

SENATE ECONOMICS COMMITTEE

Budget Estimates hearings

Wednesday 31 May 2006.

ASIC witnesses:

Jeffrey Lucy; Chairman. Australian Securities and Investments Commission

Jeremy Cooper; Deputy Chairman. Australian Securities and Investments Commission

Mark Steward; Deputy Executive Director, ASIC Enforcement directorate

Discussions regarding the Westpoint group

This Hansard is an extract from proceedings transcribed by the Hansard office of the Australian Parliament.

Senator WATSON—My first questions concern the Westpoint scheme. If I may commence with the general observation that I believe the Senate is increasingly becoming frustrated by the inability of regulators to act in a timely manner to prevent consumers from unnecessary losses and hardship, and the subsequent discovery of legislative gaps in regulatory powers. I remind you, Mr Lucy, that the most recent case came before us yesterday, when the regulator in that case, the Australian Taxation Office, sought to quickly remedy the problem. Therefore, I ask you: were concerns about Westpoint's operations formally raised with ASIC as early as 2001 by the Real Estate Consumers Association and in 2002 by the Western Australian government, in particular about an apparent gap in the Corporations Act in relation to promissory notes?

Mr Lucy—I am very happy to answer that. Indeed, I think it is important that we again put on the record the background to Westpoint, because there is some misunderstanding.

Senator WATSON—Misunderstanding by whom?

Mr Lucy—The media in particular.

CHAIR—Senator Watson, let Mr Lucy make the preliminary remark he wants to make.

Mr Lucy—If I could remind the Senate that Jeremy Cooper does not participate in matters to do with Westpoint, so to the extent that he does not respond on these issues it is simply a reflection of his ongoing situation regarding a former conflict, so he is not engaged. I am engaged. I have advised the Senate of that previously. I am engaged literally on a daily basis. But Mark Steward is engaged on a minute-by-minute basis as far as Westpoint. With your indulgence, I will ask Mark to perhaps talk about where our investigation is at the moment, although we do have some constraints as to what we can talk about. Nevertheless, as fully as we possibly can, he can talk about our investigation, and then trace back to 2001, the earlier date that Senator Watson referred to.

CHAIR—I know this goes without saying, but let me just say for the record anyhow that, if any questions trespass beyond what you feel you are able to answer without compromising the investigation, you will indicate it at once, won't you, Mr Lucy?

Mr Lucy—Thank you, Chairman.

Senator WATSON—Mr Lucy, that may well come later, because I would like to find an orderly development in terms of a calendar approach to how you have managed this scheme, rather than where we are now, because where we are now is that millions of dollars have been lost, homes have been broken, fortunes have been lost and there is a lot of hardship out there. I would like an answer to my question, firstly, going to 2001 and concerns from the Real Estate Consumers Association, and then in 2002 from the Western Australian

government about an apparent gap in the Corporations Act in relation to promissory notes. And then in due course, I think we will come up to the current situation, which obviously we have a lot of interest in.

Mr Lucy—Up to the year 2004, which of course encompasses the years 2001 and 2002, ASIC received an aggregate of 12 complaints to do with Westpoint. During that period, we would have typically received about 40,000 complaints. Of those 12 complaints, none related to any suggestion of financial difficulty as far as the Westpoint Group. None related to its viability as an operation. All of the questions related to our jurisdiction.

Senator WATSON—That was not my question, with respect, Mr Lucy. My question was: were concerns about Westpoint's operations formally raised with ASIC as early as 2001 by the Real Estate Consumers Association and in 2002 by the Western Australian government about an apparent gap in the Corporations Act in relation to promissory notes? I am not asking about how many you received or whether it was financially viable. My question was quite specific. It was about two organisations that allegedly approached you in 2001 and 2002 concerning a legislative gap.

Mr Lucy—I will ask Mark to respond, but I was indeed responding to your point and your comment regarding the apparent inability of regulators to protect consumers, and the regulatory gap. That was the reason I was talking about that. But let us ask Mark to respond to your specific questions.

Mr Steward—There were issues raised about the fact that promissory notes did not appear to be regulated under the Corporations Act. There was certainly correspondence—I am not sure there was any correspondence from the first organisation you mentioned in 2001—and certainly there was ongoing discussion with the Department of Consumer and Employment Protection in Western Australia and staff of ASIC about a whole range of consumer issues. One of those issues was the fact that there was no coverage under the Corporations Act of promissory notes, and in particular there was correspondence about consumer warnings that both the Minister for Consumer and Employment Protection in Western Australia was issuing in 2002 and that ASIC was also raising about mezzanine finance. The answer to your question is, yes.

Senator WATSON—Obviously, you have confirmed the Western Australian government's acknowledgment of a gap in 2002. But you cannot recall correspondence? Could you check your correspondence from the Real Estate Consumers Association?

Mr Lucy—We have checked that, and there is no correspondence. There were communications, but there was no correspondence.

Senator WATSON—What was the nature of that communication?

Mr Steward—I think it was the same issue that was being discussed between ASIC officers and officers of the Department of Consumer and Employment Protection in Western Australia, that there was no coverage on the face of the Corporations Act for these sorts of promissory notes.

Senator WATSON—The lesson is that people have to write to you rather than just communicate with you?

Mr Lucy—No, of course not.

Senator WATSON—You said they contacted you or communicated with you but did not write to you.

Mr Lucy—Sorry; it was a misunderstanding. I thought you were using the word ‘communicate’ as in written communications. That was the specific point that I was responding to. You are quite right. I will make the point clear: yes, we received oral communications.

Senator WATSON—My next question follows from that: how many Westpoint projects were established between those initial concerns being raised and the eventual collapse of this organisation?

Mr Steward—I am not sure what you mean by ‘projects’. Certainly in 2002 when there were discussions between the Department of Consumer and Employment Protection in WA and staff of ASIC and consumer warnings were issued, ASIC also started looking more closely at what could be done to deal with the risk that seemed to exist. A matter was commenced in the enforcement directorate of ASIC in January or February 2003 to look more closely at this issue. That exercise has largely been ongoing since that time. I am not sure what you mean by ‘different projects’. There have obviously been different actions and different formulations since the beginning of 2003, but certainly there has been something ongoing since then.

Senator WATSON—In other words, Westpoint added to its structure and continued to borrow money to finance its new widened operations?

Mr Lucy—Absolutely. But, again, a lot of the money was in a structure that was determined by parliament. Parliament specifically carved out promissory notes of greater than \$50,000, and Westpoint exploited that.

Senator WATSON—You are uncertain about your legislative powers, because you acknowledge that you thought there was a gap. Is that right? You felt there was a gap at that time?

Mr Steward—There was an exclusion.

Senator WATSON—That is the impression you have given me, so I am giving you the opportunity to clarify as to whether you believe there was a gap or there was not a gap.

Mr Steward—I am not sure about the word ‘gap’. There was an express exclusion for promissory notes over \$50,000 from the definition of ‘debentures’; that was the problem. We looked at what could be done given that that is what the situation appeared to be, that these were not covered by the legislation that we are tasked to regulate. We developed an argument that we thought had some merit and we thought we needed to raise directly with Westpoint to persuade them that what they were doing, which purported to rely upon the exclusion, did not in fact do so.

That occupied several months in 2003. It would be fair to say there was a lot of toing-and-froing between ASIC and Westpoint and in particular their lawyers, Freehills—they might say ‘toing-and-froing’; we might say ‘cat and mousing’—over this issue. We eventually realised by the end of 2003 that we were being stalled, we were being given the run around, and we delivered an ultimatum to Westpoint to either comply with the argument that we had put forward about the Corporations Act or we would take court action. We ended up taking court action to force Westpoint to comply with the Corporations Act, based on a very difficult technical argument that in part relied upon an interpretation of the Bills of Exchange Act rather than the Corporations Act. Nonetheless, we had to fight for our jurisdiction and that is what we did.

Senator WATSON—If there was uncertainty, why did you not approach the minister to introduce an amendment to clarify the law?

Mr Steward—I think the issue we were facing, as a practical pragmatic matter, was that we were dealing with the here and now; we had to do something. It was not a matter of waiting

for law reform through the normal processes. I am not sure how long that would have taken. We had to deal with something in the here and now and that is what we did.

CHAIR—Senator Watson, we were going to take the afternoon break now until four o'clock. If that suits you, we will resume at four o'clock with you in the chair.

...

Senator SHERRY—I will ask a preliminary but overall question on Westpoint. Can you give us the latest update assessment on, firstly, the level of liabilities—moneys owing—and, secondly, the number of people affected? We had an update from Mr Lucy at the last estimates, but has there been any further information on that macro impact?

Mr Steward—I do not think there is any change and I think those figures were the best estimates that we had.

Senator SHERRY—Yes, I accept that.

Mr Steward—We conducted a questionnaire survey of investors and we are looking at those results now to try to come up with a firmer figure, or a figure that we can justify with some data. Similarly, in relation to the size of liabilities and losses incurred by the companies, we are reliant on what the various insolvency practitioners will be reporting to us about that, so I do not have any further updated figure on that at this stage.

Senator SHERRY—If there is a prima facie case of theft and fraud, there is a provision under the SI(S) Act for compensation that may be awarded by the minister in those circumstances. My understanding is that with respect to self-managed superannuation funds that provision is not applicable.

Mr Steward—I think that is right. We have looked at it. That is the early indication.

Senator SHERRY—I have lots more detailed questions, but I just wanted to deal with those macro matters.

ACTING CHAIR (Senator Watson)—Mr Lucy, I think you referred to 'toing-and-froing by the solicitors' and I think you mentioned Freehills. You were very patient with the solicitors right up until 2004 before starting to take action. Is that correct?

Mr Lucy—I would not accept that assessment.

ACTING CHAIR—That is an incorrect interpretation?

Mr Lucy—Yes.

ACTING CHAIR—You did not use the words 'toing-and-froing'?

Mr Lucy—I think it might have been Mark who used those words. It certainly was not in the sense of toing-and-froing, it was all very relaxed and a nice easy dialogue; there was a significant amount of tension, but it might be better for Mark to—

ACTING CHAIR—Perhaps Mark could explain the significance of his words 'toing-and-froing by the solicitors' until you became impatient in 2004.

Mr Steward—What I meant was that we did embark initially on a dialogue with Westpoint through its solicitors to try to come up with an agreed approach. We thought that there was a basis for Westpoint to agree that our interpretation of the legislation was one that they should adopt. That appeared to be something that was being entertained and what I meant

by the catting and mousing was that we formed the view fairly quickly that we were not being seriously entertained and that we were being stalled.

ACTING CHAIR—Your interpretation of the legislation was?

Mr Steward—We said a couple of different things. We said that what was being offered to investors through the information memoranda that had been issued by the various Westpoint companies was an undertaking to repay within the definition of a debenture in the Corporations Act, regardless of the existence of the promissory notes, and that that undertaking to repay was combined with a series of risk mitigation promises that meant it was something different. It was something different within the definition of debenture in the Corporations Act, without even getting to the fact that there were promissory notes being issued. The second argument was that these were not in fact promissory notes that complied with the Bills of Exchange Act. That is why I said earlier that part of the argument rested on a fairly unique way of tackling this issue, which was a statutory interpretation exercise involving not just the Corporations Act but, significantly, the Bills of Exchange Act, which we do not regulate.

ACTING CHAIR—It was a very softly-softly approach, was it not?

Mr Steward—Not at all.

ACTING CHAIR—You do not think so?

Mr Steward—No. As I said, we formed the view that we were getting the run-around and we issued an ultimatum to the company.

ACTING CHAIR—In 2004?

Mr Steward—Yes, in January 2004.

ACTING CHAIR—So you were fairly confident about your powers?

Mr Steward—We were confident that we had a good argument. It was an argument that seemed to be contrary to what was explicitly set out in the Corporations Act.

ACTING CHAIR—But that argument seemed to have been reinforced today when the matter was raised with Mr David Love, who is the manager of Corporation and Financial Services, Market Group. I am interpreting here, but my belief was that it was reasonably clear to him that there was a mandate and he disputed whether a gap did exist in terms of regulatory power. That was my view and I stand corrected. That is why I asked whom you consulted with.

Mr Steward—The fact is that the argument that we thought was a good one, we lost. We lost the argument before the judge. We lost that argument, the issue is under appeal and we are still awaiting a decision from the Full Court of the Western Australian Supreme Court. It is not a simple, straightforward argument or a straightforward issue by any means. It is a very technical issue, a very difficult issue, and it is beyond doubt that the Corporations Act does exempt or exclude promissory notes with a face value of \$50,000 or more from the definition of 'debenture'. That is in black and white in the Corporations Act.

ACTING CHAIR—Why did you not seek to clarify your powers, say, under the Managed Investments Act at an earlier date? It still has not happened. That would seem to be the appropriate vehicle.

Mr Steward—The action that we took did include that as an alternative argument. Both arguments cannot sit side by side. Either one is right and the other is wrong or vice versa, and we raised both issues with the court in May 2004.

ACTING CHAIR—And they knocked you out on both counts?

Mr Steward—The court said that we were wrong on the promissory note issue but that the promissory notes gave rise to interests in a managed investment scheme.

ACTING CHAIR—Did that then give you power to act?

Senator MURRAY—It sounds like a lose-win option.

Mr Steward—That was a ruling by the court in a substantive proceeding which both parties appealed. Both parties appealed that. We appealed on the promissory note issue and Westpoint appealed on the managed investment scheme issue. The question you are asking is: should we have done something about the finding that it was a managed investment scheme? That was certainly something that was under consideration. But in order to take action at that point and, given that this trial was still on foot—the proceedings were still on foot—and the relief that we were seeking as a consequence of that finding was still before the court, we needed to have some additional here and now urgency or some here and now risk that meant the issue could not wait. We were very concerned about things like financial vulnerability. We had sought further audited accounts to be lodged by the Westpoint Group. They came back audited and unqualified, so we did not seem to have any financial grounds on which to attack Westpoint at that point. We had raised arguments before the court about misleading representations in the information memoranda that were issued by Westpoint. We lost that argument. We did not seem to have that.

ACTING CHAIR—On misleading representations?

Mr Steward—Yes. We lost that argument. We had circulated to all the investors about the action that we had taken in 2004. We did not hear any responses from them. In the meantime, Westpoint was continuing to meet redemption requests. It was continuing to pay monthly interest to investors. There did not seem, at that point, to be an urgent issue that would require the court to take immediate action as opposed to continuing to hear the matter in the normal course, which meant awaiting the appeal.

Senator SHERRY—On the appeal, do you have any indicative date, time line or idea of when that appeal decision will be handed down?

Mr Steward—We do not know. The appeal was heard in February this year and we have not heard anything from the court at this stage.

Mr Lucy—Allow me to recap a little on what Mark said, perhaps in layman's terms, because that is what I present here. The matter in 2004 argued, firstly, that the documentation was false and misleading. Part of the directions that the court gave us was that we needed to write to all the investors, that is, to every one of the investors, in two particular undertakings in a manner that was approved by the court, inviting the investors to join our action that these were false and misleading communications from Westpoint. So we wrote to every one of the investors and not one came back and said that they felt that there was any false or misleading representation and that they wanted to join us. In the other two areas of the court, the court gave us one, it gave Westpoint the other and we have cross-appealed. So at that stage we had the option of going to the court and seeking the appointment of a receiver. Because the issue of an appeal was on foot, the only ground on which they would appoint a receiver was if there was some financial viability threat or sustainability of business threat. At that stage, we sought audited accounts. They were provided by KPMG, unqualified. At that stage, none of the complaints received into the office

related to the lack of payment of any interest or to rolling capital not being repaid. At that stage, we felt that we had no opportunity to go to the court.

ACTING CHAIR—It is becoming a lot clearer. I note that during the meeting of Westpoint investors in late February this year, ASIC's Executive Director of Enforcement, Jan Redfern, stated that the Westpoint investigation is 'high-priority, multi-faceted and resource-intensive for ASIC'. Does ASIC share the concerns as reported in *The Australian* of 19 April 2006 by the Australian Property Institute that Westpoint-style structures were not unique and that there could be more Westpoint-style collapses on the horizon?

Mr Lucy—Yes and yes. ASIC continues to support the concerns expressed by Jan Redfern to the investors. We do take this issue very seriously and we have allocated very substantial resources to it. Yes, there is the potential for further Westpoints.

ACTING CHAIR—What action can be taken by ASIC or the parliament to intervene to stop any further losses of this nature reasonably quickly?

Mr Lucy—In the first instance, the government traditionally and reasonably does not undertake law reform where there is a matter before a court; they wait for the court to determine whether or not there is jurisdiction and, if there is not jurisdiction, they act. At this stage, we continue to be in a situation, as all of us are, including the investors, where simply we do not know which way the court is going to determine in respect of the appeal. In respect of the potential for others, we are surveilling the Australian financial market landscape very closely. We have dialogue with a small number of entities where we have varying levels of concern and we think that those issues are being managed satisfactorily.

ACTING CHAIR—My next question concerns advertising. Can you assure the Senate that, given mezzanine finance is recognised as a high-risk commercial product, currently in the daily financial pages and on radio, no Westpoint products are still being advertised? They have been, but I have not seen any lately.

Mr Lucy—When you say Westpoint products, what do you mean?

CHAIR—Mezzanine finance.

Senator SHERRY—Westpoint-like products.

Mr Lucy—That is what I am seeking clarification on.

Mr Cooper—The point is that these products are not illegal but we did a considerable amount of work during 2005 that did not relate to Westpoint but to other entities and to assertions made in advertising that these products were 'secure, certain, guaranteed'—language like that. In one case we actually forced an issuer to offer a full refund to all investors that, we said, had been misled. That was an issuer that had not run into difficulties like Westpoint; it was still in business but, nonetheless, we forced them to offer all investors their full money back if they so chose.

ACTING CHAIR—Have you contacted the newspapers in relation to their social responsibilities about taking advertising for these high-risk, mezzanine-type schemes and the consequences that can have on consumers, if you do not feel that you can act in any other way at the moment?

Mr Lucy—We have certainly had a very high level of dialogue with the media generally and, indeed, it is the media that typically carry our consumer warnings.

Senator SHERRY—I love the way you describe that.

Mr Lucy—I think that they are very much aware of our attitude to this. Frankly, it really is a very serious issue.

ACTING CHAIR—Absolutely.

Mr Lucy—It is true that people are continuing to invest in types of investment that we would still regard as high risk.

Senator SHERRY—On this advertising issue, there are certainly Westpoint-type products still on the market, aren't there?

Mr Lucy—Yes.

Senator SHERRY—Have you taken any action in respect of Westpoint-type products that you can name?

Mr Cooper—Yes, we have. Our typical tool is what we call an interim stop order or a stop order that actually stops the capital raising, and we have done that with a number of issuers.

Senator SHERRY—I suspect I know a number of them you are going to name and I will ask some more detailed questions. Can you name those you have taken action against?

Mr Cooper—Fincorp is an example.

Senator SHERRY—Given the issue in respect of the question over power, how have you been able to do that?

Mr Cooper—That is a disclosure-based power, so we look at the disclosure document, typically—in the case of debentures, a prospectus; in the case of other products, a product disclosure statement. We form a view that there is inadequate disclosure and that enables us to issue a stop order.

Senator SHERRY—Senator Watson raised the advertising issue. With due respect, even if they stopped advertising, isn't the reality—I do not know whether this is true or not—that a lot of these people are channelled into these types of product through a planner? They may not be channelled as a consequence of any advertising; it may be the advice given by a planner.

Mr Cooper—Typically not. I would have to disagree. In fact, our knowledge of the industry suggests that Westpoint was unusual in that most of these products are what they call in the jargon of the trade 'disintermediated'; in other words, they do not rely on a financial planner chain. There are a couple of reasons for that. One is, as we saw in Westpoint, a substantial amount of each dollar that is invested has to be shared through commissions. The other reason is that by going through the vehicle of newspaper advertising these issuers can effectively control the tap of funds. The worst thing that can happen to someone who is in the high-yield market is that they actually have too much money on hand on which they have to pay high interest and, unless they have got projects to lend it out to, they get themselves into financial difficulty.

Senator SHERRY—It is a mismatch of inflow of funds as against generation of return.

Mr Cooper—Correct. If you are paying nine per cent you do not exactly want to have a whole lot of cash on deposit with one of the main banks because you are going to go out of business in a big way.

Senator SHERRY—Even if the advertising ceased, it does not mean that these products are not being offered.

Mr Lucy—It does not eliminate the risk.

Mr Cooper—That is right. They are still lodging documents with us and seeking to raise funds on them.

ACTING CHAIR—It appears that we are now at the stage of mopping up and waiting for court decisions. Given the resource-intensive nature of such an operation—Jan Redfern's 'high-priority, multi-faceted, resource-intensive' investigation—and the impact that these operations are likely to have on ASIC's overall effectiveness, can you assure the Senate that ASIC now has, to use a colloquialism, a fence at the top of the cliff—you have mentioned one fence in terms of advertising, newspaper proprietors and others, so to speak—rather than an ambulance at the bottom with regard to monitoring of high-risk public offers similar in structure to Westpoint?

Mr Lucy—I can answer that in two parts. The first is that you refer to the fact that they have been waiting on a determination by the appeal court and our investigation. The facts are that in 2005, notwithstanding the fact that we were still seeking communications with the auditor, still not obtaining advice from the auditor as to issues to do with going concern and so on, and largely still not receiving complaints from the public regarding the financial model of Westpoint, our commission took the risk, and it was a risk, prior to Christmas and actually sought the appointment of administrators. The timing of that was that we were aware that there was a group of investments which were due to roll over and we felt that if we were to act it was ideal, if not crucial, to act before that rollover, so we took the decision, and fate may well have gone in a different direction, to seek the appointment of an administrator, which in turn brought the whole organisation down to ground.

ACTING CHAIR—You mentioned your relationship with the auditor. Did you have some problems there?

Mr Lucy—That is a matter of an ongoing investigation. It is true that we did have dialogue with the auditor on a number of occasions up until December 2005. The fact that we have now commenced an investigation on a wide range of areas, including the role of the auditor, is a matter that we have in front of us.

ACTING CHAIR—The last time the auditors or firm gave an unqualified clearance of the accounts was in what year?

Mr Lucy—June 2004, but of course those were issued subsequent to that. The auditors have a responsibility under section 311 to notify ASIC, the regulator, in the event that various events occur with their clients, including, for example, concerns about going concern. That is not an annual, yearly cycle.

ACTING CHAIR—No. It is immediately it comes to their notice.

Mr Lucy—Precisely.

Senator SHERRY—On the issue of the auditor, KPMG is the firm in this case, isn't it?

Mr Lucy—Yes.

Senator SHERRY—We have not explored this, at least at these committee hearings, in great detail, but you were on the *Four Corners* program.

Mr Lucy—Yes.

Senator SHERRY—I certainly did not know until I saw that program that Mr Beck, who is part of the investigation and a primary operator involved in Westpoint, was the former chief compliance officer with KPMG.

Mr Lucy—Yes, I understand that was the case, although I also understand that it was for a relatively short period. But he did have an employee relationship with KPMG.

Senator SHERRY—Yes. That struck me as a little beyond coincidence that KPMG were the auditors that had signed off the unqualified audit reports.

Mr Lucy—Really, we do need to be careful about that aspect because it is a matter of an ongoing investigation.

Senator SHERRY—Yes. We have not asked about this, but you are now carrying out an investigation in respect to KPMG and the auditing that occurred?

Mr Lucy—Yes.

Senator SHERRY—Good. I also notice that, on at least one of the research house reports, KPMG was also the auditor that signed off on that.

Mr Lucy—I think you referred that to us at the last hearing.

Senator SHERRY—Yes.

Mr Lucy—Yes, we have taken that on board and that is also part of our consideration.

Senator SHERRY—But KPMG were the auditor in respect of that research house?

Mr Lucy—I believe that is the case.

Senator SHERRY—Do we know whether it is the same partner involved in the auditing of Westpoint and the research house?

Mr Lucy—I have to take that on notice.

Senator SHERRY—We do know that there were planners associated with Westpoint who were recommending Westpoint products through self-managed superannuation funds. Do we know whether any of those self-managed superannuation funds, which were the channel vehicle, were audited by KPMG? Is that a matter that is being examined at all?

Mr Lucy—I doubt whether we would know that yet. We are certainly now getting a fairly clear profile on the investors, including those that were a part of the self-managed super fund group and the quantum of investments, the nature of the investments and so on.

Senator MURRAY—That is a result of your survey?

Mr Lucy—Yes, it is. It was an online survey; indeed, it was a first and it has been very effective. For example, investors totalling in the aggregate of something like \$300 million have responded to the survey. It is becoming a very reliable piece. Again, that is something which clearly we will look at down the track as to whether or not the auditors of the super funds indeed have been truly independent.

Senator SHERRY—I just think it is passing coincidence that so many tracks lead to KPMG in respect to auditing.

Mr Lucy—I do not think that we can assume that there is a track as far as the self-managed super funds are concerned at this point.

Senator SHERRY—Not yet. On that issue, I am not concerned with your activities in respect of self-managed super funds, but that is regulated by the tax office, is it not?

Mr Lucy—Yes.

Senator SHERRY—I questioned them about this yesterday. You are transmitting information to the tax office in respect to the regulation of self-managed super funds?

Mr Lucy—Yes, we are.

Senator SHERRY—I am still concerned about what appears to be a sort of lack of ‘get up and go’ in respect of the tax office. They are the regulator of self-managed super funds and my understanding is that we are looking at a substantial proportion, if not the majority, that was channelled through self-managed super funds?

Mr Lucy—About 30 per cent we think, which is a substantial amount.

Senator SHERRY—There is one other aspect of the *Four Corners* interview which was again something I had not been made aware of. There was a Mr Carey, who was also associated with Westpoint. He is under investigation, isn't he?

Mr Lucy—Yes, he is.

Senator SHERRY—Apparently, according to that program, he is still operating, but indirectly, through a company called Ferntree.

Mr Lucy—Yes, we understand that.

Senator SHERRY—Is he still operating as an advisor through this new company, Ferntree?

Mr Lucy—I will ask Mr Steward to advise, but I do think that we are getting very close to saying that that is operational.

Mr Steward—What I can say is that Ferntree Financial Services was a business name under an entity called Redchime. Redchime is a defendant in the proceedings that we commenced in March this year, which has ultimately led to receivers being appointed to that entity, as well as to a number of others, and some former directors of Westpoint. We now understand that that business may be operating under a different regime now and that is something that we are looking at.

Senator SHERRY—Which different regime?

Mr Steward—Pursuant to a different company. That is something we are interested in.

Senator SHERRY—Was Ferntree operating with a licence from ASIC?

Mr Steward—No.

Senator SHERRY—This fellow Carey has morphed into a new entity, Ferntree, and apparently now into another unnamed entity. Short of locking him up and throwing away the key, how do you contain this? The fellow keeps morphing into a new financial advisory business.

Mr Lucy—We really respect your interest, but you have to assume that we are thinking along the same lines and we do not want to go there as far as providing an answer, I am afraid.

Senator SHERRY—Has there been any preliminary analysis of the number of new clients and moneys involved in this Ferntree entity?

Mr Steward—I think the understanding, and I will put it as an understanding because of what the chairman has just said, is that Ferntree really operates more like a finance broker than a financial services business. Its name is suggestive of something that perhaps may not be the case, but its activities remain of interest, perhaps because of the name itself.

Senator SHERRY—You mentioned finance broking type activity. How is that regulated?

Mr Steward—I think there are state laws that govern the conduct of that style of business.

Mr Lucy—WA law in particular.

Senator SHERRY—Have you had any liaison with the WA—

Mr Lucy—I would rather not go there, I am sorry.

Senator SHERRY—You are aware that we had a discussion about broking earlier; you may or may not have heard it. It is not regulated yet, uniformly, nationally?

—Yes.

Senator SHERRY—There is regulation in WA but we are awaiting the completion of a sort of template regulation which apparently is a couple of years away.

Mr Lucy—Yes, we did view that, but the situation that might exist at the moment between ourselves and Western Australia is not waiting for that sort of template.

ACTING CHAIR—You indicated that you sent letters out to a whole host of investors.

Mr Lucy—About 250.

ACTING CHAIR—And you invited them to join in an action with you?

Mr Lucy—Yes.

ACTING CHAIR—That was a suggestion from the court?

Mr Lucy—In fact, it was a direction of the court.

ACTING CHAIR—Why did you not take action yourself?

Mr Lucy—We did.

ACTING CHAIR—You took action at that stage?

Mr Steward—This was in proceedings that we had commenced and, because the proceedings might have some impact on the investors' interests in those companies, we raised with the court the interest that these third parties would have. As a result of that, the court, effectively at our request, ordered us to write to all of these investors so that they understood what was happening, which is what we did.

ACTING CHAIR—Nobody responded in the affirmative?

Mr Steward—That is right.

ACTING CHAIR—My question is: did you have the opportunity to go it alone to take action?

Mr Lucy—We did take that matter through the court, under the false and misleading provisions, and the court ruled against us.

ACTING CHAIR—On what ground did the court rule against you?

Mr Lucy—Presumably one ground is the fact that no investor felt that there was any false or misleading material provided to them.

ACTING CHAIR—Despite the fact that you, the experts, were of the view that the information was false and misleading?

Mr Lucy—That is right.

ACTING CHAIR—So they took your view rather than that of an amateur investor?

Mr Lucy—They did not take our view.

ACTING CHAIR—They rejected your view?

Mr Lucy—Yes.

ACTING CHAIR—That is absolutely surprising, isn't it?

Mr Cooper—It is a key part of life at ASIC that we are subject to the rule of law.

ACTING CHAIR—Absolutely.

Senator SHERRY—It is surprising that, in terms of the court hearing, it was the weighing up of the evidence. You gave evidence that it was misleading, and presumably no punter turned up.

ACTING CHAIR—It has certainly put a slightly different light on your role and I thank you for that.

Senator SHERRY—Unfortunately, we are not in receipt of the answers that I sought. I am not blaming you. You would recall that I did ask on the last occasion about the correspondence between the Western Australian Department of Consumer and Employment Protection and the minister and indeed the meeting that apparently took place warning about the activities of Westpoint. We do not have those answers.

Senator MURRAY—Senator Minchin said he would check it out during the tea break. Have we had any response to that, Mr Chairman?

Senator SHERRY—We will see how we go. I may come back to that, because it places us in the difficult position of having to go through all the questions that I asked you last time, Mr Lucy. My general concern is that I am interested to know what, if any, the response from ASIC, from the Treasurer and his parliamentary secretary was in respect of the warnings about Westpoint activities. We do not have the answers yet.

Mr Lucy—Can I say that I am sure that you will get the questions as soon as the minister approves. To the extent that you would like to follow up out of session with a question, I am happy for you to do so.

Senator SHERRY—Yes. I might get the opportunity to follow that up.

Mr Lucy—In June.

Senator SHERRY—Yes, in June. It is only just over a week away, isn't it? I should say I have lots of questions with respect to your very useful shadow shopping exercise, but I might have to leave those until June too, just in case—

Mr Lucy—What a pity.

Senator SHERRY—anyone in the media watching believes that I am going to let that one pass today, given the time.

Mr Lucy—Thank you. To the extent that you choose, any advance advice that you might give us of those questions will mean that we really are in a position to provide full and comprehensive answers. That is a matter for you, of course.

Senator SHERRY—Of the ongoing investigations into financial advisers, what is the number that has been identified so far?

Mr Lucy—Out of the shadow shopping?

Senator SHERRY—No, I am not going to shadow shopping. I am still on Westpoint.

Mr Steward—We have identified to date about 37 licence holders. Of course, they will have a much larger number of representatives who would have been engaged in giving advice to clients.

Senator SHERRY—So it is 37 licence holders and, underneath that, do you have any idea? Are we dealing with hundreds here?

Mr Steward—I can only give you a guess. We have issued information requests to those 37, seeking a range of information, and that is something that we are trying to gather ourselves. We need that data from those 37.

Senator MURRAY—Are they primarily in Western Australia?

Mr Steward—No.

Senator SHERRY—They are all over the country, aren't they?

Mr Lucy—Yes, particularly the eastern seaboard and Western Australia—not so much in South Australia or the Northern Territory.

Senator SHERRY—We are dealing with a much larger number of planners underneath the 37 licences. I must say that certainly the impression seems to be that it is about 37 planners, but it is licences.

Mr Steward—That is right.

Senator SHERRY—Presumably, in going to the licence holders, it would be the role and the responsibility of the compliance officers within the licence holders who oversee the regulatory regime of the planners. They would have a central role in all of this?

Mr Steward—They certainly have a central role in helping to ensure that the licence holder does what it is required to do to monitor the representatives.

Senator SHERRY—When did ASIC first conduct checks on financial advisers or licence holders, or both, with respect to Westpoint?

Mr Steward—I am not quite sure what you mean.

Senator SHERRY—You had a concern about Westpoint.

Mr Steward—Yes.

Senator SHERRY—When did you first go to the licence holders and/or the financial advisers?

Mr Steward—I think our concern was about Westpoint fighting the jurisdiction fight and then trying to go behind the accounts to look at the real financial position. They were the two main broadly thematic concerns that we have had in relation to Westpoint.

Senator SHERRY—I understand that that battle is going on, but you have jurisdiction with respect to licence holders and financial advisers whom you knew were recommending selling products. You were aware that there was some distribution at least?

Mr Steward—Yes. I suppose we must have assumed that.

Senator SHERRY—Yes. That would be a reasonable assumption, but I am just interested to know: when did you first go to the licence holders and the planners?

Mr Lucy—In 2006.

Mr Steward—Specifically about Westpoint, it was this year in relation to the information requests. Of course, there are other surveillances that are carried out on licence holders on that general basis but, specifically to do with Westpoint, it was this year.

Senator SHERRY—That is one of my concerns. You say you have the ongoing battle about Westpoint in the courts—that that is occurring and you are awaiting the outcome. You clearly had jurisdictional responsibility in respect of the licence holders and the planners but you did not initiate any investigative checking activity—I am not talking about enforcement activity—until this year of those individuals who were distributing the product. That was even though you are fighting a court battle over Westpoint and you had some concerns about Westpoint.

Mr Steward—I think that is right, and we did not have any complaints about advice that people were getting, either.

Senator SHERRY—I accept that, but ASIC was sufficiently concerned to be taking action in the court about the Westpoint entities. You were obviously concerned about that because you would not have taken the court action otherwise. Why then at the same time, certainly earlier than the beginning of this year, despite the fact that you had received no complaints from the individuals, were you not at least carrying out some checks, surveys or whatever with respect to the planners who were recommending and distributing the Westpoint products?

Mr Steward—I just think they are different issues.

Senator SHERRY—They are interconnected.

Mr Steward—The issue that we had in relation to Westpoint was whether the fundraising was in compliance with the Corporations Act or not. But that is a very different issue—

Senator SHERRY—Yes, I understand it is a different issue.

Mr Steward—to whether or not the financial advisers properly understand what they are advising on and are properly disclosing the nature of and the risks involved in investing in those sorts of products.

Senator SHERRY—You initiated the court action because you had concerns about Westpoint.

Mr Lucy—There were two court actions. The first one was in 2004 and, in fairness, that would not have given rise to a concern that we should go out and look at the financial planners. It is true, though, that towards the end of 2005, when we were starting to have our own concerns about its financial viability, it would have been open to us to start visiting financial planners at that stage, and we did not.

Senator SHERRY—You have used that that description, that you had not received a complaint.

Mr Lucy—Yes.

Senator SHERRY—You had your concerns about the entities, but you had not received a complaint. Surely you would not have been receiving a complaint, because the entities presumably were continuing to just pay out the money. The whole thing is a pack of cards that has subsequently fallen down. How is the average punter investor to know anything? You did know; they did not. Why wait for a complaint?

Mr Lucy—We thought that we knew. We were the odd man out, frankly, because the directors and the auditors who are primarily responsible—the directors and officers in the first instance—for running the company were saying to us, under our query, that the business model was fine; there was no difficulty. The auditors were saying to us, similarly, that they did not think there was any concern. Yet we were starting to develop a level of anxiety about it, which reached the point late in 2005 where we sought the appointment of an administrator.

Senator SHERRY—When did ASIC first become aware of the size of the commission based payments in respect of Westpoint investments being made to planners?

Mr Lucy—In 2006, I believe.

Senator SHERRY—Approximately when would that have been?

Mr Lucy—Almost certainly immediately following our appointment, or seeking the appointment, of an administrator, when things very quickly came to the surface. It was probably in January this year, I expect. It was either December 2005 or January 2006, I expect.

Senator SHERRY—Was the size of the commission itself an issue of concern to ASIC?

Mr Lucy—It certainly is a level of commission that is extremely high, and we have been the very first to state that. In the first instance, our anxiety is to make sure that that is disclosed and, if it is disclosed, then, high or not, in the first instance the financial planners have met their responsibilities.

Senator SHERRY—Allegedly, people are protected by the disclosure of commissions. What about the independence of the planner in recommending a product with such a substantially high commission?

Mr Lucy—Again, we really are getting into enforcement territory, because that avenue is exactly the sort of thing we are looking at when we are investigating the planners.

Senator SHERRY—I am aware that you have issued a discussion paper that includes comment on the issue surrounding the independence of advice and the impact of commission selling.

Mr Lucy—Yes.

Senator SHERRY—Have there been any issues raised by investors in respect of the so-called independence of advice? I understand some of the advisers worked for a Westpoint related entity.

Mr Lucy—Certainly, at the meeting in Sydney between us and the investors there were a number of investors who indicated that they were not aware of commissions of the order of 10 per cent having been paid. Whether or not that ultimately is the fact, time will tell. There was also a suggestion that there were one or two ethnic community planners that seemed to be very effective as far as spreading within the network of their particular community.

Senator SHERRY—When you say they had stated they were not aware, was it because they had not read the documentation, the disclosure, or had it not been issued?

Mr Lucy—It was quite an emotional meeting, and a number of investors spoke of their own circumstances. Some of them had a fairly high level of difficulty in communicating in English and they were resorting to interpreters. I think that it would be perhaps unfair on those investors to say whether or not they were specific enough to say whether or not they noticed it was there but did not understand it or that it was not there. That is all part of our investigation going forward, and that is exactly the sort of material we are collating at the moment.

Senator SHERRY—As to the issue we touched on earlier of the research houses—and we touched on them at the last hearing—is that a matter that is being followed through?

Mr Lucy—Yes. I think it is ‘house’.

Senator SHERRY—That was going to be my next question. I am certainly aware of one.

Mr Lucy—I am aware of only one at the moment.

Senator SHERRY—It is one that is being investigated at the present time?

Mr Lucy—At the moment.

Senator SHERRY—Was ASIC made aware of the online superannuation ‘advertising campaign’ run in metropolitan areas? This is related to Westpoint.

Mr Lucy—When was it being run?

Senator SHERRY—Earlier this year and, I understand, last year.

Mr Lucy—We would have to take that on notice. I am not immediately aware of it. We should take that on notice.

Senator SHERRY—I am told that those who attended the workshops for Online Super—there was an advertising campaign, and then people attended workshops—were allocated an ASIC licensed financial planner who worked for Online Super. These licensed planners advised attendees to establish a self-managed super fund. The workshops continued and, once the investor had set up their self-managed super fund, they were then informed of the benefits of investing in Westpoint mezzanine finance projects. That was one of the ways in which the propaganda was disseminated, through this campaign. Are you not aware of that?

Mr Lucy—If they were giving advice in relation to Westpoint, you can be assured that they are part of our investigation. If it is the case that people invested in Westpoint through that organisation, yes, they will be part of our investigation.

Senator SHERRY—Apparently the licensed financial planners—they claimed they were licensed; let us assume they were—were advising the SMSF clients to put all their money in Westpoint mezzanine projects. The extent that that occurred is a matter of fact and consequence. Is that one issue that is under investigation into the activity of planners—the recommendation that all moneys go into Westpoint entities?

Mr Lucy—Yes, it is. That will also be an issue for the Australian Taxation Office, because it also has that interest. Yes, is the short answer.

...

Senator SHERRY—Mr Lucy, are you aware of the press release put out by the Westpoint Investors Group on 23 May 2006?

Mr Lucy—No. Indeed, I have had communications from them, including as late as this week, but I cannot recall seeing that communication.

Senator SHERRY—In that press release they raise a number of questions with respect to ASIC. One of the issues raised is that ASIC should provide a copy of the warnings that were issued to Westpoint investors. Is there any particular difficulty with that?

Mr Lucy—No. As I said, I have not seen the release that you have referred to.

Senator SHERRY—And the location, date and publication of the warnings—

Mr Lucy—Yes.

Senator SHERRY—There is no particular difficulty in that?

Mr Lucy—No, I would not have thought so.

Senator SHERRY—It is alleged by the Westpoint Group that their requests for a meeting with Ms Redfern were not agreed to on three occasions.

Mr Lucy—I do not think that is a fair reflection, frankly, in that their request for a meeting and the agenda for that meeting was discussed with Jan. Indeed, as late as this week they agreed to hold a meeting in the manner that both they and we think would be the most fruitful. I expect that meeting will occur within the next couple of weeks. They were angling for a meeting that simply was not appropriate. There has been dialogue with the chairman of that group. He has accepted that that was the case and has now accepted with Jan an approach for a meeting which will be convened in the near future.

Senator SHERRY—Will that be with Ms Redfern?

Mr Lucy—Yes, definitely. Whether I will attend that I am not sure. It depends upon what the final agenda is. One of their key interests, of course, is how we are going with our investigation. Of course, that is an appropriate expectation that they have. We are limited as to how much we can communicate. I expect there is going to be an expectation gap, a difference, between what they seek out of the meeting and what we can provide.

Senator SHERRY—You say you are limited in respect of communication. Is that a budgetary limitation or a practical limitation?

Mr Lucy—No, it is a legal limitation. It is just prudence and nothing to do with the budget.

Senator SHERRY—In a letter from Freehills on 2 June 2004 to the directors of Emu Brewery Mezzanine Ltd and Bayshore Mezzanine Pty Ltd it was revealed that ASIC was ordered by a preliminary hearing on 1 June 2004 that notice be given immediately to all the promissory note holders in both Emu Brewery and Bayshore fundraisings by sending them copies of the originating summonses, counterclaims, orders and a pro forma letter prepared by ASIC giving them 21 days to seek to be joined in the proceedings. Did ASIC follow through on that order? If so, how?

Mr Lucy—Yes. That was the matter I was referring to when I was speaking with Senator Watson, in that we were directed by the court to write to about 250 investors, which we did.

Senator SHERRY—You followed that through. You referred to not receiving feedback or a response.

Mr Lucy—Yes.

Senator SHERRY—Was that in respect of that matter as well?

Mr Lucy—No, not as well. That is that matter.

Senator SHERRY—Approximately how long after the order were those letters sent out?

Mr Lucy—We think it was 4 June. If that is incorrect, we will advise.

Senator SHERRY—So a couple of days?

Mr Lucy—Yes.

Senator SHERRY—If you could, let me know. I will not hold you to that precise date. Can you provide a copy of that letter for estimates?

Mr Lucy—Certainly. We probably will not have the title of the investor, respecting the names of the investors; we will just send you a—

Senator SHERRY—Just blank it out?

Mr Lucy—Yes. Would you have any appetite to let us have a look at that letter that you refer to?

Senator SHERRY—Which letter?

Mr Lucy—That Freehills letter?

Senator SHERRY—I will have to check on that. I do not think I have it here. I am not sure.

Mr Lucy—If that was possible, we would be very interested in that letter.

Senator SHERRY—Have you asked them for it?

Mr Lucy—They would probably claim it was privileged.

Senator SHERRY—I do not know whether I have it. I have some questions in respect of the Freehills letter. I will check to see if I have it. I would have to check with them.

Mr Lucy—I understand.

Senator WATSON—My question concerns the solicitors. I have been reflecting, Mr Steward, on your term ‘toing-and-froing’ in terms of the negotiations between ASIC and the solicitors and the scope, I suppose that would be the correct word, of the regulatory powers. Being a large firm, would you say they were acting in an intimidatory, overbearing or unreasonable way?

Mr Steward—They may well say the same about us.

Senator WATSON—Obviously they must have had some impact of terms of a degree of hesitancy on your part. Could you give the Senate some feeling of the sort of environment in which you suddenly placed yourself?

Mr Steward—Firstly, I was not personally involved in this. But I have looked at and reviewed what occurred. It was no different to what often occurs when we have a view that we want to impose on someone that we are looking at. I am not too sure what you are seeking to characterise our negotiating position as, but it certainly was not timid or reluctant. It was forceful and willing, and theirs was the same.

Senator WATSON—I would be surprised if they were timid. I am not querying your approach. But I could imagine very large firms could have the capacity to be quite overbearing and intimidatory.

Mr Steward—No.

Senator WATSON—So they just in a quiet way put their legal argument. Is that right?

Mr Steward—Yes, that is right. We had opposing views.

Senator WATSON—It was all done in a very professional manner, without threats on their part?

Mr Steward—I am not sure what you are getting at. We delivered an ultimatum to them, if you want to call it that, about the way in which this issue was going to be resolved.

Senator WATSON—Ultimately, but before you got to ultimatum stage—

Mr Steward—I am not aware of any—

Senator WATSON—You eventually lost patience, did you not?

Mr Steward—Yes, we did.

Senator WATSON—I am trying to work out why you did not act sooner and go in earlier with your ultimatum but instead allowed a fair bit of toing-and-froing, negotiation and lots of opportunities.

Mr Steward—We were dealing with a very technical legal issue. They had advice that they felt supported their view. We had a view supported by advice and we were at loggerheads over it, as we are on a host of issues every day with a host of people. If your question implies that we did anything that was overbearing or threatening, that is certainly not the case.

Senator WATSON—No, quite the other way this time.

Mr Steward—No. It was a forceful, willing contest between two people who had opposing views. That is really what it was. At the end of the day, we felt that we were not getting where we needed to get to quickly enough, so we thought we had to bring it to a head.

CHAIR—I suppose it is also relevant to this discussion to say that you are a regulator, not a prosecutor, and your core obligation is to secure compliance, which is done in a variety of ways but, at least in the initial phases, by discussion rather than any other mechanism?

Mr Steward—That is certainly what we had on our mind. We were seeking to impose a fairly fundamental change on the way in which the Westpoint Group was going to conduct its fundraising activities in the future and going to be dealing with its current investors. Before taking such a major step, it was sensible for us to raise that and try and negotiate and persuade Westpoint to comply rather than simply go off to court straightaway.

Senator WATSON—It seems a bit of a soft-touch approach. That is what I am really worried about. I have a view of a regulator as a bit of a policeman, in effect—

Mr Steward—I disagree.

Senator WATSON—who says, 'This is the law, why are you not complying with it?' Bang!

Mr Steward—The difficulty was—

Mr Lucy—The bang came through the court, and we lost.

Senator SHERRY—I am actually not fundamentally disagreeing with you in respect of that action. My argument is that you should have taken action earlier and against a wider range of people for a wide array of reasons. I want to go back to the compensation issue. We know that self-managed super funds are not covered by the theft and fraud provision of the CIS Act. Are you aware of whether any of the persons who placed money have complained to FICS, as I think it is known?

Mr Lucy—Yes, we are. There are a number that have complained.

Senator WATSON—Right.

Senator SHERRY—But FICS has a limit, doesn't it, on the amount that it can award?

Mr Lucy—Yes. It is \$100,000, but it can be waived by consent.

Senator SHERRY—Do you know of the approximate number of individuals who have sought to take that course?

Mr Lucy—It is a work in progress. At this stage, it is a relatively low number.

Senator SHERRY—There would be some, I would have thought, commonsense in persons, certainly those with relatively small amounts of money, under \$100,000, taking this avenue. It is a relatively quicker form of restitution.

Mr Lucy—We would certainly support that observation and, indeed, we have been almost aggressive in trying to encourage investors to take that route.

Senator SHERRY—Yes. None of those matters have been heard by FICS yet, have they?

Mr Lucy—Not to my knowledge.

Senator SHERRY—Under the CIS Act compensation, theft and fraud prima facie is not going to be applicable. FICS is a possibility for some people and, I suspect, a probability for some. That is another avenue. What other avenues are available for compensation?

Mr Lucy—It is a question of whether or not there is any culpability sheeted home to the directors, officers and third parties such as auditors and, in the event that that is the case, whether or not that bears fruit. It is also a question of looking at the assets of particular entities and parties that may not be secured by way of a first-charge security to see whether or not there is any opportunity for introducing further funds there and then, ultimately, whether or not we conduct a section 50 process.

Senator SHERRY—In respect of Westpoint—and there is a time issue, obviously—whatever assets are left after the receiver is finished, what is the position with auditors if there is a finding that they were negligent? Is it possible to access compensation from the auditing firm?

Mr Lucy—Yes.

Senator SHERRY—What section of the act would allow that?

Mr Lucy—Just the law of negligence.

Senator SHERRY—In terms of the investors, I frankly do not think there is a likelihood that there is going to be a substantial amount of money from the Westpoint entities, whatever is left over. If there was a negligent case prima facie to recover moneys from the auditors, would ASIC leave that to the individual investors to initiate or could it do that itself on behalf of investors?

Mr Lucy—My expectation is that the liquidators and/or the receivers would take that action in the first instance.

Senator SHERRY—Could ASIC do that itself?

Mr Lucy—In the event that there was nobody else willing to take it and it passed the public interest test then, yes, we would take it.

Senator SHERRY—It is probably too early, but I certainly think—

Mr Lucy—It is too early, with respect. It is something which we are very much alive to.

Senator SHERRY—One of the difficulties for many of the investors I have spoken to is, first, their frustration with the likely length that this will take. You understand that many of them are elderly.

Mr Lucy—I totally understand.

Senator SHERRY—It could be years away. Second, whatever money is left in Westpoint, it will certainly be less than they have put in. There are also the costs of litigation for them as individuals. These are all issues that they are concerned about.

Mr Lucy—Perhaps a smaller issue, but a side issue, is their own taxation circumstances.

Senator SHERRY—Yes. On that issue and tax liabilities, have you had any liaison with the tax office? That is not something I asked the tax office about yesterday.

Mr Lucy—Yes, because one of the issues will be the ability of the investors to crystallise the loss.

Senator SHERRY—Yes. So you have obviously had some discussions with the ATO about it.

Mr Lucy—Yes.

Senator SHERRY—What information is known about the likely treatment?

Mr Lucy—We cannot speak for the tax office on that. We have raised the issue, they are alive to it and clearly it is in the interests of the investors to have their position clearly understood as quickly as possible.

Senator SHERRY—I can raise that. There will be plenty more estimates hearings over the next couple of years. I will raise it with the ATO.

Mr Lucy—I have no doubt. It is an important issue for many investors.

Senator SHERRY—Yes.

Senator WATSON—On that question of the responsibility of the tax office in relation to their small superannuation fund regulatory powers, I have to point out that diversification of investment is just one issue that the trustees have to look at.

Mr Lucy—It is.

Senator WATSON—Obviously, I think it is going to be very hard to pin much on the tax office, given the fact that it is not mandatory for them to enforce or anything like that; it is just one of the issues.

Mr Lucy—My understanding is that it is part of their qualifying test. We have had situations, for example, where investors have put investments into four separate Westpoint investments, saying, 'There is the diversification.' How the tax office will treat that is for the tax office. What we are raising with the tax office, the liquidators and so on is that the funds and the individual investors will want to crystallise a loss and they need to be in a position to be able to crystallise it, the earlier the better.

Senator WATSON—That is a different issue.

Mr Lucy—Quite right; it is.

Senator WATSON—Senator Sherry is giving us the appearance that, perhaps, the tax office regulation was remiss.

Senator SHERRY—I think it was. I think they are remiss in respect of self-managed super funds generally. I make no bones about it. They are not doing enough. There might be a range of reasons for it that the tax office cannot help, but they are not doing enough. To come back to Mr Lucy, one of the issues here is that the tax office, to be fair to them—and I am critical of their lack of action in respect of self-managed super funds generally—have not yet received the audited reports or accounts of the trustee entities, the self-managed super funds, in which moneys were placed in Westpoint, in many cases. That is the case, isn't it?

Mr Lucy—I cannot speak for the tax office. We would not know of that circumstance.

Senator SHERRY—Coming back to the meeting that you had on, I think, 23 February with about 70 individuals in respect of Westpoint, have you given a commitment to them? I think you have referred already to the fact that some people were emotional and upset, which is understandable.

Mr Lucy—Yes.

Senator SHERRY—Did you give a commitment to come back with a response to the issues they raised?

Mr Lucy—Yes. We have a specific website dealing with Westpoint and we have issued at least three specific releases on that already.

Senator SHERRY—Specifically addressed to those people who were at that meeting?

Mr Lucy—Yes. We advised them that we were setting that website up and we referred them to it. My recollection is that the first update was within 24 hours of that meeting and that we continued to refresh it as appropriate.