

16 May 2007

**The Hon Kevin Rudd  
PO Box 6022  
House of Representatives  
Parliament House  
Canberra ACT 2600**

Dear Mr. Rudd,

In light of the Fincorp and Westpoint debacle, the questions on many taxpayers lips is: "**who is watching the Watchdog (ASIC)**" and, do we have to wait for ongoing financial disasters before an urgent and much needed Royal Commission exposes the continuing regulator's dodging.

My question to you and the Labor Party is: "**do you want to be saddled with the unconscionable and callous inactions detailed below, which you will inherit from the Howard Government should Labor win Government later this year**". I am referring to ASIC which in the opinion of many Australians is the Titanic, steaming rudderless at an increasing rate of knots on the Financial Ocean towards devastating icebergs comprising cleverly hidden worded risks. Following considerable criticism of the previous regulator (Australian Securities Commission), the Liberal Party under Peter Costello subsequently invented ASIC in 1998, however, the evidence seems to indicate the Howard government does not have the fortitude to rein in and control its inept regulator. Labor now has an opportunity and challenge, to correct this heinous injustice imposed upon the voting public.

Albeit a secured investor, like approximately 8000 other unwitting people I am a victim of Fincorp's inept and selfish management practices. This hurt is exacerbated by a government and bureaucracy which can only be construed as an Australian live version of the ABC comedy '**Yes Minister**' with Jim [Costello] Hacker MP and Sir Humphrey [Lucy] Appleby.

This is evident as reported by Matthew Drummond<sup>1</sup> "*It's the chairman's voice that has to carry the message above the noise of the news cycle and, **without a clear tone**, that message gets lost. Jeff Lucy ... concedes that under his reign the message could have been delivered more clearly at times" ... and ... "*On the matter of financial planners, Lucy agrees that message has sometimes [??] become muffled*".*

According to one Editor<sup>2</sup> "*The regulator cannot stop people making poor investment decisions, **but** when warning signs are evident the community demands decisive action. Instead, ASIC moved slowly and its messages to financial advisers were cloudy*". Whereas there is a limit to the extent a government and its servants should protect the public, one however needs to question whether this continual miscommunication is unintentional clumsiness by a professional senior bureaucrat, or there are underlying reasons which require rigorous investigation.

Very conveniently Mr Lucy's tenure as Chairman has expired and the helm is taken over by ASX ex-chairman Tony D'Aloisio. Whereas on the surface this appears as good news, one needs to question whether it is not a case of Mr Costello rearranging the deckchairs on the Treasury flagship 'SS ASIC' while it cruises in ever decreasing circles. As according to the report by Matthew Drummond<sup>1</sup> "*He [Tony D'Aloisio] will also inherit an organisation that has the old boss still partly calling the shots. In a move that has raised eyebrows, Treasurer Peter Costello has allowed Lucy to stay on as commissioner for two more years...*". **It begs the question as to whether Mr Costello has had the approval of**

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<sup>1</sup> AFR '*Gentler ASIC steady as he goes*' : dated 11 May 2007

<sup>2</sup> AFR '*ASIC must be seen and heard*': dated 14 May 07

**the Australian State Governments under the Corporations Agreement for the further appointment/transfer of Mr Lucy.** No doubt people who have been made redundant or sacked for lesser offences than their deficient communication skills, would consider Mr Lucy's sideways move a bonus.

According to Fincorp<sup>3</sup> the "... companies (Fincorp Financial Services Limited [Licence No. 287480] and Fincorp Managed Investment Limited [Licence No. 246855]) within the Fincorp Group hold Australian Financial Services Licences and act as Responsible Entities under the Corporations Act 2001 (ACT). **Fincorp and its Funds are regulated by the Australian Securities and Investment Commission (ASIC)**". Evidence of this can be found on the ASIC website. The ASIC document also shows that the auditors for 'Fincorp Financial Services Limited' licence is PricewaterhouseCoopers (PWC). It is interesting to note that the article by Matthew Drummond<sup>1</sup> shows that Mr Lucy was the managing partner of the PWC's Adelaide office from 1994 to 2000. Whereas to date there is no evidence of impropriety, one has to seriously question the merits of a regulator's management practice where according to the Drummond<sup>1</sup> "... contentious [ASIC] commission decisions typically go to vote, D'Aloisio may find himself unable to mark out his own path as quickly as his predecessors. All votes are equal and with three men in the boardroom at 1 Martin Place, **Cooper and Lucy can overrule him**". Notwithstanding an apparent lack of accountability to the Minister for the Treasury, a Chairman being overruled by his subordinates is not exactly a desirable management situation.

Matthew Drummond reported<sup>1</sup> that according to Mr Lucy, "... company directors and external advisers such as auditors and lawyers need to play their part". A sentiment heavily supported by such extensive legislation as the Corporations and Trade Practices Acts.

AAP<sup>4</sup> reported Mr Lucy as stating that "The point that people need to understand is that an investigation is a formal step in a law enforcement agency, by law, we must be satisfied that in all likelihood the law has been broken" and "We are looking into it [Fincorp], **but we are not investigating it, that's the point**" Mr Lucy was asked "how Fincorp could have collapsed despite ASIC scrutiny, Mr Lucy said the failure of the group was a commercial one, not a regulatory one." And according to Mr Lucy "The best insight for that is the comments by Korda Mentha, the administrators, and they have said that the failure is a commercial failure". A convenient answer for ASIC, but not one which gives any comfort to the investors who's financial future is dependant upon a regulator exercising due diligence. But according to Mr Lucy "... in the end that's not a job for the regulator, that's a job for the people running the business". By this, one may reasonably assume Mr Lucy is also referring to Trustees.

As reported by Anthony Klan<sup>5</sup> "Debenture holders have the protection of the trustees - ASIC said after the [Fincorp] collapse" and "The Trustee has a duty to exercise reasonable diligence to see that investments are sufficient to repay capital and interest to those debenture holders'. But those requirements were not bound by criminal provisions or civil penalty actions like other corporate breaches, ASIC said. Sandhurst Trustees Limited<sup>6</sup> promotes itself as a 'Responsible Entity' and being responsible for the management and administration of each Fund and its investments. The Sandhurst Professional Product Disclosure Statement (dated 26 May 2006) states 'As Responsible Entity we are the issuer of interests in the Funds. The Funds are registered Managed Investment Schemes regulated **under the Corporations Act**' ... and further, 'Sandhurst Trustees aims to create wealth for investors by employing a **disciplined approach** to managing assets'. Whereas the documents do not directly refer to Fincorp, Sandhurst does however exhibit its skills as an experienced Trustee company and it would not be unreasonable to assume that the same skills and diligence would have been exercised pursuant to the **Corporations Act** when managing the Fincorp funds for a fee. In light of the embarrassment rightfully directed at ASIC, one needs to question why in the case of Fincorp ASIC is relying on a third party investigation (i.e. Korda Mentha), rather than undertaking its own and direct much needed forensic audit. Could this be another miscommunication by Mr Lucy? Or is it a case of inadequate legislation as according to Senator Sherry<sup>5</sup> "We need a very clear commonwealth law operating in all areas of financial services, and it is not clear at the moment in

<sup>3</sup> Fincorp Company Overview )October 06

<sup>4</sup> AAP reported 'ASIC is aggressive: retiring boss': Reported 06 May 07

<sup>5</sup> The Australian ' Fincorp flop spurs call for overhaul': dated 15 May 07

<sup>6</sup> Product Disclosure Statement – Sandhurst Common Funds

some areas". A government depends largely upon the advice and guidance of its regulators, especially where legislation requires updating or additional legislation is needed to ensure the public is protected and its needs are addressed. If **Chapter 2L (Debentures) of the Corporations Act 2001** is inadequate, then the responsibility is with ASIC to ensure the matter is expeditiously and duly addressed by its masters. But then as reported by Matthew Drummond<sup>1</sup>, Mr Lucy's "...style has been more low-key. His preference has been for consultation, enforceable undertakings and negotiated settlement rather than litigation and headline-grabbing criminal cases". Needless to say, the Westpoint and Fincorp investors will not take much comfort from that strategy.

Notwithstanding the emotional stress upon the unwitting retirees affected by the Fincorp and Westpoint collapse, the current lack of diligence by ASIC will negatively impact upon the government's strategy to make retirees financial independent, consequently ballooning an ever burgeoning social services system. However, one needs to question whether the government really cares as according to Tanya Plibersek<sup>7</sup> "Labor is [rightly] concerned that the Howard Government is leaving older Australians who have Fincorp investments in the lurch, by failing to amend the assets test for the age pension", ... as is evident by ... "A leaked memo from Centrelink shows that the average age of these investors is 60". The asset test was subsequently revised by the government, only after pressure from Labor. Despite this bleak outlook for the thousands of elderly Australians with Fincorp investments, a leaked memo showed that at the outset the Government decided not to do anything about their plight. According to the statement, a "... memo instructs Centrelink staff to ignore the fact that Fincorp investors have had their income frozen and their asset massively devalued".

As reported by Glenda Korporaala and Scott Murdoch "The regulatory body will be grilled in Canberra shortly over its handling of the Fincorp collapse, when its executives face a round of Senate estimates". If the government continues to allow ASIC to repeatedly fail in its duty of care by inadequately controlling the reprehensible conduct of some financial institutions, it must recognise that it will also fail in its strategy to make retirees financially independent and the thieves will continue to bank the spoils. In light of the reprehensible lack of control over the regulator by the current government, it is paramount that Labor insists upon a Royal Commission at the next Senate estimates hearing or alternatively give an undertaking as part of its election platform, to hold a Royal Commission into the conduct of ASIC, its chairman and the commissioners, as the public has a short memory and the blame will in the fullness of time shift from the current government.

Sincerely,

Yours faithfully,



**Adam Brunner**

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<sup>7</sup> Labor Media Statement: dated 5 April 07