

## CHAPTER 3

### THE ASC AND THE COMMUNITY

#### Key Role of the ASC

3.1 There is no doubt that the task of corporate regulation in a developed, commercial society is a task requiring extraordinary delicacy. A number of competing interests must be weighed in the balance. For example, the regulatory regime must be sufficiently vigilant and strong to stamp out fraud or other significant misbehaviour. Also, the regulatory regime must be sufficiently benign as to enhance overall economic performance and competitiveness. Managers must feel that the corporate regulator is present to protect the integrity of the market and to facilitate their task. Investors must have confidence that the only risk they face is poor judgment, not fraud. Confidence must be felt by all sectors of the community that the goals of the corporate regulator are consistent with the interests of corporate managers, investors and the community generally.

3.2 The ASC is conscious of this many faceted task, but believes that the balance between vigilance and *laissez faire* regulation must be struck in favour of strong regulation. The Chair of the ASC described the issues at stake in this way:

Our compulsory powers, which are very similar to the powers of most of our international counterparts, are essential to the effective enforcement of a body of law which is the only bulwark against abuse of the trust placed in company officers by investors and creditors. Without that trust, people will not be prepared to invest, and without that investment our economy will stagnate. The choice is that stark. The issues are that important.<sup>10</sup>

3.3 A similar view was given in evidence to the Committee by Mr Warren Scott, a witness expert in Australian and United States securities law:

..... I think we all agree that the role of a securities regulator is critical to the development and maintenance of any securities market. If investors believe that a securities market is not well-regulated and free from fraud and abuse, they will not invest; without investment, companies will not be able to attract capital; without capital, these companies will not be able to grow; and, without economic growth, Australia will be harmed.<sup>11</sup>

## Relationship with the Business Community

3.4 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. It was suggested that greater reliance could be placed upon the use of requests for voluntary assistance. The Business Council of Australia informed the Committee that:

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<sup>10</sup> *Evidence*, p 4 (Mr Cameron).

<sup>11</sup> *Evidence*, p 279 (Mr W Scott).

The second matter we wish to comment on is the failure of the ASC to develop a culture of voluntary compliance by businesses with the Corporations Law. Although the ASC is an extremely well-funded and resourced body, it ultimately can only effectively police an extremely small proportion of corporate activity. What is missing from ASC enforcement policies and strategies, as evidenced by its submission to this inquiry, is a preparedness to develop a corporate culture of voluntary compliance by periodically consulting with peak business and professional organisations on policies of surveillance and enforcement.<sup>12</sup>

3.5 The ASC agreed that it did employ its compulsory powers frequently, in preference to a reliance upon voluntary assistance<sup>13</sup>. The ASC argued that this approach was necessary because information necessary to an understanding of the arrangements under investigation is held not only by those knowingly involved in the contravention of the law, but also by those who may have been innocently caught up in the transactions. It was said that it is usually only with hindsight that it is possible to distinguish with certainty into which category a person falls<sup>14</sup>.

3.6 The ASC pointed out that another major reason for this approach was a need to ensure that persons providing assistance to the ASC were covered by the statutory protection conferred by section 92 of the *ASC Law*. Section 92 is as follows:

**Compliance With Part**

92 A person is neither liable to a proceeding, nor subject to a liability, merely because the person has complied, or proposes to comply, with a requirement made, or purporting to have been made, under this Part.

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<sup>12</sup> *Evidence*, pp 213-214 (Mr Soutter).

<sup>13</sup> *Submissions*, No. 96 (ASC), p 7.

<sup>14</sup> *Ibid*.

3.7 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.<sup>15</sup> However, the Law Council did express support for the use of compulsory examinations under section 19 rather than informal interviews because of the greater protection which is provided such as the procedure for notifying a claim to the privilege against self incrimination. The Law Council submitted that:

the ASC should, as a matter of policy, not press witnesses to attend informal interviews, without first informing them fully of the legal and practical significance of proceeding in this manner, rather than by way of formal examination under section 19.<sup>16</sup>

3.8 The Committee supports the view of the ASC that it is desirable that people assisting the ASC should have the protection of section 92 of the ASC Law, or of a provision to like effect. The Committee notes that the protection of section 92 is available only where that assistance is provided in response to the compulsory powers of the ASC under Part 3 of the ASC Law. The NRMA suggested that similar protection should be available for people cooperating voluntarily with the ASC:

**Mr P. Cameron** - There will be a number of situations in which you have people who are busy, whose evidence is necessary for an ASC inquiry and who are happy to provide information quickly and efficiently. In those circumstances, we would suggest that legislative reform may be necessary to

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<sup>15</sup> For example, *submissions* no. 80 (NRMA), no. 104 (Australian Accounting Research Fund), and no. 110 (Association of CPAs and ICAA). See also, *evidence* p 262 (Mr A Rees).

<sup>16</sup> *Submissions*, no. 90 (Law Council of Australia), para 5.4.

give them the same protection which will be available to somebody whose evidence is taken under compulsion. In other words, if the ASC is making inquiries for the performance of one of its functions, or the exercise of its powers, and that inquiry is a legitimate inquiry, then a response given to such an inquiry should be afforded the same source of protection that would be available if the evidence were given in a formal proceeding.<sup>17</sup>

3.9 This suggestion received support in principle from the ASC. Mr Procter (the National Enforcement Coordinator for the ASC), in responding to the evidence given by the legal adviser for the NRMA, gave the following response to the above suggestion:

**Mr Procter** - The first [point made by Mr Cameron] was that we ought to more often pursue informal inquiry. Mr Cameron has referred you to paragraph 1.7 of our response. It is appropriate, I think, that you have regard to the rest of that paragraph because it does put the balance in perspective. We go on to say:

The ASC has, however, successfully conducted some investigations on a largely voluntary basis. Where possible in the course of an investigation the ASC will seek voluntary assistance. A careful balance must be struck. The use of compulsory powers does provide safeguards to those who are required to assist.

Compare the Law Council submission, which suggests that we should prefer compulsory powers because they offer protection. The idea that the use of informal process ought to be combined with some additional statutory protection is a very interesting and useful one, and one that ought to be explored. At the moment, the balancing act is made more difficult by the absence of protection in some informal inquiries.<sup>18</sup>

## Recommendation

3.10 The Committee notes the view of the business representatives that greater reliance upon voluntary assistance, rather than compulsory

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<sup>17</sup> *Evidence*, p 264 (Mr P Cameron).

<sup>18</sup> *Evidence* p 266 (Mr A Procter).

powers, would improve relations between the ASC and the business community. The Committee also notes the evidence from the ASC, and the Law Council, that a major factor in the choice of compulsory powers is the availability of protection 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: 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 without the ASC having to resort to its compulsory powers under Part 3 of the ASC Law.**

## The De Crespigny Prosecution

3.11 On 1 December 1994 all charges<sup>19</sup> laid by the ASC against the Normandy Poseidon Ltd chairman, Mr Robert Champion de Crespigny, were withdrawn on the motion of the prosecution. The main allegation against Mr de Crespigny was that a takeover document, the Part A statement, issued by Brunswick NL, which was controlled by Mr de Crespigny's Normandy Poseidon group, overvalued Brunswick's main asset, the Galtee More goldmine, in Western Australia's Mt Magnet

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<sup>19</sup> *Mr de Crespigny was charged by the ASC with breaches of Subsection 44(1) of the Companies (Acquisition of Shares) (Victoria) Code, and Subsections 563(3) and 564(2) of the Companies (Victoria) Code.*

region. The withdrawal of the charges resulted in a great deal of negative press coverage for the ASC<sup>20</sup> and the Committee considered that it was appropriate that all parties be given an opportunity to put to the Committee any lessons that could be learnt from the prosecution. The Committee accordingly wrote on 31 January 1995 to Mr Champion de Crespigny, Chairman Normandy Poseidon Ltd, and Mr Alan Cameron, Chairman ASC, for their views concerning the circumstances of the prosecution. The Committee subsequently received a submission from the ASC and two letters from Mr de Crespigny's solicitor, Mr John Manetta, which were taken by the Committee as submissions to the Inquiry.<sup>21</sup>

3.12 The Committee believes that it is appropriate that the circumstances of the prosecution of Mr de Crespigny be discussed in this report for a number of reasons. Firstly the press coverage surrounding the withdrawal of the charges was highly critical of the ASC and secondly the Committee was concerned that the failure of the prosecution could have been indicative of structural defects in the investigatory powers of the ASC.

3.13 In the material received by the Committee from the ASC and Mr de Crespigny there were no accusations that defects in the investigatory powers of the ASC caused or contributed to the instigation or failure of the prosecution of Mr Champion de Crespigny. The ASC

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<sup>20</sup> 'ASC Backs down on De Crespigny Charges' *Financial Review* 2 Dec 1994 p3; 'De Crespigny charges Withdrawn' *The Sydney Morning Herald* 2 December 1994 p24; 'De Crespigny wants ASC Probe' *The Australian* 2 December 1994 p29.

<sup>21</sup> Submissions nos 146 & 147.

noted in its submission that an internal review was conducted into the investigation which disclosed shortcomings in the post investigation handling of the matter but no fundamental errors in the conduct of the prosecution.<sup>22</sup>

**3.14** In relation to the press coverage surrounding the withdrawal of the charges the ASC stated in its submission to the inquiry that:

The media coverage at the time of the withdrawal of the charges suggested that the decision to withdraw the charges against Mr de Crespigny followed intimations from the Magistrate about the strength of the case. Other media coverage suggested the decision was taken after the evidence of a particular witness. That is not correct. The decision to withdraw the charges was a decision for the DPP, on counsels' advice. The decision was primarily motivated by the fact that the apparently credible defence expert, Walker, had obtained further underlying factual data to support his view that a significantly higher value could be placed on the relevant ore body.

In the light of the new material the prosecution took the view that there was now a basis for a reasonable doubt as to the allegation that the valuation in the Part A Statement was unsustainable. It was thought unjustifiable, having regard to the Prosecution Policy of the Commonwealth, to continue to prosecute the matter in light of the emergence of new evidence that was not in the possession of the ASC or the DPP at the time the charges had been laid.<sup>23</sup>

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<sup>22</sup> *Submission, no. 145 (Mr Andrew Procter ASC), p6.*

<sup>23</sup> *Ibid. p6.*



## The ASC and the Community

3.15 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. For example, the Committee was informed:

- 'In early June 1992 I was summoned to a hearing. This took a complete day and was conducted more like the Spanish Inquisition rather than an inquiry. I certainly felt like the Kangaroo in the said Kangaroo Court. The attitude seemed to be that I was guilty until proven innocent.'<sup>24</sup>
- 'The survey of our companies revealed that the main concern about ASC investigations was the overbearing attitude of ASC officers at interviews prior to a hearing as well as in the hearing itself. Such an attitude seems unnecessary and only serves to provoke bad feeling with organisations or individuals who are happy to cooperate.'<sup>25</sup>
- 'I refused to sign the first transcript without my legal representative being allowed to read it as well. Mr [name withheld] threatened me that I would be taken to a room by myself and the transcript would be read to me and I would sign it or be in contempt of the

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<sup>24</sup> *Submissions, no. 10 (Barry McKenzie).*

<sup>25</sup> *Submissions, no. 89 (Association of Mining and Exploration Companies Inc.).*

Commission and could go to jail.'

'I responded by saying that that was duress and I would sign it on every page that it was signed under duress.'

'Mr [name withheld] jumped up and down!'<sup>26</sup>

- 'In the course of the examination of one of NRMA's officers, one of the ASC officers raised his voice to a considerable pitch and was quite hectoring and confrontational in his approach and questioning. We believe that this was quite unnecessary, unwarranted and not conducive to the efficient elicitation of information. Nor is an examination an appropriate occasion to debate market theories as was experienced in one instance.'<sup>27</sup>
- 'The experience of many examinees is that the questions directed to them are not properly framed to elicit a simple answer, often they are simply responses to an allegation or improper speculation, and they are often leading.' And

'It has further been seen that many examinations are not adequately prepared. Often ASC examining officers have arrived at the examination without some of the relevant documents or with the wrong documents.'<sup>28</sup>

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<sup>26</sup> *Submissions, no. 29 (Ms Margo Bunt) p 2.*

<sup>27</sup> *Submissions, no. 80 (NRMA), p 7.*

<sup>28</sup> *Submissions, no. 98 (Australian Institute of Company Directors), para 5.1 and 5.3 respectively.*

## ASC Complaints Procedure

**3.16** The Committee received some information about the complaints procedure which the ASC has in place for handling complaints about the conduct of ASC officers. This matter arose in the context of evidence given to the Committee claiming that an ASC officer, Ms J Weir, had given a lecture to university students and, in the officer's presentation, had given an anecdote referring to a current investigation by name. As it happened, the daughters of one of the persons interviewed by the ASC in connection with that investigation were in the student audience.<sup>29</sup>

**3.17** Affidavits by the two daughters were filed in the Federal Court proceedings then current between the ASC and the company concerned and its officers and promoters. The ASC gave evidence of its handling of the suggestion of impropriety by the ASC officer in giving the public lecture:

**Senator McKIERNAN**--Obviously the very serious complaint that was made against Ms Weir and the lecture she gave at the QUT in 1992 would have been taken pretty seriously within the ASC. Did that investigation involve checking with the university as to whether lectures of this nature are taped? It is my understanding in universities throughout the country that when lectures, particularly visiting lectures, are arranged they are taped. This is done not only for posterity but also to aid people who perhaps have missed a lecture on a particular night. They can refer back to it in the various seminars that are held as the course progresses towards fruition.

**Mr Tanzer**--The short answer to your question is no. I am not aware that inquiries were made of the QUT as to whether her lecture was taped. The affidavits of Rowena Bell-Bradbury and Natasha Bell-Bradbury, which have been presented to the committee today, were produced to the commission shortly before the matter was to proceed back to court. Ms Weir is a solicitor

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<sup>29</sup> *Evidence pp 80-82 (Mr L Nevison). Submissions no. 119 (Mr L Nevison) [attachment: affidavits of Rowena Bell-Bradbury and Natasha Bell-Bradbury].*

of the Supreme Court of Queensland. She was contacted and asked her recollection of the lecture. She was required to swear on affidavit that that was the case. You have her affidavit before you now. Partly because of the time involved and because the affidavits originally had been presented as part of the litigation, it was appropriate to find out what Ms Weir had to say about it and produce an affidavit on that. We have not taken it further.<sup>30</sup>

**3.18** The NCA gave evidence to the Committee about its complaints procedure. The Committee was told that if a complaint involved a suggestion of misconduct in an investigation, that would be drawn to the attention of the Parliamentary Joint Committee on the National Crime Authority which would ask the NCA to report on the matter.<sup>31</sup> If, however, the complaint involved alleged breaches of the law, the NCA practice is to refer such matters to the appropriate police force to be investigated. Only in very minor matters was the complaint investigated by the NCA itself.<sup>32</sup>

**Senator McKIERNAN**--Could you give me an indication of what you would consider to be a minor allegation--I think I could envisage what a major one would be--where an officer of the NCA would investigate a complaint within the NCA? Obviously, you need not go into specifics.

**Mr Buxton**--There was one recently where a complaint was made by an individual to the chairperson relating to two officers in our Sydney office. The complaint was, on the face of it, rather bizarre, but nevertheless we conducted some preliminary inquiries into the complaint. Our chairman was involved in this, as he is involved in every complaint of this nature that is made against officers of the NCA--that is the seriousness with which we regard such complaints. After we conducted our own investigations, we determined that there was really not a complaint which would warrant sending it on to the AFP. We regarded the complaint basically as a frivolous one. Those are the types of matters that we would investigate ourselves.

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<sup>30</sup> *Evidence*, pp 108-109 (Mr G Tanzer).

<sup>31</sup> *Evidence*, p 137 (Mr J Buxton).

<sup>32</sup> *Ibid.*

There have been more serious allegations in the past that the NCA has investigated itself. That is not our current policy. I think in the old days there were more serious complaints that the NCA did investigate itself but now we refer such matters to the AFP. We did both. There were some matters that were referred to the AFP, but there were some matters which involved not a breach of the law but perhaps involved an unwanted reflection on the NCA--that was the difference, I suppose. Then such matters were investigated by the NCA. But our policy now is that if there is a serious allegation made, and if that allegation involves a breach of Commonwealth legislation and on our examination is of more than a frivolous matter, we would refer it to the Australian Federal Police.<sup>33</sup>

**3.19** The Committee was advised during the course of its inquiry that the ASC was engaged in the process of revising its complaints procedures with a view to establishing a national uniform procedure. The Committee has been informed that consultations have now been completed with the Commonwealth Ombudsman and the Public Sector Union and that a national complaints assessment procedure is now in place. A copy of the complaint guidelines is annexed to this report at appendix 5.

**3.20** Complaints about the exercise of the ASC's powers are inevitable. First, there is the strong probability of dissatisfaction by someone with the exercise of ASC discretions. Secondly, the nature of much of the work of the ASC involves confrontation, which adds to the probability of complaint. Accordingly, it is of great importance that the community has confidence in the complaints handling procedure of the ASC. Also, the Committee favours the approach taken by the NCA in relation to complaints where there is a strong emphasis upon external

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<sup>33</sup> *Evidence* p 138 (Mr J Buxton).

review, with internal review being confined to the complaint assessment phase and the investigation of quite minor matters. The Chair of the NCA is informed of all complaints.

**3.21** 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 impressed with the content of the ASC's new national complaint handling procedure guidelines.

**3.22** 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. (Needless to say, the report need not contain identifying particulars of individuals concerned in any particular complaint.) Periodically (at least annually), the ASC should provide the Joint Statutory Committee on Corporations and Securities with a detailed report on the operation of the complaints procedure. After the procedure has been in operation for a period of, say, three years the procedure should be reviewed by a Parliamentary Committee, such as the Joint Statutory Committee on Corporations and Securities.

## Recommendation

Recommendation 2: The Committee is pleased to observe that, in part due to the work of this Committee, a 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 complaint procedures presently in place should be the subject of a review of its operation, after three years, by the Parliamentary Joint Committee on Corporations and Securities.