

TO : Senator Sherry, Minister for Superannuation and Corporate Law

CC : The Australian Media

FROM : Graham MacAulay, President Westpoint Investors Group
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Subject : A further set of questions

Dear Senator Sherry,

Thank you for [your communication of 25/09/2008](#) in reply to my emails of [16-04-2008](#), and [03-09-2008](#). I sent the 16/04/2008 document to a large number of politicians, including your office. I presume the recipient you quoted forwarded it on to you. However, your document failed to satisfy my misgivings in relation to the reluctance of ASIC, and the past and present Governments to answer awkward questions. Please find attached, a set of questions, each of which has caused me (and others) major concern.

Many investors to whom I have spoken have expressed a view similar to my own: the need for creation of a Royal Commission into the financial marketplace, and ASIC's regulatory failure. A short list includes investors who were involved with Triscott, Pennicott, Bangaru, Westpoint, ACR, and Fincorp, people involved in the Builders' Home Warranty Insurance problem, and a problem with Reward Insurance. People involved with companies on that list, all scathing in condemnation of ASIC inaction, claim they have written to you. A huge volume of justified criticism of ASIC, stretching back to shortly after its creation, relating to performance and the failure to heed warnings, exists in the public domain. Even Westpoint's Norm Carey has called for Royal Commission into ASIC ([The Australian 24-07-2006](#)). The latest complaint about the sit-on hands regulator involves [Environinvest investors](#). Warned in 2002, ASIC did what it does best: nothing.

ASIC has caused needless incalculable financial loss, and emotional damage, to tens of thousands of Australian investors. Some of them have committed suicide, while others have contemplated it ([a matter with which you have personal experience](#)). I have on many occasions attempted to persuade fellow Westpoint investors to seek professional help in this area (the last instance was about six weeks ago). I am ill suited to such a task by both temperament and training.

I read your statement no action can be taken against ASIC because of a lack of illegal practices on its part. The following extract is from [John McCarthy's Herald Sun article of 26 12 2006](#). *A young father was considering bankruptcy over a credit card debt he could not afford to pay because of his Westpoint losses. A mother had to sell a home she had mortgaged to invest. A father of eight has lost his house and has moved for the third time. Two financial planning companies collapsed and lawyers are relishing a raft of court battles over the remains.* The same article states, *Senator Sherry is also in the camp of ASIC accusers. He says it acted too slowly after the West Australian Government alerted it in 2002. It took ASIC another three years before it discovered major solvency issues.* Technically, ASIC may not have committed a criminal act. That defence cannot be raised in terms of morals ASIC's negligence has been the instrument of the destruction of tens of thousands of Australian lives.

In [your document of 30/07/2007](#), you promised an open inquiry into past ASIC performance if Labor came to power. You specifically mentioned your concerns about Westpoint, ACR, Fincorp, Bridgecorp, and Mega-Money. Many companies have collapsed since then in which ASIC has received considerable negative comment. I cannot agree with your concern an inquiry into past ASIC performance might influence legal cases involving Westpoint. I address this matter in the attached questions.

Your document relates the identification of problems in the marketplace, and the restructuring of ASIC. Both are, in the main, time consuming long-term projects. Laudatory though they are, they do nothing to rectify the immediate problems, the majority of which arose because of ASIC systemic failure. Strict and timely application of existing laws will not rectify the problems of the past, but would ensure history does not repeat itself. Positive results are the only measure of success.

Any return to Westpoint investors resulting from ASIC's Section 50 action against KPMG, would be a welcome relief. Given ASIC's past performance in major legal cases - and the quality of legal advice at KPMG disposal, I hold little hope of a successful outcome. A successful action is unlikely to see any return to investors in much less than four years. In such a case, many investors will not live to enjoy the money in their final years. Meanwhile, the living will continue to endure a reduced lifestyle knowing ASIC made a catastrophic error in not recognising the Westpoint Mezzanine Model was a Managed Investment Scheme from the outset. They will also continue their despair how ASIC, protected by successive Governments, has failed to publicly admit its error. A fear of having to rightfully recompense investors can be the only logical reason for the non-admission of the error. Diogenes may never find his honest man. In the meantime those of us possessing consciences pay internally for our past deceit(s). Perhaps a lack of conscience is a necessary attribute of becoming a politician, or a senior member of the ASIC hierarchy.

Nothing to date has occurred to confirm the non re-occurrence of tragedies similar to the Westpoint disaster at regular intervals. A typical example of perpetuating a known failure concerns Personal Indemnity Insurance (PII) as held by AFSL holders. PII failed Westpoint investors because of the escape clauses in the contracts, yet we are embarking on the same merry-go-round again. Nothing will change unless Parliament prescribes the wording of PII policies.

In common with many Australians, the lack of performance on the part of ASIC, and successive Australian Governments' determined efforts to shield the truth of ASIC's lack of performance from the Australian public, fills me with despair. The lack of timely regulatory action to date, and the perils of investment in the Australian financial marketplace, is disturbing. Much more worrying is the lack of integrity of ASIC and successive Australian Governments.

I look forward to your early succinct answers to my questions.

Graham MacAulay

QUESTIONS

1. Your correspondence 25-09-2008 outlines ASIC's independence, and your relationship with it. I agree with the concept of both these principles, which are a matter of legislature. However, as the following examples clearly demonstrate, practice and theory are two entirely different entities.
 - a). At a [meeting of the WIG executive on 08-11-2007 with ASIC](#), I raised the question of ASIC reimbursing investors because it failed to recognise the Westpoint Mezzanine Schemes as Managed Investment Schemes, and by not doing so, ASIC was not obeying the same rules as set for the planners it controlled. Mr. D'Aloisio did not answer my question, but said if the Government in power wanted to do something, he would comply.
Such an answer is not what one would expect from a body independent of superior control.
 - b). In the [Hansard report of August 2008](#), ASIC stated they have problems on judging how hard they should be on people, and requests an advisory committee.
An independent body would have the power to appoint such a committee without resorting to a request to a superior body.
 - c). [The SMH of 12-10-2008](#) reports the Treasurer, Wayne Swan has authorised ASIC to set up a website to compare lenders' mortgage costs over time.
I am unsure how such a website would fall under the jurisdiction of ASIC. I agree it would improve investor choice, but does not in any add to the protection of investors. If the regulator believes the website would in some way ease its workload, then as an independent body it would not have to request the authorisation from a superior body. .

Could you please advise me in each of the above cases where my logic is in error?

2. In reference to 1B above, the very concept of how hard a regulator should be puzzles me. My understanding of the regulation of a market is as follows. For each subsection of the market, parliament legislates a set of laws. The market then runs freely under those laws. The regulator does not in the normally accepted nuance of the word regulate anything. The sole job of the regulator is to ensure all entities in the marketplace obey the relevant legislated laws, and to initiate action against those who don't. For very minor offences, it may issue warnings or use the power of Enforceable Undertakings (a power abused in recent times). Where a clear breach of the law has occurred, it initiates legal action and the judicial system determines the penalty. From my limited investigation, I can find no reference to "how hard" the regulator should be on those who break the law. This of course parallels the role of the police in everyday life.

Can you please refer me to the relevant legislation referencing how hard the regulator should be on entities in the marketplace?

3. You mention concern that any enquiry instituted by the Government might jeopardise or influence proceedings against Westpoint. I am unaware of any situation where non-relevant external evidence is admissible at law. I fail to see how an inquiry into ASIC can affect the outcome of the case against Westpoint Directors. As an extreme hypothetical example, assume the inquiry found corruption was occurring within ASIC, and it was totally incompetent. That finding would not have any bearing on a case against the Westpoint Directors. The only matter of interest in the latter is whether or not the Westpoint Directors broke the relevant laws pertaining to the charges laid.

If I am wrong in observations, then please explain to me where I have made my error.

4. During the pre-trial period (before the choosing of the jury) the following arose. In 2002, an APRA superior of Ms J. Hoare (phonetic spelling) gave her the task of Contacting Keibel NSW because of a website bearing their logo contained the words “boutique bank” (a term allegedly used by Burnard later in the trial). The prosecution relied on her hand written notes. While Ms Hoare believed she had spoken to Neil Burnard, she could not be sure. In those notes, she used the term *spiel* for unimportant words at the commencement of a conversation. His Honour explained that was the common convention within APRA. In fairness to Ms. Hoare, these notes were the basis of a report to her superior at that time. The matter was not entered into evidence as she could not be sure to whom she spoke, and because the evidence was outside the period of the charges. One can only presume, borne out in another question, the superior’s report no longer existed. Had it existed then it would undoubtedly have contained the name of the person to whom MS. Hoare spoke.
 - a). **Do you think you find the word *spiel* as used in this context in any procedures manual?**
 - b). **Do you not find the reliance of the prosecution on Ms Hoare’s notes odd?**
 - c). **What happened to the report she sent to her superior?**
5. APRA did not advise ASIC of the use of the word bank in 2002, thus alerting it a scam might be in operation. With the complaints already under way at that time concerning Westpoint products, ASIC would have had no option but to take a close look at the Westpoint Mezzanine schemes. In addition, had ASIC in 2004 possessed knowledge of the 2002 incident, they might have acted immediately.

Is the above not an example of how problems can arise because of the separation of ASIC and APRA?

6.
 1. From (4) and (5) above we know Keibel first used the word *Bank* to describe itself. Yet when ASIC referred the matter to APRA, no connection to this was made.
 2. As you may recall, at a Senate Estimate’s Committee hearing, Jeff Lucy stated ASIC first became aware of Keibel Investment Bank in April of 2005, but did not investigate Keibel.
 3. Another three weeks elapsed before ASIC passed the matter over to APRA, but later it, and not APRA prosecuted Burnard.
 4. It took three months for APRA to get around to investigating Keibel, even though the previous infringement should have been logged in APRA’s records. On finding no visible evidence of the offending words at the Keibel offices in the form of signs, APRA did not investigate further.
 5. Throughout the Burnard trial, numerous Keibel employees stated Richard Beck was the originator of using Keibel Investment Bank as the “trading name” of the group. Many warned him about the consequences of using the word “bank” in this way, including Keibel’s compliance officer. Despite the warning, Beck was adamant on the matter, and refused to change his mind. However, Beck had a sudden change of mind in May 2005 - right between ASIC becoming officially aware of a problem with Keibel Investment Bank and APRA’s delayed appearance on the Keibel NSW doorstep. The delay between the laying of the complaint in April and APRA’s arrival at the Keibel NSW offices allowed sufficient time to remove the offending words from stationery, business cards, and signage.

Perhaps I have a suspicious mind. There is an amazing number of disparate events, and their timing, all favouring Keibel Do you not find the facts 1- 5 concerning?

7. After the jury found Neil Burnard guilty on all counts, and part of the trial per se, an interesting exchange took place between the Judge and the Prosecution. The judge, after mentioning it was a matter of curiosity, asked if there would be ongoing prosecutions of Senior Keibel personnel because of the damning evidence heard throughout the trial. The Prosecutor stated there would be no prosecutions along these lines as there were ongoing investigations continuing on other matters.

I am aware of the ASIC proceedings involving Westpoint directors, including Richard Beck. However, it does not include Simon Bell, or the other Keibel Director, Richard Beck, in relation to the use of Keibel Investment Bank as a trading name.

Given the clear implication of the Judge's comment, it is clear he thought sufficient evidence existed for a conviction in relation to senior Keibel figures, and the charges ASIC intends on the prosecution of the Westpoint Directors are on a different matter, why is ASIC not proceeding with the charges against the Keibel Directors? Richard Beck is the only common director of both companies.

8. ASIC told Burnard not to leave the country. He did so, and ASIC's action in bringing him back is well-known. During the discussion on Burnard's possible past misdemeanours, the prosecution did not raise the matter. The prosecution also stated Burnard had a clean record.
 - a). When ASIC requests someone not to leave the country, is it a crime if they do so.
 - b). If the (a) is yes, then ASIC should have prosecuted Burnard in the period between his return and the trial. If this the case, why did ASIC not charge Burnard?
9. Can you please supply me an answer to a question I have asked so often, and no one will answer it. My understanding is if a planner misleads an investor for any reason, then that planner is responsible for the investor's losses. The decision of the WA Supreme Court leaves no doubt ASIC misled investors in the nature of the investment, as it believed the Westpoint Mezzanine model was debenture based, when in reality it was a Managed Investment Scheme. .
 - a). **Is my belief concerning the liability of planners correct?**
 - b). **Since ASIC controls the planners, why is ASIC not responsible for misleading investors? Clearly, its error misled both planners and investors.**