Appendix 2

Answers to questions on notice

Question 1

(Possible KordaMentha conflict, p. 29)

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

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

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

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

Answer:

ASIC does not believe that there is any conflict of interest with KordaMentha. KordaMentha have 2 separate and distinct roles.

First, they are receivers or receivers and managers of assets of certain companies in the Westpoint Group, by various secured creditors pursuant to various securities (such as debenture charges). Their powers under these private appointments will be governed by the terms of the lenders' relevant security and appointment documents. Such powers are likely to include a power to realise assets with a view to satisfying amounts owing to the relevant secured creditor.

Second, they have been appointed by the Federal Court as 'receivers' of certain property of:

(b) various directors of companies associated with the Westpoint Group (that is, Messrs Carey, Beck, Dixon and Rundle); and

(c) certain different companies connected to the Westpoint Group (such as Richstar Enterprises).

KordaMentha's limited and specific powers as Court appointed 'receivers' are principally to identify, preserve and secure all of the property of the defendants for the benefit of potential creditors (but to still permit the defendants to pay their living expenses and continue carrying on business).

A principal purpose of appointing KordaMentha as 'receivers' of the defendants' property was to ensure the preservation of such property pending ASIC's continuing investigations.

As Court appointed receivers, their role is not (in the absence of a specific order by the Court) to realise assets.

As far as ASIC is aware, KordaMentha have not been privately appointed as receivers and/or receivers and managers (that is, by any lender) to any of the same companies as those to which the Federal Court has appointed them as 'receivers' (with the principal purpose of preserving assets).

Therefore, no conflict of interest for KordaMentha is apparent.

However, if – as Court appointed 'receivers' – KordaMentha feel that they may be placed in or face a conflict of interest in performing that role (given their appointment as receiver and/or managers appointed by any secured lender or for any other reason), they would be required to bring that matter to the Court's attention and make an application to the Federal Court for directions.

Similarly, if ASIC became aware of KordaMentha facing an actual or potential conflict, it would consider whether that matter ought be brought to the attention of the Court.

In ASIC's view, this is an appropriate way for any potential conflict to be managed and is not uncommon in insolvency practice.

Question 2

(Banking complaints, p. 30)

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

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

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

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

Answer:

ASIC's oversight as to the way in which banks and other AFS Licensees handle complaints through their internal procedures is an ongoing process.

Background

The Corporations Act requires that all AFS Licensees providing financial services to retail clients, including banks, have an internal dispute resolution (IDR) system that complies with standards made or approved by ASIC and covers complaints made by retail clients in connection with the provision of all financial services covered by the licensee (ss 912A(1)(g) and 912A(2)(a)).

ASIC Policy Statement 165 explains ASIC's requirements for IDR procedures. In part, PS 165 applies the Essential Elements of IDR set out in Section 2 of the Australian Standard on Complaints Handling (AS 4269-1995). PS 165 also provides guidance on the application of AS 4269-1995 to the financial services industry and outlines additional matters necessary for compliant IDR procedures. ASIC is satisfied that all banks have procedures in place to ensure their IDR procedures comply with these requirements.

Oversight of compliance

As this is a licence obligation, failure to maintain a compliant IDR process would be a matter for a breach notification, if such a failure is characterised as a significant breach, or likely breach of the licensee’s obligations (s912D).

ASIC also reviews the efficacy of IDR procedures when considering individual complaints made by or on behalf of consumers or analysing complaints data provided by banks under Statutory Notices in relation to particular issues.

It is an additional licence requirement that AFS Licensees be a member of an ASIC approved External Dispute Resolution (EDR) Scheme. ASIC Policy Statement 139 explains how ASIC will approve an EDR scheme. PS139.62 requires that EDR schemes identify issues that are systemic or that involve serious misconduct and report such issues to ASIC. Failures to adequately deal with complaints at the IDR level are likely to result in systemic issues capable of being identified by the relevant EDR scheme (in the case of banks – the Banking and Financial Services Ombudsman), which will in turn be reported to ASIC.

ASIC therefore monitors the effectiveness of the IDR procedures by banks through feedback from the BFSO and through reviewing complaints.

Question 3

(Banking complaints, p. 31)

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

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

Answer

Please see answer to PJC [question] 2

Question 4

(Banking complaints, p. 31)

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

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

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

Answer

ASIC collects banking statistics when monitoring compliance with the Electronic Funds Transfer Code of Conduct ('EFT Code'). The last publicly reported EFT complaint statistics covered the period April 2003 to March 2004.

The complaints statistics collected as part of the EFT Code monitoring are basic volume statistics. Statistics are only collected for complaints that are covered under the EFT Code, i.e. not all banking complaints. The April 2003 to March 2004 EFT complaints breakdowns included:

- Institution type (Major Bank, Other Bank, Building Society, Credit Union, Other Institution)
- Transaction type (ATM, EFTPOS, Internet, Phone, Other)
- Handling status (handled internally, discontinued, referred to EDR)
- Resolution status (customer liable, institution liable, outstanding)

- Whether the complaint was about a system malfunction or an unauthorised transaction.

These complaints statistics are available in the annual monitoring reports, which are posted to both the ASIC and FIDO websites: www.fido.asic.gov.au/fido/fido.nsf/byheadline/compliance+with+financial+industry+codes+of+practice+FIDOv?openDocument

Question 5

(Westpoint, p. 36)

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

> No, Westpoint Finance Pty Ltd held an Investment Adviser's licence ... from 27 June 1996 to 21 January 1999. ASIC has no record of Westpoint Finance Pty Ltd ever making an application for an AFSL, however it was an Authorised Representative ... for CGU Insurance Ltd ... during the period 4 February 2004 to 14 July 2004.

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

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

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

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

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

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

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

Mr Cooper—It does not.

Answer

If, in the course of acting as CGU's authorised representative, Westpoint Finance Pty Ltd breached the law and there was evidence of this, ASIC may be able to take action against CGU.

ASIC is not aware of any complaints against Westpoint Finance Pty Ltd that relate to it acting as an authorised representative of CGU and has not taken any action against Westpoint Finance Pty Ltd as an authorised representative of CGU to date.

If there is any evidence available to support an allegation that in the course of acting as CGU's authorised representative, Westpoint Finance Pty Ltd breached the law, ASIC will look into those allegations.

Question 6

(S8, p. 40)

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

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

Answer

ASIC examined the matter about whether the non-disclosure of the potential Queensland Office of Fair Trading action was in breach of the Corporations Act.

At the time, the action was threatened, not initiated, and was already in the public domain. The view was taken that there was not contravention of the continuous disclosure provisions.

Question 7

(Budget for HIH case, p. 45)

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

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

Answer

The HIH funding bid was jointly prepared by ASIC and DOFA, and no gap existed between what was requested and the final amount received by ASIC.

Question 8

(Business judgment rule, p. 49)

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

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

Answer

ASIC was not asked to advise on anything in the Parliamentary Secretary to the Treasurer's 'Corporate and Financial Services Regulation Review Consultation Paper' (April 2006).

Question 9

(Earlier question on notice AT20, p. 50)

Senator WONG—Mr Lucy, in the context of this hearing I want to draw your attention to a question on notice, AT20, that you responded to through the additional estimates in relation to the history of the section 19 issue.

Mr Lucy—Yes.

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

Mr Lucy—I do recall that discussion.

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

Mr Lucy—We will.

Answer

There appears to be some confusion about the questions and the responses that ASIC has provided.

Senator Wong refers to the response to Question AT20, and indicates that it was not an answer to her request for a copy of the proposed amendment. The response that provided a copy of the amendment proposed by ASIC was the response to Question AT18. This response set out the suggested amendment to s49 of the ASIC Act to enable ASIC, in certain circumstances, to compel people who had attended a s19 examination to provide a signed statement admissible in a criminal prosecution.

The response to which Senator Wong refers above, the response to Question AT20, refers to her subsequent question as to why disclosure of the proposal to amend s49 was not made to the previous hearings. The answer to this was that the line of questions at that hearing was such that there was not an opportunity to do so.

(Attachment below)

Question: AT 20

Topic: Section 19 in the context of Vizard issue

Hansard Page: E8

Senator WONG asked:

Mr Lucy, why was this not disclosed to the committee previously when questions were asked about the section 19 issue?

Mr Lucy—I am not sure that we were asked that question.

Senator WONG—We did ask quite a lengthy range of questions, in the context of the Vizard matter, about why section 19 had not been utilised.

Mr Lucy—I would have to take that on notice and refer back to the questions that were specifically asked. Obviously we do not make the laws, but, as to that particular reference, I would need to go back to Hansard.

Senator WONG—I am not suggesting you make the laws, Mr Lucy. I am asking why, when the committee was inquiring into this issue, it was not raised. If you want to take that on notice, obviously you can do that.

Answer:

The history of a request to Treasury to amend the ASIC Act to enable ASIC to compel a person to provide a witness statement in certain circumstances was not raised at the PJC hearings in September 2005 because during that hearing the line of questioning referred to whether ASIC did or should have conducted an examination of a person in

relation to an investigation into conduct by Mr Vizard. Ms Redfern attempted to raise the issue of reluctant witnesses (CFS11), but was asked to address questions on use of the power to conduct s19 examinations.

The discussion then moved on to the utility of conducting a s19 examination of the person in question, and what consideration ASIC had given to this and what advice it had received. In the context of the discussion – that the person proved not to be appropriate as a witness – it was not directly relevant to attempt again to refer to a proposal for law reform that would very likely not have assisted in the case in question.

Question 10

(Vizard, p. 51)

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

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

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

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

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

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

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

Mr Lucy—Understood.

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

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

Answer

In preparing the statement of agreed facts, ASIC considered all the evidence it had obtained during the course of the investigation. This evidence included sworn testimony given by Mr Vizard and other parties. The statement of agreed facts that ASIC filed with the Federal Court represents a version of events that ASIC believes to be accurate and that, in ASIC's opinion, is supported by the evidence. Mr Vizard had agreed to that version of events.

As for the possibility that Mr Vizard may have committed perjury in the preceding committal hearing of Mr Hilliard, that is a matter for the relevant state authorities, namely the Victoria Police and the Victorian Director of Public Prosecutions. ASIC has and will continue to provide whatever assistance it can to any enquiries by the Victoria Police.

Question 11

(HIH, p. 52)

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

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

Answer

ASIC has regularly liaised with the Liquidator of HIH since the collapse of the HIH Group in March 2001, within the limits of its statutory obligations.

On 3 May 2004, General Re Australia Ltd (formerly General & Cologne Re Australia Limited (GCRA)) paid $27.2 million to the Liquidator of FAI General Insurance Company Limited as part of an enforceable undertaking provided to ASIC. The enforceable undertaking followed ASIC's investigation into reinsurance arrangements entered into by FAI with GCRA in 1998.

The Liquidator has provided ASIC with a broad account of proposed civil actions including actions relating to the takeover of FAI. The takeover of FAI by HIH was not the subject of a specific referral to ASIC from the HIH Royal Commission, however, ASIC did conduct a preliminary assessment as to whether there were civil remedies available for ASIC to pursue regarding the takeover prior to the receipt of the HIH Royal Commission referrals.

At the request of the HIH Liquidator, HIH material obtained by ASIC from the HIH Group of Companies, pursuant to ASIC's compulsory powers, and from the HIH Royal Commission, was returned in electronic form to the Liquidator on 19 July 2006 to assist the Liquidator with current and proposed civil actions. ASIC will continue to liaise with the Liquidator with a view to facilitating any requests arising from the conduct of proceedings.

Question 12

(MLA reporting/Philps letter, p. 53)

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

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

Answer

Meat and Livestock Australia is an unlisted public entity and is also not a disclosing entity.

Mr Philip's main complaint is that the company discloses that "they feel the ASX [Corporate Governance] Principles are an appropriate benchmark for guiding MLA practices" and "MLA's corporate governance practices are now consistent with the ASX Recommendations to the extent they are relevant to MLA as a non-listed company".

The complainant disputes this.

ASIC is currently reviewing the extent to which MLA does not comply with these guidelines.

It should be noted that the complainant does not disclose any contraventions of the Act.

Question 13

(Timeshare, p. 53)

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

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

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

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

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

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

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

Answer

Question 14

(Possible offenders register, p. 5)

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

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

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

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

Mr Cooper—It does.

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

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

Senator MURRAY—It seems to me that you should consider going further. For the period in which a person is prohibited from acting as a director, for the period under which somebody is banned or for the period under which a particular action has been taken, it would seem to me a list of names which is easily accessible would be of great

assistance. That extends further to those lawyers, accountants or valuers who have been tied up in schemes which have been disallowed or have had the force of law attached to them. I am not suggesting you should become judge, jury and executioner; I am talking post facto or after a judgment has been made.

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

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

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

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

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

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

Mr Lucy—In colour code.

Mr BAKER—That is right: red for danger.

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

Answer

Under the law, ASIC maintains public statutory registers of persons who are:

- banned or disqualified from providing financial services (Corporations Regulation 7.6.06); and

- disqualified from managing corporations (s.1274AA of the Corporations Act).

These registers are easily searchable by the public, both by means of ASIC's general website (www.asic.gov.au) and its consumer website (www.fido.gov.au) and via popular search engines such as Google. Any person who wishes to determine whether a particular individual is listed on one of these registers may do so at no cost to them.

The terms for which particular disqualifications and bannings apply, or previously applied, are also clearly apparent from the registers.

A consolidated alphabetical list of banned and disqualified persons appearing on these registers would be duplicative of the current arrangements, but ASIC will give further consideration to whether there might be any demand for, and utility in, such a list.