

CHAPTER 4

OUTLINE OF THE POWERS OF THE ASC

Key Investigatory Powers

4.1 The ASC is equipped with an extensive array of investigatory powers to assist it in the discharge of its statutory functions. The key powers available to the ASC are set out in Part 3 of the *ASC Law*. They are as follows:

- the power to inspect statutory records: section 20;
- the power to require the production of books in relation to the affairs of a body corporate, securities and futures contracts: sections 30-33;
- the power to require a person to attend an examination in relation to an investigation: section 19; and
- the power to require the disclosure of information about dealings in securities or futures contracts: sections 41, 43, 44 and 46.

Criticism of the Extent of the ASC's Powers

4.2 A number of submissions, and witnesses at the public hearings, expressed concern at the breadth of the powers conferred on the ASC. For example, Hall, Tuckfield Richardson, Solicitors for Split-

Cycle Technology Limited (a company being investigated by the ASC) expressed the view that under ASC Law subsections 13(1) and (3):

the ASC need only have "reason to suspect" (of which it, or one of its many delegates, appears to be the sole judge) contravention of a relevant law or previous law.

The ASC may then make such investigation as it considers expedient (subsection 13(1) or appropriate subsection 13(3)).

The power is absolute, unlimited and virtually uncontrollable except by the ASC itself.³⁴

The Critical Balance

4.3 An examination of the investigatory 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.

4.4 Persons under investigation quite understandably wish to know the nature of the allegations against them, if only to enable them to respond. On the other hand, the investigatory agency will wish to maintain the confidentiality of its investigation to the maximum extent possible. The High Court recognised this dilemma in *NCSC v News Corporation Ltd*³⁵:

³⁴ *Submissions*, no. 13 (Hall, Tuckfield Richardson, Solicitors for Split-Cycle Technology Limited), p 4.

³⁵ (1984) 8 ACLR 843 at 862, per Mason, Wilson and Dawson JJ quoted in John Kluver 'ASC Investigations and Enforcement: Issues and Initiatives' (1992) 15 UNSW Law Journal 31 at 32.

It is of the very nature of an investigation that the investigator proceeds to gather relevant information from as wide a range of sources as possible, without the suspect looking over his shoulder all the time to see how the inquiry is going. For an investigator to disclose his hand prematurely will not only alert the suspect to the progress of the investigation but may well close off other sources of inquiry.

4.5 The remainder of this report will discuss the appropriateness of the present balance between these competing interests in the context of the powers conferred upon the ASC.