

**TO** : Ms Helen McNally, ASIC Liaison Officer

**CC** : The Australian Media

**FROM** : Graham MacAulay, President, Westpoint Investors Group  
PO Box 661  
Miranda 1410  
Telephone 02-9525-2396  
Mobile 0411 141 888  
Email [gmac@ihug.com.au](mailto:gmac@ihug.com.au)

**Date** : 16 January, 2009

**Subject** **Four Questions concerning ASIC's responsibility to Westpoint Investors.**

Dear Ms McNally,

The questions I ask are not new. I first raised the question of ASIC responsibility in the Westpoint investor losses at a meeting between the Westpoint Investors Group executive and ASIC on 05/07/2007. At that meeting, Tony D'Aloisio sidestepped the question of ASIC responsibility in the matter. I again raised the matter in a [communication addressed to Mr D'Aloisio on 12-02-2008](#). That communication remains unanswered.

- a). Given the facts in the appendix, will ASIC now ADMIT its explicit and easily recognised failure to protect consumers has cost Westpoint Mezzanine Investors dearly?
- b). Given the Westpoint Mezzanine Model was an MIS from its inception in 2000 and ASIC was negligent in its failure to identify significant losses would most likely be suffered by non-sophisticated (normal English usage) investors, will ASIC now take steps to immediately compensate all Westpoint victims?
- c). Given the majority of Westpoint investors were at the time of their investment of an age such that they can never recover, will ASIC publicly announce the best plan would be to compensate Westpoint victims from its \$500 million annual revenue on the basis Westpoint investors transfer any future recovery of Westpoint funds to ASIC?
- d). Will ASIC be prepared to publicly acknowledge this is the best outcome? If not, why not?

Graham MacAulay

## Appendix

1. As the Australian Financial Regulator, ASIC has a duty to ensure all participants in the market place obey the Australian Government legislated marketplace rules and takes the necessary action where a participant breaches these rules. This includes those holding an Australian Financial Services Licence.
2. One of the reasons for the creation of ASIC by the Howard Government was the need for investor protection
3. In 2000 ASIC issued the document that has become known as “[The 2000 Freehills letter](#)”. It is clearly a “no action” document. This implies ASIC studied the Westpoint Mezzanine Model and the use of promissory notes very carefully.
4. In 2004 ASIC took Westpoint to court. The Hansard record of the [Senate Estimates meeting of 31-05-2006](#) clearly shows ASIC did not recognise the Westpoint Mezzanine Scheme model was a Managed Investment Scheme. Further, the evidence of Mark Steward clearly demonstrates ASIC’s confusion over the issues that mattered. In November 2004, the Judge in the case commented the test cases, viz. Emu Brewery and Bayshore, were MIS’s.
5. In the subsequent appeal by both parties, ASIC asked the Court to determine whether the Westpoint Mezzanine Companies were Managed Investment Schemes. The 2006 WA Supreme Court decision determined the Westpoint Mezzanine Companies were MIS’s.
6. The law states a planner misleading an investor is responsible for the losses incurred by that investor. The nature of the misleading is irrelevant.

The items 1 - 5 above are a matter of public record, and I am informed item (6) is a matter of law. Using items 1 - 6 above, the following three claims are irrefutable.

- i). The [“no action” letter to Freehills](#) proves ASIC had every opportunity to examine the Westpoint Mezzanine Model from the outset. ASIC continued its mistaken belief the Westpoint Mezzanine Model was NOT a Managed Investment Scheme from the time ASIC issued the 2000 Freehills letter until the WA Supreme Court’s decision in 2006 that it was.
- ii). As Westpoint never presented any Westpoint Mezzanine Scheme to ASIC for examination under the Corporations Act for registration as a Managed Investment Scheme, it automatically follows each of the Westpoint Mezzanine Companies was an illegal Management Scheme from the time it entered the marketplace.
- iii). From (i) and (ii) above it is clear ASIC failed in its duty to protect every Westpoint Mezzanine investor from the outset. It follows, unless specific legislation excludes ASIC from the same rules it applies to those it regulates, ASIC is responsible for Westpoint Mezzanine investor losses.