

TO : Senator Sherry, Minister for Superannuation and Corporation Law

FROM : Graham MacAulay, President Westpoint Investors Group
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NSW

DATE : 13 March, 2009

Subject Renewed call for Royal Commission into ASIC non-performance and compensation for Westpoint Mezzanine Investors.

Dear Senator Sherry,

Would you please bring the following matter before the Australian Parliament as a matter of urgency with the twin objectives of righting the wrongs inflicted on Westpoint Mezzanine investors, and the construction of an urgently needed credible financial regulator that WILL carry out the Australian Parliament's relevant legislature.

The failure of ASIC to perform its duties with diligence has played a pivotal role in a multitude of Australian investors losing their life savings. You, yourself, promised an OPEN INQUIRY into the Australian Financial Marketplace, and ASIC in particular, on behalf of the Labor party if it came to power. Given that promise, the continuous justified criticism of ASIC's performance since its inception until the recent Storm Financial failure, and the new evidence presented in this document, Westpoint investors request that open inquiry be a Royal Commission with the widest possible powers.

I base my claim on the following points, each of which is freely available in the public domain.

1. In 2000 ASIC issued a 'no-action' letter to Westpoint lawyers, Freehills, on the validity of the use of proposed promissory notes. ASIC could not have issued such a document without careful consideration of the Westpoint Mezzanine model.
2. In the absence of any document rescinding the no-action letter of 2000, ASIC took Westpoint to court in 2004 claiming the promissory notes were debentures.
3. In November 2004, the Judge in the case told ASIC the test Westpoint Mezzanine Schemes were Managed Investment Schemes.
4. Despite the judge's statement, ASIC appealed the decision of the court, but took no action on the Westpoint Mezzanine Model being a Managed Investment Scheme. Investors continued to pour money into Westpoint Mezzanine Companies in 2005 until Westpoint's collapse in November of that year.
5. In 2006 the WA Supreme Court found the Westpoint Mezzanine test cases were MIS's.
6. As at no time did Westpoint ever present any of the Westpoint Mezzanine Schemes for testing as a Managed Investment Scheme there can no doubt every Westpoint Mezzanine investor put their money in an illegal Managed Investment Scheme because of ASIC's incompetence.
7. ASIC's role is to act swiftly on any allegations of misleading and deceptive conduct or false and misleading information contained in any distributed material produced by the financial advisers and/or by those who are selling financial products or services without the benefit of a licence. The law states that if a planner misleads an investor for any reason, that

planner is responsible for the losses of the investor. I can find no reference to any legislation exempting ASIC from the same laws as imposed on planners.

Given the above, it is more than difficult to understand why ASIC has called a mediation meeting calling for others involved in Westpoint to pay for its own mistakes

[The attached set of communications between ASIC's Helen McNally](#) and myself display a complete lack of integrity and accountability on the part of ASIC. I am still waiting for a reply to my last email to her. Her evasive replies to a set of straightforward questions do nothing to enhance the reputation of an Australian regulatory body, which should be setting the standards for the Australian Financial Marketplace.

The Senate Inquiry initiated by Labor MP Mr. B. Ripoll must fail unless its terms of reference is widened to address ASIC's failure to control/regulate the marketplace, and its failure to monitor and control the behaviour of the planners for which it is responsible.

The Howard Government created ASIC a decade ago. Since then, the media, and others, have directed a steady stream of criticism at ASIC's perceived incompetence and its failure to act in a timely manner in a very long list of company failures. This pattern continues to the present day.

The enumerated list above clearly demonstrates ASIC is responsible for the losses of Westpoint Mezzanine investors. The Federal Government must now consider the payment of compensation and Westpoint investor losses resulting from ASIC's negligence in respect of investor protection in carrying out its role as the Federal Corporate Regulator.

Graham MacAulay