

## CHAPTER 5

### THE EXERCISE OF ITS POWERS IN PRACTICE

#### **The Need for Wide Powers of Investigation**

5.1 Contraventions of the law relating to corporations and securities are frequently committed behind a mask of extremely complex commercial transactions. The investigation of such matters usually requires specialist expertise from a number of professional backgrounds to provide an understanding of the factual basis of the investigation.

5.2 Many of the arrangements under investigation by the ASC were said to share a number of common characteristics:

- the arrangements are highly structured, and may involve hundreds of individual transactions. Professional advisers (typically lawyers, accountants, tax advisers or merchant bankers) are often used at all stages of the arrangements;
- transactions often cross over state and national borders;
- complex corporate structures or groups with interlinked share holdings or debts, some of which may be incorporated or have assets outside Australia, often in jurisdictions which do not have co-operative arrangements with Australia for sharing information or whose laws (especially banking laws) impose secrecy obligations which inhibit information gathering;

- cover up strategies are often used, including nominee corporations or trusts, or devices such as blind trusts (where the beneficiary of the trust may not be named or ascertainable on the face of any document) or bearer shares (which are transferable by delivery and the owner is not recorded on any register);
- hundreds of thousands of documents recording a myriad of individual transactions;
- there may be a number of financial or other intermediaries; and
- "stakeholders" (such as investors, creditors and company officers) whose interests are often in conflict.<sup>36</sup>

## The Time Taken to Complete an Investigation

5.3 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.

5.4 Complaints about the time taken for an ASC investigation, and the consequent expense, were a recurrent theme through the written and oral submissions provided to the Committee.

5.5 For example, Split-Cycle Technology Limited stated that the investigation of its affairs had commenced in mid-1991 and was still

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<sup>36</sup> *Submissions, no. 96 (ASC) p 6.*

ongoing when the company officials gave evidence in February 1994.<sup>37</sup>

In its response to this information the ASC explained that:

The investigation was commenced in September 1991. On 26 March 1992 the ASC applied to the Federal Court in Brisbane to restrain Mr Mayne from offering securities in Split Cycle except in compliance with the Corporations Law. On 9 April 1992 the action was settled, on the basis that Mr Mayne undertook to the Federal Court that he would not offer securities except in compliance with the law. Following this action, the Commission became aware through media reports generated by Split Cycle Technology Limited, that securities were still being actively traded. The Commission therefore continued to investigate possible breaches of sections 1018, 767 and 780 of the Corporations Law. The investigation continued until mid 1993 as the company failed to lodge the necessary prospectuses until April 1993.

In addition to staff time, \$6,500 has been spent on the costs of transcripts and witness fees.<sup>38</sup>

The ASC response suggests that the investigation had been finalised in mid-1993, and was not ongoing when the Split Cycle company officers gave evidence in February 1994.

5.6 The NRMA advised that the investigation by the ASC of the NRMA's dealings in the shares of Foodland Associated Limited commenced in March 1992. The NRMA gave evidence that on 10 June 1994 the ASC advised the NRMA that no action would be taken against the NRMA following the investigation.<sup>39</sup> In its response to this statement the ASC said that:

[t]he ASC has set itself a performance indicator to complete investigation to commencement of action or conclusion within 12 months [of] the resourcing of

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<sup>37</sup> *Evidence*, p 49 (Mr A J D Richardson). *Submissions*, no. 13 (Split-Cycle Technology Limited) p 3.

<sup>38</sup> *Submissions*, no. 120 (ASC Supplementary Submission), p2.

<sup>39</sup> *Evidence*, p 261 (Mr A Rees).

the investigation. The meeting of this performance indicator is a high priority.<sup>40</sup>

The ASC also pointed out that the matter under investigation was 'not typical' and the trading patterns were 'complex'. Further, the investigation was briefly delayed from time to time 'due to the absence of certain officers who were involved in other major investigations.' Also, the ASC had 'agreed to delay the examinations of NRMA officers for several weeks to dates more suitable to the persons to be examined.'<sup>41</sup>

5.7 The Association of Mining and Exploration Companies Inc. (AMEC) conducted a survey of its membership in preparing its submission to the Committee. AMEC noted that in some cases more than two years have elapsed since the start of an investigation without the outcome being known.<sup>42</sup>

### **No Notification When an Investigation Finishes**

5.8 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. An example of this is shown in the remarks made by the representatives of Split-Cycle Technology (noted above at paragraph [5.5]) indicating that Split-Cycle believed the ASC investigation was ongoing at the date of their appearance before the Committee (February

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<sup>40</sup> *Submissions, no. 129 (ASC Supplementary Submission) p 102.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Submissions, no. 89 (AMEC) p 2.*

1994) whereas the ASC advised that the investigation had ended some months earlier. The Law Institute suggested that

where the ASC has finally and conclusively determined to take no civil or criminal action against an examinee or is in a position to say no such action will be taken based on information then in its possession, it should be encouraged to do so in writing.<sup>43</sup>

5.9 The ASC has already adopted this suggestion. At the Committee's public hearing in Melbourne the ASC representative informed the Committee that the ASC:

took on board the comments that were made on that topic at the Brisbane hearings. We revised our procedures and we have now prepared - they are standard letters but of course they are not to be used prescriptively - forms of advice to parties that the ASC does not intend to take any further action based on the information presently available to it.<sup>44</sup>

The ASC later supplied the Committee with a copy of the *pro forma* letters of advice which are sent to potential targets and examinees once an examination has been completed.<sup>45</sup>

## Recommendation

5.10 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.

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<sup>43</sup> *Submissions, no. 106 (Law Institute of Victoria) p3.*

<sup>44</sup> *Evidence, p 178 (Mr A Procter).*

<sup>45</sup> *Submissions, no. 142 (ASC Supplementary Submission) p 2.*

**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.

## Late Service of Documents

5.11 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. For example, Ms Margo Bunt stated that she and her husband 'each received a box (17" x 13" x 6") of documents one night. On the top was the advice that an Interlocutory Hearing was to be conducted the next morning at 10:00 am.<sup>46</sup> Because of the shortage of time it was impossible to read the documentation, much less to arrange for legal representation. 'The result of that hearing was that

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<sup>46</sup> *Submissions, no. 29 (Ms Margo Bunt), p 5.*

every asset we had was frozen.<sup>47</sup>

5.12 Another witness, an investor in the same company with which Ms Bunt was connected, also told of being served with a box full of papers late one afternoon. 'After several hours I finally realised I had to appear in Court the following morning at 9 AM as I had obviously been issued with a summons.'<sup>48</sup> A third witness gave evidence to the same effect, stating that 'a large cardboard carton full of material' was delivered late in the afternoon before the first return date.<sup>49</sup>

5.13 On the point of late service of the documentation the ASC stated that this had been the deliberate policy, on advice, of the ASC:

During the afternoon and evening of 16 March 1992, the application and the material on which the ASC sought to rely was served on the 45 respondents. Having regard to the history of the matter and after consultation with senior Counsel it was decided to serve as many respondents as possible with the material but provide minimum notice and proceed ex parte in the first instance. That decision carried with it the additional onus that the ASC was itself required to put all relevant matters before the court.

On 17 and 18 March 1992, the ASC application proceeded before Mr Justice Northrop of the Federal Court. The application resulted in an interim order for the appointment on 18 March 1992 of interim receivers over the entire or partial assets of the 45 corporate and individual respondents.<sup>50</sup>

5.14 Section 1323 of the Corporations Law gives the ASC and 'an aggrieved person' the opportunity to seek from either the Federal Court

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<sup>47</sup> *Ibid.*

<sup>48</sup> *Submissions*, no. 63 (Mr G D Mathers), p 1.

<sup>49</sup> *Submissions*, no. 26 (Ms B Bell-Bradbury), p 2.

<sup>50</sup> *Submissions*, no. 120 (ASC Supplementary Submission), p 5.

or a State Supreme Court orders prohibiting a person from leaving Australia without the permission of the Court [paragraph 1323(1)(k)], prohibiting dealings in personal and corporate property [paragraphs 1323(1)(d) to (g)] and appointing receivers or trustees [paragraph 1323(1)(h)]. For the section to be triggered an investigation needs to be in existence under the ASC Law or the Corporations Law [paragraph 1323(1)(a)] or a prosecution needs to have been commenced for a contravention of the Corporations Law [Paragraph 1323(1)(b)] or a civil proceeding needs to have been commenced under the Corporations Law [paragraph 1323(1)(c)]. When one of these conditions is satisfied a court may then act under the section if it "considers it necessary or desirable to do so for the purpose of protecting the interest of [an aggrieved] person." The section is preventative in nature and aimed at preserving the interests of creditors and civil claimants against persons under investigation or subject to criminal or civil prosecutions under the Corporations Law.<sup>51</sup>

**5.15** The section significantly provides the ASC with a facility to obtain a remedy similar to Mareva injunction but at a much lower standard of proof. The applicant is not, on the face of the section, required to prove a prima facie case or good prospects of success in terms of obtaining the principal relief sought. The principles applied by courts when granting relief under the section nevertheless have evolved in a manner in tandem with those applied to the granting of Mareva injunctions:

The Mareva remedy is discretionary. So too, is the remedy under s1323 of the Corporations Law. Under the statute the discretion is to be

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<sup>51</sup> See generally: *Butterworth's Australian Corporate Law Service* at p 152,168.



exercised having regard to the need or the desirability of protecting the interests of people to whom the company may or become liable to pay moneys. The discretion is a general one. In the exercise of the discretion the court may have regard to all the circumstances of the case.<sup>52</sup>

**5.16** 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<sup>53</sup> proceeded ostensibly *ex parte*<sup>54</sup> and arose out of an ASC investigation rather than the existence of an actual prosecution or civil proceedings.

**5.17** The section therefore allows the ASC, even when matters are at the purely investigatory stage and no criminal or civil prosecution have been commenced or necessarily contemplated, 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 publically debut investigations with paralysing orders effecting personal and corporate assets.

**5.18** The Committee received evidence from a number of the

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<sup>52</sup> *Beach Petroleum NL and Anor v Johnson and Others* (1992) 9 ACSR 404 at 407 (per von Doussa J.).

<sup>53</sup> *Op. Cit.* n 47 p 1264.

<sup>54</sup> At the initial hearing for an interim order under s1323 on 17 March 1992 some of the respondents were present and legally represented. Mr Justice Northrop determined that the application should be treated as an *ex parte* application, see generally: *Australian Securities Commission v Aust-Home Investments Ltd and Others* (1993) 11 ACSR 136 (per Hill J.).

respondents to the application made by the ASC on 17 and 19 March 1992 concerning the Aust-Home Investments Limited investigation that the interim order which froze their personal assets caused them great financial hardship.<sup>55</sup> The Committee further received evidence from Mrs Margo Bunt that the order left her and her husband bereft of adequate legal representation due to the inability to access the funds to pay for such.<sup>56</sup>

5.19 The range of persons affected by section 1323 orders is potentially extremely wide and it is not necessary that they be 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.<sup>57</sup> 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.<sup>58</sup> 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

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<sup>55</sup> *Submission no. 27 (Mrs Margo Bunt) at p 6; Submission no.63 (G.D.Mathers) at p 2; Submission 26 no. 26 (Ms Beatrix Julie Bell-Bradbury) at p 3.*

<sup>56</sup> *Ibid. at p 5.*

<sup>57</sup> *CAC v ASC Timber Pty Ltd (1989) 7 ACLC 467; Connell v NCSC (1986) 1 ACSR 193; CAC v Walker (1987) 11 ACLR 884.*

<sup>58</sup> *CAC (NSW) v Walker & ORS (1987) 11 ACLR 884 at 888 (per Waddell CJ in Equity).*

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

**5.20** This issue has arisen in the context of the late service of documents and the Committee is disturbed by the admission made by the ASC that this formed part of a wider strategy of proceeding *ex parte* [see para. 5.13]. The Committee is aware that as the law stands that such a course of action is entirely legal and a tactical issue for the ASC to determine when conducting its investigations. The Committee concedes that *ex parte* applications under section 1323 are sometimes necessary due to the reality of swift movements of money 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 considers 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 any loss or damage incurred as a result of the original order.

## Delay in the Provision of Transcripts of Examinations

5.21 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. Subsection 24(2) of the ASC Law provides that the ASC inspector 'shall, if requested in writing by the examinee to give to the examinee a copy of the written record, comply with the request without charge but subject to such conditions (if any) as the inspector imposes.'

5.22 A number of witnesses stated that there had been considerable delay in obtaining a copy of the transcript of their examination. In some cases this may have been due to the examinee overlooking the requirement in subsection 24(2) for a *written* request.

However, the frequency of the complaints is an indicator of the existence of a problem, independent of the source of the problem.

5.23 Split-Cycle Technology Limited submitted that the provision of a transcript be mandatory, and that there be no restrictions on the use of the transcript by the examinee.<sup>59</sup>

5.24 Another submitter stated that a copy of the transcript was forwarded after summonses had been issued more than two years after the examination.<sup>60</sup> Commonwealth Attorney-General's Department observed that the legislation does not impose a time limit within which the transcript must be supplied:

While in most cases fairness to the examinee would require a transcript to be provided within a reasonable time, the ASC may be entitled to delay supplying a copy where its release would impose a risk of impeding the inquiry. This may be so where an examinee seeks to obtain a transcript of prior evidence during the course of his or her examination: *NCSC v News Corp Ltd* (1984) 52 ALR 417; *Connell v NCSC* (1989) 14 ACLR 765.<sup>61</sup>

5.25 Ms Beatrix Bell-Bradbury stated that at her examination on 16 September 1992 a request by her legal representative to independently record the examination was refused on the basis that a transcript would be made available. However, Ms Bell-Bradbury stated that the transcript

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<sup>59</sup> *Submissions*, no. 13 (*Split-Cycle Technology Limited*), p 12.

<sup>60</sup> *Submissions*, no. 23 (*Mr Peter H Vanderhorst*), para 1.2. In this case it is unclear whether the transcript was a record of a voluntary interview or of a compulsory examination under section 19. However, the submission states that at the end of the interview the investigator undertook to prepare a transcript and to contact Mr Vanderhorst when it was ready.

<sup>61</sup> *Submissions*, no. 100 (*Commonwealth Attorney-General's Department*), para 47.

was not provided to her at all, but was eventually appended to one of the affidavits filed by the ASC in the Federal Court on 16 March 1993. The affidavit showed that on 23 October 1992 the ASC had provided the transcript to the receivers and managers of a corporation investigated by the ASC.<sup>62</sup>

5.26 The ASC advised the Committee that the inspector stated in the examination that if she required a transcript she should make 'a formal written request for a copy.' The ASC went on to say that it had 'no record of any such request having been made. If a misunderstanding occurred in this particular case that is regrettable but the ASC does not believe that there is any general problem concerning access to transcript.'<sup>63</sup>

5.27 Ms Margo Bunt advised that she requested a copy of her transcript on 30 July 1991 and received it on 8 May 1993.<sup>64</sup>

5.28 The Trustee Companies Association of Australia asked rhetorically why it was necessary for the examinee to apply in writing to receive a copy of the transcript. It was observed that records of interview have not always been furnished and concluded by stating that the examinee should be given a copy of the transcript as a matter of right.<sup>65</sup> The Business Council of Australia also proposed that a copy of the

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<sup>62</sup> *Submissions*, no. 26 (Ms Beatrix Bell-Bradbury), p 2.

<sup>63</sup> *Submissions*, no. 120 (ASC Supplementary Submission), p 3.

<sup>64</sup> *Submissions*, no. 29 (Ms Margo Bunt), p 2.

<sup>65</sup> *Submissions*, no. 91 (Trustee Companies Association of Australia) p 2.

transcript should be provided as a matter of right:

The Business Council considers that the ASC Act should be amended to make a provision of transcripts mandatory, subject to the usual condition that the examinee does not disclose the transcript to any other person other than the examinee's legal advisers.<sup>66</sup>

**5.29** 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.<sup>67</sup>

## Recommendation

**5.30** 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. Accordingly, the ASC should ensure that the witness is provided with a transcript as soon as it becomes available, 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 then the witness should be given advice in writing to this effect.

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<sup>66</sup> *Submissions*, no. 95 (Business Council of Australia).

<sup>67</sup> *Submissions*, no. 97 (Mr Mark Williamson, Coudert Brothers), p 9.

**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.

## **Training of ASC Staff**

5.31 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.

5.32 The ASC informed the Committee that it treated its responsibilities in this direction as matters of great importance:

The ASC is not complacent about proper exercise of its powers and is aware of the need to train and supervise effectively those staff who are delegated to exercise ASC powers. The ASC has recently issued an Enforcement Manual which sets out details of its investigative powers and the way in which the ASC staff should exercise them. .... Regardless of whether they are seeking voluntary assistance or using compulsory powers, it is the ASC's policy that staff behave in a professional and reasonable manner. Since January 1991, the ASC has expended considerable effort in staff training, treating this as a high priority. The ASC is now developing and implementing national core and advanced training programs to ensure nationally consistent training regarding



the use of its powers.<sup>68</sup>

**5.33** However, as noted earlier in this report [at para. 3.15], a disturbing number of anecdotes were supplied to the Committee which were indicative of unprofessionalism, or inadequate training, on the part of a few ASC officers. Although the anecdotes would seem to be confined to only a few officers of the ASC, and not representative of a cultural problem within the Commission, the Committee believes that the great powers which are vested in ASC officers must be exercised responsibly by all, *without exception*.

**5.34** In addition to the suggestions of attitudinal problems by some ASC officers, a number of submissions also called into question the professional skills of some ASC investigators:

In various of the submissions put before the committee the point is made that at the field level the ASC lacked training. It is a submission that I would support. My observation is that the ASC investigators may be well academically trained..... [B]ut they appear to be wanting in the area of commercial evaluation of their inquiries.<sup>69</sup>

**5.35** The NRMA felt that some of the ASC officers handling the inquiry into its share dealings with the Foodland Group were 'patently unfamiliar with relevant market practices.'<sup>70</sup>

**5.36** 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. A

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<sup>68</sup> *Submissions, no.120 (ASC) p 5.*

<sup>69</sup> *Evidence p 97 (Mr M J P Hart).*

<sup>70</sup> *Submissions, no. 80 (NRMA) para 3.5.1.*

supplementary submission provided by the ASC provided a list of the ASC officers who had been placed with the private sector as part of the ASC development program (and also the employees from the private sector who had been placed within the ASC).<sup>71</sup>

5.37 While the list of secondments is impressive it does have a strong emphasis toward placements with (and from) legal and accounting firms. The NRMA expressed the view to the Committee that an important deficiency in the skills of ASC staff was a limited awareness of the markets from the practical point of view. It was suggested that exchange programs between the ASC and the ASX and fund managers might be introduced as a way of addressing this perceived problem.<sup>72</sup>

5.38 The ASC did point out that there was an exchange program which had commenced only recently between the ASC and the ASX:

**Mr Procter** - [It was said] that there ought to be an exchange program between the ASC and the ASX. Indeed, there is such a program. It has only recently commenced. We have had ASC staff in the companies branch of the ASX on a secondment basis for some months. We presently have an ASC staff member from one of our market surveillance teams on secondment to the ASX surveillance team, and that is a process that we expect will continue. It is likely that, in the near future, there will be a further secondment into the membership branch of the ASX. So we agree with that as an appropriate way of skilling-up the ASC and improving our understanding of market practices.<sup>73</sup>

5.39 The Committee supports this initiative by the ASC as a method for enhancing the understanding by its staff of commercial practices.

## Liaison with the Business Community

5.40 In chapter 3 of this report there was some discussion of the

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<sup>71</sup> *Submissions, no.143 (ASC Supplementary Submission) p9.*

<sup>72</sup> *Evidence, p 262 (Mr A Rees).*

<sup>73</sup> *Evidence, p 267 (Mr A Procter).*

evidence given to the Committee about the relationship between the ASC and the business community. This section of the report will discuss the information given to the Committee about the mechanisms for formal liaison between the ASC and the business community. This section will also discuss the arrangements for the exchange of staff, for training and development, between the regulator and the regulated.

**5.41** The Business Council of Australia was critical of the liaison by the ASC with the corporate community:

**Mr Soutter** - 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.

The Business Council believes that the formation of a business and professional consultative group, to meet periodically with the chairman and senior staff of the ASC, would not only enhance corporate compliance but it would also facilitate greater procedural fairness by the ASC. I point out that other government bodies, such as the Trade Practices Commission and, indeed, the Commissioner of Taxation, have put in place such bodies. Another measure which we adopted to provide the ASC with a greater understanding of the corporate sector is the appointment of business people as part-time members of the ASC. We note that, to date, none of the five vacancies that are provided for in the act have been filled.<sup>74</sup>

**5.42** The ASC responded that it was strongly committed to close liaison with the business community. Evidence was given to the Committee by the ASC about the liaison arrangements which are in place:

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<sup>74</sup> *Evidence*, pp 213-214 (Mr G Soutter).

**Mr Tanzer** - ..... Mr Soutter suggested that there was no attempt by the commission to meet regularly with peak bodies such as the Business Council. As Mr Procter stated, pursuant to the former agreement reached between governments at Alice Springs in June or July 1990, each region has established a regional liaison committee on which there are representatives from the key professional bodies and business representatives in those areas. Those liaison committees are set up to enable discussion of current market issues; to notify market participants of areas of concern to the ASC; to provide information on standards required by the ASC; and to provide a forum for effective two-way communication between market participants and the ASC. I might say that I know that in some regions those liaison committees also have subcommittees that deal with issues such as accounting; there may be an accounting subcommittee of the liaison committee. In our region we have an accounting subcommittee and a securities industry subcommittee.<sup>75</sup>

**5.43** Further details of the liaison arrangements were contained in a supplementary submission provided to the Committee by the ASC.<sup>76</sup> Attachment A to that submission sets out the membership of the range of liaison committees at the ASC regional office level. Attachment B sets out the organisations with which the Office of the Chair of the ASC 'holds periodic liaison meetings'. The private sector bodies listed in attachment B are as follows:

- Companies and Securities Advisory Committee;
- Australian Stock Exchange;
- Sydney Futures Exchange;
- Investment Funds Association of Australia;
- Financial Planning Association of Australia;
- Securities Institute of Australia;
- Australian Institute of Company Directors;

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<sup>75</sup> *Evidence*, p 222 (Mr G Tanzer).

<sup>76</sup> *Submissions*, no.143, (ASC Supplementary submission).

- Australian Financial Markets Association;
- Trustee Corporations Association of Australia;
- Insolvency Practitioners Association of Australia;
- International Banks and Securities Association of Australia;
- Authorised Dealers Association.

The Business Council of Australia is a notable omission from this list of organisations. 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.

**5.44** The Committee notes from the information given to the Committee by the ASC that it has made very extensive efforts at consultation with business and other groups, both at the regional office level and at the peak level. However, in light of the complaints made in evidence about the need for further efforts in this direction, and the omission of the BCA from the organisations with which the Office of the Chair of the ASC liaises, 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.

**5.45** Needless to say, the consultative arrangements between the ASC and its law enforcement colleagues (eg the NCA, AUSTRAC and so on) and other regulators in the public sector (eg ITSA, the Insolvency and Trustee Service Australia) should also be comprehensive.

## Recommendation

**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.