



**Senator the Hon Nick Sherry**  
**Minister for Superannuation and Corporate Law**

25 SEP 2008

Mr Graham MacAulay  
PO BOX 661  
MIRANDA NSW 1410

Dear Mr MacAulay

Thank you for your letter of 25 June 2008 and your emails of 16 April 2008 and 3 September 2008 regarding the operations of the Australian Securities and Investments Commission (ASIC). This response also addresses issues raised in your letter of 27 May 2008, originally addressed to the Minister for Climate Change and Water. Your email has been referred to me as I have portfolio responsibility for this matter. I apologise for the delay in responding to you.

At the outset, it may be helpful to explain my relationship to ASIC. ASIC is an independent statutory authority responsible for the administration of the *Corporations Act 2001* (Corporations Act) and related legislation. Under its governing statute, the *Australian Securities and Investments Commission Act 2001* (ASIC Act), I am specifically precluded from giving ASIC a direction about its policies or priorities in relation to a specific case. One of the reasons that ASIC was established as an independent body was to ensure that its decisions and actions are, and are seen to be, independent of the political process.

### **ASIC's Strategic Review and Restructure**

In relation to your comments about ASIC, I note that it has recently undergone a comprehensive independent strategic review of its operations by McKinsey & Company, including a survey of its stakeholders. ASIC has subsequently announced that it intends to restructure its operations, a decision that is fully supported by the Government.

This restructure will enable ASIC to meet regulatory challenges over the next five years. It will also benefit ASIC's stakeholders by ensuring that ASIC better understands the markets it regulates; is more forward looking in its decision making processes; and communicates clearer messages to the market in relation to its activities.

Some of the key changes resulting from the Strategic Review will include:

- additional investment in market research and analysis;
- the replacement of the current 'directorate' structure (comprising of 4 directorates) with 17 outwardly-focused stakeholder teams covering specific sectors of the economy;

- additional resources allocated to growth regions (for example, Western Australia) and to the supervision of brokers, intermediaries and market operators as well as to surveillance of exchange traded-markets; and
- the creation of an External Advisory Panel to advise the Commission on developments and potential systemic issues.

Also a result of the restructure, the number of senior ASIC positions will be reduced from 54 to 41. A copy of ASIC's media release about the Strategic Review is enclosed for your information.

In addition, I have also announced that two extra commissioners will be appointed to ASIC. These appointments should strengthen ASIC's ability to enforce the law and broaden the skills and geographical spread of ASIC.

### **Insider Trading and Opes Prime**

The Government is committed to upholding the integrity of Australia's financial markets, the changes implemented as a result of ASIC's strategic review will better enable it to deal with challenges in the market, including enforcing Australia's insider trading prohibitions. Since ASIC became the corporate regulator in 1998, it has successfully prosecuted 15 insider trading cases. Others are underway or under investigation now. In addition, the Government is reviewing the law on insider trading to assess areas where the law needs to be changed or strengthened.

Our economy depends on a stable financial system and the Government is committed to ensuring that our financial markets are fair, orderly and transparent. While the current regulatory system has performed well under pressure, recent issues have highlighted the need for some fine tuning to ensure the integrity and systemic stability of our markets. The Government is addressing that fine tuning, particularly in regard to the disclosure of covered short sales and equity derivatives.

While there is always room for improvement, Australia's corporate regulators have done, and continue to do, a solid job in very difficult circumstances. The Government continues to monitor the position and to consider any options that would enhance the integrity of our financial markets.

It is also the Government's view that in response to corporate events such as the Opes Prime collapse, any company or individual that might have contravened the Corporations Act should be held to account. In this context, ASIC launched an investigation into Opes Prime on 28 March 2008. A special team within ASIC has been formed to investigate and that team will work with the ASX as well as the receivers and administrators that have been appointed to the company.

The ASX Markets Supervision Pty Ltd (ASXMS), the market regulator of the ASX, is also investigating whether any conduct by Opes Prime amounted to a breach of the ASX market rules.

The Government welcomes the actions taken by ASIC and ASXMS to enforce the law and market rules. The Government will continue monitor developments closely.

## **Westpoint**

ASIC is continuing its wide-ranging investigations of Westpoint and its directors, examining any possible misconduct and considering a variety of civil, criminal and administrative remedies, including civil penalty proceedings.

Late last year ASIC determined that it was in the public interest to commence action under section 50 of the ASIC Act to recover damages on behalf of Westpoint investors. This action could potentially provide financial benefits for many Westpoint investors. The first two phases of that action have now commenced.

ASIC continues to investigate other parties involved in the operation and promotion of the Westpoint mezzanine finance schemes, including financial services licensees and unlicensed operators who advised on Westpoint products.

Further, following the laying of major criminal charges against Mr Neil Austin Burnard in September 2007, Mr Burnard was found guilty by the District Court of NSW on nine criminal charges in May 2008. Mr Burnard was a director of Palentia Pty Limited, formerly known as Kebbel (NSW) Pty Ltd, and was one of the main promoters of the Westpoint schemes. As the court proceedings are now finalised it is not appropriate for the Government to comment on the outcome.

On 30 June 2008, ASIC commenced new proceedings against the directors of Westpoint, for compensation for breach of directors' duties. ASIC also obtained asset preservation orders against Mr Norman Carey, Mr Cedric Beck and Mr Graeme Rundle.

You have also requested that the Government initiate a Royal Commission to investigate ASIC's role in these matters in more detail. Royal Commissions are commonly established where there is evidence of unlawful behaviour on the part of a government agency or of substantial policy failings in the legal or regulatory regime. The Government does not consider that this has been the case in relation to this matter.

I would like to emphasise that the activities of ASIC are regularly scrutinised through ongoing and regular inquiries undertaken by both Joint Parliamentary and Senate Committees. The Parliamentary Joint Committee on Corporations and Financial Services (the PJC), which has a range of duties, generally inquires each six months into the operations of ASIC. The Committee's ten members are divided equally between the two Houses. The Committee sets its own agenda and the Government does not have the power to direct the Committee to undertake a particular inquiry.

Additionally, as part of its role in scrutinising the operations of government generally, the hearings of the Senate Estimates committees also review ASIC's ongoing activities. ASIC's actions in relation to the major property development collapses, including Westpoint, have been discussed on numerous occasions during such hearings.

The transcripts of the PJC's hearings are available on the Parliament House website at [www.aph.gov.au](http://www.aph.gov.au), as are copies of the Hansard records for the Senate Estimates hearings.

You have also sought advice on whether the Australian Government intends to establish an inquiry into the performance of the Australian Securities and Investments Commission.

The Government has not announced its intention to hold an inquiry into these matters at this time. Consideration needs to be given to current legal proceedings against West point

as any inquiry must ensure it will not jeopardise or influence those proceedings. In the meantime, the Government continues to monitor the regulatory framework in the financial services sector, and as noted above has commenced a number of reviews, including, alongside ASIC's work, in the debentures sector, research houses and various other elements of the financial services sector to ensure that consumers protection remains optimal.

### **The 'twin peaks' regulatory structure of APRA and ASIC**

In your correspondence you expressed concern about the efficiency of the 'twin peaks' regulatory structure that applies to Australia's financial system. Under the 'twin peaks' model of regulation, the Australian Prudential Regulation Authority (APRA) is the prudential regulator with responsibility for ensuring that regulated entities are prudently managed and able to meet their financial promises to consumers. ASIC is responsible for regulating the conduct of providers of financial services and advice to consumers.

The 'twin peaks' model was introduced after the 1997 Wallis Inquiry recommended replacing the industry-based approach to financial system regulation with a functional and objectives-oriented approach, based around two strong and effective regulators. The Government and the regulators are mindful of the need to minimise the risk of duplication and excessive compliance costs for industry and APRA and ASIC conduct regular consultative meetings with industry to discuss issues of concern, including compliance costs.

Arrangements are in place to facilitate coordination and cooperation between the Regulators. The Council of Financial Regulators (CFR) is the formal coordinating body for the main financial regulatory agencies (APRA, ASIC, the Reserve Bank of Australia, and Treasury). The CFR is complemented by bilateral information exchange and coordination arrangements between the Regulators.

The Government is of the view that this model of regulation is working well in the current market environment, however, we will be vigilant in monitoring the need for any fine tuning in response to events in the financial system.

### **Recent and future Government action**

I would also like to bring to your attention some further work being undertaken by the Government in the area of financial services. On 3 June 2008, the Government released a Green Paper on *Financial Services and Credit Reform: Improving, Simplifying and Standardising Financial Services and Credit Regulation*. The Green Paper discusses a range of issues, including the regulation of mortgages, mortgage brokers, margin loans, trustee corporations, debentures and property spruikers. It also proposes options for the Commonwealth taking over regulation in some of these areas or enhancing existing regulation. The closing date for submissions was 1 July 2008.

In considering the way forward on these issues, the Government will be analysing the submissions received from that process.

## **Financial Services Disclosure Documents**

Another area of action for the Government is in relation to the quality, complexity and length of financial services disclosure documents. The Government is committed to seeing that industry providers produce simple, standard, and readable financial services disclosure documents.

For this reason, the Minister for Finance and Deregulation, the Hon Lindsay Tanner, and I created the Financial Services Working Group (the Working Group) earlier this year, comprised of officials from Treasury, the Department of Finance and Deregulation and the Australian Securities and Investments Commission. The over-arching aim of the Working Group is to facilitate short, simple and readable disclosure documents. The Working Group has already developed a concise four page Product Disclosure Statement (PDS) for First Home Saver Accounts.

Regulations were recently made which demonstrate that it is possible to have short, simple disclosure that covers the important information that consumers need before investing in a financial product. The Government will closely monitor how consumers and industry respond to the First Home Saver PDS and regulations and apply those lessons in developing solutions for other financial products.

## **Financial Ombudsman Service**

Recently, I launched the Financial Ombudsman Service Limited (FOS). The scheme provides a means of resolving disputes in an economical, informal and efficient manner and is an alternative to using the court system.

The FOS brings together three separate external dispute resolution schemes: the Banking and Financial Services Ombudsman, the Financial Industry Complaints Service, and the Insurance Ombudsman Service. FOS will be responsible for providing independent dispute resolution services for 80% of Australian banking, insurance and investment disputes. More information is available on FOS via its website at [www.fos.org.au](http://www.fos.org.au).

## **Research Houses**

On 22 May 2008 I announced that Treasury, together with ASIC, would be undertaking a review of the regulation of research houses, as well as credit rating agencies. While the review of credit rating agencies is important in the context of the recent market turmoil, I have also requested, in the light of recent corporate collapses, that a review be undertaken of the regulatory framework that applies to research houses. The review is well advanced and extensive stakeholder consultations were recently completed. When the review process is completed later this year, I will make an announcement about any proposed reform in this area.

## **SMSF Governance**

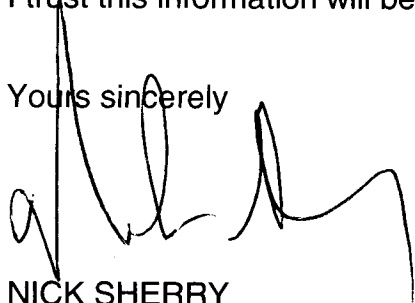
The Government also intends to improve the operation of self-managed superannuation funds (SMSFs). Recently I have raised the issue of governance of SMSFs in general terms; however, I am not focussed on SMSFs alone. This work simply forms part of my broader focus on governance.

Given that the Government will provide estimated taxation concessions for superannuation savings in the order of \$27.5 billion in 2008-09 to encourage individuals to save for their retirement, the Government has a responsibility to all taxpayers to ensure superannuation savings are appropriately managed. It is also critical that trustees of SMSFs, as the key guardians and decision-makers in relation to these funds, have the knowledge to undertake their duties and responsibilities in accordance with current law.

Finally, I would like to thank you for the time you have taken to outline concerns you have and your suggestions for improvements in these areas. Community views are of critical importance to the Government in its considerations and all submissions, including your views, will be taken into account in this process.

I trust this information will be of assistance to you.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Nick Sherry', written over the typed name below.

NICK SHERRY

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## 08-93 ASIC announces results of its strategic review

Thursday 8 May 2008

ASIC today announced it had completed the strategic review, which will better position it for the challenges of the next three to five years.

Mr Tony D'Aloisio, Chairman of ASIC, said the focus of the review had been to prepare ASIC for current and future challenges.

'The review will result in us being closer to the market, we will be more accessible and flexible, and we will be able to take emerging trends into account more quickly', Mr D'Aloisio said.

Key beneficiaries of the review will be ASIC's stakeholders. They will see an ASIC that:

- better understands the markets it regulates;
- is more forward-looking in examining issues and assessing systemic risks;
- better articulates why it has chosen to intervene and the behavioural changes it wants the market to make; and
- has a clearer set of priorities (principal priorities being retail investors and insider trading, market manipulation and disclosure).

The key changes ASIC is making in order to deliver these benefits are:

- additional investment in market research and analysis;
- the appointment of an experienced External Advisory Panel drawn from a variety of sectors of the economy in order to advise ASIC's Commission on market developments and potential systemic issues;
- abolition of the four current 'silo' directorates of ASIC and replacing them with 17 outwardly-focused stakeholder teams covering the financial economy (e.g. teams for retail investors and consumers, investment managers, investment banks, superannuation funds and financial advisors);
- additional resources directed to the supervision of brokers and intermediaries and to operators of exchange-traded products and to surveillance of exchange-traded markets; and
- a better balance between national and regional initiatives (e.g. more resources into Perth and Western Australia.).

'ASIC will deliver these outcomes through greater investment in people, training and development, building the credentials of existing staff and leaders. We will also recruit senior people from the market', Mr D'Aloisio said.

The development of skills and credentials will be boosted through:

- secondments;
- the introduction of an ASIC Academy;
- greater workplace training through mentors and network leaders; and
- recruitment from the market for senior positions.

With the introduction of stakeholder teams, ASIC will reduce two layers of management (Executive Directors and Directors) to a new single level of 'Senior Executive Leaders'. This move involves:

- a reduction of 54 senior positions to 41 with increases in remuneration levels for the new positions; and
- a process of opening these positions to internal and external applicants. In other words, all new positions will be subject to an across the board appointment process.

For ASIC to move from good to really good or superior, we need clearer priorities and credentials and skills which are as good or better than the professionals who advise the so called big end of town', Mr D'Aloisio said.

'People join ASIC to make a difference through improving confidence in the integrity of our markets. These changes will give our people, and new people, better opportunities to make that difference', he said.

ASIC will retain its strong approach to enforcement. ASIC will now have six main enforcement or deterrence teams (instead of one large directorate). Each team will be tasked with specific responsibilities such as insider trading, major fraud, and international fraud and teams for other significant misconduct.

ASIC will retain current staff levels of 1600 and while the mix of staff may change, the numbers overall will not. ASIC will carry out the restructure within its current budget and has not asked the Government for additional resources for the 2008/09 financial year.

The review was completed within the timetable and in line with the process announced by Mr D'Aloisio at Senate Estimates last year (30 May 2007).

The priorities announced last year by Mr D'Aloisio included a Capital Markets Taskforce and Retail Investor Taskforce. Their work has been completed and has been incorporated in the changes announced today.

The new arrangements take effect from now and will be fully implemented during the next four months.