, after a couple of interventions, their compliance is pretty poor. I mean, if time after time they cannot get their material right, it would seem to me, well, who is your compliance officer here who is overseeing this? It would seem to me there is certainly a point where you have to say you are operating with a compliance person or whoever it was who is not doing their job properly and at least intervene to that extent.

Mr D'Aloisio—The test for me is looking forward and looking at others. What has to come out of this is an ability to make that judgement. I can say at the moment in terms of the investigation and everything else we have done, that is a very difficult call to make prospectively. I am sorry to use the phrase again but it is work in progress. We are very alive to the issue you are raising as to what point in time do you make that call, but you really need to know that at that point in time, if you are going to make the call, that your investors are going to be better off than not. That is the really tough issue.

Senator SHERRY—I accept the tough call about shutdown but the call about what is the compliance officer doing—in a superannuation fund overseen by APRA you could not get away with—

Mr Cooper—You have hit the nail on the head: that is a prudential regulator. We do not run these people's businesses for them. We have powers on disclosure and then right at the end of the line we make, as the chairman was saying, a judgement about whether they are solvent or not. There is a lot in the middle.

Senator SHERRY—Perhaps you should. What is unreasonable is you have reached the conclusion after two or three interventions and a couple of stop orders that at the minimum their compliance is a problem. Whether it is you or APRA, it begs the question: what was the trustee entity doing? Surely the trustee entity—

Mr Cooper—You have auditors and directors and quite a matrix in the structure.

Senator SHERRY—Yes, I accept that, but you have that in a superannuation trustee. If APRA intervened on, say, poor disclosure by a superannuation fund on two or three occasions and came in and said, 'You have this wrong, correct it,' there would be hell to pay, I suspect, in terms of at least the compliance person who is operating in that space.

Mr D'Aloisio—The judgement you have to make before you go much further with these sorts of things is this: is the answer going to lie in the ultimate business model? If that is flawed, even taking the point you have just made about compliance, that still is not going to fix it. Ultimately if the business model is flawed because there is not enough equity in it, or the way that these things are run, it cannot work. That is the bit I think that we certainly want to put a lot more effort into. I am not suggesting that your point about being more aggressive about compliance is not appropriate, as it is part of the plan that we have announced. When you look at property development that works, it works across a whole range of companies and organisations. Why does it not work in this instance? It has to come down to the way that they model their forward planning and how they are raising their money, the competence of the directors and so on. It is going to be in issues of management and in the amount of equity so they can withstand unforeseen risks and indeed foreseen risks of markets turning down, of the demand for apartments dropping all of a sudden and being left with 150 apartments instead of 30 apartments. You need to look at those risks and those issues and form a judgement about the overall business plan and model.

Senator SHERRY—I accept that and I am not criticising that approach, but when it comes to the detail of the disclosure document in which you did actively intervene over a significant period of time on a significant number of occasions—presumably they did have a compliance officer, or a lawyer?

Mr Cooper—Legal advisers and so on.

Senator SHERRY—What were these people doing so as to so constantly get it wrong? It begs the question of your ability to at least demand that of them. It may not be a role for ASIC, it may be a role for APRA; I do not know. On the related issue, are there any other similar type entities where over a timeline of a year or two years you have had to intervene in terms of the accuracy of prospectuses and issuing stop orders?

Mr D'Aloisio—We are doing that analysis at the moment. The sort of chart that we gave you for Fincorp and ACR, we are doing that across a whole range of issues to see if in fact that snapshot points to the same issue as you were just talking about. As to whether the interventions have been too many or too few, if too many then we should be doing something else about it. We are preparing a similar sheet for each one of them.

Senator SHERRY—Good, but in terms of ASIC's powers or any need for legislative change that might require other powers not exercised by ASIC, that is not an issue you have approached government with yet. It is an issue you approach government with at some point when you have completed this process?

Mr D'Aloisio—Yes, what I have said is I would like to give it the six to 12 months I have talked about. It is more in line with 12 months. At the end of that period we would form a judgement as to whether in fact some change is needed. At this point we do not see any change required.

Senator MURRAY—Just on the same line of questioning, when Senator Sherry was in full flight, I think Mr Cooper was about to say, we are not an American style securities commission. Is that right?

Mr Cooper—Slightly different words in the sense that ASIC does not make a judgement in relation to the business that is being carried on; it is really a disclosure system.

Senator MURRAY—I was really interested to see if you were saying that other authorities in your same field have powers which are greater than you have. The quick question I wanted to put to you in your consideration of these matters and your response over the next six months is whether the provision of a series of ASIC notices at some stage should trigger a higher potential liability from the directors of the company and their advisers who have a fiduciary role. Let me explain what I mean. I am a supporter of the present business judgement rules with respect to directors being able to take reasonable risk which is part of their function. However, when a regulator has fired a number of shots across the bow it would seem to me there is the sniff of delinquency and that should be an automatic trigger for a higher standard of liability. That kind of two or three step process could easily be introduced into corporate law as it does not affect the majority of businesses at all. It just affects the ones where there is a serial problem. I merely ask whether you would consider in your development of a potential policy response the possibility of separating out recalcitrants or delinquents in terms of potential liability under the law from conditions that apply to the mass of people. The danger of giving you enhanced powers that apply to everybody is that that becomes unfair, unnecessary and excessive.

Mr D'Aloisio—In terms of reacting to the proposition, ordinarily in negligence law, the law of omissions, failure to take due care, all relevant factors would be looked at including, I would have thought, whether ASIC had issued notices to directors and so on. If ASIC had given warnings about certain types of conduct, you would have thought that would have been taken into account in determining already under current law. We can look at the point you make.

Senator MURRAY—Jurisprudentially it does not alter the basic penalty structure; it merely alters your potential—

Mr D'Aloisio—Just liability as distinct—

Senator MURRAY—Yes; that is where I am looking at, because in administrative law there are precedents. A simple one is speeding. If you keep speeding you get points taken away. At a certain level you get your licence taken away. You are in a different category of driver, because you have been a serial offender.

Senator SHERRY—A points system for directors.

Senator MURRAY—I am not suggesting that but I think the analogy is close enough to indicate where I am going. I really would not be keen to see ASIC demanding much stronger powers in many of these areas except where it is relevant to the sector concerned.

Senator SHERRY—Changing subjects totally, in February ASIC invited submissions on the Electronic funds transfer code and there were some media reports that I am sure you would have spied in the *Australian Financial Review*: 'Banks warned on online liability shift'. It suggested some banks may seek to change the code to shift liability for internet banking scams onto consumers. That AFR report was on 9 May 2007. Could you just provide us with an update on the code?

Mr Cooper—Work in progress would be the expression that describes it. We have received a large number of over 30 submissions. Certainly we did see that report. That was I think attributing comments to some of these smaller financial institutions which I then understand were contradicted in letters to the editor and so on. The key point to bear in mind is ASIC's very strong view of where that ought to sit and also I believe the ABA's submission did not favour the model that was in the AFR.

Senator SHERRY—Yes, I just wanted to gauge—it seemed to me the media report was more about the internal debate that was taking place amongst a number of organisations about what they would or would not want to do in shifting liability, but that is not ASIC's approach. When will there be an indicative date on conclusion?

Mr Cooper—I actually cannot provide you that. We can take that on notice. I can tell you that the submissions were formally supposed to close in April but I believe we only very recently got the ABA's submission, probably because there was a fair bit of discussion amongst its members.

Senator SHERRY—As evidenced in the review.

Mr Cooper—Possibly.

Senator SHERRY—Possibly. More than possibly, I suspect, but you can be tactful and say possibly.

Mr Cooper—Absolutely.

Senator SHERRY—No indicative date on that? It seems to me, talking of internet banking scams, I have a quarantine on my website now and I am regularly going through these things every night. There are just such an enormous number of scams about. I get that one as well and a few others. There are a lot of these financial service scams about and if any indication by the numbers going into my quarantine box, they just seem to be increasing. I had one on an ATO letterhead which looked very official going around at the present time which I raised with the ATO. I think attempts to shift liability would meet with a very poor consumer response in this area. I have nothing more, Chair.

CHAIRMAN—Senator Murray.

Senator MURRAY—Just a couple of consumer orientated questions. Mr Cooper, I had an odd letter but it seemed to make sense to me. Do you have complaints or queries arising out of identity issues at all? I do not mean fraud; I mean people who have difficulty getting satisfaction from transactions because of their identities. There are two areas I want to cover: one is general assets and one is superannuation assets.

Mr Cooper—Do you mean they cannot prove to meet the 100 point—

Senator MURRAY—Perhaps I should be a bit more specific. This man wrote to me and he said his name was Lynn but he dropped the 'n' and had become Lyn. As you know, that is both a male and female name. His wife is Pamela and she used the name Pam just as Williams use the name Bill, et cetera. He said the problem is when they buy shares, or assets through the broker or the agent, when asked for names he says Lyn or Bill or Pam or whatever it is; that is the name that is written on the share certificate. Later on when they try and redeem them and they say, 'My name is actually Pamela Jane such and such,' they say, 'This is not you.' This particular person said he had a fight for nine months with the ASX. You can understand whoever is the authority or the registry owner being afraid of identity fraud, but the problem is it is a very common feature of Australian life that Johns call themselves Jacks and on it goes. Have you had this sort of issue raised with you before?

Mr Cooper—Yes, and in fact I have personal knowledge of it. My eldest son uses his middle name rather than his first name and he is forever getting superannuation accounts that do not marry up.

Senator MURRAY—You have a conflict of interest in answering this question!

Mr Cooper—Possibly; I just think it is a feature of modern life. I would not say that ASIC has any particular solution to it. You have mentioned that share registries have quite strict rules around this; superannuation funds do also and bank accounts and so on.

Senator MURRAY—I am aware that you issue guidance notes and non-official kind of things and it would seem to me that the collectors of the primary information, the broker for instance in whatever form of asset it is, should be encouraged to take down the correct identity details. This is an older man, he is 65 years old and it caused him nine months of anguish. Just reading his handwritten note to me it strikes me that it must be quite common.

Mr D'Aloisio—It is interesting that you raised it. I would have thought a statutory declaration would have clarified it very quickly. I am known as Tony or Anthony Michael or Antonio Michelanio in terms of my Italian name. Generally I have found where that has happened is a statutory declaration normally clears it up very quickly.

Mr Cooper—We might be able to have a word with our FIDO people and see whether there is some guidance and perhaps some corresponding newspaper articles or something.

Senator MURRAY—For the collectors of primary information it should be a standard broking requirement where the same should apply if you are a mortgage broker or a stockbroker.

The second question related to the issue of superannuation. As you know, this committee is examining matters to do with the superannuation industry and one of the concerns I have had is an allegation by people that some companies may be using devices to ensure that the transfer of funds is slower than it might otherwise be, which in the individual case does not matter but in the aggregate might be very useful at year end or other times. There was an example recently with a very major company who you have had an interest in where somebody wrote about their superannuation with respect to an advice from a person. That person had left the company and they sent back the letter and said that person is no longer in the superannuation company. It is obviously an official strategy. Those sorts of things are just a great irritant to people. The question is: do those irritations reach your ears, are you aware of them and are you doing anything to kind of monitor this area from a consumer's perspective?

Mr Cooper—We are. I think in the early days of super switching there were all types of complaints about organisations that were habitually delaying and it turned out that they were not. There were a lot of allegations and cross-allegations in the industry. Certainly we would encourage anyone who is not getting the right sort of response when seeking to find out about their superannuation or switch their superannuation to complain to ASIC.

Senator MURRAY—I am trying to avoid getting to the situation where I name companies, but it does seem to me that enough of that irritation is reaching my ears to indicate that there may be a couple who are using administrative devices to delay transferring moneys or consolidating moneys and it is now much more important because of the government's change in legislation that if you do not have a TFN or have found your stuff it can be a 45 per cent tax rate.

Mr Cooper—I will take that on board

Senator MURRAY—I hesitate to ask you to do a shadow shopping thing across the industry but perhaps a snapshot of a particular major company just to see what happens and get down to the nuts and bolts so that you can get a feeling for it.

Mr Cooper—Generally our complaints department are a pretty good indicator of what is happening out there, so perhaps we will just see what that is telling us at the moment.

Senator MURRAY—The estimates filled most of my needs. I do not have any more, Chairman.

CHAIRMAN—I just have a couple of questions. I refer back to the Australian National Audit Office report of January this year on the effectiveness of your processes for receiving reports of breaches of the Corporations Act; you might remember that report. While the number of complaints referred to ASIC have been increasing, the number investigated has fallen dramatically. You accepted the five recommendations that the Audit Office made in relation to that. Can you give us an update on your implementation of the recommendations and how you are moving to improve your procedures to follow up requests for further information from external administrators?

Mr Cooper—Certainly I can do that. Data in the 2006-07 year already shows that we are now doing a two per cent rate on reports as opposed to the one per cent which was mentioned in the ANAO report. It is pleasing to see that the effects of the assetless administration fund that the

government introduced for us are really starting to come through. So far this year under that regime we have banned a total of 72 company officers coming directly out of the assetless administration system, which is more than twice the 30-odd bannings that happened in the previous year. Already we are seeing the effects of that system coming through. We have updated our training materials for our staff who work in this area on the intricacies of section 206F, which is one of the matters brought up by the ANAO; the significance that officers need to put on whether directors were involved in related party group or not. We have also been following up some practitioners and external administrators who have owed us what are called schedule C reports. We have sent out some 400 letters to tardy practitioners to try and speed up the information that is coming to us in that area.

I can give you some other statistics also. As I mentioned to Senator Wong last time, part of the explanation for a seemingly low response rate on liquidators' reports was that in fact ASIC had moved into a more proactive mindset and not waiting around for liquidators' reports to come in but actually visiting companies where they were giving off some signs that they might be having problems with solvency. In the 2005-06 year we did 536 surveillance visits to companies that were suspected of having these sorts of difficulties. This intervention resulted in some 95 of these companies having external administrators appointed. We would say looking at over 500 companies and appointing administrators in nearly 100 of those cases is effectively preventing the sort of later catastrophes that might occur if you had not done that and waited for the companies to go into liquidation and then again waited even further for liquidators' reports to come in. In fact we have moved our activities from the graveyard to while these companies are still alive but exhibiting difficulties. We think that is much more profitable for protecting creditors. What this is really about is protecting creditors who deal with these companies and the investors who invest in them, and we think the early intervention is better rather than picking over the ruins and seeking to punish company directors. We as professionals in this area have generally found that to be difficult and the information in these reports often not borne out by the evidence. That has largely been because of the lack of assets in the administration. We think the assetless administration fund is already starting to show benefits and also our early interventions are working as well.

CHAIRMAN—I just want to ask about an issue that has been raised in some correspondence by Mr Martin Vink, who is complaining to us about ASIC's refusal to investigate a possible breach of the Corporations Act. His allegation is that a liquidator destroyed business records. He raises concern that ASIC's failure to investigate the matter potentially condones breaches to the Corporations Act. Can I ask whether you have looked into that matter?

Mr Cooper—The name does not ring a bell. Do you have the company name there? We would certainly be more than happy to take that on notice if we do not have the information with us. We will take that on notice and contact your office.

CHAIRMAN—Does he refer to the company? He talks about Creighton Brown, does he not? Anyway, we will give you the details.

Mr Cooper—Certainly we will take that on notice.

CHAIRMAN—Thanks. We have got no further questions. If there are no further questions, thank you for your attendance before the committee.

Committee adjourned at 7.14 pm