

TO : Senator Sherry, Minister for Superannuation and Corporate Law

CC : The Australian Media

FROM : Graham MacAulay, President Westpoint Investors Group
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DATE : 3 September, 2008

Subject : A set of questions arising from the Burnard trial and the sentence imposed.

Dear Senator Sherry,

NB. Please note I have sent a formal copy of this document to you by registered post.

I write to you on matters arising out of the Neil Burnard trial and the subsequent sentence he received. In the attachment [2008 08 25 BurnardSentence](#) I give my reasons for believing the sentence inadequate. Both the trial and the sentencing raise a number of unanswered questions. For ease of reference I now pose my questions in point form.

1. Before the choosing, and swearing in of the jury, legal discussion took place on the determination of a number of items on their legal admissibility as evidence. Among these was that in 2002 APRA contacted the NSW Keibel office because of a website describing Keibel as a 'boutique bank'. APRA's Ms J. Hoare (phonetic) spoke to someone at Keibel, whom she believed was Neil Burnard in 2002. Although her original handwritten notes existed, she could not be sure to whom she spoke because she had, as Justice Charteris explained, used the common APRA practice of inserting the word *spiel* for unimportant material at the beginning of an oral communication, and she had not included the name of the person she had rung in the notes. In fairness to Ms Hoare, these notes were the basis of a formal communication to an unnamed superior.
 - Q1a. Why did ASIC have to rely on Ms Hoare's notes, and not the report to her unnamed superior?
 - Q1b. What does the use of the word *spiel* as a de-facto APRA standard about procedural standards within APRA?

2. Hansard records Jeff Lucy stating ASIC received its first complaint about Keibel Investment Bank from a consumer in April of 2005. ASIC passed it on to APRA, which visited the North Sydney Keibel offices three months after receipt of the initial complaint. On finding no signage at the Keibel NSW offices, APRA took no punitive action. The most cursory investigation in 2005 would have revealed the offending words on business cards and stationery, of Keibel personnel. Witnesses, at the Burnard trial, gave evidence Beck refused advice as to the folly of using the word *Bank* at seminars, on Keibel stationery, and business cards. Then, in 2005, without explanation he suddenly changed his mind.
 - Q2a. Why was ASIC so slow to alert APRA?
 - Q2b. Why did it take APRA so long to respond?
 - Q2c. Given the nature of the complaint, why did APRA make such a cursory examination?
 - Q2d. Does APRA's non investigation of Keibel in 2005 suggest APRA personnel did not look up its database, or was it the case that the database failed to record the events of 2002?
 - Q2e. Given the removal of the signage from the Keibel NSW main door between the time of ASIC's first complaint and the arrival of APRA three months later, is it an unreasonable deduction by a non conspiracy-minded person to assume someone from one of the regulators warned Beck? The foregoing question demands an informed answer.

3. A witness gave evidence in Burnard's trial of how the use of the term *boutique bank* influenced him in his decision-making. *Boutique bank* is the exact same term a witness claimed Burnard used in a discussion with him (I heard Burnard use it at seminars).
 - Q3a. Why did the prosecution not draw attention to the use of the word "boutique bank" on the website?

4. At Online Super workshops, Neil Burnard promoted Westpoint products in addition to products from other companies. At these seminars Burnard, introduced himself as a Director of Kebbel Investment Bank. A witnesses at the trial stated Neil Burnard promoted products at the Kebbel NSW North Sydney offices. He said he saw Kebbel Investment Bank emblazoned on the main doors of these premises. Any person passing through these doors had reason to believe they were dealing with a legitimate Merchant Bank.
 - Q4a. Why did the prosecution at Burnard's trial restrict witnesses to eight clients from Online Super, and one from Solutions 1?

5. During his summation, Justice Charteris stated the nine witnesses in the case lost approximately \$1.1 million - a fraction of the figure lost by Westpoint investors. Burnard's deception of Westpoint investors cost them well in excess of \$100 million. Newspapers report Kebbel NSW received total of \$18 million in Westpoint commissions. Neither at the trial, nor in the Justice's summation did anyone mention these figures.
 - Q5a. Why didn't the prosecution produce the true Kebbel NSW financial figures relating to Westpoint investors at the trial?
 - Q5b. Did Justice Charteris impose a sentence on Burnard relative to the crime?
 - Q5c. What sort of example does the Burnard sentence set to a person contemplating a similar crime?

6. I attended many Online Super workshops, and on more than one occasion heard Neil Burnard describe an Information Memorandum, which carried an ASIC registration number, as an, ASIC approved, "baby" prospectus.
 - Q6b. Why did ASIC investigators not uncover this matter and present it at Neil Burnard's trial?

7. In June of 2006, Neil Burnard left Australia for America, despite ASIC having advised him not to leave the country. The ABC reported ASIC was in the process of having his passport confiscated at the time of Burnard's departure.
 - Q7a. If ASIC did advise Burnard not to leave the country, what form did the advice take?
 - Q7b. Why did ASIC not ensure it had taken all action to prevent Burnard leaving the country, including the cancellation of his passport, before advising him?
 - Q7c. At a meeting on 23-02-2006 between ASIC and the Westpoint Investors Group I personally raised the matter of Kebbel Investment Bank. Jan Redfern claimed she had not heard of Kebbel Investment Bank before I raised it with her on the previous evening. Throughout the meeting, Jeff Lucy, the then ASIC Chairman remained silent on the subject. However, under questioning at a Senate Estimates inquiry in 2006, he claimed ASIC received the initial complaint about Kebbel Investment Bank in April of 2005! Why did it take ASIC so long before commencing action to cancel his passport?
 - Q7d. Burnard's flight from Australia is not the action of a man who has nothing to hide. Why did the prosecution not raise this matter at the appropriate point in the discussion of Burnard's past character?

8. A vast array of evidence in Burnard's trial indicated Beck deliberately ignored the advice given to him by Kebbel staff concerning the misuse of the word *bank*.
 - Q8a. Why did the prosecution say there would be no further prosecutions of senior Kebbel personnel on this matter?

The jury found Neal Burnard guilty on all nine charges, each of which carries a maximum penalty of five years. The nine witnesses at the trial were but a fraction of the number Burnard helped lose their hard earned savings. The majority of these people, in their senior years, will never recover their previous living standard. A suspended sentence, and a fine of \$50,000, is incomprehensible. As matters stand, Burnard cannot hold office in a company again, but that does not stop his wife opening a new business with him running it.

I don't believe Justice Charteris gave sufficient thought to his decision. However, I realise he based his judgement on the evidence presented at the trial, and did not take into account any externally acquired knowledge. Had the prosecution presented all of the available relevant evidence, Justice Charteris may have imposed a vastly different sentence. Whether the fault lies with ASIC or the DPP is of little consequence. Either way the failure to present all available evidence prevented the Justice making an informed decision. Even though the jury found Burnard guilty, it is yet another botched prosecution involving ASIC

The continuing failure of the regulators goes far beyond Westpoint. Every segment of marketplace is in chaos, and far beyond the ramifications of the sub prime mortgage scandal. I remind you of your promise, in a media release - and in a communication to me - Labor would hold an open inquiry into past ASIC performance if they came to office. Labor has come to office and we are yet to hear the date of that inquiry.

Such an inquiry would not damage financial confidence - ASIC, APRA, and the ASX have ensured it cannot fall to a lower level. Their combined continuing lack of effective action is a running sore on investor confidence.

Please, Senator Sherry, would you immediately announce the setting up of the promised open inquiry into past ASIC performance. Given ASIC's lack of performance in the current year it cannot be less than a Royal Commission if anything positive is to flow from its findings.

Graham MacAulay