

## CHAPTER 7

### EXAMINATION OF WITNESSES

#### Outline of the Provisions

7.1 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). The ASC exercises this power by issuing a written notice to the examinee informing him or her of the identity of the inspector, the *general* nature of the matter under investigation, the examinee's right to legal representation, and the restrictions on the privilege against self incrimination arising from section 68 of the ASC Law.

7.2 The ASC argued that a witness appearing for an oral examination was protected by a number of specific rights:

- (i) the right to the prescribed information in the notice convening the examination: section 19;
- (ii) the privacy of the examination: section 22(1);
- (iii) the right to legal representation: section 23(1);
- (iv) the entitlement to a record of the examination: section 24;
- (v) various rights of objection to the subsequent admission into

- evidence of statements made at an examination: section 76;
- (vi) the claim of legal professional privilege where applicable: section 69; and
  - (vii) the claim of privilege against self-incrimination which confers evidentiary immunities: section 68.

7.3 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. The one protection not exposed to significant criticism was protection no. (v). Comment on the remaining protection is summarised in the following paragraphs.

### **Protection (i): The Information Contained in the Notice to Attend for Examination**

7.4 Subsection 19(3) of the ASC Law requires that a notice for attendance at an oral examination state 'the general nature of the matter' under investigation. Subsection 21(3) provides that the examinee may be required to answer a question 'that is put to the examinee at the examination and is relevant to a matter that the Commission is investigating'. Thus, the extent of the power conferred on the ASC to require an examinee to answer a question is defined by reference to the relevance of the question.

7.5 The ASC explained that the notice requiring the examinee to attend for oral examination will identify the matter to which the investigation relates. This is usually in the form of a general statement of

the circumstances being investigated, 'for example, "the affairs of company X in relation to the takeover bid of company Y" or "the affairs of company R as regards its solvency between date X and date Y".<sup>106</sup>

### Relevant Case Law on the Notice to Attend

7.6 The case law on what amounts to 'the general nature of the matter' suggests that the ASC need not provide much detail in the notice.

7.7 In *ASC v Graco*<sup>107</sup> Jenkinson J of the Federal Court of Australia considered subsection 19(3) of the ASC Law. In that case the examinee was served with a notice requiring him to attend for oral examination 'in relation to an investigation of Titan Hills Australia Ltd.' It was held that the notice should include some specification of the time period covered by the investigation. However, on a more general note, the Court rejected the argument that the notice should include a sufficiently detailed specification of grounds such as would enable the examinee to test the relevance of questions put to the matter under investigation. The Court felt that the phrase in subsection 19(3) ('state the general nature of the matter') 'invites both comprehensiveness and brevity in description of the matter, and gives no encouragement to definitional particularity.'<sup>108</sup>

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<sup>106</sup> *Submissions*, no. 96 (ASC), para. 6.12.

<sup>107</sup> (1991) 29 FCR 491; (1991) 5 ACSR 1.

<sup>108</sup> (1991) 29 FCR at 495.

7.8 In *Johns v Connor*<sup>109</sup> the Court considered a notice under subsection 19(3) which required the examinee to attend for oral examination in connection with 'an investigation into the affairs of Hotel and Immobilien Development AG ('HMI') covering the period 20 December 1991 to 31 March 1992.' It will be seen that the ASC had reacted to the decision in *Graco* by specifying a time period in the notice. The examinee argued that the notice was deficient because of its generality. The Court observed that the word 'affairs', as used in the notice, is a word of very wide import. 'The use of the word 'affairs' in the notice does little, if anything, to specify or identify what the investigation is about. The only words of limitation appearing in the notice are those of temporality.'<sup>110</sup>

7.9 The Court expressly agreed with the view of Jenkinson J in *Graco* that the subsection 19(3) 'invites both comprehensiveness and brevity in description of the matter, and gives no encouragement to definitional particularity.' The Court also agreed with Jenkinson J's view that a section 19 notice does not have to state matters designed to provide a means of determining the relevance of questions for the purposes of subsection 21(3). It was noted that a section 19 examination is essentially of an inquisitorial nature 'and the ASC ought not to be unduly fettered in the execution of its investigative functions.'<sup>111</sup>

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<sup>109</sup> (1992) 35 FCR 1; (1992) 7 ACSR 519. The decision was subsequently approved by the Full Court (Black CJ, Doussa, Davies JJ) in *Johns v Australian Securities Commission* (1992) 35 FCR 146.

<sup>110</sup> (1992) 35 FCR at p 13 (Lockhart J).

<sup>111</sup> (1992) 35 FCR at p 13.

7.10 However, the Court also observed that:

the ASC must have reason to suspect that there may have been committed a contravention of the relevant law before its power to conduct an investigation pursuant to subsection 13(1) is enlivened. It is not asking too much that it states the general nature of the matter that it is investigating in the notice itself.<sup>112</sup>

Accordingly, the Court found that the section 19 notice in the *Johns* matter was deficient because it did not state the general nature of the matter under investigation.

#### Comments in the Evidence About Section 19 Notices

7.11 A number of submitters and witnesses were critical of the lack of information contained in the notice. The Australian Institute of Company Directors stated that the practice of including minimal information in the section 19 notice allowed the ASC 'the unjustifiable power to conduct a trial by ambush. This power must be limited so that prior to examination directors and executives know what issues are sought to be examined, and for what purpose they are required.'<sup>113</sup>

7.12 The Australian Institute of Company Directors contrasted the lack of particularity in a section 19 notice with the requirements imposed on the Trade Practices Commission when issuing a notice under section 155 of the *Trade Practices Act 1974*. The Trade Practices Commission is

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<sup>112</sup> *Ibid.*

<sup>113</sup> *Submissions, no. 98 (Australian Institute of Company Directors), para 3.1.*

under an obligation to be satisfied that there is a breach of the Trade Practices Act and to identify in the notice the specific breaches to be investigated. The section 155 notice must specify the information sought with sufficient particularity to enable the recipient to know what is required.<sup>114</sup>

**7.13** The Institute of Company Directors submitted that the ASC Law be amended to compel the ASC when issuing a section 19 notice:

- (a) to identify in the notice specific breaches to be investigated;
- (b) to specify the information sought with sufficient particularity to enable the examinee to know what is required;
- (c) to have reason to believe that an examinee is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes, or may constitute, a contravention of the ASC Law.<sup>115</sup>

**7.14** The Commercial Law Section of the Law Institute of Victoria argued that the vagueness of a section 19 notice not only made it difficult for the examinee to make full use of the right to legal representation but also could lead to the examination being conducted in an inefficient, and perhaps an unfair, manner:

[H]ow is the examinee to properly prepare himself or herself when all he or she is told is that they are to be examined on matters "in relation to Company X between period a and period b"? If the period in question is lengthy and a multitude of issues are to be raised by ASC investigators during the

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<sup>114</sup> *Submissions, no. 98 (Australian Institute of Company Directors), para 3.6-3.7 (summarising the effect of the decision in Riley McKay Pty Ltd v Bannerman (1977) 31 FLR 129).*

<sup>115</sup> *Submissions, no. 98 (Australian Institute of Company Directors), para 3.8.*

examination (as is often the case), an examinee can hardly be expected to be in a position to address all issues on the spot. An inability to do so may reflect poorly on the examinee and may unfairly or incorrectly encourage the ASC to pursue an examinee on occasions where it is not warranted. To interrupt the examination to then allow the examinee to go away and "brush up on his or her evidence" or "refresh his or her memory" is an unsatisfactory method of conducting an examination both from the ASC's and the examinee's viewpoint.<sup>116</sup>

## Protection (ii): The Privacy of the Examination

7.15 Examinations under section 19 must take place in private, although the ASC inspector does have the right under subsection 22(1) of the ASC Law to give directions as to who may be present during the examination. Subsection 22(2) provides that the following persons are entitled to be present at the examination:

- the ASC inspector;
- a member of the ASC;
- the examinee;
- an ASC staff member approved by the Commission;
- the examinee's lawyer; and
- any other person permitted to attend by the inspector.

The importance attached to the privacy of the examination is emphasised by the fact that subsection 22(2) creates a criminal offence (punishable by a fine of \$1,000 or imprisonment for 3 months, or both) for any other person to be present at the examination.

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*Submissions*, no. 106 (Commercial Law Section, Law Institute of Victoria) para 2.

7.16 The privacy of the examination is further reinforced by the power given to the ASC inspector to require that those present at an examination maintain the confidentiality of the examination after it has closed by undertaking not to disclose the matters discussed at the examination except only for the purpose of taking legal advice. The examinee's legal adviser is often directed not to disclose the contents of the examination except for the purpose of advising the examinee. The form of one such direction was read to the Committee by a witness who had been examined under section 19:

At the very beginning, line 20 of the transcript - which is really in the first minute of the examination - states:

I order you not to discuss your evidence with any person or disclose to any person any matter concerning the investigation which will be revealed or was revealed to you in the course of the examination except your legal representatives for the purpose of taking legal advice. This order will remain in force so long as is necessary for the purpose of the investigation and until further notice. Do you understand that?

Similarly, those orders were made against my solicitor and my counsel.<sup>117</sup>

7.17 The ASC likened the examination to a trial where one witness is not allowed to speak to another about their evidence. It was argued that this rigorous protection of the privacy of the examination was necessary because:

ASC investigators have become aware of some instances where one examinee has apparently told other potential examinees of the questions asked in the examination, and in at least one case, the examinee told other witnesses how they should answer those questions.<sup>118</sup>

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<sup>117</sup> *Evidence p 98 (Mr M J P Hart).*

<sup>118</sup> *Submissions, no. 96 (ASC), para 6.18.*



**7.18** The inspector's power to give such directions as to confidentiality was said to be implied from various provisions of the ASC Law, in particular:

- section 22 (examination to take place in private); and
- paragraph 19(2)(a) (providing that the examinee shall give all reasonable assistance to the ASC).

Also, the power of the NCSC to make similar orders was upheld in *NCSC v Bankers Trust Australia Ltd* (1989) 1 ACSR 330. The inspector's power to make confidentiality orders is limited to making orders that are necessary for the purposes of the investigation and accordingly can only be for a reasonable time.<sup>119</sup> From the examinee's perspective the direction will appear open ended in duration. The ASC argued that it is usually not possible to indicate precisely the time during which the restriction will bind the examinee:

It is not only difficult but in most cases impossible to set a particular date in advance so that after that date it will no longer be necessary to sustain the order for the purposes of the investigation. That is the difficulty that one faces in an investigative environment. But the general proposition is that the order has to be reasonably necessary.<sup>120</sup>

### **Comment in the Evidence About Confidentiality**

**7.19** Once again, as with the evidence relating to the first

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<sup>119</sup> *Ibid*, para 6.19.

<sup>120</sup> *Evidence* p 105 (Mr A Procter).

protection, there was consistent criticism of the second protection. Some witnesses spoke of the climate of fear induced by the stringent secrecy:

- 'it [the confidentiality order] places in people's minds immediately a fairly distinct fear. One of the results of that fear is generally that people will not volunteer information but simply answer questions which are asked..... If their concern is to protect the integrity of their investigation so far as prospective examinees are concerned, then there is no warrant for maintaining confidentiality orders between people who have already been examined.'<sup>121</sup>
- 'The most devastating part to me was the secrecy. I could just not comprehend how due democratic process could compel people to be taken into a room, questioned, and be threatened with imprisonment for two years or fined \$10,000 or both if they revealed any part of said examination.....

'I believe this legislation is clearly written to protect the people who are compelled to give information of a private, economic and/or sensitive nature. However, at least from my experience, it was used to brow-beat me into submission. It didn't work.'<sup>122</sup>

**7.20** Other witnesses spoke of the practical disadvantages caused to the witnesses by the secrecy provision. For example, witnesses who are employed by a corporation were precluded from discussing the matter

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<sup>121</sup> *Evidence*, p 96 (Mr M J P Hart).

<sup>122</sup> *Submissions*, no. 29 (Ms Margo Bunt).

with their employer:

- '... the confidentiality direction must be directed to the protection of the interests of the investigation, and that is certainly reasonable. But, of course, in a responsible corporation where individual officers are examined, their superiors will want to know what has been going on and if their superiors are not coming under potential investigation themselves, it is right and proper, from a compliance point of view, that they should have that opportunity.<sup>123</sup>
- 'In the event that junior staff are interviewed, we would be concerned that they be provided with support. Further, responses provided by junior staff may be made in good faith but in the absence of knowing the total picture, may not present the Commission with an accurate assessment.

'We therefore suggest that during interviews with junior staff that they be accompanied by a senior person or a lawyer<sup>124</sup>.

Alternatively, an opportunity should be given for a senior [person] to review the transcript. In this way, the ASC would be protected from taking action based on false information.<sup>125</sup>

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<sup>123</sup> *Evidence pp 324-325 (Mr N Korner). See also Submissions, no. 90 (Law Council of Australia) p 14.*

<sup>124</sup> *Under section 23 of the ASC Law the examinee could be accompanied by a lawyer. However, the usual direction as to confidentiality would inhibit the lawyer from discussing the issues raised during the examination of the junior officer with other, more senior, company officials.*

<sup>125</sup> *Submissions, no. 91 (Trustee Companies Association of Australia) para 1(a).*

- '[W]hen examinations of bank employees take place, currently the bank is not entitled to be present or to receive a copy of the transcript of the examination and this is an unsatisfactory position.'<sup>126</sup>
- 'It is common during section 19 interviews for the investigator to give a direction that nothing revealed in the course of the investigation can be discussed by the interviewee or his or her legal representative, other than between those two persons for the purpose of requesting or receiving legal advice.'

'This direction means that matters discussed at the interview which may have significant ramifications for member firms (eg if the firm is being investigated by the ASC) are not able to be communicated to third parties (eg the firm's insurers) which may constitute a breach of the insurance policy and prevents the communication of information between members of the firm about an inquiry which may be of importance to the firm.'<sup>127</sup>

7.21 The Law Council suggested that the ASC was not always meeting the requirements set out in the case law that the confidentiality direction should be limited to what is reasonably necessary to protect the confidentiality of the investigation. 'It appears that the ASC may from time to time be continuing to give wide general directions, in a manner which would, for instance, inhibit an examinee from locating evidence in

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<sup>126</sup> *Submissions, no. 99 (Australian Bankers Association) p 2.*

<sup>127</sup> *Submissions, no. 113 (The Institute of Chartered Accountants in Australia) para 7.*

rebuttal of suspicions put forward in the course of the examination. In the submission of the Companies Committee, this practice should be discouraged.<sup>128</sup>

**7.22** Yet other witnesses noted that, despite the rigorous secrecy imposed upon them, information did still leak out to the market place in the form of rumour and speculation. This sort of information could be very damaging in a sensitive market:

The fact of the ASC's investigation has become known to the market and the press. We believe the allegations of market manipulation (and possibly other matters) made against NRMA are known to the market. We also believe the market has (wrongly) drawn inferences of misconduct by NRMA from the fact that the investigation has continued for so long.

The prolonged duration of the investigation, with brokers being kept aware of the fact that the investigation is continuing, has itself had an impact on the market. Investors tend to avoid a stock where dealings may invite the focus of the ASC in connection with an investigation. It is a regrettable irony that an investigation directed to market practices can itself result in an imperfect market.

In these respects, we believe the ASC's actions in this matter fall short of an appropriate standard of conduct, requiring confidentiality and sensitivity by the ASC in its dealings in such a matter.<sup>129</sup>

**7.23** The anger of some witnesses about the secrecy provision was clearly evident from their submissions:

The law prevents me from saying anything about what went on in the Court room. The ASC indicated it would put me in contempt of court if I spoke about the interviews.

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<sup>128</sup> *Submissions, no. 90 (Law Council of Australia) p 14.*

<sup>129</sup> *Submissions, no. 80 (NRMA) paras 3.7.2 - 3.7.4.*

I ask you, does this protect the public from their complete incompetence and wasteful spending of the tax payer's funds?<sup>130</sup>

## Conclusion

**7.24** The Committee was concerned at the volume of evidence critical of the ASC's approach to confidentiality and secrecy. A provision, one aim of which is said to be protective of the interests of examinees, is perceived by many as an instrument of oppression. However, the Committee is aware of the importance of the principle that secrecy is frequently essential to the protection of the integrity of an investigation. The Committee believes that its other recommendations relating to the availability of transcripts of compulsory examinations; the protection of the privilege against self-incrimination; the role of the examinee's legal representative; and the procedure at compulsory examinations will provide a redress to the present imbalance of rights between the examinee and the ASC.

## Protection (iii): The Right to Legal Representation

**7.25** As noted earlier, 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.

**7.26** Subsection 23(2) of the ASC Law empowers the ASC

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*Submissions, no. 10 (Mr B McKenzie).*

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.<sup>131</sup> These limitations on the participation of the examinee's lawyer were described by the ASC as aspects of the right of the ASC, and of other similar bodies such as the NCA with the power to conduct hearings or examinations, to regulate its own process. This right 'means that, in cases where the ASC apprehends that there may be a real prejudice through the representation of an examinee by a particular lawyer, that lawyer can be excluded.'<sup>132</sup>

**7.27** 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.<sup>133</sup> The power enables the ASC to deny representation by the particular lawyer, not to deny representation altogether.

**7.28** The ASC's objection to a particular lawyer is not necessarily based upon any suggestion of impropriety, or anticipated impropriety, on the part of the legal representative. The concern is that a lawyer may represent two or more witnesses who are each questioned on similar matters. The lawyer would develop a clear idea of the nature of the

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<sup>131</sup> *ASC v Bell (1991) 9 ACLC 1607.*

<sup>132</sup> *Evidence p 158 (Mr Procter).*

<sup>133</sup> *ASC v Bell, op. cit.*

investigation. The lawyer would be under a duty to each of the witnesses to represent them adequately. The lawyer would, however, be subject to the confidentiality provisions of the ASC Law and would be unable to disclose to the client witness whatever may have been learned at the previous hearings. The lawyer may therefore be in a position of conflict between the duty to the client and the duty of confidentiality under the ASC Law. More to the point, the ASC may fear that the lawyer may, unintentionally, reveal to the clients matters which would forewarn him or her of what to expect at the hearing.

**7.29** At Appendix 3 to this report is appended a copy of a transcript of a compulsory hearing held before the ASC. The transcript was provided to the Committee by the ASC. It has been edited by the Committee by omitting all names of individuals and corporations and other identifying details. The transcript illustrates a number of critical points raised in evidence about compulsory hearings. In particular, the transcript illustrates the exclusion of the witnesses lawyer of choice on the basis of possible prejudice to the investigation by the ASC.

**7.30** It is clear from a reading of the powers conferred on the ASC that the legislature intended its powers to be extensive and far reaching. The functions of the ASC are concerned with the investigation of serious commercial fraud, and the protection of the integrity of the securities markets in Australia. The critical nature of this function has been commented upon earlier in this report.

**7.31** The similar power of the NCA to regulate its proceedings enables the NCA to exclude a particular lawyer if the NCA concludes on



reasonable grounds and in good faith that to allow the representation either will, or may, prejudice the investigation which it is obliged to carry out pursuant to the terms of its statute.<sup>134</sup>

7.32 Equally, the right of a witness to legal representation is fundamental to civil liberties in Australia. The Committee agrees with the statement in another transcript provided by the ASC made by an ASC inspector (the same inspector involved in the examination at Appendix 3) to an unrepresented witness:

It always is of concern to me when any person appears for examination without legal representation because I wish to be absolutely sure that the people understand their rights.<sup>135</sup>

7.33 Further, the need to instruct a different lawyer for each of a number of witnesses can be both costly and inefficient:

It is, for instance, very burdensome, if a corporation is under investigation for each individual officer to be required to brief a separate lawyer on the basis that there could be some flow-over of information from one hearing to another. The rules of professional ethics .... make it fairly clear that if a legal practitioner is subject to a confidentiality direction then you must not tell the next witness what was said in the last examination.<sup>136</sup>

7.34 The Committee is of the view that due to the compulsory

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<sup>134</sup> *NCA v A, B and D* (1988) 78 ALR 707 at 716.

<sup>135</sup> *Transcript of compulsory examination provided to the Committee by the ASC. The transcript relates to an examination held on 9 October 1991 and is held by the Committee with its records.*

<sup>136</sup> *Evidence* p 324 (Mr N Korner).

nature of the section 19 examinations, 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 does, 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 previous representation of other examinees or due to prior professional involvement in the corporate structures under investigation.

7.35 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.'<sup>137</sup> The Committee nevertheless believes that due to the nature of the matters under investigation by the ASC, 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.

7.36 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. The edited transcript appearing at Appendix 3 of the report does not, on its

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<sup>137</sup>*Evidence p324 (Mr N Korner)*

face, indicate a sufficiently thorough consideration of the implications of the decision, nor a clear statement of the Commission's reasons for taking the decision.

7.37 Accordingly the Committee believes that a requirement that the ASC make an application to either the Federal Court or a State Supreme Court for exclusion of a particular lawyer will introduce into the process an important element of restraint and require the ASC to clearly articulate the reasons why a particular lawyer should be excluded. The importance of requiring the ASC to bring the application, in the Committee's mind, is that it places the onus on the ASC to prove, on the balance of probabilities, that the exclusion of a particular lawyer is justified and necessary to avoid prejudice to an investigation. The investigation should be stayed during the course of any such application and the normal rule as to costs should apply. The Committee believes that such a process would minimise the burdens placed on witnesses where their legal representative is impeached.

## Recommendation

**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.

## Protection (iv): The Entitlement to a Record of the Examination

7.38 In Chapter 5 of this report comment is made on the amount of evidence provided to the Committee about the delay in the provision of transcript of compulsory hearings before an ASC inspector. The sample edited transcript at Appendix 3 of the report indicates the difficulty which is presented to witnesses who are provided with a transcript but who are subject to onerous conditions as to confidentiality. If these conditions are either unnecessarily imposed, or are excessively burdensome, the availability of transcript ceases to be a protection and becomes another imposition on a witness who will feel threatened by the mere fact that he or she is being examined compulsorily. In addition, if

the availability of a transcript is truly to be protective of the witness, then the transcript should be provided promptly.

## Recommendation

**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.

## Protection (vi): The Claim of Legal Professional Privilege

**7.39** The question of the availability of legal professional privilege is discussed fully in Chapter 9 of this report.

## Protection (vii): The Claim of Privilege Against Self-Incrimination

**7.40** The question of the application of the privilege against self-incrimination is discussed fully in Chapter 8 of this report.

## Inquisitorial Examinations Under the Bankruptcy Act

**7.41** Because of the extent of the criticism of the ASC's examination power under section 19 of the ASC Law the Committee decided to examine another similar examination procedure under section 81 of the *Bankruptcy Act 1966* for the purposes of comparison.

7.42 An important investigative power which is available to a trustee in bankruptcy in the administration of a bankrupt estate is the power to conduct an examination of the bankrupt or of a wide range of other persons under section 81 of the *Bankruptcy Act 1966*. The examination is usually conducted before the Registrar in Bankruptcy, although it may be conducted before a magistrate and may be adjourned for further hearing before the court. (In most jurisdictions the Registrar in Bankruptcy is the District Registrar of the Federal Court of Australia, the court which exercises bankruptcy jurisdiction in most parts of Australia.) The witness is examined on oath. Application for the issue of a summons to be examined is made to the registrar by the trustee in bankruptcy. (Application may also be made by a creditor or by the Official Receiver.) The purpose of the examination, when held on the application of the trustee, is to enable the trustee 'to inform his mind, as if he were an officer of the court, so that he may know what future action to take.'<sup>138</sup>

7.43 The power to issue a summons under the section is vested in the registrar (or the court). 'Accordingly, the person summoned is not in the ordinary position of a witness called by a litigant party in order that he or she may be examined by the litigant parties before the court. He or she is, so to speak, the witness of the court, or the registrar, or the magistrate: *Re Scharrer; Ex p Tilly* (1888) 20 QBD 518 at 521-522.'<sup>139</sup> The application for the summons is made *ex parte* and, accordingly, 'vigilance will be exerted by registrars when considering the application

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<sup>138</sup> McDonald, Henry and Meek '*Australian Bankruptcy Law and Practice*', 5th edition (edited by Darvall and Fernon) para 363.

<sup>139</sup> *Ibid.*

for an examination, .... and, if issued, will set in train the whole examination process.<sup>140</sup>

**7.44** The questions to be put to the examinee are in the discretion of the registrar (or the court or magistrate), in that the examinee may be asked only those questions about his or her affairs as the registrar (or the court or magistrate) thinks appropriate<sup>141</sup>. Questions are not to be put 'unless they are bona fide for the benefit of the creditors and not for any indirect purpose: *Re Easton; Ex p Davies* (1891) 8 Mor 168 at 171.<sup>142</sup> However, an assurance by examining counsel that the questions asked are for the benefit of creditors generally ought not be disregarded.<sup>143</sup> Also the registrar will assign considerable weight to the views of the trustee 'because the trustee is conversant with the issues affecting the administration of the estate, and what information is needed.'<sup>144</sup>

**7.45** In an examination under section 81 of the Bankruptcy Act there are two important controls. The first is when the application for the issue of a summons is brought before a court or registrar. Secondly, the registrar or court must decide whether questions asked of the

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<sup>140</sup> Andrew Keay, *The Parameters of Bankruptcy Examinations*, *Australian Business Law Review*, Vol 22 (April 1994) p 75 at 77, citing as authority *Re Csidej* (1979) 39 FLR 387 at 392.

<sup>141</sup> *Bankruptcy Act 1966* subsection 81(10).

<sup>142</sup> Keay, *op cit.* n.140.

<sup>143</sup> Keay, *op cit.* n.140, citing *Re H J Price (No 3)* (1948) 14 ABC 137 at 140.

<sup>144</sup> Andrew Keay, *op.cit.* n.140 , at 77, citing as authority a number of cases including *Re Csidej* (1979) 39 FLR 387 at 392-393 and *Re Rothwells Ltd (No 2)* (1989) 15 ACLR 168 at 186.

examinee are permissible, during the course of the examination.<sup>145</sup>

## Checks on the Misuse of a Bankruptcy Examination

7.46 The courts have established a number of parameters for a section 81 examination which operate to prevent any abuse of the examination procedure. These parameters are examined in the article by Andrew Keay cited earlier<sup>146</sup>. In summary, the parameters, or controls, are as follows:

- *Questions must be relevant.*

The registrar presiding at the examination will be concerned to ensure that the questions put to the examinee are within the permissible scope of section 81, ie the questions are relevant to the affairs of the bankrupt. Keay points out that Toohey J in *Hamilton v Oades* (1989) 166 CLR 486 at 515-516 stated that the asking of irrelevant questions was an abuse of process.

- *The applicant for the examination must not have an improper object.*

Both at the time of the issue of the summons and during the examination the registrar presiding at the examination must ensure that there is no improper object being served by the examination process. For example, where a bankrupt had previously entered into an arrangement with his creditors under Part X of the Bankruptcy Act an examination under section 81 of the trustee of

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<sup>145</sup> Andrew Keay, *op.cit.* n.140 at p77.

<sup>146</sup> Keay, *op.cit.* n.140, at 79-85.



the earlier Deed of Arrangement (with a view to cancelling the trustee's registration) the court held that the evidence was inadmissible against the trustee because the examination was not held for an improper purpose and was an abuse of process.<sup>147</sup>

- *The summons must not be vexatious or oppressive.*

Keay comments that 'the courts have been emphatic that vigilance must be shown in ensuring that trustees do not use the power to examine vexatiously or oppressively.'<sup>148</sup> Some of the actions which may constitute vexatious or oppressive conduct are:

- that the summons is expressed in terms which are too wide<sup>149</sup>;
- that the summons amounts to a 'fishing expedition' (ie where an investigation begins without any clear suspicions of particular misconduct and the examination is held to see 'what may emerge')<sup>150</sup>; and
- that litigation involving the examinee and the trustee is pending or contemplated and it would be unfair to compel

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<sup>147</sup> *Re Alafaci* (1976) 9 ALR 262.

<sup>148</sup> *Keay, op cit, n.140 at 81.*

<sup>149</sup> *Re Andrews* (1958) 18 ABC 181.

<sup>150</sup> *Re Aitken; Ex parte Trans Tasman Timbers Pty Ltd* (1987) 17 FCR 71.

the examinee to disclose his or her case to the trustee<sup>151</sup>.

## Conclusions

**7.47** 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.

**7.48** 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. This expectation should be met by the ASC no less than the Australian Federal Police.

**7.49** Unless greater protection is provided for examinees it is possible that the 'Star Chamber' perception will create a climate of fear that is inimical to the willing and comprehensive supply of information,

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*Hamilton v Oades* (1989) 166 CLR 486 at 495-496.

which is the central purpose of the examination. 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.

**7.50** This purpose could be achieved by introducing an external element into the issue of the summons for Section 19 examinations. At present the ASC may undertake an investigation and exercise its examination powers under s19 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.

**7.51** The Committee believes that it is appropriate that the issue of section 19 notices not be entirely within the discretion of the ASC and that some independence and objectivity be brought into the process.

**7.52** A number of the submissions received by the Committee argued that there should be greater particularity in Section 19 notices. The Australian Institute of Company Directors, for example, argued that the present legal requirements for section 19 notices allows the ASC to conduct "trial by ambush" and do not allow the examinee any way in which to determine the relevance of questions put during the examination<sup>152</sup>.

**7.53** The Law Council, in its submission, also made the point that

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<sup>152</sup> *Submission no.98 (Mr Mackay- Australian Institute of Company Directors).*

examinees were at a disadvantage in the identification of the matters under investigation and accordingly unable to exercise their rights. The Law Council stated that clear identification of the matters under investigation, at least at the time of the interview:

...enables the person being examined to make proper use of the right to legal representation under section 23 of the ASC Law. In the absence of provision of this information the right of legal representation is devalued, because the relevance of the question to the matter under investigation cannot be tested, and if necessary determined, for the purpose of subsection 21(3) of the ASC Law.<sup>153</sup>

7.54 The Law Council further noted that the imprecision with which examinees are informed of the nature of the investigation against them creates difficulties when other powers of the ASC are taken into account. Knowledge of the matters under investigation become very important in consideration of the choice of a legal representative as it has been suggested that the ASC has sought to exclude legal representatives on the basis of a conflict of interest.<sup>154</sup>

7.55 The Committee therefore believes that the introduction of an external element and the attendant requirement that the ASC coherently set out the ground for its reasonable suspicion of a contravention of the corporations law would add discipline, transparency and focus to the investigatory process. Accordingly it considers that summonses for examinations under subsection 19(1) of the ASC Law be issued by the

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<sup>153</sup> *Submission no.90 (Law Council of Australia) p 11.*

<sup>154</sup> *Ibid at p.12.*

District Registrar of the Federal Court. The ASC would then 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.

**7.56** 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.

**7.57** 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.

**7.58** In relation to the ASC:

- The examination should only be conducted by an officer who has 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 to provide 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.