



ASIC

Australian Securities & Investments Commission

Tabled Document No 2

By: Australian Securities and Investments  
Commission

Date: 16/2/06

## Senate Economics Committee

### ASIC Opening Statement

Canberra, 16 February 2006

#### Introduction

Mr Chairman, members of the Committee.

I appreciate the opportunity to deliver a short opening statement on ASIC's activities and achievements since our last appearance in October 2005.

At this morning's hearing, I am accompanied by my fellow Commissioner, Deputy-Chairman Jeremy Cooper. Members would be aware that Professor Berna Collier has recently left ASIC, having been appointed a judge of the Federal Court of Australia and is, therefore, not attending this hearing. ASIC is grateful for former Commissioner Collier's significant and active contribution to our regulatory achievements, particularly in the areas of financial services regulation, insolvency law and consumer protection.

For the Committee's information, I would like to highlight some of our recent key projects and achievements.

In December 2005, the Parliamentary Joint Committee on Corporations and Financial Services released its report on its statutory oversight of ASIC. The Committee stated that 'it is satisfied that in the period since the last ASIC Oversight report was tabled, the Commission, its leaders and officers have all continued to apply both the letter and the spirit of the corporations legislation in the specific matters considered by the Committee within this oversight hearing'.

Enforcement currently has 136 separate investigations involving a large number of individuals or entities under investigation. In addition, we have 135 criminal actions involving 258 individuals, 100 civil proceedings involving 261 individuals or entities before the courts and 35 administrative actions involving 45 individuals or entities. Since the beginning of the 2005-2006 financial year, we have:

- completed 209 criminal and civil litigations, 95% of which resulted in a successful outcome for ASIC;
- entered into 17 enforceable undertakings, including with some of the larger industry players such as Coles Myer, ING Australia, Hostplus and the American International Assurance Company;

- obtained 18 criminal convictions;
- disqualified or obtained undertakings to remove 17 people from directing companies and 7 people from offering financial services; and
- taken action against the operators of illegal early release superannuation schemes by obtaining court orders against 13 companies or individuals and criminal charges against 3 individuals involving superannuation funds of over \$1.3 million.

One particular enforcement matter that will, I am sure, be of interest to the Committee is that of the Westpoint group. As you may know, ASIC has commenced a number of legal proceedings against Westpoint. These proceedings were taken to protect investors and creditors and to stop new investors from investing money to prop up a failing business.

Since November 2005, ASIC has commenced 25 proceedings against 16 companies and individuals in the Westpoint Group. Ten of those proceedings have been finalised with orders in ASIC's favour.

However, ASIC's work on the Westpoint Group is just beginning. ASIC is now investigating the conduct of a number of officers and related entities in the Group, the licensed and unlicensed advisers who promoted the Westpoint investment and professional advisers. The scope of ASIC's inquiries and investigations will be extensive, covering close to 50 individuals or entities.

There are aspects regarding the Westpoint collapse that are very worrying for ASIC.

The Westpoint Group was involved in property development through a complex web of finance, development and construction companies. There are over 50 companies in the Group. The finance companies promoted high yield promissory notes and it appears that these investments were marketed towards investors wanting a 'secure' income at interest rates above cash rates.

High yield investments have been a concern to ASIC for sometime. We have been issuing consumer and investor warnings since at least 1998, either in the context of enforcement action or more general warnings guiding investors to be wary. In the last year, we have issued seven media releases on these types of investments.

The Westpoint model was based on mezzanine finance only investments rather than a spread of investments. The problem with mezzanine finance is it is a second level of finance that only gets paid out after secured lenders in the event of failure.

ASIC became concerned about the Westpoint model in 2003 when it commenced an investigation. Two years ago, ASIC commenced proceedings against two companies in the Group, arguing that they were illegally operating outside the *Corporations Act*. ASIC sought a court ruling that the two Westpoint companies were promoting a financial product and operating a managed investment scheme. This was a test case for ASIC involving the Westpoint Group and was an attempt by ASIC to bring these structures within the regulation of *Corporations Act*, which would require a licensee to undertake compliance programs, liquidity buffers, audited accounts and financial disclosure. Advised by its lawyers, Westpoint had structured its fund raising

based on the issue to investors of promissory notes which are similar to an IOU, unsecured and offer little protection.

While the Court made findings on a numbers of legal issues in late 2004, the proceedings were not concluded by the time of ASIC's recent investigation and proceedings and there are currently still appeals on foot.

The Supreme Court of Western Australia found that the promissory notes issued by the Westpoint companies which were the subject of the proceedings were not debentures within the meaning of the Corporations Act and therefore ultimately not financial products. However, the Court also found that the promissory notes were an 'interest in a managed investment scheme'. These legal rulings raise important issues for ASIC concerning its jurisdiction. The case is a good example of ASIC testing the boundaries in complex matters.

As this matter is listed for hearing, on 20 February 2006, before the Court of Appeal of the Supreme Court of Western Australia, I do not wish to comment any further on these legal issues. However, I should note that ASIC first raised concerns about fundraising through promissory notes in 2003 when we issued an Information Release on 14 July 2003. This was followed by a specific media release in relation to the Westpoint proceedings in May 2004.

ASIC commenced new investigations into the Group in July 2005 after complaints from investors.

One of the key issues for ASIC is how did so many mum and dad investors get involved in Westpoint?

Once of the first tasks for ASIC will be to focus on facilitating some relief for investors. Unfortunately, in many cases, it will take some time before investors will know how much of their original investment will be repaid. ASIC will work with the liquidators and administrators of the Group and licensed entities to facilitate payments to investors.

ASIC will take action against unlicensed advisers and, where appropriate, licensed advisers who promoted these schemes. ASIC will certainly be focusing on those who were involved in the management of the companies in the group, including related entities.

In terms of taking action, we're looking at all possible options within our regulatory and legislative jurisdiction.

The Commission is committed to working through this matter and I am taking a personal interest in the investigation.

The nature of this matter further highlights the importance of consumers seeking licensed financial advice, understanding the nature of their investments and diversifying their financial investments having regard to risk and asking themselves, when they are dealing with a scheme that is unregistered, why that scheme is not registered? What are the protections in place? Of course, it also reminds financial advisers to provide quality advice, based on a proper understanding of the needs of their client.

We have undertaken considerable and specific work with both consumers and the industry in order to get this message across. ASIC at all levels (including Commission) has been extremely active in endeavouring to obtain high levels of press and other coverage in providing consumer warnings and key messages regarding investments. There have literally been dozens of such articles carried in the press in all states and territories under ASIC's name.

For example, in December we released a booklet for consumers, in consultation with the Financial Planning Association, entitled 'Getting Advice: A practical guide to personal financial advice'.

A further example is the recent launch of our guide on 'book up' – a common practice allowing consumers to purchase goods on credit by, for example, the trader holding the consumer's bank debit card and PIN as a form of security. Through this guide, ASIC has reinforced its commitment to consumer education in Indigenous communities.

Similarly, we worked collaboratively with APRA to launch our 'Unit Pricing: Guide to Good Practice' for the life insurance, superannuation and funds management industries. This joint initiative involved ASIC and APRA together drawing on extensive industry consultation to tackle the issue of errors in unit pricing and ensure that investors can be confident that they will be treated fairly.

In the regulatory space generally, ASIC has in recent months, taken some important steps to minimise the regulatory burden on business by simplifying and streamlining some of our compliance and lodgement requirements. We have, of course, implemented CLERP 7 (which simplified company lodgement, reporting and compliance procedures) and we have now also simplified the financial services licensing process (reducing the paperwork involved in applying for an AFSL by at least 50%).

We have, together with APRA, established a working group to review areas of perceived regulatory overlap or duplication between the two agencies and evaluate how each one might be resolved.

We also have significant additional work in progress. Our current year's business plans already commit us to, in the first six months of 2006:

- improving the quality, transparency and 'useability' of our regulatory communications (including considering the nature, clarity and effectiveness of our policy documents and possibly establishing a 'user's guide' to our various policy documents, guidance and class orders);
- systematically reviewing our industry liaison and implementing a comprehensive revised industry and stakeholder management plan; and
- reviewing and refining our approach to breach notifications, including providing greater transparency in our approach.

In addition, we acknowledge the work of the Regulation Taskforce and recognise the benefits of reducing the regulatory burden on business, wherever and whenever prudent.

Thank you.