Ex-Westpoint chief

There are indications the regulator contributed to the Westpoint collapse, writes **Marcus Priest**.

Former Westpoint boss Norm Carey's claim that the Australian Securities and Investments Commission gave him the green light in 2001 to raise money through risky lending practices is gathering growing support in the property investment community.

In an interview with *The Australian Financial Review*, Carey says Westpoint failed because of poor legal advice, ASIC's actions in 2001 and a "toxic mix" of greedy insurance salesmen turned financial planners.

"Westpoint was not in financial problems. It was entirely manageable, the whole situation," Carey says.

"There's no other cause [for the collapse] but for ASIC's action. Westpoint would simply have gone on to finish the projects."

Carey's claims have been dismissed by ASIC and Westpoint's receivers, but they are supported by some in the industry.

Institutions who lent money to Westpoint say that at the time of the collapse they had no concerns.

"As far as I knew they were paying their bills," one banker says.

The head of property investment banking at Investec, Brendan O'Sullivan, says ASIC's role is under the spotlight.

"ASIC's role was to protect mum and dad investors and they should have been making it very, very clear as to the risks they were taking going into these projects," O'Sullivan says.

"ASIC could have acted earlier in terms of not allowing money to be raised in the first instance, rather than being half in and half out. I feel ASIC failed in that obligation, and that is a widely held view in the structured finance sector."

Carey is under investigation by ASIC over the collapse and faces legal actions by the liquidator of the Westpoint fund-raising mezzanine companies.

"Westpoint was not in financial problems. It was manageable."

Westpoint collapsed in late 2005 after ASIC moved to wind up the mezzanine companies, stopping the flow of money into a number of projects that were nearing completion.

ASIC's move on Westpoint came after it challenged the legality of the company's fundraising practices in the West Australian Supreme Court. When it lost on its main argument, it spent 18 months investigating the company, during which time it issued more than 200 notices to produce information on the company.

"By serving so many notices on Westpoint we couldn't actually run the business anymore," Carey says. "ASIC had a wider agenda. One of them was to get rid of promissory notes, unregulated product, full stop."

Yet shortly after Westpoint issued its first information memorandum for its Bayview project in 2001, ASIC wrote to the company querying the use of promissory notes.

Advice was then sought by Westpoint from Sydney silk Tony Bannon, which confirmed the original advice from the company's lawyers Freehills on promissory notes.

And within two months, ASIC wrote to Westpoint that "no further action would be taken".

"As far as everybody in the commercial world is concerned, that is an endorsement by ASIC that one, the product's legal," Carey says.

But after complaints from consumer groups and warnings from then Reserve Bank governor Ian Macfarlane, ASIC had a change of heart in 2003.

After initial talks, ASIC delivered an ultimatum: phase out the use of promissory notes or face legal proceedings.

ASIC has since conceded it didn't have a strong case and the move was designed to force Westpoint into toeing its line.

"We were confident that we had a good argument [but] it was an argument that seemed to be contrary to what was explicitly set out in the Corporations Act," ASIC officer Mark Steward told a parliamentary inquiry in 2006.

"At the end of the day, we felt that we were not getting to where we needed to get quickly enough, so we thought we had to bring it to a head."

points finger at ASIC

Norm Carey says Westpoint would have finished the projects. Photo: ERIN JONASSON

But despite its concerns about Westpoint, ASIC failed to get any support from investors, receiving only 14 complaints about Westpoint before it took action.

Former ASIC chairman Jeffrey Lucy conceded before a Senate hearing in 2006 that ASIC acted to wind up the mezzanine companies even though it had very few complaints about the company and had timed its move to prevent the company refinancing its debts.

The move came after the company's lawyers, Freehills, warned ASIC early in 2005 that the likely ramifications of aggressive legal action by ASIC would lead to "likely loss of substantial if not all mezzanine investor capital".

Freehills and Carey proposed a solution whereby the company completed existing projects financed by promissory notes, phased out the use of promissory notes and moved into regulated financial products under the Managed Investment Act.

"How can you possibly investigate a product in 2000, issue a letter saying 'Yes, OK, it's legal' and then simply start saying, 'Oh look, we've changed our minds about this'," Carey says.

"That is acting without conscience, particularly when . . . between 2003 and 2005, Freehills continually tried to negotiate a position so we could finish those projects and everyone get their money back.

"We then had experts inform ASIC about the consequences of them taking the action that they ultimately did and in full knowledge of all that, they took the action and then they've blown away a rump stump."

According to Westpoint administrators Taylor Wooding, there were clear signs of insolvency by June 2005 and even before then; it owed money to the Australian Taxation Office and was forced to enter into a repayment arrangements with respect to overdue tax in late 2004.

And former Westpoint employees have told ASIC that they were instructed to delay payments to creditors for as long as possible.

Carey has denied these assessments and says receivers and liquidators were not in full possession of the documents because they were held by ASIC.

"There's two guys now reconstructing the whole financial position, and what's going to be demonstrated is there's nothing wrong with Westpoint Group, the overall financial position was manageable, it was very profitable and there was sufficient cash to operate without breaching the law," he says.

But Westpoint receiver Mark Korda says Westpoint would have failed regardless of ASIC.

"Everyone wants to blame someone else. ASIC is a pretty good whipping boy," Korda says.

"ASIC did not cause the cause the collapse; this guy was not a very good property developer. You have got high commission, high interest costs because of cost overruns and time overruns."