

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

**INVESTIGATORY POWERS OF THE
AUSTRALIAN SECURITIES COMMISSION**

Report by the
Senate Legal and Constitutional
References Committee

June 1995

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Investigatory Powers of the ASC

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TERMS OF REFERENCE

That the following matters be referred to the Standing Committee on Legal and Constitutional Affairs for inquiry and report:

- (1) The exercise of the powers of officers of the Australian Securities Commission (ASC) to interview witnesses including:
 - (a) the manner in which those interviews are conducted;
 - (b) the power to take transcripts of interview and the treatment of those transcripts; and
 - (c) the power to compel production of books and records.

- (2) The exercise of the powers of the ASC to bring applications against corporations and individuals including:
 - (a) the bringing of applications during the course of an investigation; and
 - (b) the process by which the applications are brought.

Journals of the Senate No 14, 27 May 1993, p 288.

INVESTIGATORY POWERS OF THE AUSTRALIAN SECURITIES COMMISSION

Executive Summary

Introduction

0.1 Corporate regulation in Australia has passed through a period of dramatic change over the last 10 years. Australia has moved from a cooperative structure with no comprehensive regulator with national powers to a situation where the ASC is one of the most powerful corporate regulators in any developed economy. The period of transition has been punctured by the notorious 'excesses of the 1980's', the fallout from which is still with us.

0.2 Not unexpectedly, there have been difficulties during this transition. This report is concerned with claims that the powers conferred upon the ASC are too extensive, and that we have reacted too extremely to the hard lessons of the 1980's.

Chapter 2

0.3 It required almost forty years to achieve uniformity of company law in Australia. A major factor contributing to the disillusionment with the co-operative scheme of corporate regulation was the string of corporate collapses, and the general corporate excess, of the late 1980s.

0.4 Not all agreed that the corporate failures of the late 1980s were due to poor corporate regulation. Some argued that the events of the late 1980s were caused not by poor or inadequate regulation by the NCSC, but by the deregulation of the Australian financial system and the easy availability of credit. On this view, the excesses of the 1980s were corrected by the dramatic shift in market conditions following the stock market crash in 1987.

0.5 However, in 1989, the Commonwealth enacted a package of legislation to replace the applied law regime of the co-operative scheme with a national scheme of legislation based upon Commonwealth

legislative power.

0.6 Following the High Court case of *New South Wales v Commonwealth*¹ where the Commonwealth's attempt at a federal corporations law failed the Commonwealth, the States and the Northern Territory reached an agreement, at Alice Springs, on a revised system of regulation for corporations and securities in Australia, taking account of the principles contained in the decision of the High Court majority.

0.7 As a result the Commonwealth enacted the *Corporations Legislation Amendment Act 1990* which converted the 1989 Corporations Act into a law which applied only in the ACT. The ASC Act was similarly converted into an Act applying only in the ACT. Each State and the Northern Territory passed application legislation which applied the Corporations Law and the ASC Law as laws of each jurisdiction.

0.8 One of the major outcomes of this period of transformation of companies and securities law in Australia is that the ASC has sole responsibility for the administration and the enforcement of the relevant law in Australia.

Chapter 3

0.9 The Committee was told by a number of witnesses and submitters that the relationship between the ASC and the business community was not in perfect health. It was suggested that the unhealthy state of this relationship exacerbated the task of the ASC in promoting a sound investment climate. For example, it was argued that the ASC placed undue reliance upon the use of compulsory powers (such as compulsory notices to produce documents or to attend for examination) when investigating a matter.

0.10 Evidence provided to the Committee was mainly to the effect that the use of compulsory powers against persons and individuals who are more than willing to cooperate voluntarily with the ASC was damaging to good relations between the ASC and the community.

0.11 The ASC advised that a major factor in the choice of

¹ (1990) 169 CLR 482

compulsory powers over less formal processes for gathering information is the availability of protection for the person supplying the information pursuant to section 92 of the ASC. The Committee is of the view that the suggestion that the statutory protection of section 92 be extended to cover those providing voluntary assistance is a useful and sensible compromise.

Recommendation 1

Recommendation 1: The Committee recommends that the ASC Law be amended to provide protection, along the lines of section 92 of the ASC Law, to those persons voluntarily providing information at the request of the ASC.

0.12 The attitude of some ASC officers (toward those whom they are investigating or from whom they are seeking or requiring information) was also the subject of a number of anecdotes provided to the Committee. The frequency of the adverse anecdotes is a matter of concern for the Committee.

0.13 Complaints procedures in other law enforcement bodies (such as the police) can be a valuable source of knowledge. Complaints present an opportunity for self correction. A complaints procedure should not be viewed as an exercise in damage control. The Committee is confident that the ASC will view the matter in this light in developing its new procedure.

0.14 The Committee received some information about the complaints procedure which the ASC has in place for handling complaints about the conduct of ASC officers. The ASC advised the Committee, during the course of the inquiry, that it has been engaged in the process of revising its complaints procedures with a view to establishing a national uniform procedure. This process has now been completed and new guidelines for managing allegations of misconduct against ASC officers have been released by the ASC.

0.15 In order to maintain community confidence in the integrity and effectiveness of the procedure, the ASC should include a report on complaints, and their handling, in the Commission's Annual Report.

Recommendation 2

Recommendation 2: The Committee is pleased to observe that, in part due to the work of this Committee, a national complaints procedure has been adopted by the ASC. The ASC should include an account of the operation of the complaints procedure in its Annual Report and, at least annually, should report on complaints and their handling to the Joint Statutory Committee on Corporations and Securities. The Complaints procedures presently in place should be the subject of a review, after three years, by the Parliamentary Joint Committee on Corporations and Securities.

Chapter 4

0.16 The ASC is equipped with an extensive array of investigatory powers to assist it in the discharge of its statutory functions. A number of submissions, and witnesses at the public hearings, expressed concern at the breadth of the powers conferred on the ASC.

0.17 An examination of the investigative powers of the ASC requires the Committee to address the balance which should be struck between two competing interests: the need for effective corporate regulation and the need to protect individuals from an excess of administrative power.

Chapter 5

0.18 Many people giving evidence to the Committee commented on the length of time taken by the ASC in conducting its investigations. The passage of time was said to exacerbate the stress associated with being under investigation, and also having an adverse effect on the market where the investigation involved a listed company.

0.19 The Law Institute of Victoria also commented on the fact that an ASC investigation may continue for some time yet when it concluded those who had been examined compulsorily, or been required to produce documents, would be unaware of the end of the investigations.

0.20 The ASC has already adopted this suggestion. The Committee believes that the decision of the ASC to adopt a notice procedure at the conclusion of an investigation is a very positive step toward improving relations between the ASC and the business community. The Committee is also supportive of the ASC's performance indicator of finalising an investigation within 12 months of the resourcing of the investigation.

Recommendation 3

Recommendation 3: The Committee recommends that:

- the ASC make a major effort to achieve its performance indicator of finalising investigations within 12 months of the resourcing of the investigation;
- the ASC ensure that, when an investigation concludes and no further action is contemplated, notice is given to the parties involved in the investigation; and
- the Joint Statutory Committee on Corporations and Securities monitor compliance with this recommendation.

0.21 A number of witnesses before the Committee, all apparently involved in the same matter under investigation by the ASC, gave evidence that summonses and applications issued by the ASC were served so close to the return date of the summons or application as to preclude, or minimise, the opportunity to obtain legal advice prior to the appearance before the Court. The ASC stated that this had been the deliberate policy, on advice, of the ASC.

0.22 The Committee is not in a position to form a view on the merits of the ASC approach in the particular investigation concerned (Aust-Home Investments Limited). However, in light of the devastating consequences (particularly for the individual respondents) of the freezing of their property, it is regrettable that the approach was found to be necessary in the particular circumstances. During the course of the Committee's investigations it became obvious that the late service of documents was indicative of a wider strategy of proceeding *ex parte*. The

Committee believes that such a strategy should be employed in exceptional circumstances only.

0.23 Section 1323 of the Corporations Law provides the ASC with a facility to obtain a court order freezing assets and appointing receivers or trustees, similar to a Mareva injunction, but at a much lower standard of proof. The applicant is not required to prove a prima facie case or good prospects of success in terms of obtaining the principal relief sought. The section is preventative in nature and aimed at preserving the interests of creditors and civil claimants against the person under investigation or subject to criminal or civil prosecutions under the Corporations Law.

0.24 This section was used by the ASC in the Aust-Home Investments Limited investigation. The ASC's initial application to appoint receivers to the various natural and corporate persons involved in the Aust-Home Scheme proceeded ex parte and arose out of an ASC investigation rather than the existence of an actual prosecution or civil proceedings.

0.25 The section therefore allows the ASC, even when matters are at the investigatory stage and no criminal or civil prosecutions have been commenced, to apply for a variety of orders which have potentially dire consequences for an individual's personal and business activities. The Committee is particularly concerned that the section allows the ASC to publicly debut investigations with paralysing orders affecting personal and corporate assets.

0.26 The range of persons affected by section 1323 orders is potentially extremely wide and it is not necessary that they be potentially complicit in the matters under investigation. The case law that has evolved around the section suggests that it is not necessary that the investigation be directed solely or even primarily against the defendant. All that is necessary is that the defendant falls within the general ambit of the investigation. It has further been held in relation to one of the predecessors of section 1323 that the investigation does not need to have taken a definitive direction and that the evidence necessary for an order to be made will depend on the circumstances of the investigation. The implication from the manner in which courts have interpreted section 1323, and its predecessors, is that it is entirely conceivable that the ambit of an investigation can shift and that persons made subject to an initial

order under the section could cease to be within its ambit. The only recompense that these individuals would be able to obtain, as of right, would be an order relating to their legal costs.

0.27 The Committee is aware that as the law stands proceeding ex parte is entirely legal and a tactical issue for the ASC to determine when conducting its investigations. The Committee believes that ex parte applications under section 1323 are sometimes necessary due to the reality of the swift movements of monies in the corporate world. The Committee nevertheless does not believe that the law as it presently stands provides any incentives for caution in the use of the ex parte procedure and that there is a capacity for innocent persons to suffer loss and damage without any right to compensation for the loss suffered.

Recommendation

Recommendation 4: The Committee recommends that the Corporations Law be amended so that in situations where the ASC:

- obtains ex parte an order freezing personal assets under section 1323 of the Corporations Law;
- the order is subsequently lifted;
- no determinative order is made against the property the subject of the order; and
- no successful criminal or civil prosecution results against the respondent,

the respondent should be given a statutory right to recover from the ASC damages for any loss incurred as a result of the original order.

0.28 Another frequent complaint in the evidence provided to the Committee related to the delay in supplying a copy of the transcript of a compulsory examination under section 19 to the examinee.

0.29 An expert on securities law in the United States and in Australia informed the Committee that in the United States where a person is examined by the Securities and Exchange Commission (SEC), if a transcript of an examination is made the examinee has a right to a copy of the transcript. However the target of the investigation does not have a right to a copy of another examinee's transcript.

0.30 The Committee believes that in a compulsory examination of a witness the witness should be entitled, as of right, to a copy of the transcript unless the circumstances indicate that the privacy of the examination or the integrity of the investigation would be endangered as a result.

Recommendation 5

Recommendation 5: The Committee recommends that the ASC Law be amended to provide that the ASC must ensure that a witness examined under section 19 of the Law is provided with a transcript, as of right, as soon as practicable, without the necessity for a request (whether oral or written) from the witness. If the ASC decides that it is inadvisable to supply the transcript, because to do so would prejudice the investigation or endanger the privacy of the examination, then the witness should be given advice in writing to this effect.

0.31 The importance of the task entrusted to the ASC places a great burden of responsibility upon its officers. They must necessarily be highly skilled, well trained in all facets of their duties, and subject to rigorous accountability mechanisms.

0.32 However, a disturbing number of anecdotes were supplied to the Committee which were indicative of unprofessionalism, or inadequate training, on the part of some few ASC officers. The Committee believes that the great powers which are vested in ASC officers must be exercised responsibly by all, *without exception*.

0.33 The ASC advised the Committee that it placed considerable emphasis on the exchange of staff between itself and the corporate sector as one way of enhancing the business skills of its officers. The Committee supports this initiative by the ASC as a method for enhancing the understanding by its staff of commercial practices.

0.34 Details of the liaison arrangements between the Office of the Chair of the ASC and the business community were contained in a supplementary submission provided to the Committee by the ASC. The

submission set out the organisations with which the Office of the Chair of the ASC 'holds periodic liaison meetings'. The private sector bodies listed did not include, for example, the Business Council of Australia. Some other bodies which one would expect to find in this list are also absent, such as the Bankers Association, the Australian Merchant Banks Association, and other key industry bodies.

0.35 The Committee believes that the consultative arrangements should be reviewed by the Chair of the ASC with a view to ensuring that the arrangements are comprehensive.

Recommendation 6

Recommendation 6: The Committee recommends that the ASC review its consultative arrangements, particularly with the business community, with a view to ensuring that the arrangements are comprehensive.

Chapter 6

0.36 Numerous submissions given to the Committee mentioned the difficulty occasioned by the broad scope of notices to produce documents. In the view of the ASC this was unavoidable in most cases. However, the ASC gave evidence that its investigators are specifically directed to very carefully confine the scope of notices to produce documents.

0.37 The degree of detail required in the notice is not settled as a matter of law. There are now conflicting decisions of the Federal Court on whether the ASC is required to specify in the notice the relationship between the documents sought and the relevant affairs of the body corporate.

0.38 Another recurrent theme in the criticisms made of the ASC's exercise of the power to seize documents was the difficulty presented to companies in obtaining access to documents seized by the ASC. This was said to be particularly critical where the documents were needed for the daily functioning of the company concerned.

0.39 The ASC was at pains to explain that it was conscious of the commercial inconvenience which could occur when a company's

documents are removed. It was explained that the ASC had an administrative practice of providing a company with a photocopy of the documents which it requires for its daily operations.

0.40 The Committee is of the view that the viability of a company should not be endangered because the ASC is investigating a matter and has seized some, or all, of its records. Needless to say, the investigation may disclose no breach of the law by the company or its officers. As well, the collapse of the company would adversely affect people who, in all probability, will have no connection whatever to the ASC investigation, for example the company's creditors and its shareholders. Accordingly, the Committee believes that where records are seized by the ASC the company must be given copies of the records which are necessary for its daily operations.

Recommendations 7 and 8

Recommendation 7: The Committee recommends that regulations be promulgated requiring ASC investigation officers to undertake that the ASC will provide to the person from whom business or financial records are seized a copy of all those records which are necessary to enable the person or company to carry on the ordinary business activities of the person or company.

Recommendation 8: The regulations should further state that the requirement on the part of the ASC to ensure that such undertakings are noted on the form of Notice to Produce Documents which is served on the company or person concerned.

0.41 A bone of contention for a number of the organisations providing evidence to the Committee was the cost to them of complying with requests for information made by the ASC. Subsection 89(3) of the ASC Law provides as follows:

89(3) The Commission may pay such amount as it thinks reasonable on account of the costs and expenses (if any) that a person incurs in complying with a requirement made under this Part.

0.42 The ABA, in a supplementary submission to the Committee, provided some anecdotal information of a lack of support by the ASC (and its predecessor, the NCSC) for claims to reimbursement. Rather, the bank concerned was given the impression that 'it should be happy to provide the information sought as part of its duty as a "good corporate citizen".'

0.43 In enacting section 89 the Parliament has expressed its will that a facility should be available for the reimbursement of the cost of compliance with a requirement made by the ASC under Part 3 of the ASC Law.

Recommendation 9

Recommendation 9: The Committee recommends that:

- the ASC note on its relevant forms, particularly the Notice to Produce Documents and the Notice to Attend for Compulsory Oral Examination, the existence of a right to apply for reimbursement of costs and expenses under section 89;
- the ASC develop guidelines for its officers to guide the exercise of its discretion under section 89;
- the ASC report in its Annual Report to Parliament on the number and amount of claims made under the section, and the number and amount of claims approved for reimbursement; and
- the Government ensure that an appropriate level of resourcing is available to the ASC to meet claims under section 89.

Chapter 7

0.44 If the ASC suspects or believes that a person can give evidence relevant to a matter that it is investigating it may, by written notice, require a person to attend a private examination to give evidence on oath (section 19 of the ASC Law).

0.45 The ASC argued that a witness appearing for an oral examination was protected by a number of specific rights. In fact, during the course of the inquiry, almost all of these protective rights were criticised by those whom they were said to protect, namely examinees and their legal representatives, and others, on the basis of inadequacy and

ineffectiveness.

0.46 Compulsory examinations are conducted in private. However, the examinee is entitled to have his or her lawyer present (section 23). The lawyer may address the inspector and question the examinee about matters on which the ASC inspector has questioned the examinee.

0.47 Subsection 23(2) of the ASC Law empowers the ASC inspector to 'require [the examinee's lawyer] to stop addressing the inspector, or examining the examinee' if the inspector is of the opinion that the lawyer 'is trying to obstruct the examination'. The ASC has also been held to have an implied power to exclude a particular lawyer from an examination. The implied power to exclude a particular lawyer from an examination is available if the inspector has reasonable grounds for a bona fide belief that to allow the particular lawyer to participate is likely to prejudice the investigation.

0.48 The Committee is of the view that due to the compulsory nature of the section 19 examinations that restrictions on the right of examinees to instruct a lawyer of their choice should be minimal and only exercised in exceptional choices. The ASC should only seek to exclude a particular lawyer if there is solid evidence that the involvement of that lawyer in the examination will or is likely to compromise the investigation. It is the Committee's view that the only real grounds for exclusion are that the lawyer's involvement amounts to a conflict of interest in relation to his or her representation of other witnesses or prior professional involvement in the corporate structures under investigation.

0.49 The danger of the existing power is that it gives rise to the perception, if not the fact, 'that, on occasions, the ASC may be seeking a little bit more than they should to encourage the picking and choosing of legal representatives.' The Committee nevertheless believes that due to the nature of the matters under investigation, there are circumstances where it is desirable that the ASC possess the ability to exclude a particular lawyer. The Committee accordingly believes that the ability to exclude a particular lawyer should not be totally abrogated although it should be made the subject of explicit judicial supervision.

0.50 It is the Committee's view that the legislature conferred the present power on the ASC in the expectation that it would be exercised only sparingly and with due consideration for the significance of the

measure and of the burden placed upon the witness concerned.

Recommendation 10

Recommendation 10: The Committee recommends that the ASC Law be amended so that the power of the ASC to exclude a particular lawyer from a compulsory examination under section 19 be only exercisable on application by the ASC to a court of superior jurisdiction. The onus should be on the ASC to prove that the exclusion of a particular lawyer is necessary so as to avoid prejudice to an investigation. The examination should furthermore be stayed during the duration of any such application.

0.51 Chapter 5 of this report discusses the evidence provided to the Committee about the delay in the provision of the transcript of compulsory hearings before an ASC inspector. If the availability of a transcript is truly to be protective of the witness, then the transcript should be provided promptly.

Recommendation 11

Recommendation 11: The Committee recommends that the transcript of an examinee's compulsory oral examination be provided promptly and as of right as proposed in recommendation 5 above.

0.52 There is no doubt that the compulsory oral examination is a key investigatory tool for the ASC. The examination is an important element in the regulatory structure which protects investors, creditors and the community generally from misbehaviour. Equally, it is evident from the information provided to the Committee that there are deficiencies in the present examination procedure - particularly deficiencies in the protection for examinees against the misuse of the procedure. Unfortunately, the material provided to the Committee indicates that there is at least a perception on the part of a number of examinees that they are at the mercy of the ASC when participating in a compulsory oral examination.

0.53 The Committee is of the view that it is possible to provide greater protection for examinees whilst preserving the utility of the examination for ASC investigators. There is a community expectation that there will be fair dealing for persons who are being examined or interviewed by the police or any other law enforcement agency. Greater protection for examinees will enhance confidence in the process on the part of examinees whilst not detracting from the integrity of the examination procedure.

0.54 This purpose could be achieved by introducing an external element into the issue of Section 19 examinations summonses. At present the ASC may undertake an investigation and exercise its examination powers under section 19 whenever it "has reason to suspect " that a contravention of a national scheme or related corporate law "may have been committed"(section 13 ASC Law). Independent judicial review can only occur after the issue of a notice. The Committee believes that it would be appropriate that the issue of such notices not be entirely within the discretion of the ASC and that some independence and objectivity be brought into the process. Accordingly the Committee considers that summonses for examinations under subsection 19(1) of the ASC Law be issued by the District Registrar of the Federal Court.

0.55 The Committee further believes that the introduction of an external element and the attendant requirement that the ASC coherently set out the grounds for its reasonable suspicion of a contraventions of the corporations law would add discipline, transparency and focus to the investigatory process. The ASC would be required to file an affidavit in support of its application for a section 19 notice which would then be available, as a public document, for perusal by any interested party.

0.56 The Committee does not believe that the actual conduct of the examinations should be taken away from ASC officers, although, it is of the view that attention should be given to improving the levels of training of the relevant officers in the proper conduct of interviews. In particular the Committee believe that many of the principles which have evolved in relation to bankruptcy examinations, so as to avoid their misuse and abuse, could provide a starting point for ASC officers in conducting interviews. The aim of training should be to give ASC officers a clear understanding of the relevant legislation, the role of natural justice and effective communication skills.

0.57 The procedural change should be that:

- Summonses for the examination should be issued by the District Registrar of the Federal Court on the application of the ASC. The summons would issue where the District Registrar is satisfied that the examinee can give information relevant to a matter that the ASC is investigating, or is to investigate, under Division 1 of the ASC Law. This is the same test which is presently required under subsection 19(1) of the ASC Law.

0.58 In relation to the ASC:

- The examination should only be conducted by officers who have undertaken appropriate training. The officer should be allowed to put to the examinee any question relevant to a matter that the Commission is investigating, or is to investigate, under Division 1 of the Law. This is the requirement which presently appears at subsection 21(3) of the ASC Law.

Recommendations 12 and 13

Recommendation 12: The Committee recommends that the ASC Law be amended so that summonses for the section 19 examination should be issued by the District Registrar of the Federal Court on the application of the ASC. The summons should issue where the District Registrar is satisfied that the examinee can give information relevant to a matter that the ASC is investigating, or is to investigate, under Division 1 of the ASC Act. The issue and application in this instance should be able to be done electronically if there is a need.

Recommendation 13: The Committee recommends that funds be made available for training so that the ASC officers conducting examinations are equipped with a clear understanding of their legislation, the role of natural justice and effective communication skills.

Chapter 8

0.59 At common law a person cannot be compelled to incriminate himself or herself, and may refuse to answer any question, or produce a document or thing, which may put the person at risk of being convicted of a criminal offence. Subsection 68(1) expressly abrogates this common law privilege for the purposes of ASC investigations.

0.60 Two significant criticisms of the abrogation of the privilege were made to the Committee. The first related to the requirement that the privilege be asserted before each answer in question. In other words a blanket, or ambit, claim to the privilege is not permissible. Once again, the edited transcript at Appendix 3 illustrates the operation of this principle. It will be noted that numerous answers are prefaced with the word 'privilege', which signifies that the privilege against self incrimination has been claimed.

0.61 The second criticism related to the unavailability of a corporate privilege against self incrimination. Also, of course, the question was raised whether it was sound policy to tamper with the common law privilege at all.

0.62 The High Court has recently held, in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, that the privilege against self incrimination is not available to corporations, because the privilege is in the nature of a human right, designed to protect individuals from oppressive methods of obtaining evidence of their guilt for use against them. Accordingly, the Committee is not persuaded that there is a need to change the law relating to the privilege against self-incrimination in relation to corporations.

0.63 The Committee is concerned at the extensive abridgment of the usual protection which are available to a person being questioned by an investigative authority. The transcripts of compulsory hearings examined by the Committee indicate that the privilege against self-incrimination is claimed almost as a matter of form by many examinees. The Committee feels that the evidence of Mr Scott of Coudert Brothers about the law and practice in the United States, was compelling and persuasive. Mr Scott pointed out the SEC in the United States does not possess a similar power. Mr Scott also argued that conferring this power

on the ASC may hinder the ASC's ability to investigate a matter 'since I would doubt that few examinees will actually answer truthfully to a question the response to which may incriminate them.'

0.64 The Committee believes that some redress of the balance of rights is needed to protect examinees at compulsory hearings. However, the Committee believes that the law in relation to the privilege against self-incrimination should not be changed in relation to notices to produce documents nor in relation to corporations.

Recommendation 14

Recommendation 14: The Committee recommends that:

- the ASC Law be amended in order that an examinee appearing at a compulsory hearing under section 19 shall be entitled to the protection of the privilege against self-incrimination;
- the privilege should not be available in relation to documents discovered pursuant to a notice to produce documents or the examination; and
- the privilege should not be available in relation to corporations.

Chapter 9

0.65 At a compulsory oral examination under section 19 of the ASC Law neither the privilege against self incrimination, nor legal professional privilege, can be relied upon as an excuse for failing to answer a question. The abrogation of legal professional privilege was a major issue during the Committee's inquiry.

0.66 Legal professional privilege protects the disclosure of communications between a client and his or her legal adviser which are confidential and which are brought into being for the dominant purpose of enabling the client to obtain, or the legal adviser to give, legal advice or for use in legal proceedings. The privilege derives from the principle that a citizen, before committing himself or herself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.

0.67 In *CAC (NSW) v Yuill* a majority of the High Court found in

the Companies (NSW) Code a statutory intention to abrogate the entitlement of a client to claim legal professional privilege, and held that a client could not claim the privilege to refuse to produce documents or answer questions at an oral examination under the then provisions of the Companies Code. The Code provisions were in similar terms to the present provisions of the ASC Law.

0.68 Coudert Brothers, International Attorneys, noted the difference between US law and Australian law on this point. It was pointed out that in the United States the SEC has no power to force disclosure of information which is protected by attorney/client privilege.

0.69 The Committee believes that, on balance, the inroads made on the availability of legal professional privilege by the decision in *Yuill* have had a negative effect upon corporate regulation in Australia. The limitation upon the privilege has been inimical to a constructive relationship between the ASC and the business community. It is also not conducive to the building of a climate of voluntary compliance with the law.

0.70 Importantly, the fact that the decision in *Yuill* may prompt some company officers to act without legal advice, or on the basis of possibly imperfectly understood oral advice, cannot be good for the public interest in the sound and lawful management and administration of corporations.

Recommendation 15

Recommendation 15: The majority of the Committee recommends that the ASC Law be amended with a view to ensuring the availability of legal professional privilege to all parties in investigations under the ASC Law.