

TO : All Members of Parliament.

CC : The Australian Media

FROM : Graham MacAulay, President Westpoint Investors Group
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Subject ASIC performance and the need for a Royal Commission.

Dear Member of Parliament,

An investigation by The AFR has uncovered internal Opes Prime documents in which staff recorded discussions with regulators. The documents reveal that the stockbroking firm felt "encouraged" by senior ASX market supervision staff to exploit a loophole in the rules by hiving off its \$1.3 billion worth of bank debts into a company that did not need an Australian Financial Services licence and was therefore out of the regulators sights. [Mathew Drummond, Australian Financial Review, 14-04-2008].

The avalanche of critical press reports on ASIC performance in the last few days concerning Opes Prime only add to the existing mountain of evidence of the failure of the Australian regulators. The following four articles in the Australian Financial review demand Government action. Copies of the articles to which I refer can be found at the following URL's

http://www.wig.org.au/Royal_Commission/2008_04_15_AFR_1.pdf
http://www.wig.org.au/Royal_Commission/2008_04_15_AFR_2.pdf
http://www.wig.org.au/Royal_Commission/2008_04_15_AFR_3.pdf
http://www.wig.org.au/Royal_Commission/2008_04_15_AFR_4.pdf

The revelations on the 7.30 Report of 16-04-2008 are very revealing (see the transcript at file:///F:/wig/Royal_Commission/2008_04_16_7.30_Report_Transcript.pdf or watch the video at <http://www.abc.net.au/7.30>). Erik Mather claims he was warning ASIC about insider trading problems as far back as 2005. As time and again we have heard people say ASIC ignored their warnings of impending disaster in a variety of cases, we have no reason not to believe Erik Mather.

The question of why successive Governments have not taken open and transparent action to repair our regulators demands an answer. Australia can no longer ignore ASIC's continuing abysmal performance. It stretches back to when it became operational in 1999. In every case of failure, ASIC has either hid behind the protection of "we can't discuss it because we are investigating it", or blamed everyone else but its own regulatory failure. Since its inception, ASIC has been a retroactive regulator in a proactive business world. Rightly, the press has continuously criticised it for its lack of timely action. Its inability to provide investor protection has irrevocably damaged the lives of tens of thousands of Australian investors. It should not be forgotten that it has also cost every taxpayer for the funding of

additional pensions and the associated welfare costs.

While markets around the world are in turmoil, neither the Government nor ASIC can use the “if you think I’m silly, you should meet my brother” argument that regulators around the world have problems is a valid excuse. Australian regulators have a responsibility to the Australian people to apply the laws as set down by the Australian Parliament, a task that is independent of world markets, foreign regulators, and foreign governments. In addition to the statutory laws in place, ASIC has a duty to follow policy as set down by the incumbent government. The marketplace is not fully informed when a government fails to make public its policy. It disappointed me at a Westpoint Investors Group meeting ASIC on 08/11/2007 to hear Mr. Tony D’Aloisio say he would do anything the Government asked him.

That the current situation involving ASIC failure of this magnitude has arisen should surprise no one. Given its past performance of investor destruction, it was only a matter of time before an ASIC failure it could not disown or ignore arose.

A few disparate items, in which information is freely available in the public domain, will give some idea of the inadequacy of ASIC’s inadequacy in performing its assigned duties. Its generic failure is not isolated to one sector of the marketplace.

The lead article of the Australian Financial Review of 14-04-2008 claims Opes warned ASIC and the ASX of regulatory breaches. As has been its practice since its inception, ASIC found reason not to take action. ASIC followed the same pattern of ignoring warnings when the ASX warned ASIC of problems involving insider trading twelve months ago. True to past behaviour, ASIC took no immediate remedial action. Why am I not condemning the ASX? Perhaps it is because I recognise the income of the ASX is dependent on the volume of shares traded, and as co-regulator it has a conflict of interest. That the ASX is a co-regulator is a disgrace. Is there another regulator around the world enjoying the status of co-regulator?

The ABC’s 4 Corners program of 31-03-2008 highlighted the lending behaviour of the banks without intervention of either regulator. (APRA is the prudential regulator, but in many areas whether it is the domain of ASIC or that of APRA is ill defined).

In recent weeks ASIC announced it would no longer pursue the prosecution of Henry Kaye - despite the earlier trumpeting of the previous ASIC Chairman, Jeff Lucy. When ASIC caught up with Henry Kaye in 2003, it made him sign an enforceable undertaking - a worthless bit of paper as events proved.

Much has been said and written on ASIC’s failure in the collapses of Westpoint, ACR, Fincorp, Bridgecorp, Streetwise, and a host of other companies (a few are mentioned on the website www.wig.org.au).

ASIC failed to find either of the absconders Bangaru and Pennicott, but the detectives hired by the investors of the two companies with which there were involved did find them. It says volumes about ASIC’s investigative powers, or alternatively, its zeal.

I do not intend in this document to concentrate on Westpoint, but will raise two matters relevant to Westpoint (the website www.wig.org.au contains most of the full story).

The first relates to an email sent to Tony D’Aloisio on 12-02-2008 (a copy can be obtained via

the URL http://www.wig.org.au/ASIC/2008_02_12_MacAulay_Daloisio.html). I am still waiting an answer to those questions anytime soon as honest answers would severely embarrass ASIC. However, ASIC's behaviour in this matter is now on the public record.

The second relates to the fact that the WA Supreme Court found the Westpoint Mezzanine Model was a Management Investment Scheme in July 2006. Westpoint never submitted any of its mezzanine products to ASIC for registered MIS consideration. ASIC is yet to prosecute any Westpoint Director for running an unregistered Management Investment Scheme (or any other breach of the Corporations Act). Each of those directors has been free since the Court's decision to fleece a new flock of investors should they be so inclined.

The public record shows ASIC has failed to protect investors in a myriad of companies, when it had every opportunity to do so. In the vast majority of these ASIC had sufficient information to act in time to save significant amounts of investor monies.

While the website www.wig.org.au contains more than sufficient evidence for a Royal Commission based on Westpoint alone, the pressing need for a Royal Commission goes far beyond Westpoint, ACR, Fincorp, etc. The weight of evidence from all markets regulated by ASIC and APRA scream for an open investigation. Senator Nick Sherry promised an open inquiry into ASIC past performance. As yet, he has set no date for that inquiry. After the revelations in the Opes Prime fiasco and the 7.30 report involving insider trading, it is impossible to keep the lid on matters and clean up ASIC quietly over a period of time. Any attempt in that direction would be contrary to all principles of accountable government. A multitude of investors have needlessly lost money because of regulatory failure. Many more will suffer the same fate in the near future. Fear and uncertainty now dominate the Australian Financial marketplace. No one's money is "safe" under the current regulators. I am yet to hear of an inhabitant of the market place with a good word about ASIC, which has done its utmost to earn its reputation for incompetence. It is time to clean out the Aegean stables, and make those who have failed in their duties accountable.

My hope is the Australian media "joins the dots" of ASIC failure over the years, and leads the call for a Royal Commission into the Australian Financial Marketplace. The density of evidence in the public domain makes for an easy task of assembling a logical argument for the calling of a Royal Commission. .

It is in the interest of Australia that all members of parliament to forget political difference, and repair ASIC - an impossible task with the current ASIC management team. The regulatory chaos we now have did not arise by accident or fundamentally flawed legislation. It is the direct result of the regulator not vigorously applying existing laws. The government must hold those responsible for the current mess to account. The calling of a Royal Commission is the first step.

Australia needs a set of competent, proactive, regulators who have an interest in seeking out the lawbreakers and taking swift action against them without fear or favour.

A market lacking confidence in either the regulator or company directors is a market that serves the interests of only a few disreputable persons. It does not optimally serve honest directors and investors. Nor does it serve the wealth building of Australia. Australia. The sooner the current problems are addressed and rectified, the sooner everyone in the marketplace can feel a little

easier about the “safety” of their money, whether it be direct investment or superannuation monies, and the markets can again become a tool in increasing the wealth of all Australians.

Graham MacAulay