

ASIC set for another court savaging if Westpoint wind-up documents revealed

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The Australian Securities and Investments Commission is bracing itself for a king hit in the courts this week after a judge indicated that it would lose its claim to suppress critical documents which allege the collapsed property group Westpoint was wound up while still solvent.

The documents - including a preliminary solvency review by the independent expert Deloitte - were not included in ASIC's Federal Court wind-up application, upon whose orders Westpoint was wound up.

Westpoint collapsed in 2006 with losses of more than \$300 million. The documents are expected to lead to questions about ASIC and the officers involved in the wind-up.

In a hearing in the Federal Court on Friday, Justice Finkelstein made draft orders that he handed to the various parties, including Westpoint's founder, Norm Carey, and ASIC. A formal order will be made this week but the draft order is that a Deloitte report into Westpoint's solvency was in the public domain and should be released.

ASIC is suing the directors of the Westpoint mezzanine companies, Carey and various other parties including the Westpoint auditor, KPMG. Carey has a cross-claim against ASIC for malfeasance in public office, alleging that Westpoint was not insolvent at the time ASIC took its action and that the collapse of the Westpoint was caused by ASIC.

Central to Carey's cross-claim is being able to get his hands on the Deloitte solvency review. On Friday, this was helped when Justice Finkelstein indicated that ASIC's bid to suppress the Deloitte document might not be protected under professional legal privilege because it was already in the public domain.

Senator Nick Xenophon opened up this can of worms in a Senate Estimates Committee hearing on June 1 and June 23 this year. During the session he made the statement: "There is a perception amongst investors who have lost their money that ASIC timed their action to prevent the rollovers and repayments proceeding, and that led to a chain of events that led to the collapse of this group when a solvency review found that the group was still solvent at that time."

The Deloitte review is a document ASIC has fought tooth and nail to keep secret since its existence came to light 13 months ago.

Indeed, on June 3, two days after Xenophon discussed the existence of the report, ASIC wrote a letter requesting that he return any copies of documents in his possession and the names of anyone he had disclosed the unmasked documents to or had discussed their content with, together with the dates of any disclosure or conversations. Xenophon declined on the basis of parliamentary privilege and at a Senate hearing on June 23 called for ASIC to supply the Deloitte document.

This solvency review was commissioned by ASIC during its investigation into Westpoint and before it made the winding-up application. The review was based on boxes of documents ASIC had obtained from Westpoint after serving section 30 notices on the controversial property group. These documents, which included most of Westpoint's financial records, were used to conduct a solvency review of the Westpoint Group.

During discovery ASIC released certain documents in error. What happened was ASIC's lawyers failed to permanently blank out sections of some documents, specifically the minutes of meetings of ASIC's National Enforcement Co-Ordination Committee. The upshot? Carey and his sister Karen Carey received a non-redacted copy. The unmasked documents referred to the findings of a preliminary solvency review.

The unmasked minutes of the meeting of an ASIC meeting held on September 27, 2005, are believed to state that a progress report of the Deloitte Solvency Review was provided and discussed.

If the Deloitte review found the group of Westpoint entities was solvent, it will pose the question of why

ASIC did not mention the existence of the review, even if it was not yet final, to the Federal Court when it made its wind-up application.

On November 22, 2005, ASIC applied to the Federal Court in Perth for the appointment of a provisional liquidator to York Street Mezzanine Pty Ltd on the basis that it was insolvent. It made a similar application over another Westpoint entity on December 5.

In its statement, ASIC said that at the time it made its wind-up applications on the two mezzanine debt companies, Deloitte had not provided ASIC with a final review on the group's solvency. It also said that an affidavit sworn by a Deloitte partner did form part of the evidence ASIC relied on in its November 2005 liquidation application in relation to York Street Mezzanine. While this might be so, the report was about the solvency of the group, not one or two entities.

ASIC maintains that it did not act improperly in applying to the court to wind up the companies. Given its recent track record with litigation, ASIC will be praying it is right.

One thing is for sure: a little more transparency and a little less hiding behind legal privilege wouldn't go astray.

Source: [The Sydney Morning Herald](#)



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