

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

1 June – 3 June 2010

Question: BET 23

Topic: Mr MacAulay & Westpoint Investors Group

Hansard Page: E118-120 (01/06/2010)

Senator XENOPHON asked:

Senator XENOPHON—Mr D'Aloisio, I have been asked by Graham MacAulay, who is the president of the Westpoint Investors Group, to put some questions to you.

Mr D'Aloisio—Yes. I know Mr MacAulay.

Senator XENOPHON—He has contacted my office. Firstly, did ASIC commission a solvency review of the Westpoint group and its entities?

Mr D'Aloisio—In what year?

Senator XENOPHON—Prior to action being taken by ASIC?

Mr D'Aloisio—I am not sure. I think there was. Whether it is a solvency report I am not sure. Again, I think so, but I will take it on notice and answer that specifically.

Senator XENOPHON—Thank you. Following on from that, was there a Deloitte solvency review carried out in relation to Westpoint before action was taken by ASIC? Did that solvency review find that Westpoint was not insolvent?

Mr D'Aloisio—I cannot answer that either. I will have to take that one on notice. It does not ring a bell with me.

Senator XENOPHON—Further to that, would that be a public document in relation to any solvency reviews carried out?

Mr D'Aloisio—I will have a look.

Senator XENOPHON—The question that Mr MacAulay has raised with me is: why did ASIC make the winding up application against ASIC's own expert opinion, given his understanding that Deloitte's solvency review found that Westpoint was not in fact insolvent?

Mr D'Aloisio—Again, I will look more carefully at that, because this now goes back to about 2004-05. ASIC was quite clear at the time that it needed to take action to put the companies into liquidation in order to protect investors. That then led to a series of actions that ASIC took. So ASIC made a judgment that it was in the best interests to put those companies into liquidation. I think as history has proven, that was correct. As to what the basis of it was and the nature of the reports ASIC received, I will have a look at that and answer the question.

Senator XENOPHON—I have a couple more questions. If that is the case, did not ASIC suppress the Deloitte solvency report when making an application to the Federal Court? In other words, that solvency report was not provided to the Federal Court when the application was made.

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Mr D'Aloisio—I will take that on notice. That is not ASIC—we would not—

Senator XENOPHON—Again—

Mr D'Aloisio—I will take it on notice.

Senator XENOPHON—I want to make it clear that these are concerns—

Mr D'Aloisio—These are questions—

Senator XENOPHON—These are questions that have been expressed to me. If that is not the case, it will be terrific if you could clarify that. The other matter that has been put to me is that there is a perception amongst investors who have lost their money that ASIC timed their action to prevent the rollovers and repayments proceeding and that led to a chain of events that led to the collapse of this group when a solvency review found that the group was still solvent at that time.

Mr D'Aloisio—ASIC has worked hard to recover money. We are now in the process where, I think of the \$370 million or \$380 million lost through liquidations and ASIC actions, investors have now received somewhere in the order of \$100 million. There is a major litigation matter outstanding with the auditors. There is litigation outstanding with the directors. The directors have cross-claimed. Indeed, one of the cross-claims that the directors have made is that the company should never have been put into liquidation and that if ASIC had not done that, the company would be solvent today. I am paraphrasing.

Senator XENOPHON—Sure.

Mr D'Aloisio—Our view is that there is just no substance to that defence. But these are before a court of law. In due course, the court will rule on those issues as well. We commenced some 17 actions, of which a significant number were against financial advisers. Pretty much all of those have now been settled and moneys have been recovered for the investors. So we are working very hard to protect the interests of people like Mr MacAulay.

Senator XENOPHON—But if there were any expert reports, including a Deloitte solvency review, into Westpoint, ASIC would not have difficulty in releasing that document?

Mr D'Aloisio—I have to look at the nature of the document and how it was obtained and what its relevance is in the current court proceedings. In principle, one would look at it. If it is a document that can be made available, of course it would. But I do have to weigh up the nature of the litigation that is going on in this. These are not resolved matters at the moment.

Senator XENOPHON—Sure, but go back a step. Before any litigation, there was not a document—

Mr D'Aloisio—No. But all this will be relevant to litigation that is going on today.

Senator XENOPHON—Sure. But insofar as a document was not prepared for the purpose of litigation, it is not in the nature of an expert report for the purposes of litigation. It was a preparatory report as to the solvency of the Westpoint group. As a

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general principle, if a document is prepared prior to any litigation, not in anticipation of litigation, would not that document be in the public interest to be released for those concerned about this matter?

Mr D'Aloisio—There are very strict rules under the ASIC Act as to what we can and cannot make available. Under section 127, for example, there are things that have to be maintained, such as confidentiality, and what we can and cannot release. I am not disagreeing with you, Senator, and I am not suggesting that I will not make a document available if we can. What I would like to do is to take it on notice and have a look at it. If we can make it available, we will.

Senator XENOPHON—And you can let the committee know—

Mr D'Aloisio—Absolutely.

Senator XENOPHON—if you do not wish to make it available, as to what basis?

Mr D'Aloisio—Absolutely.

Senator XENOPHON—And any other expert reports in relation to the solvency of this group before action was taken.

Mr D'Aloisio—Okay, I will have a look at that as well.

Senator XENOPHON—Insofar as there was any opinion or advice given prior to the action taken by ASIC. Thank you very much.

Mr D'Aloisio—Thank you.

Answer:

Q1 Firstly, did ASIC commission a solvency review of the Westpoint group and its entities prior to action being taken by ASIC?

ASIC's actions in commencing winding up proceedings against York Street Mezzanine Pty Ltd and Ann Street Mezzanine Pty Ltd (both companies in the Westpoint group) in November and December 2005 are currently the subject of a claim against ASIC in the Federal Court. The claim was commenced by Mr Norman Carey, the founder of the Westpoint Group, and companies associated with Mr Carey, in October 2008, as a cross-claim in a proceeding against Mr Carey and others for breach of directors' duties and participation in breaches of trust. This proceeding was brought by ASIC in the name of Anne Street Mezzanine Pty Ltd. ASIC has similar proceedings on foot on behalf of eight other mezzanine finance companies in the Westpoint Group.

As part of its preparation for the winding up proceedings commenced in late 2005, ASIC commissioned Deloitte to do some work for it. At the time of the winding up applications and the hearing of those applications on 20 December 2005, Deloitte had not provided ASIC with a final report on the Westpoint group's solvency. The work commissioned from Deloitte by ASIC prior to the winding-up proceedings, and issues

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surrounding it, will be considered by the Federal Court as part of the cross-claim proceeding. It is therefore not appropriate that ASIC engage in discussions about that material in other fora. In addition, in ASIC's view, that work is subject to legal professional privilege on the basis it was obtained for the purpose of litigation. This view has been challenged by Mr Carey, and has been argued before his Honour Justice Finkelstein on 7 July 2010. Judgment has been reserved and pending its outcome, the material remains confidential.

Q2 Was there a Deloitte solvency review carried out in relation to Westpoint before action was taken by ASIC? Did that solvency review find that Westpoint was not insolvent.

As stated above, as part of its preparation for the winding up proceedings commenced in late 2005, ASIC commissioned Deloitte to do some work for it. At the time of the winding up applications and the hearing of those applications on 20 December 2005, Deloitte had not provided ASIC with a final report on the Westpoint group's solvency.

Q3 Would that be a public document in relation to any solvency reviews carried out?

In ASIC's view, the work Deloitte performed for ASIC is subject to legal professional privilege as it was obtained for the purpose of litigation. This view has been challenged by Mr Carey, and as outlined above, judgment has been reserved.

Q4 Why did ASIC make the winding up application against ASIC's own expert opinion, given his (Mr MacAulay's) understanding that Deloitte's solvency review found that Westpoint was not in fact insolvent?

The premise on which this question is based (i.e. against ASIC's own expert opinion) are not correct. As stated above, ASIC's action in commencing the winding up proceedings, and issues surrounding it, will be considered by the Federal Court as part of Mr Norman Carey's cross-claim proceeding. It is therefore not appropriate that ASIC engage in discussions about these matters in other fora.

Q5 If that is the case, did not ASIC suppress the Deloitte solvency report when making an application to the Federal Court? In other words, that solvency report was not provided to the Federal Court when the application was made.

As stated above, ASIC's action in commencing the winding up proceedings, and issues surrounding it, will be considered by the Federal Court as part of Mr Norman Carey's cross-claim proceeding. It is therefore not appropriate that ASIC engage in discussions about these matters in other fora.

Q6 But if there were any expert reports, including a Deloitte solvency review, into Westpoint, ASIC would not have difficulty in releasing that document? And

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you can let the committee know if you do not wish to make it available, as to what basis?

See the response to questions 1 and 3 above.

Q7 And any other expert reports in relation to the solvency of this group before action was taken, insofar as there was any opinion or advice given prior to the action taken by ASIC.

Any other such material, insofar as it exists, is also subject to legal professional privilege, on the basis that it was obtained for the purpose of litigation.

ENDS