

APPENDIX 4

**ASC SUBMISSION TO THE ATTORNEY-GENERAL
LEGAL PROFESSIONAL PRIVILEGE
IN ASC INVESTIGATIONS**

Legal Professional Privilege

23 FEBRUARY 1993

ASC SUBMISSION TO ATTORNEY-GENERAL

1 The decision of the High Court in *Corporate Affairs Commission v Yuill* (1991) 65 ALJR 500 has generated a vigorous debate among lawyers about the role of legal professional privilege in the exercise of the powers of the Australian Securities Commission (ASC).

2 The ASC believes that the significance of *Yuill's* case must be measured in the context of the public interest in the timely and efficient administration, investigation and enforcement of the Corporations Law (Law) and the ASC Law and the policy behind the general law on legal professional privilege. When considered in this context, *Yuill's* case does not represent either the wholesale or unjustified abrogation of legal professional privilege.

3 For the reasons set out below, the ASC is of the view that there should be no amendment to the law as it currently stands to modify the operation of *Yuill's* case, as applied to the ASC Law in the recent decision of French J in *ASC v Dalleagles* (1992) 10 ACLC 1104. In summary, these reasons are:

- (a) the continued application of *Yuill's* case is required for efficient and cost effective investigations and timely enforcement action. Substantial and ambit claims of legal professional privilege can delay investigations of major cases for several months or even years;
- (b) access to material ordinarily subject to legal professional privilege can have the effect of exculpating subjects of investigations and avoiding costly and time consuming tangents;
- (c) lawyers are not being put in the position of informers given that they need only identify a privileged communication and the name of the client (s69 ASC Law);
- (d) with the unique and complex nature of many of the transactions being investigated, access to legal communications is vital to obtain a proper understanding of the transactions and any liability of those involved. ASC investigators are frequently met with the explanation that witnesses "acted on legal advice", and unless the

ASC has the ability to review that advice, it is often impossible to take the investigation further. As well, the complexity of the transactions means legal advice is necessarily sought in most transactions, avoiding the concern that any abrogation of the privilege would mean that clients would avoid lawyers;

- (e) the privilege is not totally abrogated:
 - (i) oral evidence taken by way of examination which is properly the subject of a claim of legal professional privilege cannot be admitted in evidence (s76(1)(d) ASC Law); and
 - (ii) oral evidence which is self incriminatory cannot be used in criminal proceedings or proceedings for the imposition of a penalty (other than proceedings for false statements) (s68(3) and 76(1)(a) ASC Law);
- (f) an ability to make claims of legal professional privilege would result in:
 - (i) undue delays in investigation and reluctance by prosecuting authorities to prosecute, even when the documents in respect of which the claim is made are not useful, since the investigator and prosecutor cannot know that until they see the document;
 - (ii) delays which would permit potential defendants to leave the jurisdiction or destroy documents;
 - (iii) undermining the ability to take effective interim or preservative action;
 - (iv) ambit claims of privilege where a significant body of material is not properly the subject of the claim are included in the claim; and
 - (v) significant expense and delays in pursuing unnecessary avenues of investigation and in litigating claims for the privilege.

BACKGROUND

What is legal professional privilege?

4 Legal professional privilege protects from disclosure communications between a client and legal adviser, if made for the sole purpose of obtaining legal advice. The privilege also protects from disclosure communications between third parties and the lawyer or the client if made in contemplation of, or for use in, existing or anticipated litigation.

5 The privilege is that of the client and not of the lawyer or any third party. The lawyer can only claim the privilege on behalf of the client.

Yuill's case

6 In *Yuill's* case, Brian Yuill had refused to comply with a notice to produce documents. The notice was issued in the course of a special investigation of Spedley Securities Ltd. The documents had been unsuccessfully sought from the solicitors for Mr Yuill. The solicitors claimed legal professional privilege under s308 of the Companies (NSW) Code. The solicitors' claim was not in dispute.

7 Proceedings were brought by the Corporate Affairs Commission seeking a declaration that documents produced in sealed envelopes pursuant to a notice issued under s295(1) of the Companies (NSW) Code were not protected by legal professional privilege.

8 The majority of the High Court (Brennan J, Toohey J, agreeing with Dawson J) held that legal professional privilege was not a "reasonable excuse" under s296(2) of the Companies Code for non-compliance with the order to produce the documents.

9 The judgments of the majority rested on four interrelated grounds for implying the abrogation of legal professional privilege:

- (a) the state of the law at the time the Companies Code was enacted;
- (b) the general overall purpose or objective of the provisions;
- (c) the significance of the statutory right of the legal practitioner to claim the privilege; and
- (d) the significance of the provision excluding the admission in evidence of certain privileged information gathered at an investigation.

ASC investigations

10 By the ASC Act, the ASC is directed to strive, in performing its functions and exercising its powers, to maintain the confidence of investors in Australian securities and futures markets. It is to do this by ensuring adequate protection for such investors, and to take whatever action it can take, and is necessary, in order to enforce and give effect to national scheme laws (s1(2) ASC Law).

11 If ASC investigations and enforcement actions are to have any regulatory effect, they must be timely and decisive. This is acknowledged in the Attorney-General's directions under s12 of the ASC Act and s8 of the Director of Public Prosecutions Act which state that the ASC and the

DPP should collaborate to the fullest extent possible to expedite and facilitate the completion of the investigation and prosecution of any serious offence the prosecution of which is supported by evidence gathered during the investigation (see MEMO 105).

12 The ASC is empowered to make such investigation as it thinks expedient for the due administration of a national scheme law. The ASC's investigation power arises where the ASC has reason to suspect that there may have been a contravention of a national scheme law or a contravention of a Commonwealth, State or Territory law concerning the management or affairs of a body corporate or involving fraud or dishonesty in relation to a body corporate, securities or futures contracts (s13 ASC Law). In addition, if in the Attorney-General's opinion it is in the public interest, he or she may direct the ASC to investigate a particular matter (s14 ASC Law).

13 When a matter properly the concern of the ASC is brought to its attention for investigation, a preliminary assessment is made of the available material. Sometimes preliminary enquiries are conducted. On the basis of that information, a decision is taken whether or not to commence an investigation.

14 If an investigation is commenced, an investigation plan is prepared, having regards to the means available to the ASC to gather information and evidence. These steps must be co-ordinated to maximise the effectiveness and cost efficiency of the investigation.

15 The ASC wishes investigations to be resolved as efficiently as possible to ensure that the necessary regulatory effect is achieved by the public seeing that an action in contravention of the Law is followed by timely and effective enforcement action. The ASC also wants to undertake efficient investigations in the interest of proper management of its resources and limiting the cost of investigations.

16 From its experience, the ASC considers that investigations must be completed expeditiously for the following reasons:

- (a) the more timely and effective the enforcement action, the greater is the general disposition to comply;
- (b) public support for fair and balanced laws is dependent on timely and efficient law enforcement; and
- (c) investigations and prosecutions which are protracted by what are seen to be tactical ploys of dubious merit lead to demands for more intrusive regulation and higher penalties.

17 Depending on the results of an investigation enforcement options available to the ASC include:

- (a) criminal prosecution;
- (b) civil proceedings (preservative or recovery actions);
- (c) disciplinary proceedings; and
- (d) release of written records of examination to litigants under s25 of the ASC Law.

ASC'S POWERS OF INQUIRY AND INVESTIGATION

Notices to produce documents

18 The ASC may issue notices for the production of documents in the course of preliminary inquiries or a formal investigation.

19 Section 28 of the ASC Law provides that the ASC may issue notices for the production of documents:

- “(a) for the purposes of the performance or exercise of any of the Commission’s functions and powers under a national scheme law of this jurisdiction; or
- (b) for the purposes of ensuring compliance with a national scheme law of this jurisdiction; or
- (c) in relation to:
 - (i) an alleged or suspected contravention of a national scheme law of this jurisdiction;
 - (ii) an alleged or suspected contravention of a law of this jurisdiction, being a law that concerns the management or affairs of a body corporate, or involves fraud or dishonesty and relates to a body corporate, securities or futures contracts; or
- (d) for the purposes of an investigation under Division 1.”

Generally, notices for production of documents for preliminary investigations are issued pursuant to s28(b) or 28(c), and notices for formally constituted investigations (s13 or 14 investigations) are issued pursuant to s28(d).

20 The ability to issue notices for production of documents is fundamental to the due function of the ASC. The ASC’s preliminary investigations would not be possible unless the ASC had power to inspect and obtain documents in a cost effective and timely manner. The removal of

the derivative use immunity from s68(3) of the ASC Law has removed difficulties with the prompt examination of witnesses. However, as a matter of investigative method, witnesses are generally not examined until the relevant documents have been obtained under notice so that investigators have a basis for the detailed questioning of witnesses.

21 In limited circumstances, where the ASC has reason to suspect that particular documents which have not been produced in answer to a notice are on particular premises, the ASC may apply to a magistrate for a warrant to be issued, authorising the AFP to enter and search the premises and take possession of the books (s35 and 36 ASC Law).

22 Where the ASC has obtained books under notice, or under a s36 warrant, the ASC may require the person who produced or who was party to the compilation of books to explain any matter to which the books relate (s37(9)).

23 If the ASC is satisfied that a person has, without reasonable excuse, failed to comply with a requirement to produce books or give information, it may certify the failure to the Court and the Court may inquire into the case and order compliance (s70 ASC Law). Further, it is an offence for an examinee to fail to comply with a requirement to produce books or give information without a reasonable excuse (s63 ASC Law).

Lawyers need not provide privileged documents

24 If a notice to produce is issued to a person's lawyer, in the absence of the client's consent, he or she need not disclose privileged communication but must disclose the name and address of the client and give sufficient particulars to identify any privileged communication, (s69 ASC Law). Section 69 of the ASC Law applies to the operation of the powers in s30, 31, 32, 33, 36 and 37(9).

Examinations

25 If the ASC has commenced a formal investigation, it may by written notice require a person to attend at a private examination and give evidence on oath (s19 ASC Law). Written records may be prepared of the examination, and the examinee may be required to sign the record (s24 ASC Law).

Certain statements not admissible

26 Subject to certain exceptions, statements made at examinations are admissible in evidence against the examinee in later proceedings (s76 ASC Law).

Statements are not admissible:

- (a) if the person could have otherwise claimed legal professional privilege in the proceedings and the person objects to the admission of the statement (s76(1)(d) ASC Law); or
- (b) in criminal proceedings, or proceedings for the imposition of a penalty (other than proceedings for false statements), if the person claimed before making the statement, that the statement might be self-incriminating or make him or liable to a penalty (s76(1)(a) ASC Law).

27 Sections 63 and 70 of the ASC Law also apply where a person refuses to answer questions in an examination.

Lawyers need not provide privileged material on a s19 examination

28 As in the case of notices to produce, if the examinee is a lawyer, in the absence of the client's consent, he or she need not give information that would disclose privileged communications, but must disclose the name and address of the client and give sufficient particulars to identify any privileged documents (s69 ASC Law).

WHY SHOULD THE HIGH COURT'S REASONING IN YUILL'S CASE APPLY TO THE ASC?

Correspondence between Companies Code and ASC Law

29 The statutory regime for special investigations considered by the High Court in *Yuill's* case corresponds closely with the ASC's powers of investigation and inquiry in the ASC Law. It is an offence to refuse or fail to comply with a notice to produce, or to be examined (s296(2) Code, s63 ASC Law). Lawyers are not required to reveal privileged communications (s308 Code, s69 ASC Law).

30 The correspondence between the two statutes was recognised by French J in *ASC v Dalleagles* (1992) 10 ACLC 1,104. In that case, *Dalleagles Pty Ltd* (a company controlled by Mr and Mrs Lawrence Connell) claimed that it was not required to comply with a notice to produce documents because the documents were subject to a claim of legal professional privilege. The notice was issued in the course of the ASC's investigation into the affairs of *Rothwells Ltd*. French J held that the Connells' company was required to comply with the notice and that legal professional privilege was not a reasonable excuse to fail to produce the documents.

Nature and purpose of the statutory power

31 In reaching their decision, the majority of the High Court in *Yuill's* case had regard to the nature and purpose of the statutory power in

question. The removal in the ASC Law of the distinction between special and other investigations supports the application of the reasoning in *Yull's* case in construing the ASC Law.

32 In contrast, the Full Court of the Federal Court held that legal professional privilege was not excluded in examinations under s597 of the Law, in part because examinations under that section were for the purpose of obtaining information and documents about the affairs of a particular company, rather than an investigation under Part 3 of the ASC Law: *Re Compass Airlines Pty Ltd* (1992) 109 ALR 119 at 128-9.

Complexity of corporate investigations

33 The ASC Law preserves the previous regime of special investigations (s14 and 14A ASC Law). It is clear from the Explanatory Memorandum to the Australian Securities Commission Bill, 1988 that the legislature did not intend any dilution of the special investigation powers in replicating them in relation to investigations generally:

“41 It is proposed that the ASC Bill will contain provisions strengthening the existing powers and clarifying the scope of existing hearing powers...

42 The present inspection and special investigation powers are to be amalgamated so that the existing inspection powers will be more effective...”

34 The legislature has acknowledged the unique and complex nature of investigations into suspected breaches of corporate law, and has given the ASC its powers of investigation and inquiry. The complexity of much of the conduct which constitutes breaches of the corporate law has now long been acknowledged and gave rise to the regime of special investigations. What the 1980s have shown is that the complexity has increased and corporate offences involving fraud or dishonesty are frequently committed behind a mask of ostensibly legitimate (and mostly complex) commercial arrangements. Parliament has addressed that problem by giving the ASC the powers set out above. In its investigations, the ASC must unravel the kind of conduct that gave rise to Parliament's concern, to determine its financial, accounting and legal context. The ASC must also determine the identity of those involved in the arrangements and the nature and extent of that involvement.

35 Such is the nature of the conduct which may breach corporate law, that documents are usually the main, and frequently, the only reliable evidence. In this context, the question as to whether documents may or may not be reviewed is far more than a procedural or technical issue. It goes to whether the law is enforceable.

36 The legal advice received by those involved in a suspect transaction is often vital to understanding the transaction and any liability of those involved. ASC investigators are frequently met with the explanation that witnesses "acted on legal advice", and unless the ASC has the ability to review that advice it is often impossible to take the investigation further.

Frustration of investigations and enforcement action by delay

37 The majority of the High Court in *Yuill's* case recognised the direct link between the availability of the privilege in corporate investigations, and the ability to impede the investigation and prosecution of breaches of the law. Dawson J said (at 333):

"Plainly, an investigation is likely to be hampered by a claim of legal professional privilege on the part of an officer of the company being investigated. This is the more so when the aims of the investigation include the prosecution of offences and the institution of civil proceedings. In particular, establishing such matters as fraud, negligence or breach of duty may depend upon proof of the nature of any legal advice given."

38 If notices to produce documents or give evidence could be challenged on the grounds of legal professional privilege, challenges may well involve lengthy court proceedings and concomitant delays and expense prior to resolution.

This results in:

- (a) undue delays and cost in the conduct of an investigation — in practice the ASC would be reluctant to conclude an investigation or the Director of Public Prosecutions (DPP) to prosecute until the outcome of a claim is known, whether or not it turns out that the documents or evidence were relevant to the investigation;
- (b) potential defendants leaving the jurisdiction, or important documents yet to be the subject of a notice for production being destroyed or removed from the jurisdiction; and
- (c) the undermining of the ability of the ASC effectively and decisively to pursue civil remedies (especially those of a preservative nature — such as actions under s1323 and 1324 of the Law).

39 In addition, early access to relevant legal advice may be critical to:

- (a) an understanding of the transactions the subject of investigations; and
- (b) avoiding "tangents" so that people who are otherwise likely targets of investigation can be excluded, involving cost and time savings for both the investigation and those people.

40 Lawyers seeking an amendment to the law have argued that because legal professional privilege is never available to protect communications in furtherance of a crime or fraud, the privilege should not be abrogated in the ASC Law. This proposition does not hold up in practice. As Dawson J noted in *Yuill's* case (at 326):

“Legal professional privilege may not, of course be claimed even at common law for communications which amount to participation in a crime or a fraud, but a claim of privilege may nevertheless seriously impede the investigation of those matters.”

41 Experience demonstrates that the lengthy and expensive proceedings to determine claims of privilege would cripple ASC investigations. By the time privilege claims have been resolved, memories will have faded and the evidence trail will have chilled.

Ambit claims

42 The damage resulting from delay because of claims of legal professional privilege is made worse by imprecise and ambit claims of privilege which become the subject of lengthy litigation. In practice, legal professional privilege is often claimed over a substantial number of documents, which, following months of litigation, may be found not to be covered by the privilege. As a result, the delay and disruption to investigations is exacerbated by the unsubstantiated claims.

Practical examples of delay and ambit claims

43 Some significant cases within the last two years provide dramatic examples of the delays and difficulties created by claims of legal professional privilege. These demonstrate how investigations and possible prosecutions can be hindered by ambit claims for privilege.

44 In one special investigation over 1200 documents were withheld from production in answer to a notice on the grounds of legal professional privilege. Following the High Court's decision in *Yuill's* case, the documents were ultimately produced to the investigation. Having reviewed the documents, the investigators believe that a claim for legal professional privilege in respect of the majority of documents would not have succeeded.

45 The damage to investigation planning by claims of legal professional privilege is demonstrated by the following case history of another major investigation.

46 ASC investigators formed the view that there had been a number of instances in this case where there had been a failure to produce documents in response to notices and were concerned that documents would be destroyed. Accordingly, it was determined that search warrants under s10 of the Crimes Act (Cth) 1914 should be obtained. These

warrants are available to Australian Federal Police (AFP) officers and *Yuill's* case does not apply to material obtained under these warrants.

47 On 28 February 1992, the AFP executed a search warrant under s10 of the Crimes Act on the premises used for the storage of records by a firm of solicitors. On the same day, the solicitors wrote to the ASC claiming that a large portion of the records seized were subject to legal professional privilege and asked the ASC to desist from examining the records. The ASC agreed not to examine the records, and in the presence of a solicitor from the firm, the ASC copied and registered all records seized and provided copies to the solicitors.

48 On 18 March 1992 the AFP executed nine search warrants for further documents concerning the investigation. A large number of documents obtained were subject to claims of legal professional privilege. An ambit claim of privilege was made over all books and records seized from the solicitors.

49 On the advice of the DPP an inspection procedure was established. All documents were inspected by solicitors, and documents claimed to be privileged were tagged. This took place between 23 March and 1 May 1992. A large number of claims of privilege were made.

50 In accordance with the guidelines agreed between the Commissioner of the AFP and the Law Council of Australia, an independent arbitrator was employed on 3 June 1992 to review the privilege claims. The arbitrator dismissed the majority of the claims.

51 Between 19 June and 29 September 1992, computer discs were inspected by the parties and their legal representatives. Claims of legal professional privilege were again reviewed by the arbitrator.

52 On 5 November 1992, the ASC was advised by the DPP that under the guidelines all claims of privilege were now out of time. A small number of documents were returned to the parties involved.

53 A current investigation by another agency in relation to suspected offences against the Companies (Victoria) Code illustrates the extent to which investigative endeavours can be frustrated following claims of legal professional privilege made in relation to documents sought in investigations.

54 This investigation commenced in December 1989. Throughout 1990 documents were recovered and witnesses questioned (involving some 44 witnesses and over 5000 pages of transcript). Targets of the investigation have, through their legal representatives, resisted production of some 450 documents to the investigators. To date, production of the documents has been successfully resisted through action in the Federal Court and the High Court. Senior Counsel has expressed the view that there is no real possibility that access to the documents will be obtained

inside 12-18 months. The consequence is that any decision to charge may well have to be taken without consideration of relevant evidence contained in the disputed documents. That is far from the most satisfactory way in which to commence a prosecution. Yet to delay a decision for a further lengthy period will result in a prosecution that will be approaching staleness at its commencement.

Abrogation of the privilege and compliance with the law

55 In the ASC Law, the legislature has demonstrated an acute awareness of the public interest in the honest conduct of the affairs of companies and accordingly subordinates to that objective privileges which apply in different circumstances.

56 Lawyers seeking amendment to the law have emphasised that recourse to legal advice promotes compliance with the law and that the partial abrogation of that privilege pursuant to *Yuill's* case may lead some people to avoid obtaining legal advice or to prevent advice being reduced to writing. The ASC does not find this convincing because:

- (a) many of the commercial transactions which surround suspected contraventions are so complex that lawyers, accountants and other professionals must be used to effect them;
- (b) the fact that the ASC may obtain details of legal advice from clients would support the value of lawyers warnings to their clients. In the interests of effective regulation of Australia's corporate and securities markets, there can be little sympathy for those clients who do not heed their lawyers' warnings, or choose not to take legal advice for fear of what they may be told; and
- (c) the experience of the 1980s demonstrates that an effective system of corporate regulation cannot rest on voluntary compliance.

57 It is suggested that *Yuill's* case threatens clients by giving lawyers a role akin to that of informers rather than professional advisers. Section 69 of the ASC Law clearly provides that lawyers are not required to disclose privileged material.

58 In any event, the use of any information which is self-incriminatory (regardless of whether it is subject to legal professional privilege or not) is regulated by s68 and 76 of the ASC Law. Accordingly, oral statements which are self-incriminatory cannot be used in criminal proceedings against the person making the statement, except for proceedings for the falsity of the statement.

59 In balancing the competing interests, the legislature has acknowledged that oral evidence that is the subject of legal professional privilege, or self-incriminatory, is not admissible in proceedings against

the person making the statement (s76(1) ASC Law). In *Yull's* case, Brennan J (at page 326) explained the distinction between documentary and oral evidence because "books are real evidence which speak only for themselves unlike oral evidence which comes into existence only in response to the exercise of an investigative power".

ASC policy on gathering and disclosing privileged information

60 The ASC considers that it must fully comply with the will of Parliament by utilising fully its powers of inquiry and investigation in order to pursue its objective of maintaining the confidence of investors in securities and futures markets by ensuring adequate protection of investors and to take what action it can take, and is necessary, in order to enforce and give effect to national scheme laws (s1(2) ASC Law).

61 The ASC may be required to disclose documents in giving discovery or answering subpoenas. In addition, the ASC has discretion to release information obtained under compulsion under s25, 37(4) and (7), and s127 of the ASC Law (subject to various constraints).

62 Because the effect on the privilege of acquiring documents subject to legal professional privilege under compulsory powers is not entirely clear, the ASC will not take unnecessary steps which might destroy any privilege. Accordingly, when information is disclosed to the ASC under compulsion, the fact that the material may be subject to legal professional privilege should be advised to the ASC, notwithstanding that the claim has no legal effect with regard to the ASC. Claims of privilege in respect of documents will be recorded on registration of the documents. Claims of privilege in respect of oral evidence should be placed on the record of examination. The ASC will then be in a position to exercise its discretion to disclose information in an informed manner.

63 If the ASC is required to give discovery of, or produce documents which are subject to a claim of privilege, the ASC will produce those documents in a sealed envelope and notify the person claiming the privilege, so that they may defend the privilege claimed in court.

64 The ASC will take into account claims of legal professional privilege before deciding whether to disclose information under s25, 37(4) and (7), and s127 of the ASC Law. Generally, claims of legal professional privilege will not prevent the release of written records of examination under s25 or 127 because the use of the records is regulated by s76 of the ASC Law. However, instead of releasing books claimed to be subject to legal professional privilege under s25, the ASC may notify the person who made the s25 request of the existence of documents asserted to be privileged. If the ASC is then subpoenaed to produce the documents, it will notify the person claiming the privilege, so that they may defend any privilege in court.