

APPENDIX 3

**EXAMINATION UNDER PART 3 DIVISION 2 OF
THE AUSTRALIAN SECURITIES COMMISSION
ACT 1989 IN RELATION TO [NAME OF
CORPORATION]**

TRANSCRIPT OF PROCEEDINGS

WEDNESDAY 2 OCTOBER 1991

MR A [Name of ASC Inspector]: It is 10.15 am on Wednesday, 2 October 1991 and before me I have Mrs B [name of witness] who is represented legally by Mr C [name of solicitor], solicitor. Mrs B, pursuant to section 24(2)(a) of the Australian Securities Commission Law, I require you to read the transcript of the examination that I have handed to you this morning. When you have completed reading it, I will require you to sign each page of that transcript.

MRS B: I would like to know why I can't take this home.

MR A: I have given my direction in that matter, Mrs B.

MRS B: Well, I would like to ask why when I was here with the other gentleman who stated quite clearly that if I put it in writing that I could have a copy of that.

MR A: Your request and your comments are noted on the record and will be responded to in due course and the provisions of the Australian Securities Commission Law will be obeyed. However, I require you to read the transcript that has been given to you now and, upon completion of reading it I will require you to sign the transcript.

MRS B: Well, I feel right now because of the - the situation that I will be reading this without taking it in as clearly as I could if I had been given a copy of it prior to coming here, which I was under the impression from the previous hearing that I would get. And now I'm then required to initial something that I've read that I may not have clearly understood as I am reading it, and that I'm signing this under duress? Have I the right to put down that I am signing it under duress?

MR A: My requirement is for you to read it and to sign it. You can take advice from your solicitor with regard to any other matters that you wish to make, but that is my direction.

MRS B: I'd like my solicitor to move closer to me so I can speak to him.

MR A: If you wish to consult with your solicitor, I would allow that to occur.

MRS B: But I have to get up each time and go over.

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MR A: Consultation will take place once the examination commences for today by way of adjournment. So my requirement to you is for you to read the transcript I've handed to you or I shall arrange to have it read to you, and then require you to sign each page of it.

MRS B: I would like to speak to my solicitor now.

MR A: Certainly. I'll adjourn the matter whilst you discuss your rights with - - -

MR C: Just before we adjourn, Mr A. If I can just get back to remarks you made a few moments ago in relation to Mrs B's request for a copy of the transcript. As I read section 24(2)(b), which is the one that I understand is applicable, it reads that:

The 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.

As I read that, there is no discretion as to whether you supply it or not. The position is, as I understand it, Mrs B has made a request in writing for that - a copy of that - that transcript which she is now being handed is - I can't see any basis upon which you can decline to give her a copy of that statement - of that transcript.

MR A: From information in my possession, being the nature of the request made by numerous examinees in identical form to the address listed as the postal address for a company under investigation, I have formed the belief that to release the transcript prior to the completion of the examination of Mrs B may prejudice this investigation.

MR C: Mr A, the act doesn't say that though. The act says that, "You shall comply". You can put whatever conditions you want on it - on the supply, such as that she doesn't discuss it with any else.

MR A: When the examination is completed, but the examination is continuing.

MR C: But the act doesn't say that, Mr A.

MR A: I note your comments, Mr C. I am making my directions today with regard to Mrs B, requiring her to read the transcript that's put in front of her and then I will require her to sign it. The other matters that you have raised have been placed on the record.

MR C: That is so, Mr A; they are on the record.

MR A: I would note at this stage that you - Mr C and Mrs B are perusing the transcript. I am not prepared to allow that to occur, Mr C, at this stage, for you to peruse the transcript also. Mrs B can peruse the transcript or consult with you in respect of any matters but the transcript itself remains private. If she wishes to consult with you in respect of her rights, then I will make for the appropriate directions to allow that to occur, but the transcript itself is for the examinee to read.

MR C: Mr A, I hear what you're saying. Am I to understand that you are now giving a formal direction that I'm not to peruse any part of that - of that transcript?

MR A: For the purposes of the direction of having Mrs B read the transcript or consult with you in respect to her rights, I am prepared to allow her to consult with you with respect to her rights, but I am not prepared to allow you to read the transcript at this stage.

MRS B: Well. if you won't let me, him read it to me, then what does:

Mr [name of previous lawyer], may I again caution you that this is a private hearing, pursuant to section 19(2) of the Australian Securities Commission Act, and that requires that you do not discuss any of the questions asked, or answers given, or exhibits given or provided until advised otherwise by the commission. But I do have the right -

Oh sorry, I missed a bit, excuse me on this:

The copy of the transcript is made available to you on the condition that you do not make it available to any other person other than your legal adviser, and that you do not communicate the contents of the examination in any manner whatsoever to any other person. other than your legal adviser,

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until advised otherwise by the commission.

So are you saying that otherwise by the commission is now?

MR A: The otherwise by the commission is that Mr C is a different legal adviser to the person you had at the time that inspection or examination was conducted. And there are a number of matters that are of concern to me in maintaining the privacy of this investigation, that are of extreme concern to me and I am not prepared to allow Mr C, at this point, to read the transcript. I require you to read the transcript. If you require an advice as to whether you are required to read the transcript or to sign it, then you can consult with Mr C. But at this stage, my direction is for you to read the transcript given to you or I will have Mr [name of ASC officer] read it to you in private.

MRS B: Well then, I want Mr [name of previous lawyer] with me. I feel I am totally - I feel I am on trial here for something I didn't do. You're going to try and make me say that I did something that I didn't do. I don't understand most of what's going on, and if that's against the law then fine. I'm guilty. But that does not make me - because I'm maybe stupid - does not make me one - the first in line in this country. And I don't want to read that without legal counsel.

MR A: I - - -

MRS B: Do I not have that right?

MR A: I object to your comment that I would try to make you say something or - that is untrue. There is no foundation for such a comment whatsoever.

MRS B: Well, it feels like that to me. That is the message I'm getting here.

MR A: The act requires that where a record is made under subsection 1, in writing, or is reduced to writing that you are required to read it or have it read to you. And the inspector may require you to sign it. Now I'm directing that you do read it, or alternatively if that is unsatisfactory that I will arrange for it to be read to you, and then I will require you to sign it.

MRS B: Without Mr [name of previous lawyer]; is that correct?

MR A: For the purposes of reading it - - -

MRS B: And signing it?

MR A: And signing it, yes.

MRS B: I don't sign anything unless I understand it. And Mr [name of previous lawyer] - you won't allow Mr [name of previous lawyer] to be here.

MR A: What is before you is a transcript made by Auscript of the examination that was conducted of you. That is all that is before you. And that is all that I'm asking you to read.

MRS B: I don't mind reading it but I'm not signing it without Mr [name of previous lawyer]. Unless I can put on there on each page, signed under duress, I want Mr [name of previous lawyer] here.

MR A: Your comments are recorded. My direction is for you to read the transcript.

MRS B: Okay I'll read it but I won't sign it, unless I can put on there signed under duress. Now do I go to jail for that?

MR C: Mr A, I might be able to short circuit this whole thing if we just adjourn for two minutes so I can speak to my client. In accordance with your direction; the transcript will remain on the desk in front of - at that desk. If we just adjourn for a couple of moments.

MR A: Yes certainly, Mr C. It's now 10.30 am and stand adjourned.

SHORT ADJOURNMENT

MR A: It's now 10.32 am and Mrs B and Mr C have now re-entered the examination room

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MR C: Perhaps the record should be noted, Mr A, that it's quite obvious that Mrs B is quite distressed - - -

MR A: I - - -

MR C: - - - quite upset and I think the record, from what you said, and how she said it would probably show that anyway.

MR A: I understand the concern and it is noted, and it is recorded - the concern of Mrs B. All I can do is acknowledge that, but I request that - direct that she read the transcript, and as I have explained to her, it is only the transcript that I'm asking her to read nothing further at the moment.

MR C: Just a housekeeping matter, Mr A. This is a private hearing. I've just noticed that the door is open.

MR A: Yes. Well, thank you, Mr C. In fact, I wasn't actually intending to get under way. I hadn't anticipated this occurring.

I will adjourn for a few moments, whilst I leave Mrs B the opportunity to read the transcript.

SHORT ADJOURNMENT

MR A: It is now 11.23 am on Wednesday, 2 October 1991 and the examination of Mrs B by myself, [name of ASC Inspector], is to commence. I would note that there has been some delay by myself as a result of an urgent attendance, and I apologise for that delay.

The Australian Securities Commission has decided to conduct examinations of various individuals pursuant to its statutory powers and functions in performing its investigative functions under part 3 of the Australian Securities Commission Act of 1989 in respect of the contravention or contraventions which the Commission has reason to suspect may have been committed in respect of a national scheme law, or of a relevant previous law of this jurisdiction.

I note that presently before me for examination is Mrs B. Without limiting the extent of the statutory powers, the examination will be in relation to the affairs of [name of corporations], associated corporations and persons, or corporations having dealings with any of the foregoing. The Australian Securities Commission has delegated the powers and functions pursuant to division 2 and part 3 of the ASC law to myself, [name of ASC Inspector], to exercise those powers and functions so conferred and, more specifically, to act as an inspector at this examination.

Now today I, [name of ASC Inspector], will be commencing an examination of Mrs B, pursuant to section 19(2)(b) of the ASC law. The examination will commence at 11.25 am on Wednesday 2 October 1991. The proceedings will be informal, pursuant to section 22 of the ASC law. The examination will take place in private. The venue for the examination will be [address of ASC Regional Office].

I direct that the examination be recorded by a tape recording device, and for the purpose of operating this device, I direct that personnel from Auscript, the Australian Reporting Service, attend the hearing and have custody of the tapes. I direct that the following persons from the Australian Securities Commission may be present at the hearing, namely, [name of ASC officer]. I further direct that clerical staff from the Australian Securities Commission may also be present. Persons who are required to appear for examination as witnesses, on oath, are entitled to be represented at the examination by virtue of section 23(1) of the ASC law.

I will require examinees to give evidence at the examination, on oath, or affirmation, as provided in section 21 of the ASC law. A written direction has been prepared to provide information to examinees pertaining to their rights of an examination of this nature. This direction entitled, 'Notice of Relevant Statutory Provisions', contains information as to rights and obligations of examinees under section 23 and section 68 of the ASC law. A copy of that direction is at the foot of the notice requiring you to attend for this examination.

I note that the examination of Mrs B was commenced before Inspector [name of previous ASC Inspector] on 30 July 1991 in relation to the same investigation. This is a continuing examination conducted by myself,

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[name of ASC Inspector].

Mrs B, for the record, could you state your full name, your address, occupation and date of birth.

MRS B: [Name of witness]. I live at [address of witness] and I work for [name of employer].

MR A: And your date of birth?

MRS B: [deleted].

MR A: Did you receive a notice requiring you to attend before me for examination?

MRS B: Yes.

MR A: And have you read that notice?

MRS B: Last week I read it, yes.

MR A: I draw your attention to the foot of the notice which provides notice of relevant statutory provisions. Have you read those statutory provisions?

MRS B: I can't remember.

MR A: I note, for the record, that Mr C is present representing Mrs B. Mr C, could you state your name and announce your appearance, please.

MR C: Yes, Mr A. [Name of lawyer], and I'm a solicitor with the firm of [name of firm], Solicitors.

MR A: Thank you.

I draw your attention, Mrs B, to the statutory provisions on the notice and just clarify them. In Number 1- - -

MR C: Mr A, could I interrupt there? Have you got a spare copy of that available? Mrs B hasn't her copy here and I haven't a copy either at the

moment. In your absence I did ask Mr [name of ASC officer] if there was one available.

MR A: If you wait just a few moments, Mr C, I'll get one. There is one on the file, which was a photocopy of the one that was served.

MR C: That - that would be sufficient. Thank you.

MR A: I'll have Mr [name of ASC officer] go and get that now.

MR C: Thank you very much.

MR A: And perhaps if I just continue on - - -

MR C: By all means.

MR A: - - - with the formalities.

MR C: Yes. Thank you.

MR A: Section 23 of the ASC law entitles you to legal representation during an examination. Section 68 of the ASC law, in summary, entitles you to claim a privilege against self incrimination. It is my practice, where questions are asked of you, and you form the belief that your answers may incriminate you in any way, then you may claim privilege before answering those questions. But you must answer the question after claiming the privilege.

I want to emphasise to you that privilege is yours to claim and cannot be claimed by Mr C on your behalf, but if you do have any doubts as to the position, then you should indicate to me that you would like to consult Mr C to clarify the position, so that the matter can be determined between yourself and your counsel in private. The practice is that you cannot claim a blanket privilege. If you wish to claim privilege, you must do so before each question - before each answer. The word privilege is sufficient before answering a question and I will deem that to be a privilege pursuant to section 68 of the legislation. Do you understand?

MRS B: I guess I'll be claiming that. Yes, thank you.

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MR C: Mr A, perhaps in order to speed things up, a formula has been used on previous occasions - I'm not sure whether it's been used before you, or before the Australian Securities Commission. Instead of Mrs B, in this particular case, using a number of words to claim privilege, if she just used the word privilege before each answer, can we take that to read that she has claimed the privilege, you have over-ruled that privilege and are directing her, in accordance with your powers, to answer the question.

Mr A: That is what I intended when I described to her the, the - my requirement is that any answer, prefaced by the word privilege will - I will deem to be a claim for privilege and attract the benefits and entitlements under section 68 of the legislation.

MR C: Thank you. If we use that short form sure will speed things up.

MR A: Now I intend to raise some further matters in a moment, but initially are there any questions, Mrs B, that you have before I have you sworn or affirmed?

MRS B: I'd like to ask why I'm here, what I'm being charged with? I'm given - to be giving evidence and I don't know what it's against or for.

MR A: You are here as a result of a statutory notice served on you, to assist me in an investigation which is being conducted in private. You are required, by law, to answer my questions that are relevant to the investigation that I am conducting.

MRS B: Against - what is the investigation against? Is it against [name of company]? Is it against [name of company]? Is it against all of them? Is it against us as individuals? Is it against what we're doing or what we're supposed to be doing?

MR A: The very nature of investigation at this stage, Mrs B, is such that I'm not prepared to disclose to you anything further than providing the statutory notice that it's in relation to the affairs of [name of companies], associated corporations and persons or corporations having dealings with any of the foregoing.

MRS B: So I'm not allowed to know what it is that we're supposed to have done? I don't know what the charge is.

MR A: You're on no charge at all, Mrs B. You are here pursuant to a statutory notice served upon you to assist in the investigation, and to answer questions put to you by myself, who is a delegated, authorised person to act as an inspector by the Australian Securities Commission in relation to that investigation. The very nature of an investigation is to not disclose the information available to the investigator before the proper time.

MRS B: I just want to know how many times are you permitted under your rules, as many times as you want, to get me down here to assist in this investigation of which I don't know what it's about, to miss days work. That's all under the act; that I have to come? As many times as you want me?

MR A: The very nature of an investigation of this nature is that it is a continuing investigation, and I'm unable to advise you further, as to the course or nature that the investigation will take. However I am aware and conscious of the points that you make. Any administrative agency does inevitably interfere with the rights of individuals, and there are certain powers bestowed upon me under the legislation. And in fact, the nature of the investigation is such that I am unable to inform you further as to the course that this will take.

MRS B: I'd also like to ask another question if I could.

MR A- Yes

MRS B: The document that I was to sign, I would like to state that I'd like that under privilege.

MR A: That's noted.

MR C: I don't know Mr A, whether the actual direction was given previously before we adjourned. It certainly hasn't been raised since you've come back in, in relation to the signing of the document.

MR A: Well the document's signed and I gave that direction before I - before I left. Mrs B, do you require to be sworn or to swear an affirmation?

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MRS B: An affirmation.

[NAME OF WITNESS], affirmed:

MR A: Mrs B, as you were informed at your earlier examination, I wish to reaffirm the examinations conducted of you are in private, and I intend to make directions to try to ensure the security and maintain the privacy of the examination until the investigation is completed. I make a direction that you do not discuss either the questions asked or the answers given or any exhibits provided to you with any other person, other than your legal adviser, until this investigation is completed. Do you understand?--Privilege. I do.

There are some preliminary matters I wish to raise, one of which was mentioned by yourself this morning. You indicated to me before the formal examination commenced that you had written to the commission requesting a transcript of your examination before Mr [name of previous ASC Inspector]. Is that correct?--Privilege. As far as I can remember, that's correct.

Did you prepare that letter?--Privilege. I asked for it to be typed.

Who did you ask?--Privilege. [D - name of person], who was the secretary at [name of company].

That's [name of person] you are referring to?--Privilege. I believe that was her last name.

Could you tell me whether these photocopied documents which - one is dated 30 July 1991 and the other is dated 15 August 1991 - are the documents you signed?--Privilege. That is my signature, yes.

For what purpose were you asking that a copy of the transcript be forwarded to Post Office Box [number]?--I don't understand the question. For what purpose?

Do you own the rights to Post Office Box [number]?--Privilege. No.

Who does have the rights to Post Office Box [number]?--Privilege. I assume, and I say assume, [name of company].

And also [name of another company]?--Privilege. I don't know. I presume - I don't know, I don't know who owns it. It was [name of company] that D works for - [name of company], so I presumed it was toinaudible.....

Weren't you aware that this was a private examination? For what purpose would a copy of your transcript be forwarded to the parties under investigation?--Because it could be - privilege. Because it could be marked private and confidential.

Why would documents which are transcripts of proceedings in a private examination be forwarded to a post office box which is the registered post office box of a number of companies under investigation - - -?--Privilege. Why not?

- - - rather than be forwarded to your personal address?--Privilege. Why not?

MR C: Perhaps the record should be noted, Mr A, that in that letter in 30 July, Mrs B has requested a copy of the transcript be sent to her at that address, not to anyone else.

THE WITNESS: Can I ask - is it against the law to have it sent to a public - to a private company's public post office box, Mr A?

MR A: Can you offer any explanation to me why identical letters in the identical wording which are apparently typed on the same typewriter have been received by numerous examinees and then subsequently signed?--Privilege. No, I cannot answer that.

Mr C, can I just ask you to clarify. You are a partner in the firm [name of firm]?

MR C: That is so, Mr A?

MR A: And [name of previous lawyer] is a partner in the firm [name of firm]. Is that correct?

MR C: Yes, he is.

MR A: As you are aware, it is my view that -I have information in my

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possession that a member of the firm [name of firm] may have contravened the law and national - - -

MR C: I'm not aware of that. Mr A.

MR A: - - - and, in particular, laws the subject of this investigation. And I am seeking to have my powers in that regard clarified. I believe that to continue to examine Mrs B today, in your presence, Mr C, may prejudice the investigation, because of the information that I have in my possession and the beliefs that I have formed. But, as it is uncertain as to what my powers are, the matter is before the Full Federal Court in Sydney on Friday for determination and I propose to adjourn the further hearing - further examination of Mrs B until a date to be fixed in order that my powers as an inspector can be clarified.

I am conscious of the comments made by Mrs B with respect to having to take time off work and appear in an examination during an investigation, but I am also aware of my statutory duties. As a result of my concerns, from information in my possession, I believe that it would be inappropriate for me to make any directions that may impinge upon the rights of Mrs B if the appropriate tribunals determine that those rights exist. However, if the tribunals determine that I have certain powers, then I will exercise those powers as I believe should be done in good faith in the conduct of this investigation. So, in the circumstances, I intend to now adjourn your further examination, Mrs B, to a date to be fixed. I will endeavour to advise you of that date and give you sufficient notice so that you are not unduly inconvenienced.

MR C: Mr A, just before you do adjourn, could I just make this comment: I am not aware of any suggestion or any allegation that either Mr [name of previous lawyer] or any other member of the firm of [name of firm] may have committed any breach of any law and has not committed or has committed any breach in relation to this investigation. I believe you prefaced your remarks by saying, "As, Mr C, you are aware". I am not - I am not aware.

MR A: I accept what you are saying, Mr C. I - I note those comments; they are recorded and I accept what you are saying. I don't dispute that you - you hold a different view from my belief that there would have been communication to you. All I can - correct that comment by saying,

in view of the fact that I hold a belief in good faith and on reasonable grounds that a suspicion exists that a member of the firm [name of firm] may have breached a national scheme law or law of the Commonwealth of Australia. I believe it would be inappropriate to proceed with this examination today because the previous directions I have made have been challenged and upheld at first instance in the Federal Court and are the subject of appeal at the moment. And I do not wish to jeopardise either Mrs B's right or my rights as an inspector until that is clarified.

MR C: That course I accept as being appropriate.

MR A: I will - I will adjourn until a date to be fixed and whom I notify will depend upon the outcome of that. But I will definitely be notifying you, Mrs B, and trying to give you as much notice as is reasonable in the conduct of this investigation?--I'd like to ask something else, please. I'd like to know, since you have objected to the fact that the post office box is - that I might not get it personally, a private and confidential thing, which you seem to indicate might- can't trust the company that it would be sent to with my name on it, to open it. I would like to request a copy be handed to me now.

Your request is noted. I do not intend to provide a copy of your transcript to you at this time in accordance with that request?--Can you also ask - answer me another question then? Could you please tell me why Mr [name of previous ASC Inspector] said that I could have a copy if I can't?

I don't propose to take the matter any further at this stage. Your examination is adjourned to a date to be fixed.

THE WITNESS WITHDREW

AT 11.54 AM THE MATTER WAS ADJOURNED INDEFINITELY