

TO : The Hon. Peter Dutton, Minister for Revenue and Assistant Treasurer.
CC. : The Hon. John Howard, Prime Minister of Australia
CC : The Hon. Peter Costello, Australian Treasurer.
CC : The Hon. Kim Beazley, Leader of the Opposition.
CC : The Australian Media.

FROM : Graham MacAulay

DATE : 26 June 2006

Dear Sir,

If the intent of the half truths, distortions, and irrelevant filling of the missives your office inflicts on Westpoint victims is to antagonise them, then you have succeeded beyond any expectations.

I now wish to prove that it is in your interests to immediately cease this shameful practice.

I believe your office, Senator Coonan, and Jeff Lucy have made misleading statements, and it is now time to put the record straight. I request immediate answers to the questions asked below. Where any of them involve an ACT covering ASIC's inability to respond because of the restrictions placed upon them by legislation, could you please supply the ACT, section, and paragraph.

It is the duty of an incumbent Government to protect the financial marketplace with International Accounting standards that protect the consumer - no matter the political colour of the Government. This level of protection is extremely important for the more vulnerable members of the Australian community, and includes the aged, self-funded retirees, and those about to retire, and should meet the relevant International standards.

I remind you the current Liberal Government framed the current legislation governing ASIC. If ASIC cannot act to protect financial consumers because of inadequate legislation, it is the direct fault of the government to which you belong.

Westpoint investors do not deserve the disasters that an incompetent/negligent ASIC, and your uncaring Government, have inflicted upon us.

- The following excerpt is from a reply your office sent to Ms Margaret May MP, Member for McPherson.

This is also the reason why ASIC was not able to act on general warnings, such as those reported to have been given by Ms Denise Brailey, that mezzanine financings including those offered by Westpoint were very risky. Such allegations by themselves do not provide ASIC with any legally valid reasons to act against the issuers of these products. However, ASIC did take action to alert people to the risks associated with mezzanine products.

As I understand it, Denise Brailey warned ASIC, before Westpoint launched their mezzanine products, of the likely outcome of unleashing promissory note schemes on the market. Westpoint victims now live with her worst fears.

- 1a. Can you please supply me with a formal record of why ASIC decided they could not take action on Denise Brailey's recommendations?**
- 1b. Was the Minister informed?**
- 1c. As Westpoint Mezzanine companies were Managed Investment Schemes, why**

did ASIC allow the use of Information Memoranda and not demand full prospectuses as the ACT prescribes?

1d. In the business world, where disclosure plays such an important rule, did ASIC not have a duty to inform the public of her warnings?

- We all saw Mr Jeff Lucy strut, smirk-faced (no, Mr. Lucy, it is not amusing to investors) on TV uttering his mantra: *if it looks too good to be true, then it probably is*, and stating the investors were warned. We also read him saying it was the planners' fault. Now he is talking about suing KPMG.

2a. Senator Coonan, and your office (the member for Dickson) have consistently referred to the warnings Jeff Lucy issued to Westpoint investors. No one I have spoken to, including the press, has any knowledge of these warnings. Could you please supply a copy of the warnings, the place and date of issue, and explain their specific relationship to Westpoint Mezzanine products?

2b. In uttering promises to sue KPMG if someone else doesn't, is Mr. Lucy now blaming KPMG for the disaster?

2c. The WA court has ruled the Westpoint Mezzanine companies never came under the Corporations ACT. Does Mr Lucy blame the WA High Court ruling for the disaster?

2d. When will Mr. Lucy recognise if ASIC has done its job the Westpoint Mezzanine scheme would never have seen the light of day?

2e. Does Mr. Lucy really get paid 390K p.a. for making vague statements, and uttering generalised truisms, and taking every question put to him in Parliament on notice?

- In 2002, the *West Australian Department of Consumer and Employment Protection* complained to the Treasury about the lack of consumer protection the Westpoint Mezzanine products offered the financial consumer (See Senator Sherry's question to Jeff Lucy at the Sub Committee meeting of 2002.) ASIC received a copy of the complaint.

3a. **Who informed the Minister, and when did they tell him?**

3b. **The Treasury/ASIC passed the matter on to a committee, where it died. Can you please explain how ASIC protected the financial consumer in this instance?**

- I again present an extract from the same document.

It is important to understand that our legal system does not give ASIC the power to prudentially regulate companies such as Westpoint. Therefore, ASIC cannot intervene in a company's operations unless it has specific grounds for doing so as defined in the law.

For a considerable time ASIC did not have any such grounds. As late as 2005, Westpoint's directors confirmed that it was solvent and the audited financial statements did not indicate that there were any reasons to doubt this statement. It was only towards the end of that year that ASIC obtained specific evidence of potential insolvency which allowed it to intervene.

The Age of 31-05-2006, carried an article with the heading: **ASIC playing Cat & Mouse with Westpoint** containing the following extract.

He (Mr. Steward) said during 2003, ASIC and Westpoint lawyers spent several months arguing over whether the regulator had jurisdiction. "We eventually realised by the end of 2003 that we were being stalled, we were being given the run around," he said.

Under questioning from John Watson (Lib, Tas), Mr Steward said ASIC decided it would be quicker to convince Westpoint the regulator could act, rather than change the law.

- 4a. **Why did Westpoint Mezzanine products get on the marketplace to be sold to unsophisticated investors with ASIC's approval when they did not comply with the law?**
 - 4b. **Did Westpoint hold any discussions with ASIC on the modifications involving the use of promissory notes in Managed Investment Schemes? This has particular relevance with the WA High Court decision that Westpoint Managed Investment Schemes were within the Corporation Act but promissory notes were not.**
 - 4c. **ASIC knew from the outset that Westpoint Mezzanine schemes were Managed Investment Schemes, so why did they go to court on this matter?**
 - 4d. **What disciplinary action has the relevant authority taken in respect of Mr. Steward's cavalier attitude that put investors' monies at risk?**
 - 4e. **Mr. Steward took the decision to not inform Parliament, but there must have been other people involved who knew how risky this action was. Why did they not take it upon themselves to inform Parliament?**
 - 4f. **A noted lawyer, Mr Hugh McLernon of IMF (Australia) Ltd, said ASIC had the power to wind up the Westpoint schemes in 2004, but chose not to do so (see the Sydney Morning Herald of 16-06-2006). Why didn't ASIC take advantage of the powers it had, and close down the schemes?**
- The following extract is from the same document.
ASIC chairman Jeff Lucy admitted there was a chance there would be similar collapses to Westpoint.
"There is a potential for further Westpoints," he said.
"It is true that people are continuing to invest in types of investment that we would still regard as high risk."
Mr Lucy said it was unlikely the government would act immediately in regards to Westpoint-style investments, largely because the issue was still sub judice.
With the WA High Court having made its decision, the matter is no longer sub judice.
 - 5a. **How many investors in these unnamed schemes have been put at risk because of ASIC's incompetence/negligence.**
 - 5b. **What is the total value of these investments?**
 - The SMH of 13-06-2006 reported Mr. Lucy told parliament that ASIC was investigating KPMG, and that it would sue KPMG on behalf of the investors if the liquidators didn't.
 - 6a. **The imputation is clear that ASIC believes it has evidence to sue KPMG, so why doesn't it begin proceedings?**
 - 6b. **Why does ASIC have to wait for the liquidators to initiate proceedings?**
 - 6c. **The pain of investor financial loss and emotional trauma, do not seem to worry ASIC. If they know KPMG has broken the law, why doesn't Mr. Lucy invoke Section 50 of the ACT covering ASIC?**
 - In an Australian Financial Review of 02-06-2006 article headed, **KPMG Strikes Back**, KPMG claim they signed off accounts for eight Westpoint companies in 2003 with seven notes, and in 2004 they signed off the accounts with eight notes.

- 7a. **Given all the other problems with Westpoint, why did ASIC not act in the interest of Westpoint investors?**
- 7b. **Given the amount of publicity on this matter, why hasn't ASIC published the notes?**

- **The Australian Securities and Investments Commission enforces and regulates company and financial services laws to protect consumers, investors and creditors, is the bold claim on the ASIC website.**

Enforcing laws to protect customers is a real time operation. No matter how hard one tries, *protect* has only one semantic one meaning. To carry out such an operation needs real time monitoring

Under the leadership of Mr. Neil Burnard, Keibel posed as the *Keibel Investment Bank* under the noses of both APRA and ASIC for the best part of five years. It was not that they were secretive about it as they had brochures business cards, stationary, and flyers in both English and Chinese, and a number of references to Keibel Investment Bank appeared on the Internet. Keibel Bank was a fraud designed to induce investors into purchasing products in involving an Australian Bank.

- 8a. **Did Messrs. Beck & Bell register the name *Keibel Investments Bank* with ASIC when they did not possess a bank licence?**
- 8b. **In the same vein as 8a, did ASIC allow the registration of names containing the words Financial Planner, when those entities did not have an AFSL?**
- 8c. **Why could neither ASIC nor APRA find "Keibel Investment Bank" for almost five years and not take action against them to protect consumers?**
- 8d. **When APRA did find out that they were posing as a bank (in December of 2005 when Westpoint was in the final throes of collapse), why didn't it take sterner action than telling them, don't do it again?**
- 8e. **I know many people who claim they approached ASIC with information on "Keibel Bank", only to be told that this would have to wait; ASIC was too busy with the prosecution of the Westpoint Directors. Can you explain why ASIC took this action?**

- A portion of ASIC Media Release 04-157 states, *The Bayshore Mezzanine action was commenced shortly after ASIC issued a letter of demand in April 2004 to the Westpoint group's solicitor that companies in the Westpoint group cease all promissory note fundraising.*

- 9a. **Given there were no changes in legislation, and that ASIC had allowed the issue of promissory notes in the initial Westpoint Mezzanine offerings as a legal vehicle, how could ASIC now give an order to issue no more promissory notes?**
- 9b. **At a meeting of the Westpoint Victims Action Group on 23-02-2006, at which 70 of our members were present, I asked ASIC's Jan Redfern the question in 9a. She replied. 'That was so we could take them to court.'**
Could you please explain the relevancy of Jan Redfern's answer when it was not one of the five issues placed before the court?

- At the meeting on 23-02-2006, one of the questions I asked Mr. Lucy was a repeat of a question Senator Sherry had asked him in Parliament on 16-02-2006, which he took on notice. He could not answer my question, nor could he answer it on the ABC's 7:30 Report that same night. However, the following day the ASIC website trumpeted ASIC had sent letters to Emu Brewery and Bayshore Mezzanine investors as directed by the court?

- 10a. Is there any explanation for ASIC taking over a week to find out they had sent out a letter to investors in Bayshore Mezzanine and Emu Brewery as directed by the West Australian High Court?**
- 10b. As Emu Brewery and Bayshore Mezzanine were test cases, why didn't ASIC send letters to all Westpoint Mezzanine Investors, alerting them of a possible risk of their investment?**
- Both your office, and Senator Coonan, the Minister for Communication (who suffers from the delusion she is an expert in ASIC matters and has shown in that role she is an exemplary Minister for Mis-communication), have often claimed Westpoint investors have redress through litigation.
 - 11a. Why is it not mandatory for AFSL holders to take out Personal Indemnity insurance?**
 - 11b. Is not true that when making an interactive application for an AFSL, the program calls for details of the applicant's personal indemnity insurance, and if none is available, the applicant must supply the necessary information within 28 days?**
 - 11c. Can you please explain why neither Government, nor ASIC, took action to ensure the protection of consumers under the 2001 reforms to ensure a mandatory condition of holding an AFSL was the possession of Personal Indemnity Insurance?**
 - 11d. If many planners had no insurance, were not licenced, or in the case of those that did the insurance policies are a mass of exclusions, then how can we recover our through litigation, as your office and Mrs. Coonan claim we can?**
 - **The following extract is from The Australian Financial Review of 25-01-2006.**

The corporate regulator was so overwhelmed by the burden of supervising the new financial services regulatory regime that it issued licences without properly scrutinising applicants or recording reasons for decisions, the Auditor-General has found.

The Financial Services Reform Act was intended to impose stringent, consistent and consumer-friendly standards on every kind of financial service. Instead, it is being held up by business as Exhibit A in the case for cutting red tape.

A damning report by Auditor-General Ian McPhee found only a fraction of the expected number of financial services are licensed - raising the possibility that many financial planners, dealers and insurance brokers have chosen to evade the complex regulatory system altogether.

 - 12a What controls were in place to oversee that such an important role was correctly carried out?**
 - 12b. Since the Auditor General report, what investigation has taken place to investigate the fears, of the Auditor General?**
 - 12c. How many financial planers have been prosecuted, or are being prosecuted, as a direct result of these investigations.**
 - The liquidator of Westpoint Corporation complained of writing to ASIC, requesting funds to carry on with investigative work, and six weeks later he had not received a reply.
 - 13a. Can you explain why ASIC ignored the existence of a body on which it relies for its information for prosecution, and does not feel bound to conform to the common protocols of the market it regulates?**
 - The Sunshine Coast Daily of 18-05-2006 tells the story of the twice convicted of fraud Mr Cross, on parole with the condition he didn't handle other people's money. That did not

prevent him from running a Ponzi scam between 2003 and 2005 on the Gold Coast. On reporting the theft of his Porsche to the police, they immediately arrested him. Cautious investors, who paid money, found no red flags against his name on the ASIC database. ASIC has stated that a person's criminal record is none of their business.

14a. Why isn't the conviction of a person convicted of fraud, and on parole with the condition they are not to handle other people's money, ASIC's business?

14b. How does the non-recording on the ASIC database of a person on parole aid in financial consumer protection?

14c. Doesn't ASIC taking money from investors searching a database, which doesn't contain such fundamental information without any form of disclosure, constitute misrepresentation?

- The Following excerpt is from the Age of 15-06_2006. I believe it says a great deal about ASIC management.

The corporate regulator is considering if Westpoint investors will be negatively affected by a Supreme Court ruling in Perth. The Supreme Court of Western Australia knocked back an appeal by Australian Securities and Investments Commission (ASIC) on a 2004 decision on the type of financing used by Emu Brewery, a Westpoint company.

The earlier Supreme Court ruling found that the promissory notes issued by Emu Brewery were not debentures - a type of debt security backed by the issuer not specific assets - as ASIC contended.

Emu Brewery used the notes to raise between \$30 million and \$35 million.

The Western Australian Court of Appeal ruled in the majority against ASIC's contentions that the notes were debentures.

The ruling confirms Emu Brewery did not need to provide investors with a disclosure document before they invested money into the company, appoint an independent trustee or establish a trust deed.

ASIC deputy director of enforcement Mark Steward said the impact of the ruling on the nearly 4,000 investors who collectively lost \$300 million in the collapse of the entire Westpoint group was still being investigated.

"Clearly with a decision like this it's natural and obvious as the regulator we'll consider that issue, it may well be it has no major impact at all (on Westpoint investors) but we have to consider that," he said.

"We don't have any concrete answer we can say at this stage. "The corporate regulator is considering if Westpoint investors will be negatively affected by a Supreme Court ruling in Perth.

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ASIC deputy director of enforcement Mark Steward said the impact of the ruling on the nearly 4,000 investors who collectively

He said, generally, investors who invest via promissory notes are not covered by the

protection of the Corporations Act.

ASIC started proceedings against Emu Brewery in May 2004, saying the company should have treated the issue of promissory notes as debentures

15a. How many months did ASIC have from the launching of the case in 2004 until now to decide the ramifications of each aspect of the case.

15b. The only two outcomes of this aspect of the case: Westpoint Mezzanine companies were regulated by ASIC, or they were not. Why did ASIC not prepare in advance detailed strategies to cover both eventualities?

15c. Would you employ a manager who doesn't carry out such a fundamental management operation as not to plan for both outcomes of a known future event that can have only two mutually exclusive outcomes?

- **All information in the above questions is drawn from the public domain, and is by no means exhaustive. A tenth of it is sufficient to invoke an immediate royal commission into ASIC.**

16a. Could you please explain why the current Government ignores the reality that ASIC has a disastrous record as a regulator of the marketplace, and by its unwillingness to act in the face of overwhelming evidence has aided and abetted in the loss of billions of dollars of the investing public?

The current Australian Government's reluctance to admit ASIC's failures and come to the aid of ASIC promotes the concept that Government regards ASIC as a cash cow that now returns in excess of \$300 million p.a. In doing so, it further enhances the public image generated in the Australian Wheat Board and the Children Overboard scandals that it is a government without integrity.

I voted for the Liberal Party at the last federal election, and one of our Vice Presidents is a staunch Liberal Party worker at elections in the Prime Minister's electorate. We are both dismayed at the betrayal of our vote for a government interested in the welfare of its citizens

Many of the groups that have suffered from ASIC's negligence/incompetence over the past years are now aligning themselves with us in a coalition with us, and our combined anger at ASIC's lack of performance will not dissipate before the next election. In making ASIC a profit centre, Treasury's naked grab for money is about to bear very sour results for the current Government, as our combined groups will be active at pre election Liberal party rallies around the country.

Westpoint investors, as do other victims of ASIC, have a valid claim for ex gratia payment for our losses by the Australian Government. We also require an ASIC capable of regulating the marketplace, and protecting consumers in line with the Government's claimed performance of ASIC around the world. As it stands, we have an ASIC with the unenviable proven record of destroying the lives of Australian citizens by its non performance.

You may not be in daily contact with the victims of ASIC's rein of error and share in the needless suffering of a great many hapless Australian citizens. Many people have lost their homes: all have suffered emotional trauma in addition to their financial loss. A relatively small number have lost their lives because of the stress. ASIC, and the Government, in addition to the suffering above, is responsible of every one of those deaths. I am certain you realise the pain and suffering this Government has inflicted on innocent victims, many of whom belong to the most vulnerable in our society.

If the Liberal Party Government is without remorse, and only interested in its own selfish ends,