

Westpoint: global mediation flagged

Patrick Durkin

Three years after property financier Westpoint Group collapsed, owing about 4300 investors more than \$390 million, the corporate regulator has launched an ambitious plan for a global mediation to be run by retired High Court judge Ian Callinan.

Mr Callinan, QC, would attempt to resolve all claims against the group which are threatening to spiral out of control through the courts.

But the Australian Securities and Investments Commission is facing stiff opposition to the plan, which it is promoting as the quickest and most commercial outcome for failed investors.

The group's collapse in January 2006 triggered a wave of litigation,

KEY POINTS

- ASIC says the plan is the quickest and most commercial outcome for failed investors.
- Lawyers for other parties criticise global mediation as wasteful.

including legal action against the directors and a class action by investors against financial planners who recommended the group's investment products.

ASIC is also suing a number of financial planners to recover \$87.6 million and late last year launched a \$200 million legal action against accounting firm KPMG over its auditing of companies in the group.

Complicating matters is the fact that the trustee of one of the companies, State Trustees, which is being sued by ASIC for \$17.9 million, wants to join more financial planners to their case. Last Wednesday, Federal Court judge Ray Finkelstein told a courtroom packed with lawyers that March would now be the cut-off date for any further parties to be joined. He also ordered that a global mediation proceed, despite strong opposition from one group of planners.

"There is no overlap between each of these discrete actions and a global mediation," Robert Bain, QC, told the court from Brisbane. He is representing two groups of planners, Professional Investment Services and Strategic Joint Partners.

"We object to our quite narrow case being embroiled in a global

mediation. It is wasteful, it is unnecessary and it causes doubt, if anything, rather than efficiency or economies."

Despite the objection, Justice Finkelstein ordered that the mediation proceed, albeit with a discretion for Mr Callinan to consider the cases separately if necessary. But Justice Finkelstein was forced to move the global mediation back to July after further argument that a March date would be premature.

"[This is the best outcome]... to advance the matter efficiently... most of the objections to a mediation really raise machinery issues," John KarKar, QC, appearing for ASIC, told the court.

But the parties also buckled at a suggestion that key ASIC officers would only phone into the mediation,

with lawyers saying these key decision makers "must be front and centre".

The approach of a global mediation has gained credence since the emergence of multiple operators in the class action arena and a greater willingness by ASIC to use its public interest power to bring cases. The liquidator and financiers of Opes Prime are continuing a mediation in their second attempt at avoiding drawn-out legal warfare following the stockbroker's \$1.4 billion collapse. Efforts by liquidator John Lindholm to obtain settlement last October fell through leaving Australia and New Zealand Banking Group and Merrill Lynch exposed to years of litigation.

Last year, Justice Finkelstein proposed a US-style litigation committee to handle competing shareholder actions against Centro Properties.

Recession pressure pushes up fraud rate

A combination of employee motivation and greater scrutiny means more crime is being exposed in company ranks, writes Marsha Jacobs.

More employees are defrauding their employers, and they are stealing more too, say lawyers and accountants who investigate internal frauds.

Tougher economic times mean that employees have greater motivation to steal and employers are watching outgoings more closely.

"We are definitely seeing an increase in fraud at the moment," KPMG forensic partner Gary Gill says. "When there is a downturn, we do see more fraud because employees are more likely to steal, and companies are equally more likely to discover it as, when times get tough, their numbers come under more scrutiny."

He says the incidence and average value of fraud has increased. In the past year alone, he has worked on several cases involving the theft of more than \$1 million.

Gill says fraud is especially prevalent in procurement divisions, payroll and online payment systems, where employees are siphoning off money.

Typically, organisations try to recover the money themselves before going to the police, especially if the employee still has the money or assets, he says.

"There is always a concern about the public knowing, because it is not good from a reputational standpoint."

Clayton Utz partner Peter Keel says there is tension between the legal obligation to report serious offences to the police and employers wanting to act quickly without tipping off a fraudster.



Malcolm Shackell says fraud is exposed when staff turnover is high. Photo: LOUIE DOUVIS

"Organisations with falling share prices don't want the negative publicity, so are trying to resolve things internally as quickly as possible," he says.

"We have definitely been seeing a bit more of this sort of work, and I think it's a consequence of the economic times."

Carlo Minassian, chief executive

of Earthwave, which provides security systems on internet services offered by companies, says fraud has been on the rise for some time.

He has had two banking customers — one who lost \$12 million and the other \$3.9 million in employee frauds — and neither incident was public knowledge, he says.

"The people who commit the bigger frauds are the ones with the most access — the directors and managers."

"Most companies don't go to court because it is such a bad thing for their profile."

Minassian estimates that 80 per cent of his large clients will experience fraud, and that most big businesses are "definitely inadequately prepared" for employee fraud.

PricewaterhouseCoopers forensic partner Malcolm Shackell, who noticed an increase in fraud during the past couple of downturns, says the incidence of fraud is likely to rise over the next six months.

He suggests two main contributors. "People are feeling the pinch at the moment, so have the motivation to steal, but also, as back-office staff are being let go, weaknesses in fraud controls are exposed. Combine those two and that's where you start to see problems emerging."

He says more fraud is likely to be experienced in periods of high staff turnover because "when people leave, that's often when they are discovered".

Gill says gambling is a major driver of fraud.

In December last year, police arrested and charged a Sydney bank manager for allegedly stealing \$6.8 million from his employer, the Korea Exchange Bank, to spend on "lifestyle" and "living expenses".

Also in December, three Sydney men were jailed for five years each for their roles in a conspiracy to steal \$150 million from the Commonwealth Superannuation Scheme on Christmas Eve 2003.

On a global scale, the financial services sector was rocked in January last year by the news that Société Générale, France's second-biggest listed bank, had suffered losses worth a record €4.9 billion at the hands of rogue trader Jérôme Kerviel.

MacAir contract up in air

The Queensland government is still awaiting news on whether a contract with airline MacAir for regional services will be cancelled after the carrier went into receivership. The Townsville-based airline went into voluntary administration last week.

Henan signs trade pact

NSW and the central Chinese prov of Henan have signed a trade cooperation agreement. Henan Gov Guo Gengmao said contracts for 22 projects between businesses his province and NSW had already been signed with a total value of \$US2.7 billion (\$4.3 billion).

Garrett floats salty pl

Federal Environment Minister Pete Garrett wants the public to have their say on a proposal to flood the lower lake of the Murray with sea water. South Australia has applied to introduce water to the lakes if the drought continues and water levels fall below determined levels. The plan needs federal approval.

Power boss charged

The former head of a major Queensland electricity company will face a committal hearing over the next 10 days on allegations of insider trading. Mark Douglas Chatfield, of West Australia, has been charged with count of dishonest use of a position and one count of dishonest use of information. Mr Chatfield was also charged with a lengthy investigation by the Australian Securities and Investments Commission. It is that while chief executive of the Queensland government-owned corporation CS Energy, Mr Chatfield used his knowledge of the business dealings for personal gain.

Defence fights dow

The government has been urged to protect the defence budget from the federal budget heads for a respected think tank said much defence budget was spent on and would act as a stimulus to global financial crisis. "Despite capital acquisitions from over bulk of defence spending stay Australia," said a report released by the Australian Strategic Policy Institute.

Lead miner's exp

The mining company at the centre of a lead poisoning crisis at Espirito Santo in south-east of Perth, has been given green light to export lead ore from Fremantle. West Australian Environment Minister Donn Swaney said yesterday she had imposed conditions on Magellan's operations at the Fremantle port facilities.

Court rejects doctors' Medicare challenge

Marsha Jacobs

Two doctors — whom authorities said were seeing too many patients — have failed in their bid to have the High Court declare the Medicare system unconstitutional.

Chee Kan Wong and Ashraf Thabit Selim were seeking to challenge the validity of the bulk-billing system, but failed yesterday in their bid to have it ruled unconstitutional,

in a 6-1 majority decision. A federal government review committee found the doctors had engaged in "inappropriate practice" under the Health Insurance Act for seeing a very high number of patients in a given time.

In response, they launched a High Court action claiming sections of the act were invalid because they amounted to civil conscription. Civil conscription is banned in the constitution.

The High Court upheld a full

Federal Court decision that medical practitioners were not compelled to render service to anyone.

The court said the act did not amount to civil conscription because doctors were free to choose where and when they practised.

Aspects of the Medicare scheme, such as denial of payment for incomplete forms, were conditions of participation but did not amount to a practical compulsion to perform

a professional service, the court said.

The judgement was one of four handed down by the High Court yesterday, the last day of Justice Michael Kirby, who retires today.

However, in the Medicare case, Justice Kirby did not live up to his moniker of "the great dissenter". Justice Dyson Heydon provided the dissenting opinion.