

CHAPTER 6

NOTICES TO PRODUCE DOCUMENTS

Outline of the Power

6.1 The ASC's main powers to inspect and obtain documentary evidence are set out in Part 3 of the ASC Law. This Part also prescribes the manner in which the ASC is to exercise those powers. The powers include the power to:

- inspect statutory records: section 29;
- require the production of books in relation to the affairs of a body corporate, securities and futures contracts: sections 30-33; and
- require the disclosure of information about dealings in securities or futures contracts: sections 41, 43, 44 and 46 ASC Law and sections 718, 719 and 788 Corporations Law.

6.2 Division 3 of Part 3 of the ASC Law (sections 28-39) gives the ASC extensive powers to obtain and inspect books related to the affairs of a body corporate. Section 29 provides that where a book is required to be kept under the Corporations Law an inspector may require the person with possession of the book to make the book available for inspection without charge.

6.3 In relation to other books the ASC's power may be exercised only for the purposes stated in section 28, namely:

- the performance or exercise of any of the ASC's functions and powers under a national scheme law;
- ensuring compliance with a national scheme law;
- an alleged or suspected contravention of a national scheme law or a law concerning the management or affairs of a body corporate or involving fraud or dishonesty and relating to a body corporate, securities or futures contract; or
- an investigation under Division 1 of Part 3.1.⁷⁷

6.4 A notice to produce documents under section 30 of the ASC Law can be directed to a body corporate or to an 'eligible person' in relation to a body corporate. An 'eligible person' in relation to a body corporate means a person who:

- is, or has been, an officer of the body corporate ;
- is, or has been, an employee, agent, banker, solicitor or auditor of the body corporate; or
- is acting, or has acted, in any other capacity on behalf of the body corporate.⁷⁸

6.5 Notices to produce documents may be issued to any person who has possession of documents or information, not only to a person who may be the subject of criminal or civil proceedings: *ASC v Lucas*.⁷⁹

⁷⁷ *Submissions*, no. 100 (Commonwealth Attorney-General's Department) para 57.

⁷⁸ *ASC Law* subsection 5(1).

⁷⁹ (1992) 7 ACSR 676

Width of Notices to Produce Documents

6.6 An ASC notice requiring the production of documents can be of considerable width. In the view of the ASC this was unavoidable in most cases:

I think it is in the nature of the investigative work that the ASC undertakes, particularly in circumstances where it is unusual for an investigation to be given the assistance of someone who is in a position to provide an overview of the matters that are under inquiry and to point us in the right direction. It is in the nature of those sorts of inquiries that the net has to be cast relatively widely. There must, of course, be a sensitivity, particularly when we are dealing with live companies.⁸⁰

6.7 However, the ASC gave evidence that its investigators are specifically directed to very carefully confine the scope of notices to produce documents. This direction was said to be a consequence not only of the case law 'but also an acknowledgment that the powers are intrusive and that they are inconvenient.'⁸¹ The ASC also pointed out that a notice which 'casts the net too widely' was not only a burden for the recipient of the notice but could also be counter productive for the ASC because it would take longer for the ASC to find the material which it really needed.

6.8 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

⁸⁰ *Evidence* p 25 (Mr Procter).

⁸¹ *Evidence* p 149 (Mr Procter).

corporate. In *ASC v Zarro*⁸² Spender J held that it was not necessary to show such a linkage on the face of the notice:

In my opinion, it would be an impossible imposition on the ASC if its inquiries were to be predicated on an obligation in every case to detail the basis of the asserted connection between the documents sought and the bodies corporate the subject of the investigation.

6.9 However, in *Macdonald v ASC*⁸³ Davies J held that:

It is a principle of the law that such a notice should make it clear to the person on whom it is served that the giver of the notice is undertaking an inquiry which the giver is empowered to undertake and that the documents required to be produced are relevant to that inquiry.

Comments in the Evidence Concerning Notices to Produce Documents

6.10 Numerous submissions given to the Committee mentioned the difficulty occasioned by the broad scope of notices to produce documents. The Law Council of Australia stated that 'the notice issuing process tends to become an exercise in the broadest possible drafting rather than an exercise in targeting. Particularly if people do not go and get legal advice and enlist people who are able to negotiate reductions in the width of the notice with the ASC, it causes them undue burden and undue expense. I think the extent of the disruption caused by large documentary requirements can scarcely be underrated.'⁸⁴

⁸² (1991) 6 ACSR 385.

⁸³ (N0.2) (1994) 48 FCR 210 (per Davies J.)

⁸⁴ *Evidence* p 323 (Mr N Korner).

6.11 A company which had been the target of an ASC investigation stated that 'section 30 notices have been widely used both alone and in conjunction with section 19 notices. To be fair, drafts are sometimes (but not always) provided in advance. There is no practical facility to challenge the relevance of such notices. Relief from an oppressive notice appears to be at the discretion of the ASC signatory.⁸⁵ The company argued that persons served with a notice to produce documents should have a right of review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*.⁸⁶

6.12 Another witness who had been the subject of an investigation spoke of the seizure of the company's books by the ASC. 'The ASC promised faithfully that we could have access to these books or copies etc. Despite these assurances we were never able to get copies etc thus making it impossible to conduct normal day to day business etc.'⁸⁷

6.13 Another problem which was adverted to was the seizure of confidential documents, such as board of directors' and management meeting minutes.⁸⁸

Access to Seized Documents

6.14 Another recurrent theme in the criticisms made of the ASC's

⁸⁵ *Submissions*, no. 13 (*Split-Cycle Technology Ltd*) p 5.

⁸⁶ *Ibid* p 11.

⁸⁷ *Submissions*, no. 36 (*Mr K B Bradford*) p 2.

⁸⁸ *Submissions*, no. 89 (*Association of Mining and Exploration Companies Inc*) p2.

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.⁸⁹

6.15 It should be noted that on at least one occasion during the evidence given to the Committee a claim by a witness of difficulty in obtaining access to seized documents was rejected by the ASC. A witness who had been the subject of investigation by the ASC gave evidence that the records of the organisation by which he was employed had been impounded by the ASC. It was stated that the organisation 'made several attempts to elicit assistance from it [the ASC] in the provision of photocopies so that we could continue our work and, in fact, we were outright and abjectly denied those.'⁹⁰ The ASC later provided copies of correspondence indicating that the ASC had in fact provided copies of documents requested by the organisation and had offered to provide copies of other documents on request.⁹¹

6.16 The Watchdog Association Inc suggested that, if it is necessary to remove documents from a company, the ASC should take only photocopies, or take originals and give the company the photocopies.⁹² In response the ASC pointed out that it is necessary, for evidentiary purposes, to take the original documents. Also, paragraph

⁸⁹ *Ibid.*

⁹⁰ *Evidence*, p 30 (Mr P MacDonald).

⁹¹ *Submissions*, no. 142 (ASC Supplementary Submission) [annexure 3].

⁹² *Evidence*, p 188 (Mr A Wade).

37(7)(a) of the ASC Law provides for a person who has had records seized, or another person who is entitled to inspect the records, to inspect them.⁹³

6.17 The Business Council of Australia was critical of the fact that the legislation conferred only a right to inspect the seized documents:

That seems to me to be a very minimalist approach. While I can understand why the ASC would want to hold the originals for evidentiary purposes, it seems to be quite ridiculous that if somebody has, as a company might have, very substantial numbers of documents seized, they would have to go along to the ASC office every time they want to have reference to one of those documents.⁹⁴

6.18 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.

Senator O'CHEE--Thank you very much. I think Mr Soutter has dealt with the right to inspect documents which have been confiscated, but can I just make the point a little clearer. When we say that all the company's records are taken by the ASC, we are not just talking about balance sheets and profit and loss accounts. We are talking about things like creditor's and debtor's ledgers, cashbooks, wages records and so on. People have a right to inspect, and I know Mr Procter would say that is what the law says, but maybe the ASC would give consideration to recognising that there is a need to change the law so that people are entitled to a copy of all documents taken at the time at which they are taken. Otherwise, effectively, a company could grind to a staggering halt on the basis of the legislation.

⁹³ *Evidence*, p 207 (Mr G Tanzer).

⁹⁴ *Evidence*, pp 217-218 (Mr A M Soutter).

I think it is a drafting error, but a drafting error that should not be allowed to perpetuate injustices against companies which may be investigated. It is in the best interests not just of the company directors and the shareholders but also of the creditors of the company that they be allowed to continue on with their ordinary business until such time as it is appropriate to appoint an administrator to those companies, especially when, in many cases, you may not decide to appoint an administrator or make an application for appointment of an administrator. If the confiscation of documents is such as to severely disadvantage the company in the conduct of its business, of course, it also disadvantages the innocent creditors of that company.

Mr Procter--I think the point is well made that, whatever the legislative provision says, the practice has to be one that enables the company to go on trading. I would hesitate to say that the best answer is to provide for compulsory photocopying. I think it would be a matter that would repay some careful thought, because compulsory photocopying might bring the company to a grinding halt, the investigation to a grinding halt, and cost a lot of time and money.

Senator O'CHEE--If, for example, you have got a company dealing in securities, and you take all of the documents, that company will grind to a halt overnight.

Mr Procter--The practice is, of course, to provide the photocopies of the documents that they need to go on with. I just hesitate to endorse the proposition that there should be a provision that says, 'If a document is required under notice, you are entitled to a photocopy of it.' I think that is doing more than is necessary to ensure the ongoing operation of the company.

Senator O'CHEE--But the problem is if you say this is the practice--

Mr Procter--Yes.

Senator O'CHEE--The difficulty is that you are going to have a situation where a company and the ASC might have a dispute about what they are entitled to receive a copy of and that dispute itself may bring the company's operations to a halt.

Mr Tanzer--I guess Mr Procter is commenting in a practical sense. I know we have heard examples today where people are asserting that that can be a significant problem. I am not aware of cases on the ground where companies have ground to a halt because, whereas the notice may be quite wide and require a company to deliver up all its books in the sort of circumstances you are suggesting, the more frequent occurrence is that sort of problem is worked out by discussion between the investigator involved and the company secretary so that things can be proceed. If the solution is that copies of particular ledgers

or whatever are required forthwith, that is what is done.⁹⁵

6.19 The Institute of Chartered Accountants suggested that the ASC be entitled to take only photocopy documents until proceedings are commenced against a person and the originals are required to be produced in court under subpoena. The cost of copying the documents would be borne by the ASC.⁹⁶

Conclusions

6.20 The Committee notes the dilemma presented by the conflict between the two contending policies. The Committee accepts the clear need that in an investigation of a suspected breach of the law the ASC must move to seize and secure the original documents which may be needed in a later prosecution. Equally, the Committee understands that difficulty of access to a company's financial records can endanger the viability of that company.

6.21 Undoubtedly, in many cases, the volume of records seized will be such as to preclude (as a practical measure) the supply of a photocopy of each and every folio by the ASC to the company concerned. In any event, many of the records will not be current operating records. They will frequently be financial history documents held in the company's archives. It is unlikely that the seizure of such records will be critical to the daily operations of the company.

⁹⁵ *Evidence*, pp 234-235 (Mr A Procter and Mr G Tanzer).

⁹⁶ *Submissions*, no. 113 (*The Institute of Chartered Accountants in Australia*) p 2.

6.22 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.

6.23 The Committee notes the evidence given by the ASC that this is the approach adopted in practice and that it (the ASC) is unaware of any examples of companies having collapsed as a result of an inability to access seized documents.⁹⁷ In light of this the Committee is of the view that a change to the legislation is unnecessary at this stage. However, the obligation of the ASC to provide a copy of necessary operating documents should be set out in regulations which should apply to all ASC investigators and included in the ASC Investigations Manual. The ASC obligation should also be noted on the Notice to Seize Documents which is served on the company or individual.

⁹⁷ *However, some submissions to the Committee did state that there had been an inability to access documents after they had been seized by the ASC: For example, see Submissions, no. 36 (Mr K Bradford) and no. 109 (Mr P MacDonald). The claim in the latter submission was denied by the ASC: Submissions, no. 120 (ASC Supplementary Submission) p2. The claim made by Mr P MacDonald is discussed at para [6.15] above.*

Recommendations

Recommendation 7: The Committee recommends that regulations be promulgated requiring ASC investigation officers to clearly 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.

Cost of Compliance

6.24 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. A joint submission by the Australian Society of Certified Practising Accountants and the Institute of Chartered Accountants in Australia pointed out that compliance costs are not levied on the business community generally 'who ultimately benefit from an investigation. The cost is borne solely by the person (including members of the Accounting Bodies) or corporation who volunteers the information and who are often not connected with the

investigation.⁹⁸

6.25 The Association of Mining and Exploration Companies Inc stated that documents requested in a Notice to Produce take considerable time and effort to collate 'and necessitate a company reallocating executive time and expense to addressing ASC queries. There appears to be no recognition by the ASC that such a cost is involved, particularly given that the nature of the ASC's queries are often directed at, and need to be considered by, the senior levels of a company's management or its board.⁹⁹

6.26 The Australian Bankers' Association ('ABA') stated that very large amounts of time and expense are incurred by member banks in complying with examination requests¹⁰⁰ and document production notices¹⁰¹. Compliance with an ASC notice to produce documents may require the bank to search a number of different databases. Some records will be held electronically, and others will be in hard copy form. Some records may be current while others may be in archives. The required records may be held in different parts of the banking group, such as a trading bank arm, a finance company arm and a merchant banking arm.

⁹⁸ *Submissions, no. 104 (Australian Society of Certified Practising Accountants and the Institute of Chartered Accountants in Australia), p1.*

⁹⁹ *Submissions, no. 89 (AMEC), p2.*

¹⁰⁰ *Submissions, no. 99 (ABA), p3.*

¹⁰¹ *Evidence, p 144 (Mr A Cullen).*

6.27 The ABA suggested that the bank should have some reimbursement for the cost of complying with the ASC demand. In its response to this suggestion the ASC drew attention to section 89 of the ASC Law and Schedule 2 to the ASC Regulations which make provision for compensation in these circumstances:

There is indeed a provision in the ASC Law, at section 89, which provides that upon application to the ASC, the ASC shall meet the reasonable costs of compliance with a requirement under Part 3. Now, I may say that we are grateful to the banks for the fact that they do not very often make that sort of application; but they are entitled to.¹⁰²

6.28 Other witnesses gave evidence about the cost associated with compliance with ASC demands. Witnesses for the NRMA said that 'apart from the legal expense, the time and effort we put in was considerable.'¹⁰³ Mr Norman O'Bryan, a Melbourne barrister, argued that the cost of regulation was added to, 'very often unnecessarily, by the ASC's getting too aggressive too early.'¹⁰⁴

6.29 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.

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

¹⁰² *Evidence*, p 148 (Mr A Procter).

¹⁰³ *Evidence*, p 271 (Mr A Rees).

¹⁰⁴ *Evidence*, p 291 (Mr N O'Bryan).

the information sought as part of its duty as a "good corporate citizen".¹⁰⁵

6.30 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. It may be that the awareness of the facility available in section 89 is not widely known, and that the ASC is not resourced at a level necessary to meet a significant number of claims under the section. These problems need to be overcome in order to meet the policy aim which is expressed by section 89.

Recommendation

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.