THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

INVESTIGATORY POWERS OF THE AUSTRALIAN SECURITIES COMMISSION

Report by the
Senate Legal and Constitutional
References Committee

June 1995

ISBN 0 642 22980 5

This document was produced from camera-ready copy prepared by the Senate Legal and Constitutional References Committee Secretariat, and printed by the Senate Printing Unit, Parliament House, Canberra.

Members of the Committee

Senator Chris ELLISON (Western Australia), CHAIR
Appointed to the Committee 18 August 1993
Elected Chair from 10 October 1994
Senator Barney COONEY (Victoria), DEPUTY CHAIR
Chair until 10 October 1994 thereafter Deputy Chair
Senator Eric ABETZ (Tasmania)
Appointed to the Committee 10 October 1994
Senator Belinda NEAL (NSW)
Appointed to the Committee 1 February 1995
Senator Jim McKIERNAN (Western Australia)
Senator William O'CHEE (Queensland)
Senator Sid SPINDLER (Victoria)
Senator Amanda VANSTONE (South Australia)
Deputy Chair until 10 October 1994

Participating Members

Senator C CHAMARETTE (Western Australia)
Senator R KEMP (Victoria)
Senator D MARGETTS (Western Australia)
Senator J SHORT (Victoria)

Former Members

Senator Chris EVANS (Western Australia)
Retired from the Committee 1 February 1995
Senator Patricia GILES (Western Australia)
Retired from the Committee 30 June 1993
Senator Rod KEMP (Victoria)
Retired from the Committee 18 August 1993
Senator Graham MAGUIRE (South Australia)
Retired from the Committee 30 June 1993
Senator The Hon Margaret REYNOLDS (Queensland)
Appointed to the Committee 1 July 1993
Retired from the Committee 10 October 1994
Senator the Hon Peter WALSH (Western Australia)
Retired from the Committee 30 June 1993

Committee Secretariat

Committee Secretary:	Mr Paul Griffiths (until 20 January 1995) Ms Anne Twomey (from 13 February 1995)
Research Officers:	Mr Stephen Bull (from 29 June 1994) Ms Virginia Buring (from 12 July 1993 to 12 August 1994) Ms Marina Ellis (from 1 July 1994) Mr Peter Thomson (from 29 August 1994) Mr James Warmenhoven (until 23 December 1994) Mr Donald Wilkinson (from 13 January 1995 until 1 June 1995)
Executive Assistant:	Ms Margaret Lindeman (from 27 September 1993 until 23 December 1994) Ms Alison Cropley (from 12 September 1994 to 11 November 1994) Ms Angela Misic (to 10 September 1993) Ms Lois Carroll (from 21 November 1994) Ms Cath Drinkwater (from 27 January 1995)

The Senate
Parliament House
CANBERRA ACT 2600

Telephone: (06) 277 3560

Investigatory Powers of the ASC

Contents

Chapter 5 The Exercise of its Powers in Practice

Chapter 6 Notices to Produce Documents

Chapter 7 Examination of Witnesses

Chapter 8 The Privilege Against Self Incrimination

Chapter 9 Legal Professional Privilege

Appendices

TERMS OF REFERENCE

That the following matters be referred to the Standing Committee on Legal and Constitutional Affairs for inquiry and report:

(1) The exercise of the powers of officers of the Australian Securities Commission (ASC) to interview witnesses including:

   (a) the manner in which those interviews are conducted;
   (b) the power to take transcripts of interview and the treatment of those transcripts; and
   (c) the power to compel production of books and records.

(2) The exercise of the powers of the ASC to bring applications against corporations and individuals including:

   (a) the bringing of applications during the course of an investigation; and
   (b) the process by which the applications are brought.

Journals of the Senate No 14, 27 May 1993, p 288.

INVESTIGATORY POWERS OF THE AUSTRALIAN SECURITIES COMMISSION

Executive Summary

Introduction

0.1 Corporate regulation in Australia has passed through a period of dramatic change over the last 10 years. Australia has moved from a cooperative structure with no comprehensive regulator with national powers to a situation where the ASC is one of the most powerful corporate regulators in any developed economy. The period of transition has been punctured by the notorious 'excesses of the 1980's', the fallout from which is still with us.

0.2 Not unexpectedly, there have been difficulties during this transition. This report is concerned with claims that the powers conferred upon the ASC are too extensive, and that we have reacted too extremely to the hard lessons of the 1980's.

Chapter 2

0.3 It required almost forty years to achieve uniformity of company law in Australia. A major factor contributing to the disillusionment with the co-operative scheme of corporate regulation was the string of corporate collapses, and the general corporate excess, of the late 1980s.

0.4 Not all agreed that the corporate failures of the late 1980s were due to poor corporate regulation. Some argued that the events of the late 1980s were caused not by poor or inadequate regulation by the NCSC, but by the deregulation of the Australian financial system and the easy availability of credit. On this view, the excesses of the 1980s were corrected by the dramatic shift in market conditions following the stock market crash in 1987.

0.5 However, in 1989, the Commonwealth enacted a package of legislation to replace the applied law regime of the co-operative scheme with a national scheme of legislation based upon Commonwealth

legislative power.

0.6 Following the High Court case of *New South Wales v Commonwealth*[1] where the Commonwealth's attempt at a federal corporations law failed the Commonwealth, the States and the Northern Territory reached an agreement, at Alice Springs, on a revised system of regulation for corporations and securities in Australia, taking account of the principles contained in the decision of the High Court majority.

0.7 As a result the Commonwealth enacted the *Corporations Legislation Amendment Act 1990* which converted the 1989 Corporations Act into a law which applied only in the ACT. The ASC Act was similarly converted into an Act applying only in the ACT. Each State and the Northern Territory passed application legislation which applied the Corporations Law and the ASC Law as laws of each jurisdiction.

0.8 One of the major outcomes of this period of transformation of companies and securities law in Australia is that the ASC has sole responsibility for the administration and the enforcement of the relevant law in Australia.

Chapter 3

0.9 The Committee was told by a number of witnesses and submitters that the relationship between the ASC and the business community was not in perfect health. It was suggested that the unhealthy state of this relationship exacerbated the task of the ASC in promoting a sound investment climate. For example, it was argued that the ASC placed undue reliance upon the use of compulsory powers (such as compulsory notices to produce documents or to attend for examination) when investigating a matter.

0.10 Evidence provided to the Committee was mainly to the effect that the use of compulsory powers against persons and individuals who are more than willing to cooperate voluntarily with the ASC was damaging to good relations between the ASC and the community.

0.11 The ASC advised that a major factor in the choice of

---

1 *(1990) 169 CLR 482*

compulsory powers over less formal processes for gathering information is the availability of protection for the person supplying the information pursuant to section 92 of the ASC. The Committee is of the view that the suggestion that the statutory protection of section 92 be extended to cover those providing voluntary assistance is a useful and sensible compromise.

Recommendation 1

Recommendation 1: The Committee recommends that the ASC Law be amended to provide protection, along the lines of section 92 of the ASC Law, to those persons voluntarily providing information at the request of the ASC.

0.12 The attitude of some ASC officers (toward those whom they are investigating or from whom they are seeking or requiring information) was also the subject of a number of anecdotes provided to the Committee. The frequency of the adverse anecdotes is a matter of concern for the Committee.

0.13 Complaints procedures in other law enforcement bodies (such as the police) can be a valuable source of knowledge. Complaints present an opportunity for self correction. A complaints procedure should not be viewed as an exercise in damage control. The Committee is confident that the ASC will view the matter in this light in developing its new procedure.

0.14 The Committee received some information about the complaints procedure which the ASC has in place for handling complaints about the conduct of ASC officers. The ASC advised the Committee, during the course of the inquiry, that it has been engaged in the process of revising its complaints procedures with a view to establishing a national uniform procedure. This process has now been completed and new guidelines for managing allegations of misconduct against ASC officers have been released by the ASC.

0.15 In order to maintain community confidence in the integrity and effectiveness of the procedure, the ASC should include a report on complaints, and their handling, in the Commission's Annual Report.

Recommendation 2

Recommendation 2: The Committee is pleased to observe that, in part due to the work of this Committee, a national complaints procedure has been adopted by the ASC. The ASC should include an account of the operation of the complaints procedure in its Annual Report and, at least annually, should report on complaints and their handling to the Joint Statutory Committee on Corporations and Securities. The Complaints procedures presently in place should be the subject of a review, after three years, by the Parliamentary Joint Committee on Corporations and Securities.

Chapter 4

0.16 The ASC is equipped with an extensive array of investigatory powers to assist it in the discharge of its statutory functions. A number of submissions, and witnesses at the public hearings, expressed concern at the breadth of the powers conferred on the ASC.

0.17 An examination of the investigative powers of the ASC requires the Committee to address the balance which should be struck between two competing interests: the need for effective corporate regulation and the need to protect individuals from an excess of administrative power.

Chapter 5

0.18 Many people giving evidence to the Committee commented on the length of time taken by the ASC in conducting its investigations. The passage of time was said to exacerbate the stress associated with being under investigation, and also having an adverse effect on the market where the investigation involved a listed company.

0.19 The Law Institute of Victoria also commented on the fact that an ASC investigation may continue for some time yet when it concluded those who had been examined compulsorily, or been required to produce documents, would be unaware of the end of the investigations.

0.20 The ASC has already adopted this suggestion. The Committee believes that the decision of the ASC to adopt a notice procedure at the conclusion of an investigation is a very positive step toward improving relations between the ASC and the business community. The Committee is also supportive of the ASC's performance indicator of finalising an investigation within 12 months of the resourcing of the investigation.

Recommendation 3

Recommendation 3: The Committee recommends that:

- **the ASC make a major effort to achieve its performance indicator of finalising investigations within 12 months of the resourcing of the investigation;**
- **the ASC ensure that, when an investigation concludes and no further action is contemplated, notice is given to the parties involved in the investigation; and**
- **the Joint Statutory Committee on Corporations and Securities monitor compliance with this recommendation.**

0.21 A number of witnesses before the Committee, all apparently involved in the same matter under investigation by the ASC, gave evidence that summonses and applications issued by the ASC were served so close to the return date of the summons or application as to preclude, or minimise, the opportunity to obtain legal advice prior to the appearance before the Court. The ASC stated that this had been the deliberate policy, on advice, of the ASC.

0.22 The Committee is not in a position to form a view on the merits of the ASC approach in the particular investigation concerned (Aust-Home Investments Limited). However, in light of the devastating consequences (particularly for the individual respondents) of the freezing of their property, it is regrettable that the approach was found to be necessary in the particular circumstances. During the course of the Committee's investigations it became obvious that the late service of documents was indicative of a wider strategy of proceeding ex parte. The

Committee believes that such a strategy should be employed in exceptional circumstances only.

0.23 Section 1323 of the Corporations Law provides the ASC with a facility to obtain a court order freezing assets and appointing receivers or trustees, similar to a Mareva injunction, but at a much lower standard of proof. The applicant is not required to prove a prima facie case or good prospects of success in terms of obtaining the principal relief sought. The section is preventative in nature and aimed at preserving the interests of creditors and civil claimants against the person under investigation or subject to criminal or civil prosecutions under the Corporations Law.

0.24 This section was used by the ASC in the Aust-Home Investments Limited investigation. The ASC's initial application to appoint receivers to the various natural and corporate persons involved in the Aust-Home Scheme proceeded ex parte and arose out of an ASC investigation rather than the existence of an actual prosecution or civil proceedings.

0.25 The section therefore allows the ASC, even when matters are at the investigatory stage and no criminal or civil prosecutions have been commenced, to apply for a variety of orders which have potentially dire consequences for an individual's personal and business activities. The Committee is particularly concerned that the section allows the ASC to publicly debut investigations with paralysing orders affecting personal and corporate assets.

0.26 The range of persons affected by section 1323 orders is potentially extremely wide and it is not necessary that they be potentially complicit in the matters under investigation. The case law that has evolved around the section suggests that it is not necessary that the investigation be directed solely or even primarily against the defendant. All that is necessary is that the defendant falls within the general ambit of the investigation. It has further been held in relation to one of the predecessors of section 1323 that the investigation does not need to have taken a definitive direction and that the evidence necessary for an order to be made will depend on the circumstances of the investigation. The implication from the manner in which courts have interpreted section 1323, and its predecessors, is that it is entirely conceivable that the ambit of an investigation can shift and that persons made subject to an initial

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

0.27 The Committee is aware that as the law stands proceeding ex parte is entirely legal and a tactical issue for the ASC to determine when conducting its investigations. The Committee believes that ex parte applications under section 1323 are sometimes necessary due to the reality of the swift movements of monies in the corporate world. The Committee nevertheless does not believe that the law as it presently stands provides any incentives for caution in the use of the ex parte procedure and that there is a capacity for innocent persons to suffer loss and damage without any right to compensation for the loss suffered.

Recommendation

Recommendation 4: The Committee recommends that the Corporations Law be amended so that in situations where the ASC:

- **obtains ex parte an order freezing personal assets under section 1323 of the Corporations Law;**
- **the order is subsequently lifted;**
- **no determinative order is made against the property the subject of the order;and**
- **no successful criminal or civil prosecution results against the respondent,**

the respondent should be given a statutory right to recover from the ASC damages for any loss incurred as a result of the original order.

0.28 Another frequent complaint in the evidence provided to the Committee related to the delay in supplying a copy of the transcript of a compulsory examination under section 19 to the examinee.

0.29 An expert on securities law in the United States and in Australia informed the Committee that in the United States where a person is examined by the Securities and Exchange Commission (SEC), if a transcript of an examination is made the examinee has a right to a copy of the transcript. However the target of the investigation does not have a right to a copy of another examinee's transcript.

0.30 The Committee believes that in a compulsory examination of a witness the witness should be entitled, as of right, to a copy of the transcript unless the circumstances indicate that the privacy of the examination or the integrity of the investigation would be endangered as a result.

Recommendation 5

Recommendation 5: The Committee recommends that the ASC Law be amended to provide that the ASC must ensure that a witness examined under section 19 of the Law is provided with a transcript, as of right, as soon as practicable, without the necessity for a request (whether oral or written) from the witness. If the ASC decides that it is inadvisable to supply the transcript, because to do so would prejudice the investigation or endanger the privacy of the examination, then the witness should be given advice in writing to this effect.

0.31 The importance of the task entrusted to the ASC places a great burden of responsibility upon its officers. They must necessarily be highly skilled, well trained in all facets of their duties, and subject to rigorous accountability mechanisms.

0.32 However, a disturbing number of anecdotes were supplied to the Committee which were indicative of unprofessionalism, or inadequate training, on the part of some few ASC officers. The Committee believes that the great powers which are vested in ASC officers must be exercised responsibly by all, *without exception.*

0.33 The ASC advised the Committee that it placed considerable emphasis on the exchange of staff between itself and the corporate sector as one way of enhancing the business skills of its officers. The Committee supports this initiative by the ASC as a method for enhancing the understanding by its staff of commercial practices.

0.34 Details of the liaison arrangements between the Office of the Chair of the ASC and the business community were contained in a supplementary submission provided to the Committee by the ASC. The

submission set out the organisations with which the Office of the Chair of the ASC 'holds periodic liaison meetings'. The private sector bodies listed did not include, for example, the Business Council of Australia. Some other bodies which one would expect to find in this list are also absent, such as the Bankers Association, the Australian Merchant Banks Association, and other key industry bodies.

0.35 The Committee believes that the consultative arrangements should be reviewed by the Chair of the ASC with a view to ensuring that the arrangements are comprehensive.

Recommendation 6

Recommendation 6: The Committee recommends that the ASC review its consultative arrangements, particularly with the business community, with a view to ensuring that the arrangements are comprehensive.

Chapter 6

0.36 Numerous submissions given to the Committee mentioned the difficulty occasioned by the broad scope of notices to produce documents. In the view of the ASC this was unavoidable in most cases. However, the ASC gave evidence that its investigators are specifically directed to very carefully confine the scope of notices to produce documents.

0.37 The degree of detail required in the notice is not settled as a matter of law. There are now conflicting decisions of the Federal Court on whether the ASC is required to specify in the notice the relationship between the documents sought and the relevant affairs of the body corporate.

0.38 Another recurrent theme in the criticisms made of the ASC's exercise of the power to seize documents was the difficulty presented to companies in obtaining access to documents seized by the ASC. This was said to be particularly critical where the documents were needed for the daily functioning of the company concerned.

0.39 The ASC was at pains to explain that it was conscious of the commercial inconvenience which could occur when a company's

documents are removed. It was explained that the ASC had an administrative practice of providing a company with a photocopy of the documents which it requires for its daily operations.

0.40 The Committee is of the view that the viability of a company should not be endangered because the ASC is investigating a matter and has seized some, or all, of its records. Needless to say, the investigation may disclose no breach of the law by the company or its officers. As well, the collapse of the company would adversely affect people who, in all probability, will have no connection whatever to the ASC investigation, for example the company's creditors and its shareholders. Accordingly, the Committee believes that where records are seized by the ASC the company must be given copies of the records which are necessary for its daily operations.

Recommendations 7 and 8

Recommendation 7: The Committee recommends that regulations be promulgated requiring ASC investigation officers to undertake that the ASC will provide to the person from whom business or financial records are seized a copy of all those records which are necessary to enable the person or company to carry on the ordinary business activities of the person or company.

Recommendation 8: The regulations should further state that the requirement on the part of the ASC to ensure that such undertakings are noted on the form of Notice to Produce Documents which is served on the company or person concerned.

0.41 A bone of contention for a number of the organisations providing evidence to the Committee was the cost to them of complying with requests for information made by the ASC. Subsection 89(3) of the ASC Law provides as follows:

> **89(3)** The Commission may pay such amount as it thinks reasonable on account of the costs and expenses (if any) that a person incurs in complying with a requirement made under this Part.

0.42 The ABA, in a supplementary submission to the Committee, provided some anecdotal information of a lack of support by the ASC (and its predecessor, the NCSC) for claims to reimbursement. Rather, the bank concerned was given the impression that 'it should be happy to provide the information sought as part of its duty as a "good corporate citizen".'

0.43 In enacting section 89 the Parliament has expressed its will that a facility should be available for the reimbursement of the cost of compliance with a requirement made by the ASC under Part 3 of the ASC Law.

Recommendation 9

Recommendation 9: The Committee recommends that:

- **the ASC note on its relevant forms, particularly the Notice to Produce Documents and the Notice to Attend for Compulsory Oral Examination, the existence of a right to apply for reimbursement of costs and expenses under section 89;**
- **the ASC develop guidelines for its officers to guide the exercise of its discretion under section 89;**
- **the ASC report in its Annual Report to Parliament on the number and amount of claims made under the section, and the number and amount of claims approved for reimbursement; and**
- **the Government ensure that an appropriate level of resourcing is available to the ASC to meet claims under section 89.**

Chapter 7

0.44 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).

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

0.46 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.

0.47 Subsection 23(2) of the ASC Law empowers the ASC 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. 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.

0.48 The Committee is of the view that due to the compulsory nature of the section 19 examinations that 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 will 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 representation of other witnesses or prior professional involvement in the corporate structures under investigation.

0.49 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.' The Committee nevertheless believes that due to the nature of the matters under investigation, 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.

0.50 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.

Recommendation 10

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.

0.51 Chapter 5 of this report discusses the evidence provided to the Committee about the delay in the provision of the transcript of compulsory hearings before an ASC inspector. If the availability of a transcript is truly to be protective of the witness, then the transcript should be provided promptly.

Recommendation 11

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.

0.52 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.

0.53 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. 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.

0.54 This purpose could be achieved by introducing an external element into the issue of Section 19 examinations summonses. At present the ASC may undertake an investigation and exercise its examination powers under section 19 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. The Committee believes that it would be appropriate that the issue of such notices not be entirely within the discretion of the ASC and that some independence and objectivity be brought into the process. Accordingly the Committee considers that summonses for examinations under subsection 19(1) of the ASC Law be issued by the District Registrar of the Federal Court.

0.55 The Committee further believes that the introduction of an external element and the attendant requirement that the ASC coherently set out the grounds for its reasonable suspicion of a contraventions of the corporations law would add discipline, transparency and focus to the investigatory process. The ASC would 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.

0.56 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.

0.57 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.

0.58 In relation to the ASC:

- The examination should only be conducted by officers who have 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 so 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.

Chapter 8

0.59 At common law a person cannot be compelled to incriminate himself or herself, and may refuse to answer any question, or produce a document or thing, which may put the person at risk of being convicted of a criminal offence. Subsection 68(1) expressly abrogates this common law privilege for the purposes of ASC investigations.

0.60 Two significant criticisms of the abrogation of the privilege were made to the Committee. The first related to the requirement that the privilege be asserted before each answer in question. In other words a blanket, or ambit, claim to the privilege is not permissible. Once again, the edited transcript at Appendix 3 illustrates the operation of this principle. It will be noted that numerous answers are prefaced with the word 'privilege', which signifies that the privilege against self incrimination has been claimed.

0.61 The second criticism related to the unavailability of a corporate privilege against self incrimination. Also, of course, the question was raised whether it was sound policy to tamper with the common law privilege at all.

0.62 The High Court has recently held, in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, that the privilege against self incrimination is not available to corporations, because the privilege is in the nature of a human right, designed to protect individuals from oppressive methods of obtaining evidence of their guilt for use against them. Accordingly, the Committee is not persuaded that there is a need to change the law relating to the privilege against self-incrimination in relation to corporations.

0.63 The Committee is concerned at the extensive abridgment of the usual protection which are available to a person being questioned by an investigative authority. The transcripts of compulsory hearings examined by the Committee indicate that the privilege against self-incrimination is claimed almost as a matter of form by many examinees. The Committee feels that the evidence of Mr Scott of Coudert Brothers about the law and practice in the United States, was compelling and persuasive. Mr Scott pointed out the SEC in the United States does not possess a similar power. Mr Scott also argued that conferring this power

on the ASC may hinder the ASC's ability to investigate a matter 'since I would doubt that few examinees will actually answer truthfully to a question the response to which may incriminate them.'

0.64 The Committee believes that some redress of the balance of rights is needed to protect examinees at compulsory hearings. However, the Committee believes that the law in relation to the privilege against self-incrimination should not be changed in relation to notices to produce documents nor in relation to corporations.

Recommendation 14

Recommendation 14: The Committee recommends that:

- **the ASC Law be amended in order that an examinee appearing at a compulsory hearing under section 19 shall be entitled to the protection of the privilege against self-incrimination;**
- **the privilege should not be available in relation to documents discovered pursuant to a notice to produce documents or the examination; and**
- **the privilege should not be available in relation to corporations.**

Chapter 9

0.65 At a compulsory oral examination under section 19 of the ASC Law neither the privilege against self incrimination, nor legal professional privilege, can be relied upon as an excuse for failing to answer a question. The abrogation of legal professional privilege was a major issue during the Committee's inquiry.

0.66 Legal professional privilege protects the disclosure of communications between a client and his or her legal adviser which are confidential and which are brought into being for the dominant purpose of enabling the client to obtain, or the legal adviser to give, legal advice or for use in legal proceedings. The privilege derives from the principle that a citizen, before committing himself or herself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.

0.67 In *CAC (NSW) v Yuill* a majority of the High Court found in

the Companies (NSW) Code a statutory intention to abrogate the entitlement of a client to claim legal professional privilege, and held that a client could not claim the privilege to refuse to produce documents or answer questions at an oral examination under the then provisions of the Companies Code. The Code provisions were in similar terms to the present provisions of the ASC Law.

0.68 Coudert Brothers, International Attorneys, noted the difference between US law and Australian law on this point. It was pointed out that in the United States the SEC has no power to force disclosure of information which is protected by attorney/client privilege.

0.69 The Committee believes that, on balance, the inroads made on the availability of legal professional privilege by the decision in *Yuill* have had a negative effect upon corporate regulation in Australia. The limitation upon the privilege has been inimical to a constructive relationship between the ASC and the business community. It is also not conducive to the building of a climate of voluntary compliance with the law.

0.70 Importantly, the fact that the decision in *Yuill* may prompt some company officers to act without legal advice, or on the basis of possibly imperfectly understood oral advice, cannot be good for the public interest in the sound and lawful management and administration of corporations.

Recommendation 15

Recommendation 15: The majority of the Committee recommends that the ASC Law be amended with a view to ensuring the availability of legal professional privilege to all parties in investigations under the ASC Law.

INVESTIGATORY POWERS OF THE AUSTRALIAN SECURITIES COMMISSION

CHAPTER 1

ORIGINS OF THE INQUIRY

Reference to the Committee

1.1 On 27 May 1993 the Senate resolved to refer to the Senate Standing Committee on Legal and Constitutional Affairs for report the following matters:

(1) The exercise of the powers of officers of the Australian Securities Commission (ASC) to interview witnesses including:

(a) the manner in which those interviews are conducted;
(b) the power to take transcripts of interview and the treatment of those transcripts; and
(c) the power to compel production of books and records.

(2) The exercise of the powers of the ASC to bring applications against corporations and individuals including:

(a) the bringing of applications during the course of an investigation; and

(b) the process by which the applications are brought.[2]

Conduct of the Inquiry

1.2 Advertisements were placed in major national newspapers seeking submissions from interested persons. In addition, the Committee wrote to a wide range of persons and organisations to invite submissions.

1.3 The Committee received 147 written submissions. The list of individuals, organisations and agencies who made submissions to the Committee is attached as Appendix 1 to this report.

Public Hearings

1.4 The Committee held public hearings in Brisbane, Sydney and Melbourne. The list of witnesses who appeared at those hearings is attached as Appendix 2 to this report.

Change to the Senate Committee System

1.5 Following the report of the Senate Procedure Committee into the Senate Committee system (the First Report of 1994) the Senate agreed to amended Standing Orders implementing the Procedure Committee's recommendations. The amended Standing Orders, agreed to by the Senate on 24 August 1994, commenced operation on 10 October 1994.

1.6 One consequence of the new Standing Orders was that the

---

[2] *Journals of the Senate No 14, 27 May 1993, p 288.*

various legislative and general purpose Standing Committees were dissolved and replaced by eight pairs of committees. The Standing Committee on Legal and Constitutional Affairs was replaced by the Legal and Constitutional References Committee (having responsibility for matters referred by the Senate) and the Legal and Constitutional Legislation Committee (with responsibility for estimates of expenditure referred under Standing Order 26, for bills and draft bills and for the scrutiny of relevant annual reports).

1.7 The amended Standing Orders (SO 25(4)) provided that matters referred to the predecessor Committee, and incomplete at the commencement of the amended Standing Orders, would be completed by the relevant new Committee. As a result, the inquiry into the Investigatory Powers of the ASC was completed by the Legal and Constitutional References Committee.

CHAPTER 2

INTRODUCTION TO THE ISSUES

Uniformity of Legislation

2.1 It required almost forty years to achieve uniformity of company law in Australia. In the late 1950s moves to achieve uniformity of legislation culminated in co-operation between the Commonwealth and the States in drafting a uniform Companies Bill, which was based largely on the *Companies Act 1958* of Victoria. Enactments more or less along the lines of the uniform Bill were then passed in 1961 and 1962 by each of the States, and the Commonwealth made ordinances for the Australian Capital Territory and the Northern Territory.

2.2 Unfortunately, over time, the legislation became progressively less uniform in each jurisdiction. For example, the major changes recommended by the Advisory Committee on Company Law (chaired by Mr Justice Eggleston) were enacted in Queensland, Victoria and New South Wales in 1971, but Western Australia did not enact them until 1973. They were never enacted in Tasmania.

2.3 The turbulent times on the Stock Exchanges in the 1960s caused by the mining boom, including the notorious Poseidon share price spiral, led to the formation of the Senate Select Committee on Securities and Exchange, chaired by Senator Peter Rae. The Rae Committee

tabled its final report[3] on 18 July 1974. The major reform recommended by the Rae Committee was the formation of a national regulatory body for the securities market. Eventually, this led to the establishment of the National Companies and Securities Commission.

2.4 Proposals for a national co-operative scheme for the regulation of companies and securities resulted in the Commonwealth and the six States signing an agreement (the Formal Agreement), which contained the framework for the scheme, in December 1978. The Northern Territory joined the scheme on 1 July 1986.

2.5 The co-operative scheme entailed the enactment by the Commonwealth of an extensive array of legislation. The package included the *Companies Act 1981* which dealt with the formation and regulation of companies; the *Companies (Acquisition of Shares) Act 1980* (the takeovers code) which regulated the acquisition of shares in companies; the *Securities Industry Act 1980* which regulated the activities of those dealing in securities; and also the *National Companies and Securities Commission Act 1979*, which established the NCSC.

2.6 Under the co-operative scheme the Commonwealth enacted legislation which applied only in the ACT. That legislation was separately adopted by each other jurisdiction by means of passing Application of Laws enactments. The various State and Territory Corporate Affairs Commissions continued to exist, and to administer the applied law in their respective jurisdictions as delegates of the NCSC. The Formal

---

[3] *Australian Securities Markets and Their Regulation (Parliamentary Paper no. 98).*

Agreement obliged the NCSC to have regard to 'the principle of maximum development of a decentralised capacity to interpret and promulgate the uniform policy and administration of the cooperative scheme[4]'.

2.7 The Commonwealth Attorney-General relied upon a lengthy list of difficulties with the co-operative scheme as the justification for introducing the national legislation in 1988. The explanatory memorandum for the ASC Bill sets out the list of criticisms of the co-operative scheme. A number of these criticisms related to the inadequate accountability of the NCSC, and to the division of functions between the NCSC and its delegates.

Lessons of the 1980s

2.8 Another major factor contributing to the disillusionment with the co-operative scheme was the string of corporate collapses, and the general corporate excess, of the late 1980s:

> Arising out of the 1980's and their effect on investor confidence in Australian companies and securities markets both nationally and internationally, the Commonwealth and State governments recognised the need for an appropriately funded body with necessary powers and will to administer and enforce corporate law on a nationally consistent basis. This was in response to a widespread perception that the State based co-operative scheme was grossly inadequately funded so that the NCSC was forced to resort to "deals" and "trials by media" rather than court process to enforce the law, that there was no national consistency in the approach to exercise of powers and functions, that generally the administration of corporate law was fragmented and the powers necessary to enforce it effectively were lacking.[5]

---

[4] *A J MacDonald and J B North Australian Corporation Law. The National Scheme Butterworths p 11,106.*

[5] *Submissions, No 96 (ASC) p2.*

2.9 Others took the view that the excesses of the 1980s were caused not by poor or inadequate regulation by the NCSC, but by the deregulation of the Australian financial system and the easy availability of credit. On this view, the excesses of the 1980s were corrected by the dramatic shift in market conditions following the stock market crash in 1987. It was argued that the dramatic increase in powers and resources for the ASC was unnecessary and even counter-productive:

> It must be borne in mind that to a considerable degree the financial markets themselves have very effective self-regulatory mechanisms where improper behaviour occurs. Open and efficient financial and securities markets (such as those which operate in Australia) are very effective self-regulators because they penalise or marginalise those whose performance is not up to required standards. In this regard, market standards reflect and enforce the standards of corporate behaviour which are expected to prevail in Australia.
>
> I do not suggest that markets should be left entirely unregulated by legislation or external regulators. ..... However, industry self-regulatory organisations like the Australian Stock Exchange, the Securities Institute of Australia, the Australian Institute of Company Directors, the Australian Institute of Corporate Managers and Secretaries, and the various professional bodies governing the activities of banks, merchant banks, lawyers and accountants, have been quite effective regulators of their respective participants in the Australian financial markets in recent years.
>
> Along with the very significant additional resources devoted to the operation of the ASC, there was also a significant expansion and improvement in the scope and operation of the Corporations and ASC Laws to ensure that they applied in the widest possible circumstances. In particular, the compulsory investigatory and hearings power of the ASC are some of the widest available to any corporate and securities regulator in the world. I do not criticise this development but simply note that Australia has, relatively speaking, the toughest regime for corporate and securities regulation of any nation with an economy and markets of comparable size in the Western world. Australia's stock markets, for example, represent less than 2% by market capitalisation of international stock markets. Nevertheless we have one of the world's toughest and most comprehensive corporate and securities regulatory regimes. Care must be taken that, in this regard, we do not 'price ourselves out' of what has

become an increasingly global financial marketplace.[6]

The End of the Co-operative Scheme

2.10 The package of legislation enacted in 1989 replaced the applied law regime of the co-operative scheme with a national scheme of legislation based upon Commonwealth legislative power. The 1989 package consisted of the *Corporations Act 1989*, the *Australian Securities Commission Act 1989*, and the *Close Corporations Act 1989*.

2.11 Various provisions of the Corporations Act were challenged in the High Court later that year. The majority of the High Court held[7] that the Commonwealth did not have the Constitutional power to enact laws regulating the formation of trading and financial corporations.

2.12 Following the High Court's decision in *New South Wales v The Commonwealth*[8] the Commonwealth, the States and the Northern Territory reached an agreement, at Alice Springs, on a revised system of regulation for corporations and securities in Australia, taking account of the principles contained in the decision of the High Court majority. Under the Alice Springs agreement the Corporations Act and the ASC Act were to be amended so as to apply as laws for the ACT. The various States and the Northern Territory would then enact application legislation applying the laws in each respective jurisdiction. The ASC was to be the sole administering authority for companies and securities

---

[6] *Submissions, No 87 (Mr Norman O'Bryan), pp 3-4.*

[7] *New South Wales v The Commonwealth (1990) 169 CLR 482.*

[8] *Ibid.*

regulation in Australia.

2.13 As a result the Commonwealth enacted the *Corporations Legislation Amendment Act 1990* which converted the 1989 Corporations Act into a law which applied only in the ACT. The ASC Act was similarly converted into an Act applying only in the ACT. Each State and the Northern Territory passed application legislation which applied the Corporations Law and the ASC Law as laws of each jurisdiction.

2.14 One of the major outcomes of this period of transformation of companies and securities law in Australia is that the ASC has sole responsibility for the administration and the enforcement of the relevant law in Australia. The Commonwealth Attorney-General is the Minister having the sole Ministerial responsibility for the Commission.

2.15 The establishment of a national regulator was a watershed development in corporate regulation in Australia. Further, the ASC was not only a first for Australia, it was also charged with more extensive responsibilities than some of its overseas counterparts, such as the Securities Exchange Commission (SEC) in the United States:

> **Mr W Scott** - Before comparing the investigatory powers of the ASC and the SEC, it is important to recognise at the outset the different roles played by the SEC and the ASC. First, the SEC has a much more limited regulatory and enforcement role when compared to the ASC. The ASC is not only a securities regulator but also plays the role of a companies registrar. The SEC's role is limited to the regulation of the US securities laws. Unfortunately, in the US, each different state still regulates corporate behaviour of those corporations incorporated in that state. In contrast, we in Australia have the benefit of having one federal law regulating corporate behaviour, but we must recognise that the role of the ASC and the burdens it is under are far greater than those

on the SEC, and perhaps we are asking the ASC to do too much. [9]

[9] *Evidence, pp 279-280 (Mr W Scott).*

CHAPTER 3

THE ASC AND THE COMMUNITY

Key Role of the ASC

3.1 There is no doubt that the task of corporate regulation in a developed, commercial society is a task requiring extraordinary delicacy. A number of competing interests must be weighed in the balance. For example, the regulatory regime must be sufficiently vigilant and strong to stamp out fraud or other significant misbehaviour. Also, the regulatory regime must be sufficiently benign as to enhance overall economic performance and competitiveness. Managers must feel that the corporate regulator is present to protect the integrity of the market and to facilitate their task. Investors must have confidence that the only risk they face is poor judgment, not fraud. Confidence must be felt by all sectors of the community that the goals of the corporate regulator are consistent with the interests of corporate managers, investors and the community generally.

3.2 The ASC is conscious of this many faceted task, but believes that the balance between vigilance and *laissez faire* regulation must be struck in favour of strong regulation. The Chair of the ASC described the issues at stake in this way:

> Our compulsory powers, which are very similar to the powers of most of our international counterparts, are essential to the effective enforcement of a body of law which is the only bulwark against abuse of the trust placed in company officers by investors and creditors. Without that trust, people will not be prepared to invest, and without that investment our economy will stagnate. The choice is that stark. The issues are that important.[10]

3.3 A similar view was given in evidence to the Committee by Mr Warren Scott, a witness expert in Australian and United States securities law:

> ..... I think we all agree that the role of a securities regulator is critical to the development and maintenance of any securities market. If investors believe that a securities market is not well-regulated and free from fraud and abuse, they will not invest; without investment, companies will not be able to attract capital; without capital, these companies will not be able to grow; and, without economic growth, Australia will be harmed.[11]

Relationship with the Business Community

3.4 The Committee was told by a number of witnesses and submitters that the relationship between the ASC and the business community was not in perfect health. It was suggested that the unhealthy state of this relationship exacerbated the task of the ASC in promoting a sound investment climate. For example, it was argued that the ASC placed undue reliance upon the use of compulsory powers (such as compulsory notices to produce documents or to attend for examination) when investigating a matter. It was suggested that greater reliance could be placed upon the use of requests for voluntary assistance. The Business Council of Australia informed the Committee that:

---

[10] *Evidence, p 4 (Mr Cameron).*

[11] *Evidence, p 279 (Mr W Scott).*

> The second matter we wish to comment on is the failure of the ASC to develop a culture of voluntary compliance by businesses with the Corporations Law. Although the ASC is an extremely well-funded and resourced body, it ultimately can only effectively police an extremely small proportion of corporate activity. What is missing from ASC enforcement policies and strategies, as evidenced by its submission to this inquiry, is a preparedness to develop a corporate culture of voluntary compliance by periodically consulting with peak business and professional organisations on policies of surveillance and enforcement.[12]

3.5 The ASC agreed that it did employ its compulsory powers frequently, in preference to a reliance upon voluntary assistance[13]. The ASC argued that this approach was necessary because information necessary to an understanding of the arrangements under investigation is held not only by those knowingly involved in the contravention of the law, but also by those who may have been innocently caught up in the transactions. It was said that it is usually only with hindsight that it is possible to distinguish with certainty into which category a person falls[14].

3.6 The ASC pointed out that another major reason for this approach was a need to ensure that persons providing assistance to the ASC were covered by the statutory protection conferred by section 92 of the *ASC Law*. Section 92 is as follows:

> **Compliance With Part**
>
> **92** A person is neither liable to a proceeding, nor subject to a liability, merely because the person has complied, or proposes to comply, with a requirement made, or purporting to have been made, under this Part.

---

[12] *Evidence, pp 213-214 (Mr Soutter).*

[13] *Submissions, No. 96 (ASC), p 7.*

[14] *Ibid.*

3.7 Evidence provided to the Committee was mainly to the effect that the use of compulsory powers against persons and individuals who are more than willing to cooperate voluntarily with the ASC was damaging to good relations between the ASC and the community.[15] However, the Law Council did express support for the use of compulsory examinations under section 19 rather than informal interviews because of the greater protection which is provided such as the procedure for notifying a claim to the privilege against self incrimination. The Law Council submitted that:

> the ASC should, as a matter of policy, not press witnesses to attend informal interviews, without first informing them fully of the legal and practical significance of proceeding in this manner, rather than by way of formal examination under section 19.[16]

3.8 The Committee supports the view of the ASC that it is desirable that people assisting the ASC should have the protection of section 92 of the ASC Law, or of a provision to like effect. The Committee notes that the protection of section 92 is available only where that assistance is provided in response to the compulsory powers of the ASC under Part 3 of the ASC Law. The NRMA suggested that similar protection should be available for people cooperating voluntarily with the ASC:

> **Mr P. Cameron** - There will be a number of situations in which you have people who are busy, whose evidence is necessary for an ASC inquiry and who are happy to provide information quickly and efficiently. In those circumstances, we would suggest that legislative reform may be necessary to

---

[15] *For example, submissions no. 80 (NRMA), no. 104 (Australian Accounting Research Fund), and no. 110 (Association of CPAs and ICAA). See also, evidence p 262 (Mr A Rees).*

[16] *Submissions, no. 90 (Law Council of Australia), para 5.4.*

> give them the same protection which will be available to somebody whose evidence is taken under compulsion. In other words, if the ASC is making inquiries for the performance of one of its functions, or the exercise of its powers, and that inquiry is a legitimate inquiry, then a response given to such an inquiry should be afforded the same source of protection that would be available if the evidence were given in a formal proceeding.[17]

3.9 This suggestion received support in principle from the ASC. Mr Procter (the National Enforcement Coordinator for the ASC), in responding to the evidence given by the legal adviser for the NRMA, gave the following response to the above suggestion:

> **Mr Procter** - The first [point made by Mr Cameron] was that we ought to more often pursue informal inquiry. Mr Cameron has referred you to paragraph 1.7 of our response. It is appropriate, I think, that you have regard to the rest of that paragraph because it does put the balance in perspective. We go on to say:
>
> The ASC has, however, successfully conducted some investigations on a largely voluntary basis. Where possible in the course of an investigation the ASC will seek voluntary assistance. A careful balance must be struck. The use of compulsory powers does provide safeguards to those who are required to assist.
>
> Compare the Law Council submission, which suggests that we should prefer compulsory powers because they offer protection. The idea that the use of informal process ought to be combined with some additional statutory protection is a very interesting and useful one, and one that ought to be explored. At the moment, the balancing act is made more difficult by the absence of protection in some informal inquiries.[18]

Recommendation

3.10 The Committee notes the view of the business representatives that greater reliance upon voluntary assistance, rather than compulsory

---

[17] *Evidence, p 264 (Mr P Cameron).*

[18] *Evidence p 266 (Mr A Procter).*

powers, would improve relations between the ASC and the business community. The Committee also notes the evidence from the ASC, and the Law Council, that a major factor in the choice of compulsory powers is the availability of protection pursuant to section 92 of the ASC. The Committee is of the view that the suggestion that the statutory protection of section 92 be extended to cover those providing voluntary assistance is a useful and sensible compromise.

Recommendation 1: The Committee recommends that the ASC Law be amended to provide protection, along the lines of section 92 of the ASC Law, to those persons voluntarily providing information at the request of the ASC without the ASC having to resort to its compulsory powers under Part 3 of the ASC Law.

The De Crespigny Prosecution

3.11 On 1 December 1994 all charges[19] laid by the ASC against the Normandy Poseidon Ltd chairman, Mr Robert Champion de Crespigny, were withdrawn on the motion of the prosecution. The main allegation against Mr de Crespigny was that a takeover document, the Part A statement, issued by Brunswick NL, which was controlled by Mr de Crespigny's Normandy Poseidon group, overvalued Brunswick's main asset, the Galtee More goldmine, in Western Australia's Mt Magnet

[19] *Mr de Crespigny was charged by the ASC with breaches of Subsection 44(1) of the Companies (Acquisition of Shares) (Victoria) Code , and Subsections 563(3) and 564(2) of the Companies (Victoria) Code.*

region. The withdrawal of the charges resulted in a great deal of negative press coverage for the ASC[20] and the Committee considered that it was appropriate that all parties be given an opportunity to put to the Committee any lessons that could be learnt from the prosecution. The Committee accordingly wrote on 31 January 1995 to Mr Champion de Crespigny, Chairman Normandy Poseidon Ltd, and Mr Alan Cameron, Chairman ASC, for their views concerning the circumstances of the prosecution. The Committee subsequently received a submission from the ASC and two letters from Mr de Crespigny's solicitor, Mr John Manetta, which were taken by the Committee as submissions to the Inquiry.[21]

3.12 The Committee believes that it is appropriate that the circumstances of the prosecution of Mr de Crespigny be discussed in this report for a number of reasons. Firstly the press coverage surrounding the withdrawal of the charges was highly critical of the ASC and secondly the Committee was concerned that the failure of the prosecution could have been indicative of structural defects in the investigatory powers of the ASC.

3.13 In the material received by the Committee from the ASC and Mr de Crespigny there were no accusations that defects in the investigatory powers of the ASC caused or contributed to the instigation or failure of the prosecution of Mr Champion de Crespigny. The ASC

---

[20] *'ASC Backs down on De Crespigny Charges' Financial Review 2 Dec 1994 p3;'De Crespigny charges Withdrawn' The Sydney Morning Herald 2 December 1994 p24;'De Crespigny wants ASC Probe' The Australian 2 December 1994 p29.*

[21] *Submissions nos 146 & 147.*

noted in its submission that an internal review was conducted into the investigation which disclosed shortcomings in the post investigation handling of the matter but no fundamental errors in the conduct of the prosecution.[22]

3.14 In relation to the press coverage surrounding the withdrawal of the charges the ASC stated in its submission to the inquiry that:

> The media coverage at the time of the withdrawal of the charges suggested that the decision to withdraw the charges against Mr de Crespigny followed intimations from the Magistrate about the strength of the case. Other media coverage suggested the decision was taken after the evidence of a particular witness. That is not correct. The decision to withdraw the charges was a decision for the DPP, on counsels' advice. The decision was primarily motivated by the fact that the apparently credible defence expert, Walker, had obtained further underlying factual data to support his view that a significantly higher value could be placed on the relevant ore body.
>
> In the light of the new material the prosecution took the view that there was now a basis for a reasonable doubt as to the allegation that the valuation in the Part A Statement was unsustainable. It was thought unjustifiable, having regard to the Prosecution Policy of the Commonwealth, to continue to prosecute the matter in light of the emergence of new evidence that was not in the possession of the ASC or the DPP at the time the charges had been laid.[23]

---

[22] *Submission, no. 145 (Mr Andrew Procter ASC), p6.*

[23] *Ibid. p6.*

The ASC and the Community

3.15 The attitude of some ASC officers (toward those whom they are investigating or from whom they are seeking or requiring information) was also the subject of a number of anecdotes provided to the Committee. The frequency of the adverse anecdotes is a matter of concern for the Committee. For example, the Committee was informed:

- 'In early June 1992 I was summoned to a hearing. This took a complete day and was conducted more like the Spanish Inquisition rather than an inquiry. I certainly felt like the Kangaroo in the said Kangaroo Court. The attitude seemed to be that I was guilty until proven innocent.'[24]

- 'The survey of our companies revealed that the main concern about ASC investigations was the overbearing attitude of ASC officers at interviews prior to a hearing as well as in the hearing itself. Such an attitude seems unnecessary and only serves to provoke bad feeling with organisations or individuals who are happy to cooperate.'[25]

- 'I refused to sign the first transcript without my legal representative being allowed to read it as well. Mr [name withheld] threatened me that I would be taken to a room by myself and the transcript would be read to me and I would sign it or be in contempt of the

---

[24] *Submissions, no. 10 (Barry McKenzie).*

[25] *Submissions, no. 89 (Association of Mining and Exploration Companies Inc.).*

Commission and could go to jail.'

'I responded by saying that that was duress and I would sign it on every page that it was signed under duress.'

'Mr [name withheld] jumped up and down!'[26]

- 'In the course of the examination of one of NRMA's officers, one of the ASC officers raised his voice to a considerable pitch and was quite hectoring and confrontational in his approach and questioning. We believe that this was quite unnecessary, unwarranted and not conducive to the efficient elicitation of information. Nor is an examination an appropriate occasion to debate market theories as was experienced in one instance.'[27]

- 'The experience of many examinees is that the questions directed to them are not properly framed to elicit a simple answer, often they are simply responses to an allegation or improper speculation, and they are often leading.' And

'It has further been seen that many examinations are not adequately prepared. Often ASC examining officers have arrived at the examination without some of the relevant documents or with the wrong documents.'[28]

---

[26] Submissions, *no. 29 (Ms Margo Bunt) p 2.*

[27] Submissions, *no. 80 (NRMA), p 7.*

[28] Submissions, *no. 98 (Australian Institute of Company Directors), para 5.1 and 5.3 respectively.*

ASC Complaints Procedure

3.16 The Committee received some information about the complaints procedure which the ASC has in place for handling complaints about the conduct of ASC officers. This matter arose in the context of evidence given to the Committee claiming that an ASC officer, Ms J Weir, had given a lecture to university students and, in the officer's presentation, had given an anecdote referring to a current investigation by name. As it happened, the daughters of one of the persons interviewed by the ASC in connection with that investigation were in the student audience.[29]

3.17 Affidavits by the two daughters were filed in the Federal Court proceedings then current between the ASC and the company concerned and its officers and promoters. The ASC gave evidence of its handling of the suggestion of impropriety by the ASC officer in giving the public lecture:

> **Senator McKIERNAN**--Obviously the very serious complaint that was made against Ms Weir and the lecture she gave at the QUT in 1992 would have been taken pretty seriously within the ASC. Did that investigation involve checking with the university as to whether lectures of this nature are taped? It is my understanding in universities throughout the country that when lectures, particularly visiting lectures, are arranged they are taped. This is done not only for posterity but also to aid people who perhaps have missed a lecture on a particular night. They can refer back to it in the various seminars that are held as the course progresses towards fruition.
>
> **Mr Tanzer**--The short answer to your question is no. I am not aware that inquiries were made of the QUT as to whether her lecture was taped. The affidavits of Rowena Bell-Bradbury and Natasha Bell-Bradbury, which have been presented to the committee today, were produced to the commission shortly before the matter was to proceed back to court. Ms Weir is a solicitor

---

[29] Evidence *pp 80-82 (Mr L Nevison).* Submissions *no. 119 (Mr L Nevision) [attachment: affidavits of Rowena Bell-Bradbury and Natasha Bell-Bradbury].*

> of the Supreme Court of Queensland. She was contacted and asked her recollection of the lecture. She was required to swear on affidavit that that was the case. You have her affidavit before you now. Partly because of the time involved and because the affidavits originally had been presented as part of the litigation, it was appropriate to find out what Ms Weir had to say about it and produce an affidavit on that. We have not taken it further.[30]

3.18 The NCA gave evidence to the Committee about its complaints procedure. The Committee was told that if a complaint involved a suggestion of misconduct in an investigation, that would be drawn to the attention of the Parliamentary Joint Committee on the National Crime Authority which would ask the NCA to report on the matter.[31] If, however, the complaint involved alleged breaches of the law, the NCA practice is to refer such matters to the appropriate police force to be investigated. Only in very minor matters was the complaint investigated by the NCA itself.[32]

> **Senator McKIERNAN**--Could you give me an indication of what you would consider to be a minor allegation--I think I could envisage what a major one would be--where an officer of the NCA would investigate a complaint within the NCA? Obviously, you need not go into specifics.
>
> **Mr Buxton**--There was one recently where a complaint was made by an individual to the chairperson relating to two officers in our Sydney office. The complaint was, on the face of it, rather bizarre, but nevertheless we conducted some preliminary inquiries into the complaint. Our chairman was involved in this, as he is involved in every complaint of this nature that is made against officers of the NCA--that is the seriousness with which we regard such complaints. After we conducted our own investigations, we determined that there was really not a complaint which would warrant sending it on to the AFP. We regarded the complaint basically as a frivolous one. Those are the types of matters that we would investigate ourselves.

---

[30] *Evidence, pp 108-109 (Mr G Tanzer).*

[31] *Evidence, p 137 (Mr J Buxton).*

[32] *Ibid.*

> There have been more serious allegations in the past that the NCA has investigated itself. That is not our current policy. I think in the old days there were more serious complaints that the NCA did investigate itself but now we refer such matters to the AFP. We did both. There were some matters that were referred to the AFP, but there were some matters which involved not a breach of the law but perhaps involved an unwanted reflection on the NCA--that was the difference, I suppose. Then such matters were investigated by the NCA. But our policy now is that if there is a serious allegation made, and if that allegation involves a breach of Commonwealth legislation and on our examination is of more than a frivolous matter, we would refer it to the Australian Federal Police.[33]

3.19 The Committee was advised during the course of its inquiry that the ASC was engaged in the process of revising its complaints procedures with a view to establishing a national uniform procedure. The Committee has been informed that consultations have now been completed with the Commonwealth Ombudsman and the Public Sector Union and that a national complaints assessment procedure is now in place. A copy of the complaint guidelines is annexed to this report at appendix 5.

3.20 Complaints about the exercise of the ASC's powers are inevitable. First, there is the strong probability of dissatisfaction by someone with the exercise of ASC discretions. Secondly, the nature of much of the work of the ASC involves confrontation, which adds to the probability of complaint. Accordingly, it is of great importance that the community has confidence in the complaints handling procedure of the ASC. Also, the Committee favours the approach taken by the NCA in relation to complaints where there is a strong emphasis upon external

---

[33] *Evidence p 138 (Mr J Buxton).*

review, with internal review being confined to the complaint assessment phase and the investigation of quite minor matters. The Chair of the NCA is informed of all complaints.

3.21 Complaints procedures in other law enforcement bodies (such as the police) can be a valuable source of knowledge. Complaints present an opportunity for self correction. A complaints procedure should not be viewed as an exercise in damage control. The Committee is impressed with the content of the ASC's new national complaint handling procedure guidelines.

3.22 In order to maintain community confidence in the integrity and effectiveness of the procedure, the ASC should include a report on complaints, and their handling, in the Commission's Annual Report. (Needless to say, the report need not contain identifying particulars of individuals concerned in any particular complaint.) Periodically (at least annually), the ASC should provide the Joint Statutory Committee on Corporations and Securities with a detailed report on the operation of the complaints procedure. After the procedure has been in operation for a period of, say, three years the procedure should be reviewed by a Parliamentary Committee, such as the Joint Statutory Committee on Corporations and Securities.

Recommendation

Recommendation 2: The Committee is pleased to observe that, in part due to the work of this Committee, a complaints procedure has been adopted by the ASC. The ASC should include an account of the operation of the complaints procedure in its Annual Report and, at least annually, should report on complaints and their handling to the Joint Statutory Committee on Corporations and Securities. The complaint procedures presently in place should be the subject of a review of its operation, after three years, by the Parliamentary Joint Committee on Corporations and Securities.

CHAPTER 4

OUTLINE OF THE POWERS OF THE ASC

Key Investigatory Powers

4.1 The ASC is equipped with an extensive array of investigatory powers to assist it in the discharge of its statutory functions. The key powers available to the ASC are set out in Part 3 of the *ASC Law*. They are as follows:

- the power to inspect statutory records: section 20;
- the power to require the production of books in relation to the affairs of a body corporate, securities and futures contracts: sections 30-33;
- the power to require a person to attend an examination in relation to an investigation: section 19; and
- the power to require the disclosure of information about dealings in securities or futures contracts: sections 41, 43, 44 and 46.

Criticism of the Extent of the ASC's Powers

4.2 A number of submissions, and witnesses at the public hearings, expressed concern at the breadth of the powers conferred on the ASC. For example, Hall, Tuckfield Richardson, Solicitors for Split-

Cycle Technology Limited (a company being investigated by the ASC) expressed the view that under ASC Law subsections 13(1) and (3):

> the ASC need only have "reason to suspect" (of which it, or one of its many delegates, appears to be the sole judge) contravention of a relevant law or previous law.
>
> The ASC may then make such investigation as it considers expedient (subsection 13(1) or appropriate subsection 13(3)).
>
> The power is absolute, unlimited and virtually uncontrollable except by the ASC itself.[34]

The Critical Balance

4.3 An examination of the investigative powers of the ASC requires the Committee to address the balance which should be struck between two competing interests: the need for effective corporate regulation and the need to protect individuals from an excess of administrative power.

4.4 Persons under investigation quite understandably wish to know the nature of the allegations against them, if only to enable them to respond. On the other hand, the investigatory agency will wish to maintain the confidentiality of its investigation to the maximum extent possible. The High Court recognised this dilemma in *NCSC v News Corporation Ltd*[35]:

---

[34] Submissions, *no. 13 (Hall, Tuckfield Richardson, Solicitors for Split-Cycle Technology Limited), p 4.*

[35] *(1984) 8 ACLR 843 at 862, per Mason, Wilson and Dawson JJ quoted in John Kluver 'ASC Investigations and Enforcement: Issues and Initiatives' (1992) 15 UNSW Law Journal 31 at 32.*

> It is of the very nature of an investigation that the investigator proceeds to gather relevant information from as wide a range of sources as possible, without the suspect looking over his shoulder all the time to see how the inquiry is going. For an investigator to disclose his hand prematurely will not only alert the suspect to the progress of the investigation but may well close off other sources of inquiry.

4.5 The remainder of this report will discuss the appropriateness of the present balance between these competing interests in the context of the powers conferred upon the ASC.

CHAPTER 5

THE EXERCISE OF ITS POWERS IN PRACTICE

The Need for Wide Powers of Investigation

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

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

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

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

The Time Taken to Complete an Investigation

5.3 Many people giving evidence to the Committee commented on the length of time taken by the ASC in conducting its investigations. The passage of time was said to exacerbate the stress associated with being under investigation, and also having an adverse effect on the market where the investigation involved a listed company.

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

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

---

[36] *Submissions, no. 96 (ASC) p 6.*

ongoing when the company officials gave evidence in February 1994.[37] In its response to this information the ASC explained that:

> The investigation was commenced in September 1991. On 26 March 1992 the ASC applied to the Federal Court in Brisbane to restrain Mr Mayne from offering securities in Split Cycle except in compliance with the Corporations Law. On 9 April 1992 the action was settled, on the basis that Mr Mayne undertook to the Federal Court that he would not offer securities except in compliance with the law. Following this action, the Commission became aware through media reports generated by Split Cycle Technology Limited, that securities were still being actively traded. The Commission therefore continued to investigate possible breaches of sections 1018, 767 and 780 of the Corporations Law. The investigation continued until mid 1993 as the company failed to lodge the necessary prospectuses until April 1993.
>
> In addition to staff time, $6,500 has been spent on the costs of transcripts and witness fees.[38]

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

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

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

---

[37] *Evidence, p 49 (Mr A J D Richardson). Submissions, no. 13 (Split-Cycle Technology Limited) p 3.*

[38] *Submissions, no. 120 (ASC Supplementary Submission), p2.*

[39] *Evidence, p 261 (Mr A Rees).*

> the investigation. The meeting of this performance indicator is a high priority.[40]

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

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

No Notification When an Investigation Finishes

5.8 The Law Institute of Victoria also commented on the fact that an ASC investigation may continue for some time yet when it concluded those who had been examined compulsorily, or been required to produce documents, would be unaware of the end of the investigations. An example of this is shown in the remarks made by the representatives of Split-Cycle Technology (noted above at paragraph **[5.5]**) indicating that Split-Cycle believed the ASC investigation was ongoing at the date of their appearance before the Committee (February

---

[40] *Submissions, no. 129 (ASC Supplementary Submission) p 102.*

[41] *Ibid.*

[42] *Submissions, no. 89 (AMEC) p 2.*

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

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

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

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

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

Recommendation

5.10 The Committee believes that the decision of the ASC to adopt a notice procedure at the conclusion of an investigation is a very positive step toward improving relations between the ASC and the business community. The Committee is also supportive of the ASC's performance indicator of finalising an investigation within 12 months of the resourcing of the investigation.

---

[43] *Submissions, no. 106 (Law Institute of Victoria) p3.*

[44] *Evidence, p 178 (Mr A Procter).*

[45] *Submissions, no. 142 (ASC Supplementary Submission) p 2.*

Recommendation 3: The Committee recommends that:

- **the ASC make a major effort to achieve its performance indicator of finalising investigations within 12 months of the resourcing of the investigation;**
- **the ASC ensure that, when an investigation concludes and no further action is contemplated, notice is given to the parties involved in the investigation; and**
- **the Joint Statutory Committee on Corporations and Securities monitor compliance with this recommendation.**

Late Service of Documents

5.11 A number of witnesses before the Committee, all apparently involved in the same matter under investigation by the ASC, gave evidence that summonses and applications issued by the ASC were served so close to the return date of the summons or application as to preclude, or minimise, the opportunity to obtain legal advice prior to the appearance before the Court. For example, Ms Margo Bunt stated that she and her husband 'each received a box (17" x 13" x 6") of documents one night. On the top was the advice that an Interlocutory Hearing was to be conducted the next morning at 10:00 am.'[46] Because of the shortage of time it was impossible to read the documentation, much less to arrange for legal representation. 'The result of that hearing was that

[46] *Submissions, no. 29 (Ms Margo Bunt), p 5.*

every asset we had was frozen.'[47]

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

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

> During the afternoon and evening of 16 March 1992, the application and the material on which the ASC sought to rely was served on the 45 respondents. Having regard to the history of the matter and after consultation with senior Counsel it was decided to serve as many respondents as possible with the material but provide minimum notice and proceed ex parte in the first instance. That decision carried with it the additional onus that the ASC was itself required to put all relevant matters before the court.
>
> On 17 and 18 March 1992, the ASC application proceeded before Mr Justice Northrop of the Federal Court. The application resulted in an interim order for the appointment on 18 March 1992 of interim receivers over the entire or partial assets of the 45 corporate and individual respondents.[50]

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

---

[47] *Ibid.*

[48] *Submissions, no. 63 (Mr G D Mathers), p 1.*

[49] *Submissions, no. 26 (Ms B Bell-Bradbury), p 2.*

[50] *Submissions, no. 120 (ASC Supplementary Submission), p 5.*

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

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

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

---

[51] *See generally: Butterworth's Australian Corporate Law Service at p 152,168.*

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

5.16 This section was used by the ASC in the Aust-Home Investments Limited investigation. The ASC's initial application to appoint receivers to the various natural and corporate persons involved in the Aust-Home Scheme[53] proceeded ostensibly ex parte[54] and arose out of an ASC investigation rather than the existence of an actual prosecution or civil proceedings.

5.17 The section therefore allows the ASC, even when matters are at the purely investigatory stage and no criminal or civil prosecution have been commenced or necessarily contemplated, to apply for a variety of orders which have potentially dire consequences for an individual's personal and business activities. The Committee is particularly concerned that the section allows the ASC to publically debut investigations with paralysing orders effecting personal and corporate assets.

5.18 The Committee received evidence from a number of the

---

[52] *Beach Petroleum NL and Anor v Johnson and Others (1992) 9 ACSR 404 at 407 (per von Doussa J.).*

[53] *Op. Cit. n 47 p 1264.*

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

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

5.19 The range of persons affected by section 1323 orders is potentially extremely wide and it is not necessary that they be complicit in the matters under investigation. The case law that has evolved around the section suggests that it is not necessary that the investigation be directed solely or even primarily against the defendant. All that is necessary is that the defendant falls within the general ambit of the investigation.[57] It has further been held in relation to one of the predecessors of section 1323 that the investigation does not need to have taken a definitive direction and that the evidence necessary for an order to be made will depend on the circumstances of the investigation.[58] The implication from the manner in which courts have interpreted section 1323, and its predecessors, is that it is entirely conceivable that the ambit of an investigation can shift and that persons made subject to an initial order

---

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

[56] *Ibid. at p 5.*

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

[58] *CAC (NSW) v Walker & ORS (1987) 11 ACLR 884 at 888 (per Waddell CJ in Equity).*

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

5.20 This issue has arisen in the context of the late service of documents and the Committee is disturbed by the admission made by the ASC that this formed part of a wider strategy of proceeding ex parte **[see para. 5.13]**. The Committee is aware that as the law stands that such a course of action is entirely legal and a tactical issue for the ASC to determine when conducting its investigations. The Committee concedes that ex parte applications under section 1323 are sometimes necessary due to the reality of swift movements of money in the corporate world. The Committee nevertheless does not believe that the law as it presently stands provides any incentives for caution in the use of the ex parte procedure and considers that there is a capacity for innocent persons to suffer loss and damage without any right to compensation for the loss suffered.

Recommendation

Recommendation 4: The Committee recommends that the Corporations Law be amended so that in situations where the ASC:

- **obtains ex parte an order freezing personal assets under section 1323 of the Corporations Law;**
- **the order is subsequently lifted;**
- **no determinative order is made against the property the subject of the order;and**
- **no successful criminal or civil prosecution results against the respondent,**

the respondent should be given a statutory right to recover from the ASC any loss or damage incurred as a result of the original order.

Delay in the Provision of Transcripts of Examinations

5.21 Another frequent complaint in the evidence provided to the Committee related to the delay in supplying a copy of the transcript of a compulsory examination under section 19 to the examinee. Subsection 24(2) of the ASC Law provides that the ASC inspector 'shall, if requested in writing by the examinee to give to the examinee a copy of the written record, comply with the request without charge but subject to such conditions (if any) as the inspector imposes.'

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

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

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

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

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

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

---

[59] Submissions, *no. 13 (Split-Cycle Technology Limited), p 12.*

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

[61] Submissions, *no. 100 (Commonwealth Attorney-General's Department), para 47.*

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

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

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

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

---

[62] *Submissions, no. 26 (Ms Beatrix Bell-Bradbury), p 2.*

[63] *Submissions, no. 120 (ASC Supplementary Submission), p 3.*

[64] *Submissions, no. 29 (Ms Margo Bunt), p 2.*

[65] *Submissions, no. 91 (Trustee Companies Association of Australia) p 2.*

transcript should be provided as a matter of right:

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

5.29 An expert on securities law in the United States and in Australia informed the Committee that in the United States where a person is examined by the Securities and Exchange Commission (SEC), if a transcript of an examination is made the examinee has a right to a copy of the transcript. However the target of the investigation does not have a right to a copy of another examinee's transcript.[67]

Recommendation

5.30 The Committee believes that in a compulsory examination of a witness the witness should be entitled, as of right, to a copy of the transcript unless the circumstances indicate that the privacy of the examination or the integrity of the investigation would be endangered as a result. Accordingly, the ASC should ensure that the witness is provided with a transcript as soon as it becomes available, without the necessity for a request (whether oral or written) from the witness. If the ASC decides that it is inadvisable to supply the transcript then the witness should be given advice in writing to this effect.

---

[66] *Submissions, no. 95 (Business Council of Australia).*

[67] *Submissions, no. 97 (Mr Mark Williamson, Coudert Brothers), p 9.*

Recommendation 5: The Committee recommends that the ASC Law be amended to provide that the ASC must ensure that a witness examined under section 19 of the Law is provided with a transcript, as of right, as soon as practicable, without the necessity for a request (whether oral or written) from the witness. If the ASC decides that it is inadvisable to supply the transcript, because to do so would prejudice the investigation or endanger the privacy of the examination, then the witness should be given advice in writing to this effect.

Training of ASC Staff

5.31 The importance of the task entrusted to the ASC places a great burden of responsibility upon its officers. They must necessarily be highly skilled, well trained in all facets of their duties, and subject to rigorous accountability mechanisms.

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

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

> the use of its powers.[68]

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

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

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

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

5.36 The ASC advised the Committee that it placed considerable emphasis on the exchange of staff between itself and the corporate sector as one way of enhancing the business skills of its officers. A

---

[68] Submissions, *no.120 (ASC) p 5.*

[69] Evidence *p 97 (Mr M J P Hart).*

[70] Submissions, *no. 80 (NRMA) para 3.5.1.*

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

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

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

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

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

Liaison with the Business Community

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

---

[71] *Submissions, no.143 (ASC Supplementary Submission) p9.*

[72] *Evidence, p 262 (Mr A Rees).*

[73] *Evidence, p 267 (Mr A Procter).*

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

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

> **Mr Soutter** - The second matter we wish to comment on is the failure of the ASC to develop a culture of voluntary compliance by businesses with the Corporations Law. Although the ASC is an extremely well-funded and resourced body, it ultimately can only effectively police an extremely small proportion of corporate activity. What is missing from ASC enforcement policies and strategies, as evidenced by its submission to this inquiry, is a preparedness to develop a corporate culture of voluntary compliance by periodically consulting with peak business and professional organisations on policies of surveillance and enforcement.
>
> The Business Council believes that the formation of a business and professional consultative group, to meet periodically with the chairman and senior staff of the ASC, would not only enhance corporate compliance but it would also facilitate greater procedural fairness by the ASC. I point out that other government bodies, such as the Trade Practices Commission and, indeed, the Commissioner of Taxation, have put in place such bodies. Another measure which we adopted to provide the ASC with a greater understanding of the corporate sector is the appointment of business people as part-time members of the ASC. We note that, to date, none of the five vacancies that are provided for in the act have been filled.[74]

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

---

[74] *Evidence, pp 213-214 (Mr G Soutter).*

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

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

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

---

[75] *Evidence, p 222 (Mr G Tanzer).*

[76] *Submissions, no.143, (ASC Supplementary submission).*

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

The Business Council of Australia is a notable omission from this list of organisations. Some other bodies which one would expect to find in this list are also absent, such as the Bankers Association, the Australian Merchant Banks Association, and other key industry bodies.

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

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

Recommendation

Recommendation 6: The Committee recommends that the ASC review its consultative arrangements, particularly with the business community, with a view to ensuring that the arrangements are comprehensive.

CHAPTER 6

NOTICES TO PRODUCE DOCUMENTS

Outline of the Power

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

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

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

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

- the performance or exercise of any of the ASC's functions and powers under a national scheme law;
- ensuring compliance with a national scheme law;
- an alleged or suspected contravention of a national scheme law or a law concerning the management or affairs of a body corporate or involving fraud or dishonesty and relating to a body corporate, securities or futures contract; or
- an investigation under Division 1 of Part 3.1.[77]

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

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

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

---

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

[78] *ASC Law subsection 5(1).*

[79] *(1992) 7 ACSR 676*

Width of Notices to Produce Documents

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

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

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

6.8 The degree of detail required in the notice is not settled as a matter of law. There are now conflicting decisions of the Federal Court on whether the ASC is required to specify in the notice the relationship between the documents sought and the relevant affairs of the body

---

[80] *Evidence p 25 (Mr Procter).*

[81] *Evidence p 149 (Mr Procter).*

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

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

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

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

Comments in the Evidence Concerning Notices to Produce Documents

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

---

[82] *(1991) 6 ACSR 385.*

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

[84] Evidence *p 323 (Mr N Korner).*

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

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

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

Access to Seized Documents

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

---

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

[86] *Ibid p 11.*

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

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

exercise of the power to seize documents was the difficulty presented to companies in obtaining access to documents seized by the ASC. This was said to be particularly critical where the documents were needed for the daily functioning of the company concerned.[89]

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

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

---

[89] *Ibid.*

[90] *Evidence, p 30 (Mr P MacDonald).*

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

[92] *Evidence, p 188 (Mr A Wade).*

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

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

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

6.18 The ASC was at pains to explain that it was conscious of the commercial inconvenience which could occur when a company's documents are removed. It was explained that the ASC had an administrative practice of providing a company with a photocopy of the documents which it requires for its daily operations.

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

---

[93] *Evidence, p 207 (Mr G Tanzer).*

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

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

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

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

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

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

Mr Procter--Yes.

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

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

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

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

Conclusions

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

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

---

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

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

6.22 The Committee is of the view that the viability of a company should not be endangered because the ASC is investigating a matter and has seized some, or all, of its records. Needless to say, the investigation may disclose no breach of the law by the company or its officers. As well, the collapse of the company would adversely affect people who, in all probability, will have no connection whatever to the ASC investigation, for example the company's creditors and its shareholders. Accordingly, the Committee believes that where records are seized by the ASC the company must be given copies of the records which are necessary for its daily operations.

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

---

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

Recommendations

Recommendation 7: The Committee recommends that regulations be promulgated requiring ASC investigation officers to clearly undertake that the ASC will provide to the person from whom business or financial records are seized a copy of all those records which are necessary to enable the person or company to carry on the ordinary business activities of the person or company.

Recommendation 8: The regulations should further state that the requirement on the part of the ASC to ensure that such undertakings are noted on the form of Notice to Produce Documents which is served on the company or person concerned.

Cost of Compliance

6.24 A bone of contention for a number of the organisations providing evidence to the Committee was the cost to them of complying with requests for information made by the ASC. A joint submission by the Australian Society of Certified Practising Accountants and the Institute of Chartered Accountants in Australia pointed out that compliance costs are not levied on the business community generally 'who ultimately benefit from an investigation. The cost is borne solely by the person (including members of the Accounting Bodies) or corporation who volunteers the information and who are often not connected with the

investigation.'[98]

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

6.26 The Australian Bankers' Association ('ABA') stated that very large amounts of time and expense are incurred by member banks in complying with examination requests[100] and document production notices[101]. Compliance with an ASC notice to produce documents may require the bank to search a number of different databases. Some records will be held electronically, and others will be in hard copy form. Some records may be current while others may be in archives. The required records may be held in different parts of the banking group, such as a trading bank arm, a finance company arm and a merchant banking arm.

---

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

99 *Submissions, no. 89 (AMEC), p2.*

100 *Submissions, no. 99 (ABA), p3.*

101 *Evidence, p 144 (Mr A Cullen).*

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

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

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

6.29 Subsection 89(3) of the ASC Law provides as follows:

> **89(3)** The Commission may pay such amount as it thinks reasonable on account of the costs and expenses (if any) that a person incurs in complying with a requirement made under this Part.

The ABA, in a supplementary submission to the Committee, provided some anecdotal information of a lack of support by the ASC (and its predecessor, the NCSC) for claims to reimbursement. Rather, the bank concerned was given the impression that 'it should be happy to provide

---

102 *Evidence, p 148 (Mr A Procter).*

103 *Evidence, p 271 (Mr A Rees).*

104 *Evidence, p 291 (Mr N O'Bryan).*

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

6.30 In enacting section 89 the Parliament has expressed its will that a facility should be available for the reimbursement of the cost of compliance with a requirement made by the ASC under Part 3 of the ASC Law. It may be that the awareness of the facility available in section 89 is not widely known, and that the ASC is not resourced at a level necessary to meet a significant number of claims under the section. These problems need to be overcome in order to meet the policy aim which is expressed by section 89.

Recommendation

Recommendation 9: The Committee recommends that:

- **the ASC note on its relevant forms, particularly the Notice to Produce Documents and the Notice to Attend for Compulsory Oral Examination, the existence of a right to apply for reimbursement of costs and expenses under section 89;**
- **the ASC develop guidelines for its officers to guide the exercise of its discretion under section 89;**
- **the ASC report in its Annual Report to Parliament on the number and amount of claims made under the section, and the number and amount of claims approved for reimbursement; and**
- **the Government ensure that an appropriate level of resourcing is available to the ASC to meet claims under section 89.**

---

105 *Submissions, no. 138 (ABA Supplementary Submission), p1.*

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".'[106]

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*[107] 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.'[108]

---

106 *Submissions, no. 96 (ASC), para. 6.12.*

107 *(1991) 29 FCR 491; (1991) 5 ACSR 1.*

108 *(1991) 29 FCR at 495.*

7.8 In *Johns v Connor*[109] 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.'[110]

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.'[111]

---

109 *(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.*

110 *(1992) 35 FCR at p 13 (Lockhart J).*

111 *(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.[112]

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.'[113]

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

---

112 *Ibid.*

113 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.[114]

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.[115]

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

---

114 *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).*

115 *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.[116]

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.

---

116 *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.[117]

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.[118]

---

117 *Evidence p 98 (Mr M J P Hart).*

118 *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.'[119] 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.[120]

Comment in the Evidence About Confidentiality

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

---

119 *Ibid, para 6.19.*

120 *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.'[121]

- '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.'[122]

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

---

121 *Evidence, p 96 (Mr M J P Hart).*

122 *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.'[123]

- '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[124]. 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.'[125]

---

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

124 *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.*

125 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.'[126]

- '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.'[127]

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

---

126 *Submissions, no. 99 (Australian Bankers Association) p 2.*

127 *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.'[128]

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.[129]

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.

---

128 *Submissions, no. 90 (Law Council of Australia) p 14.*

129 *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?[130]

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

---

130 *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.[131] 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.'[132]

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.[133] 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

---

131 *ASC v Bell (1991) 9 ACLC 1607.*

132 *Evidence p 158 (Mr Procter).*

133 *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.'[134]

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.[135]

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.[136]

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

---

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

135 *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.*

136 *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.'[137] 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

---

137 *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 minimalise 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.'[138]

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.'[139] The application for the summons is made ex parte and, accordingly, 'vigilance will be exerted by registrars when considering the application

---

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

139 *Ibid.*

for an examination, ... and, if issued, will set in train the whole examination process.'[140]

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[141]. 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.'[142] However, an assurance by examining counsel that the questions asked are for the benefit of creditors generally ought not be disregarded.[143] 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.'[144]

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

---

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

141 *Bankruptcy Act 1966 subsection 81(10).*

142 *Keay, op cit. n.140.*

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

144 *Andrew Keay,op.cit. n.140 , at 77, citing as authority a number of cases including Re Csidei (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.[145]

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[146]. 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

---

145 *Andrew Keay, op.cit. n.140 at p77.*

146 *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.[147]

- *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.'[148] Some of the actions which may constitute vexatious or oppressive conduct are:

  - that the summons is expressed in terms which are too wide[149];

  - 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')[150]; and

  - that litigation involving the examinee and the trustee is pending or contemplated and it would be unfair to compel

---

147 *Re Alafaci (1976) 9 ALR 262.*

148 *Keay, op cit, n.140 at 81.*

149 *Re Andrews (1958) 18 ABC 181.*

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

the examinee to disclose his or her case to the trustee[151].

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,

---

151 *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[152].

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

---

152 *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..[153]

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.[154]

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

---

153 *Submission no.90 (Law Council of Australia) p 11.*

154 *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.

CHAPTER 8

THE PRIVILEGE AGAINST SELF-INCRIMINATION

The Common Law

8.1 At common law a person cannot be compelled to incriminate himself or herself, and may refuse to answer any question, or produce a document or thing, which may put the person at risk of being convicted of a criminal offence. Subsection 68(1) expressly abrogates this common law privilege for the purposes of ASC investigations. Subsection 68(1) provides that

> it is not a reasonable excuse for a person to refuse or fail:
> (a) to give information;
> (b) to sign a record; or
> (c) to produce a book;
> in accordance with a requirement made of the person, that the information, signing the record or production of the book, as the case may be, might tend to incriminate the person or make the person liable to a penalty.

Use/Derivative Use Immunity

8.2 Until 14 May 1992 the abrogation of the common law privilege against self incrimination was balanced by a use/derivative use immunity in subsection 68(3) of the ASC Law. Such an immunity provides that self incriminatory material provided under compulsion, and any further material which is derivative of the self incriminatory material, is not admissible in evidence against the person in a criminal proceeding

except for a proceeding for false swearing or the like. On 14 May 1992, the commencement date for the *Corporations Legislation (Evidence) Amendment Act 1992*, the protective immunity was amended to a use immunity only (i.e. the derivative extension was removed). This change to the law followed the recommendation of the Parliamentary Joint Committee on Corporations and Securities in its report *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission* which was tabled in the Senate on 26 November 1991.

8.3 The Committee has decided that it is not appropriate to review this change because of the very recent time of the change. Moreover, the Committee notes that section 10 of the 1992 amending Act presently contains a requirement for a review by stating that the change be reviewed by mid-1997.

Criticism of the Abrogation of the Privilege

8.4 In relation to the operation of the abrogation of the privilege in relation to compulsory examinations, two significant criticisms were made to the Committee. The first related to the requirement that the privilege be asserted before each answer in question. In other words a blanket, or ambit, claim to the privilege is not permissible. Once again, the edited transcript at Appendix 3 illustrates the operation of this principle. It will be noted that numerous answers are prefaced with the word 'privilege', which signifies that the privilege against self incrimination has been claimed. The second criticism related to the unavailability of a corporate privilege against self incrimination. Also, of course, the question was raised whether it was sound policy to tamper with the common law privilege at all.

Blanket Claim to the Privilege Against Self-Incrimination

8.5 On the first point (the desirability for a right to make a blanket claim to the privilege) the legal representative for the NRMA stated that the need to make the claim before each answer

> interrupts the flow of the examination and it is a distraction to the witness, because half of his mind is directed towards whether or not he has remembered to say 'privilege'. Time and time again the witness will turn and say, 'Did I remember to say "privilege"?' halfway through the examination. So his thought processes are not focussing on the subject matter of the inquiry. It is, frankly, if you have ever seen it, a perfectly ridiculous process.[155]

This criticism was endorsed by other witnesses. For example, Mr Norman O'Bryan described the process as 'absurd' and a 'crazy situation'.[156]

8.6 An examination of the edited transcript at Appendix 3 suggests that the need to claim the privilege before each answer may well be distracting, both to the examinee and to the others present at the examination. The ASC conceded that it was 'a cumbersome process'[157] but expressed difficulty with the suggestion that there be a right to make an ambit claim to the privilege. It was argued

> that there be a serious consideration of whether it is appropriate to claim the privilege, and the examinee ought to genuinely turn his or her mind to the question of whether the privilege ought to be claimed. There is a danger, if the amendment is made to allow a blanket claim, that people will tend to simply make that blanket claim without really turning their mind to it - as a matter of safety as much as anything else.[158]

---

155 *Evidence p 268 (Mr P Cameron).*

156 *Evidence pp 292-293 (Mr N O'Bryan).*

157 *Evidence p 269 (Mr Procter).*

158 *Evidence pp 267-268 (Mr A Procter).*

Corporate Privilege Against Self-Incrimination

8.7 In 1992 the *Corporations Legislation (Evidence) Amendment Act 1992* amended section 68 of the ASC Law by substituting a new subsection 68(2). Amongst other things, the outcome of this amendment was to expressly remove the right of a corporation to claim the privilege against self-incrimination (and, also, as noted above, to abolish the 'derivative use' immunity). The Law Council pointed out[159] that a corporation might wish to claim the privilege in two circumstances: when responding to a notice to produce documents, and when a company officer is giving evidence as a mouthpiece of the corporation at a compulsory examination.[160]

8.8 The Law Council noted that the removal of the right to the privilege in relation to notices to produce documents merely restored the situation which existed under the earlier co-operative scheme companies legislation.[161] The Law Council also noted that the position following the amendment of subsection 68(2) is comparable with the situation applying to other forms of compulsory requirement to produce documents, such as section 155 of the Trade Practices Act. Accordingly, the Law Council did not consider, in this area (ie in relation to notices to produce documents), 'the revised operation of section 68 to be

---

159 *Submissions no. 90 (Law Council of Australia) pp 17-18.*

160 *Where the company officer is giving evidence in his or her personal capacity at a compulsory examination the examinee will be entitled to the protection of the statutory provisions relating to the privilege against self incrimination.*

161 *Submissions no. 90 (Law Council of Australia) p 18, citing Controlled Consultants Pty Limited v Commissioner for Corporate Affairs (1985) 156 CLR 385 as authority.*

objectionable.[162]

8.9 However, the Law Council argued that the privilege should apply for company officers appearing at compulsory examinations in their capacity as mouthpieces of the corporation.

8.10 The High Court has recently held, in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, that the privilege against self incrimination is not available to corporations, because the privilege is in the nature of a human right, designed to protect individuals from oppressive methods of obtaining evidence of their guilt for use against them. Mason CJ and Toohey J felt that there was no difficulty in relation to the giving of oral evidence by company officers because '[o]ral evidence given by an officer of a corporation is that of the witness, not that of the corporation.'[163] Moreover, as pointed out by Deane, Dawson and Gaudron JJ in their dissent, 'when an officer or employee is called, even in criminal proceedings against the corporation, the officer or employee may not refuse to answer upon the basis that the answer would tend to incriminate the corporation. Thus the debate about whether a corporation may claim privilege against self-incrimination centres on the relatively confined area of the production of documents or the answering of interrogatories because these are things

---

162 *Submissions no. 90 (Law Council of Australia) p 18.*

163 *(1993) 68 ALJR 127 at 138, citing Smorgon v Australia & New Zealand Banking Group Ltd (1976) 134 CLR 475 and Penn-Texas Corporation v Murat Anstalt [1964] 1 QB 40 as authority.*

which a corporation itself may be required to do.[164]

8.11 Accordingly, the Committee is not persuaded that there is a need to change the law relating to the privilege against self-incrimination in relation to corporations.

Wisdom of Tampering With the Common Law Privilege

8.12 One expert witness gave evidence that the abrogation of the privilege against self incrimination may very well be counter productive for the ASC. Mr Warren Scott, a partner with Coudert Brothers, pointed out that the SEC in the United States does not possess a similar power. Mr Scott argued that conferring this power on the ASC may hinder the ASC's ability to investigate a matter 'since I would doubt that few examinees will actually answer truthfully to a question the response to which may incriminate them.'[165]

8.13 Mr Scott pointed out that in the United States, in an investigation by the SEC,

> to have any witness claim the right not to answer on the grounds that it could incriminate them is something that you do not do lightly. By making that claim, you are obviously letting the investigators know that they are onto something, so it is rare that someone is going to claim a privilege not to answer.
>
> Unfortunately, since you can still be compelled to testify in an ASC investigation, even if you [can't] claim the privilege, you are going to claim the privilege all the time. In an SEC investigation, you do not claim the refusal to answer on self-incrimination grounds unless you really want to tell the investigators, 'You've got me, but you are going to have to find out how to get

---

164 *Ibid p 155.*

165 *Evidence p 281 (Mr W Scott).*

me from somebody else.'[166]

8.14 The ASC conceded that the powers of the ASC and of the SEC are different with respect to the privilege against self incrimination, pointing out the role of the Constitutional Fifth Amendment in relation to self incrimination in the US.[167] The ASC stated that the treatment of the privilege against self incrimination in the ASC is analogous to the handling of the privilege in the United Kingdom.[168]

8.15 In the recent High Court decision in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 Mason CJ and Toohey J discussed the origins and relevance of the privilege against self-incrimination. They indicated that, in its application to natural persons, there may be cause to distinguish between the protection from the production of documents and the protection from the giving of oral evidence:

> It is one thing to protect a person from testifying to guilt; it is quite another thing to protect a person from the production of documents already in existence which constitute evidence of guilt, especially documents which are in the nature of *real* evidence.[169]

---

166 Evidence *p 283 (Mr W Scott).*

167 Submissions, *no. 129 (ASC), p65.*

168 *Ibid.*

169 *(1993) 178 CLR 477 at 502. (Emphasis in original. The reference to 'real' evidence would seem to be a reference to the fact that the privilege protects a person from discovering or revealing information which may lead to the discovery of admissible evidence of guilt not in his or her possession or power.)*

Conclusion

8.16 The Committee is concerned at the extensive abridgment of the usual protection which are available to a person being questioned by an investigative authority. The transcripts of compulsory hearings examined by the Committee indicate that the privilege against self-incrimination is claimed almost as a matter of form by many examinees. The Committee feels that the evidence of Mr Scott of Coudert Brothers about the law and practice in the United States was compelling and persuasive. The Committee believes that some redress of the balance of rights is needed to protect examinees at compulsory hearings. However, the Committee believes that the law in relation to the privilege against self-incrimination should not be changed in relation to notices to produce documents nor in relation to corporations.

Recommendation

Recommendation 14: The Committee recommends that:

- **the ASC Law be amended in order that an examinee appearing at a compulsory hearing under section 19 shall be entitled to the protection of the privilege against self-incrimination;**
- **the privilege should not be available in relation to documents discovered pursuant to a notice to produce documents or the examination; and**
- **the privilege should not be available in relation to corporations.**

CHAPTER 9

LEGAL PROFESSIONAL PRIVILEGE

The Availability of Legal Professional Privilege at Compulsory Examinations

9.1 At a compulsory oral examination under section 19 of the ASC Law neither the privilege against self incrimination, nor legal professional privilege, can be relied upon as an excuse for failing to answer a question. Subsection 68(1) and Part 3 Division 2 (sections 19-27) of the ASC Law contain a series of provisions relating to the conduct of examinations which appear to provide extensive protection for the rights of the examinee.

9.2 The abrogation of legal professional privilege was a major issue during the Committee's inquiry. An examination of the policy issue requires a brief outline of the common law relating to legal professional privilege, and a short discussion of the nature of the solicitor-client relationship.

The Solicitor-Client Relationship

9.3 The relationship between a solicitor and his or her client is a

fiduciary one, imposing special obligations on the solicitor.[170] One aspect of the relationship is the duty of a solicitor not to disclose to third parties certain information confidentially revealed to him or her in his or her capacity as a solicitor, and that duty continues after the relationship of solicitor and client has ceased.[171]

Legal Professional Privilege

9.4 The leading Australian cases on legal professional privilege are the decisions of the High Court in *Grant v Downs*[172] and *Baker v Campbell*[173]. Mr. Justice Murphy who was one of the majority in *Baker v Campbell* described the features of legal professional privilege in the following terms:

> *Scope of the Privilege.*
>
> Under common law as recently declared for Australia, client's legal privilege protects from disclosure any oral or written statement, or other material, which has been created solely for the purpose of advice, or for the purpose of use in existing or anticipated litigation *(Grant v Downs (83);* see also *National Employers' Mutual General Insurance Association Ltd v Waind (84)).* This defines the scope of the privilege more narrowly than elsewhere. In the United Kingdom it is enough if the dominant purpose for coming into existence of the material is legal advice or litigation *(Waugh v British Railways Board (85)).*
>
> The privilege does not attach to documents which constitute or evidence transactions (such as contracts, conveyances, declarations of trust, offers or receipts) even if they are delivered to a solicitor or counsel for advice or for use in litigation. It is not available if a client seeks legal advice in order to facilitate the commission of crime or fraud or civil offence (whether the adviser knows or does not know of the unlawful purpose) (see *Reg v Cos and Railton (86); Bullivant v Attorney-General (Vict.)(87); R v Smith (88));* but is of course available where legal advice or assistance is sought in respect of past

---

170 *Nocton v Ashburton [1914] AC 932 at 952.*

171 *Ott v Fleishman [1983] 5 WWR 721, BC.*

172 *(1976) 135 CLR 674; 11 ALR 577.*

173 *(1983) 153 CLR 52.*

> crime, fraud or civil offence. Hence the subject matter of the privilege is closely confined; in brief it extends only to oral or other material brought into existence for the sole and innocent purpose of obtaining legal advice or assistance.[174]

9.5 Dawson J, who, like Murphy J, was part of the majority in *Baker v Campbell,* said at p 132:

> To view legal professional privilege as being no more than a rule of evidence would, in my view, be to inhibit the policy which supports the doctrine. Indeed, now that there appears to be a tendency to compel the disclosure of evidence as an adjunct to modern administrative procedure (see, e.g. *Commissioners of Customs and Excise v Harz (83)),* it may well be necessary to emphasise the policy lest it be effectively undermined. For there can be no doubt that freedom of communication between a legal adviser and his client may be greatly diminished by a requirement that the information might eventually be used in some action against the client, whether in administrative or judicial proceedings.
>
> In my view, the doctrine of legal professional privilege is, in the absence of some legislative provision restricting its application, applicable to all forms of compulsory disclosure of evidence.

The Dominant Purpose Test

9.6 Legal professional privilege protects the disclosure of communications between a client and his or her legal adviser which are confidential and which are brought into being for the *dominant purpose* of enabling the client to obtain, or the legal adviser to give, legal advice for use in legal proceedings. The privilege derives from the principle that a citizen, before committing himself or herself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.[175]

---

174 *(1983) 153 CLR 52 at 86.*

175 *Balck-Clawson Ltd v Papierwerke AG [1975] AC 591 at 638 per Lord Diplock.*

9.7 The *dominant purpose* test was introduced by the Commmonwealth *Evidence Act* 1995. In all proceedings in a federal court or a court of the Australian Capital Territory the applicable test will be whether the document or advice was created with the *dominant purpose* of obtaining legal advice or for the *dominant purpose* of the client being provided with professional legal services relating to an Australian or overseas proceeding or an anticipated proceeding in which the client may or was or might have been a party.[176]

Elements of Legal Professional Privilege

9.8 The privilege belongs to, and is for the protection of, the client. It protects him or her from the disclosure of privileged communications, either in testimony or by the production of documents for inspection. It also protects the client from the disclosure of such communications by his or her legal adviser without the client's consent. It is for the person claiming the privilege to establish the facts giving rise to it.[177] The privilege is available (unless excluded) not only in judicial and quasi-judicial proceedings, but whenever the exercise of a statutory power would trespass upon the confidentiality of the communications which the privilege protects (eg in response to a search warrant or a notice to produce documents or at a compulsory oral examination).[178]

---

176 *Evidence Act 1994 subsection 118(c).*

177 *Grant v Downs per Stephen, Mason and Murphy JJ Op.Cit. at p 689. See also NCA v S (1991) 100 ALR 151 at 158-159 (per Lockhart J).*

178 *Baker v Campbell, (1983) 153 CLR 52; See also CAC (NSW) v Yuill (1991) 65 ALJR 500 at 501 per Brennan J.*

9.9 The privilege may be excluded by either express words or necessary intendment in legislation. However, in the absence of any express exclusion, an implied exclusion must be a necessary requirement, because 'legal professional privilege is a doctrine of a fundamental kind which is not to be abrogated except in the clearest terms.'[179]

> In the absence of language which expressly excludes the privilege, indicia of legislative intention can be found in the nature of the statutory power, the prescribed manner of its exercise and the purpose which its exercise is designed to achieve: *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385 at 396.[180]

9.10 Commonwealth Attorney-General's Department summarised the common law on legal professional privilege by saying that it protects from disclosure the contents of all oral and written communications between a lawyer and his or her client which exhibit the following characteristics:

- they are referable to the lawyer/client relationship;
- they are confidential in character; and
- they are brought into existence for the necessary *sole* purpose of:
- enabling the client to obtain, or the lawyer to give, legal advice or assistance; or

---

179 *CAC (NSW) v Yuill Op. Cit. at 505 per Dawson J, citing as authority Baker v Campbell Op. Cit. at 123; Sorby v The Commonwealth (1983) 152 CLR 281 at 289, 309-310 and 316; and Balog v Independent Commission Against Corruption (1990) 169 CLR 625.*

180 *CAC (NSW) v Yuill Op. Cit. at 501-502 per Brennan J.*

- use in litigation that is current, pending or within the reasonable contemplation or apprehension of the client: *Grant v Downs* (1976) 11 ALR 577 and *Baker v Campbell* (1983) 153 CLR 52.[181]

Arguments in Support of the Privilege

9.11 The following summary arguments are made in support of the privilege:

- it is conducive to justice for clients to be assured that communications between them and their solicitors will remain confidential, or at least to be disclosed beyond the implied authority given to the solicitor by them;

- our system of law requires solicitors to refrain from making judgments impugning the veracity of what their clients tell them, unless they have reason to make further inquiry of the client. Requiring solicitors to inform authorities of their personal suspicions about the conduct of clients is wholly incapable of being reconciled with this fundamental principle of our legal system;

- solicitors are, for the purposes of the solicitor-client relationship, agents of their client and are thus not free to act beyond the scope of their authority;

- the client privilege flowing from the solicitor-client relationship is subject to a number of restraints imposed by the common law and express legislative dictate, such as:

  - the sole purpose test;[182]

---

181 Submissions, *no. 100 (Commonwealth Attorney-General's Department) para 96.*

182 Grant v Downs *(1976) 135 CLR 674. This has now been changed to a 'dominant purpose' test by the Commonwealth Evidence Act 1995.*

- the rule that privilege does not extend to communications in furtherance of a crime or fraud;[183]
- the rule that privilege can be abrogated by Act of Parliament, etc.[184]

9.12 As Murphy J said in the passage quoted at paragraph **[9.4]**, the privilege is limited. *Allen Allen & Hemsley v Deputy Commissioner of Taxation* considered the position of a taxation auditor who sought access to the trust account ledgers of a firm of solicitors. The auditor was acting under an authorisation from the Commissioner of Taxation under section 263 of the *Income Tax Assessment Act 1936*. The firm declined to give access, claiming that legal professional privilege attached to entries in the ledgers. The Court held that while the doctrine of legal privilege was not excluded by section 263, only in the most exceptional circumstances can an entry in a solicitor's trust account be privileged as disclosing the contents of communication between solicitor and client.[185]

The ASC Law Provisions

9.13 Section 69 of the ASC Law expressly preserves a lawyer's right to claim legal professional privilege unless his or her client consents to the lawyer giving the information which reveals the privileged

---

183 *R v Cox and Railton (1884) 14 QBD 153*

184 *Corporate Affairs Commission of NSW v Yuill (1991) 172 CLR 319*

185 *Allen Allen & Hemsley v Deputy Commissioner of Taxation (1989) FCR 576. See also Nickmar Pty Ltd & Anor v. Perservatrice Skandia Insurance Ltd (1985) 3NSWLR p. 44) for further discussion about the limit of the privilege.*

information. However, the ASC Law makes no reference to the right of the client to claim legal professional privilege in the face of a requirement to give information or to produce books (such as a question at a compulsory oral examination, or in response to a notice to produce documents).

9.14 In *CAC (NSW) v Yuill*[186] a majority of the High Court found in the Companies (NSW) Code a statutory intention to abrogate the entitlement of a client to claim legal professional privilege, and held that a client could not claim the privilege to refuse to produce documents or answer questions at an oral examination under the then provisions of the Companies Code. The Code provisions were in similar terms to the present provisions of the ASC Law. The High Court decision in *Yuill* has been applied to investigations initiated by the ASC under Part 3 of the ASC Law: *ASC v Dalleagles* (1992) 8 ACSR 109.

ASC Defence of the Decision in Yuill's Case

9.15 The decisions in *Yuill* and *Dalleagles* have been the subject of considerable criticism. The Law Council of Australia has made unsuccessful representations to the Attorney-General recommending that the ASC Law be amended to reverse the decisions.[187] In response to the wave of criticism in journals and by professional associations, the ASC published a copy of its submission of February 1993 to the Attorney-General in the *ASC Digest* (Legislation/Law Reform Section, pp 225-

---

186 *(1991) 4 ACSR 624.*

187 *Submissions, no. 90 (Law Council of Australia), para 9.1.*

260). A copy of that submission is appended to this report at Appendix 4.

9.16 The ASC submission recommended that the ASC Law not be amended to reverse the *Yuill* decision. The key arguments made by the ASC in defence of the decision are as follows:

(a) the continued application of *Yuill's* case is required for efficient and cost effective investigations and timely enforcement action. Substantial 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 (section 69 of the 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 (paragraph 76(1)(d) of the 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) (subsection 68(3) and paragraph 76(1)(a) of the 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, not properly the subject of the claim, is included in the claim; and

(v) significant expense and delays in pursuing unnecessary avenues of investigation and in litigating claims for the privilege.

The Law Council of Australia Response

9.17 The Law Council of Australia responded to a number of these arguments in its submission to the Committee. The responses to the ASC arguments set out in the preceding paragraph may be summarised as follows:

(a) the continued application of *Yuill's* case is required for efficient and cost effective investigations and timely enforcement action. Substantial ambit claims of legal professional privilege can delay investigations of major cases for several months or even years.

Law Council Response:

'If the result of Yuill's case, in the long run, is to discourage open and uninhibited communication between lawyer and client and to encourage the conduct of transactions without recourse to lawyers, then the result achieved will be the opposite of that intended by the ASC. In the Companies Committee's [of the Law Council] opinion, the primary avenue for law enforcement is voluntary compliance, and it is not feasible for the ASC or any other authority to compel compliance by enforcement action in more than a small number of cases.'[188]

(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 (section 69 of the ASC Law).

Law Council Response:

---

188 *Submissions, no. 90 (Law Council of Australia), para 9.3.*

> The ASC submission rejects the suggestion that the Yuill doctrine turns lawyers into informers on the basis that, having regard to section 69 of the ASC Law, it is the clients rather than the lawyers who are required to disclose the legal advice. If, however, the legal advice contains a statement of the client's factual instructions (as will commonly be the case) as well as an indication of the advice received, then, if it is used by the ASC in evidence against the client, its use will be objectionable. It will amount to a use against the client of the professional work done by the lawyer in stating the relevant facts and law, notwithstanding that this was done on a confidential basis for the client's use alone. In the view of the Companies Committee [of the Law Council], the use of legal advices in this manner infringes the well-known legal principle that evidence should not be admitted where the public policy considerations in favour of bringing a wrongdoer to justice are outweighed by the legal policy of opposing unfair or unlawful conduct in the obtaining of the evidence; see, for instance, Bunning v Cross (1977-78) 141 CLR 54, R v Ireland (1970) 126 CLR 321 and Van der Meer v R (1988) 62 ALJR 656.[189]

(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.

Law Council Response:

> As a matter of evidence, such an explanation [a claim that the witness was acting on legal advice] will not be regarded as convincing, unless the legal advice is, voluntarily, disclosed. In practice, there will be a substantial incentive for any client who wishes to invoke '*legal advice*' as an explanation for actions, to disclose the substance of the legal advice. There is, the Companies

---

189 *Submissions, no. 90 (Law Council of Australia) para 9.3.*

Committee [of the Law Council] considers, no injustice in this, because the client has elected to invoke legal advice as an explanation. This occurred, for instance, in the civil proceedings concerning directors in *Advance Bank Australia Ltd v FAI Insurances Ltd* (1987) 9 NSWLR 464.[190]

(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 (paragraph 76(1)(d) of the 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) (subsection 68(3) and paragraph 76(1)(a) of the ASC Law).

Law Council Response:

The unsatisfactory state of the law in this area is illustrated by the availability of a statutory exemption from further use of matter the subject of legal professional privilege where the legal advice is disclosed at an oral exemption under section 19 but not in other situations; under section 76(1)(d) of the ASC Law, such material is protected from further use. There is no equivalent protection for documentary material - ie written legal opinions - that are compulsorily disclosed pursuant to a notice under sections 28 to 34. The Companies Committee [of the Law Council] can see no reason for this variation. This incentive to give advice in oral form is not in the public interest, as oral advice is obviously open to greater misunderstanding and less precision than a formal written opinion.[191]

(f) an ability to make claims of legal professional privilege would result in:

---

190 *Ibid, para 9.3.*

191 *Ibid para 9.3.*

(i)

(ii)

(iii)

(iv) ambit claims of privilege where a significant body of material, not properly the subject of the claim, is included in the claim; and

(v)

Law Council Response:

In many instances a tendency to make '*ambit claims*' will be encouraged by the approach of the ASC in issuing excessively broad and onerous notices allowing limited time for compliance. .... Nevertheless, the examples quoted by the ASC in its submission[192] indicate that there is a need for urgent and disciplined procedures for determining when a claim to legal professional privilege is properly available.

Guidelines to achieve this in the taxation investigation area have been established between the Australian Taxation Office and the Law Council of Australia. The Companies Committee [of the Law Council] favours similar guidelines in the area of corporate investigations by the ASC and, if necessary, the institution of a summary form of legal procedure (whether in a court or a tribunal) to resolve disputed privilege claims, in the interests of expedition in investigations. ... The procedural issue raised by the ASC concerning '*ambit claims*' does not, in the Companies Committee's [of the Law Council] submission, justify complete abandonment of the right to withhold compulsory disclosure of privileged material.[193]

9.18 The ASC commented favourably on the suggestion that guidelines be developed. At the Committee's public hearing in Sydney Mr Tanzer (the ASC Regional General Counsel in Brisbane) commented that 'the ASC is happy to entertain this and we suggest that it might be

---

192 *See Appendix 4 paragraphs 43-54.*

193 *Ibid para 9.3.*

something that we can move forward nationally.'[194]

9.19 At the Committee's public hearing in Sydney the Law Council gave further evidence on the matter. The Law Council argued strongly that the limitation on legal professional privilege was damaging to the desirable aim of promoting compliance with the law:

> **Mr Korner**--If I could come in on that point for a moment, I think there is a general agreement around the table that promoting a climate of compliance with the law is desirable. But in the vast majority of situations of the kind of which Dr Austin speaks, if the client is told that he should not do something he will not do it in my experience, certainly in the large majority of cases.
>
> **Dr Austin**--Our clients!
>
> **Mr Korner**--Our clients, that is right. That being so, the best means of promoting compliance with the law is actually to encourage people to go to their lawyers all the time, regularly. The instances that Mr Menzies speaks of are the instances where the clients do not follow the advice and I daresay that has happened to us all, if rarely.
>
> That being so, however, you have to work out whether those isolated instances are so important and the pursuit of truth is so important in those instances as to outweigh all the public benefits of the free and frank flow of information in a disciplined way, as Dr Austin has described, if the process if promoted. I believe that compliance with the law will be much greater furthered that way because at the end of the day the ASC really cannot investigate every situation.
>
> I believe it is a matter of judgment, and minds differ on it, but I do believe very strongly that if clients feel that the advice may possibly be used against them then they would generally be discouraged from seeking it. It will also give rise to the difficulties as to the form and clarity of the advice that Dr Austin has spoken of.[195]

---

194 *Evidence, p 334 (Mr G Tanzer).*

195 *Evidence p 344 (Mr N Korner and Dr R Austin).*

Comment in the Evidence on Legal Professional Privilege

9.20 The limitation on legal professional privilege was described as 'a substantial erosion of a traditional and well founded liberty' by Split-Cycle Technology Limited.[196]

9.21 Mr Norman O'Bryan, a Melbourne barrister, noted that it is highly desirable that a citizen should know his or her rights, and that, traditionally, the common law has protected the legitimate obtaining and receiving of legal advice from disclosure:

> Legal professional privilege is at the heart of our legal process, indeed a basic civil right, because it is considered essential that citizens feel free and unconstrained in giving instructions to their lawyers and receiving legal advice. The right is fundamental and the policy which underlies it equally important. It is to be hoped that the ASC recognises that the circumstances in which the privilege should be abrogated are very special and very rare and does not regard the decisions in *Yuill* and *Dalleagles* as giving it carte blanche to destroy the confidentiality which ought to attach to legitimate lawyer-client communications. Otherwise there is a risk that the policy underlying the privilege will be subverted and greater harm than good will come from that subversion.[197]

9.22 The ASC responded to Mr O'Bryan's remarks by stating that it 'is sensitive to that issue and refrains from seeking current communications between those who are subject to investigation and their lawyers, concentrating instead on material which evidences or explains the conduct under investigation.'[198]

9.23 The Law Council of Australia was critical of the limitation on the availability of legal professional privilege following the decisions in *Yuill* and *Dalleagles*. The Law Council felt that the 'compulsory

---

196 Submissions, *no. 13 (Split-Cycle Technology Limited) p6.*

197 Submissions, *no. 87 (Mr N O'Bryan), p9.*

198 Submissions, *no. 129 (ASC Supplementary Submission) p 67.*

disclosure of legal advice will, over a period of time, undermine community respect for the rule of law, because it will discourage and limit recourse to lawyers.'[199] A detailed discussion of the views of the Law Council appears earlier in this chapter.

9.24 Price Waterhouse provided a submission which firmly expressed the view that correspondence between a person or firm and its legal representatives must in the interests of natural justice be subject to legal professional privilege. It was argued that:

> [i]f a firm can not in strict confidence instruct its solicitor, confer with its solicitor and counsel and receive advice for the purpose of representation, the value of the right to representation is seriously impaired.[200]

9.25 The Law Society of NSW expressed concern at the decision in Yuill, which was described as 'fundamentally wrong, and inconsistent with the promotion of a climate of genuine respect for, and compliance with the law[201]'.

9.26 Coudert Brothers, International Attorneys, noted the difference between US law and Australian law on this point. It was pointed out that in the United States the SEC has no power to force disclosure of information which is protected by attorney/client privilege.[202] The ASC acknowledged that the powers of the ASC and

---

199 *Submissions, no. 90 (Law Council of Australia), p 17.*

200 *Submissions, no. 93 (Price Waterhouse) p6.*

201 *Submissions, no. 94 (Law Society of New South Wales) p1.*

202 *Submissions, no. 97 (Coudert Brothers), p 11.*

of the SEC are different with respect to legal professional privilege (and also with respect to the privilege against self incrimination) but referred to its arguments in favour of limiting the privilege.[203]

9.27 The Institute of Company Directors pointed out that in *Yuill* the High Court was concerned with a special investigation under Part VII of the Companies Code. (Such special investigations required the approval of the Minister or of the intergovernmental Ministerial Council for their commencement. Special investigations attracted a wider range of intrusive powers for the NCSC.)

> The ASC Law, however, does not now maintain the distinction between special and other investigations. This means if the Dalleagles decision is followed legal professional privilege is not simply eroded for certain limited 'special investigations', instead the privilege is removed across the whole spectrum of ASC investigations requiring the production of documents. It is suggested this much wider abrogation of legal professional privilege was never intended by the High Court in Yuill.[204]

9.28 The Institute of Chartered Accountants proposed that the right to claim legal professional privilege in relation to communications with the firms' solicitors should be preserved 'as a fundamental legal right.'[205]

---

203 Submissions, *no. 129 (ASC Supplementary Submission), p 3.*

204 Submissions, *no. 98 (Australian Institute of Company Directors), para 2.4.*

205 Submissions, *no. 113 (Institute of Chartered Accountants in Australia) para 4.*

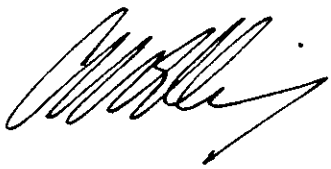
Conclusion

9.29 The Committee believes that, on balance, the inroads made on the availability of legal professional privilege by the decision in *Yuill* have had a negative effect upon corporate regulation in Australia. The limitation upon the privilege has been inimical to a constructive relationship between the ASC and the business community. It is also not conducive to the building of a climate of voluntary compliance with the law.

9.30 Importantly, the fact that the decision in *Yuill* may prompt some company officers to act without legal advice, or on the basis of possibly imperfectly understood oral advice, cannot be good for the public interest in the sound and lawful management and administration of corporations.

Recommendation

Recommendation 15: The majority of the Committee recommends that the ASC Law be amended with a view to ensuring the availability of legal professional privilege to all parties in investigations under the ASC Law.



Senator Chris Ellison

Chairman

Dissenting Report by Senator Jim McKiernan

Dissenting Report by Senator Jim McKiernan
Chapter Nine - Legal Professional Privilege

A person would usually be able to resist providing documents to a court or an investigator where the document was prepared solely for the purpose of providing legal advice.

In the area of corporate investigations, the ASC is able to require a person to provide documents containing legal advice. The rationale for this is that an investigator of a corporation's transactions needs these documents to be able to determine whether there has been a breach of the law. It is considered that the nature of financial transactions are complex and that this information should be disclosed so that the ASC can come to a timely decision as to whether there is a need for further investigation.

It is also argued that investigations would be easily impeded in the corporate area by a person saying that they undertook a particular transaction on the advice of their lawyer where that advice could not be revealed to the ASC.

It should be noted that the ASC must have reason to suspect that there could be a breach of the law in order to initiate an investigation where it could require access to a person's legal advice.

I am advised that it has been Government's policy for more that 10 years, that the public interest in expediting investigations warrant the abrogation of a person's right to claim legal professional privilege.

Efficiency in investigation vs promotion of recourse to legal advice

The Law Council, in a submission to the Inquiry, argued that the current state of the law (a person cannot decline to provide legal advice obtained to the ASC) discourages open communications between lawyer and client and recourse to lawyers.

I disagree with this argument for the following reasons;

- Such an argument is more speculation than fact.
- Arguably, the current state of the law has made no practical difference to the business community.
- It could be said that the Law Council is arguing a case for its own constituents.
- It should be noted that accountants, who these days provide considerable advice to corporations on a variety of matters, could not restrict access by the ASC to their advice. They have no right to claim privilege.

Role of lawyers where ASC can compel disclosure of legal advice

The Law Council further argued that lawyers are turned into informers as the legal advice which is disclosed to the ASC would probably contain the proposal put forward by the client which may be in breach of the law.

- Whilst I do not agree with this, I do accept that this is a difficult area. Although it is not free from doubt, the ASC would only have access to legal advice provided in the course of events under investigation and would not have access to legal advice relating to the individual's liabilities under the law.

Encouragement of oral rather than written legal advice

I do not agree with the Law Council's argument that the current structure of the ASC Act would encourage clients to seek, and lawyers to give, oral advice in preference to written advice.

- This has not been borne out in practice. I believe that for reasons such as professional negligence, it is unlikely that important advice would be given orally.

Problem of ambit claims to legal professional privilege

It should be noted that there are guidelines for taxation investigations which were jointly developed by the ATO and the Law Council. I suggest that it may be worth pursuing this concept in relation to ASC investigations.

- If ASC requests were better defined, individuals could be encouraged by these guidelines to make less expansive claims for privilege.

Difficulties of preserving privilege for purposes outside scope of ASC investigation

The Law Council states that there is legal uncertainty as to whether information which has been compulsory disclosed to the ASC containing legal advice, can be kept from being accessed by third parties.

- It is my understanding that the Attorney General's Department and the ASC view of the law is that the production of a document under compulsion under the ASC Act, does not amount to a waiver of legal professional privilege, if the documents are sought for other purposes.

Background

The legal professional privilege protects the confidentiality of communications between lawyers and their clients from compulsory disclosure, except where there is a clear statutory provision abrogating the privilege. At common law, the privilege is available to both the client and the lawyer and, in some circumstances, third parties to resist disclosure.

The ASC Law provides that only a lawyer may claim the privilege against the disclosure of information or documents to the ASC. As the ASC Law does not expressly state that a client or third party may claim the privilege if the information is in his/her possession, the view has been taken by the ASC that the Parliament intended the privilege to be limited to the lawyer.

The High Court held, in *CAC (NSW) v Yuill (1991) 65 ALJR 500*, by a majority of three *(Brennan, Dawson and Toohey JJ)* to two *(Gaudron and McHugh JJ)* that a person, other than a legal representative, who is required to attend for an examination by a corporate affairs investigator and to produce documents, may not decline to answer questions or provide the documents on the grounds of legal professional privilege. The majority considered that the Companies Code (the forerunner of the ASC Act provision) evinced a legislative intention to abrogate the privilege. Although Yuill's case dealt with interpretation of the Companies Code provisions dealing with special investigations, in *ASC v Dalleagles (1992) 8 ACSR 109 Federal Court* held that the High Court's decision also had direct application to formal investigations under the ASC Law.

ASC and the DPP are 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 in ASC v Dalleagles. In effect, they argue that the continued abrogation of legal professional privilege in corporate investigations is required to enable efficient and cost effective investigations and timely enforcement action.

They argue that claims of legal professional privilege could result in major delays to the investigation and prosecution process for corporate offences and, in particular delay investigations of major cases for considerable periods of time. They consider that, given the nature of corporate investigations, access to legal communications is essential to obtain a proper understanding of complex commercial transactions and the liability of those involved in these transactions.

Privilege is not totally abrogated in that oral evidence which would otherwise have been privileged and is provided by was of examination is inadmissible in both civil and criminal proceedings. Further, oral evidence which is self incriminatory cannot be used in criminal proceedings or proceedings for impositions of penalty other that proceedings for false statements.

I dissent from recommendation 15 of the Committee's report.

SENATOR JIM McKIERNAN

APPENDIX 1

Submissions Received and Published by the Committee

APPENDIX 1

Investigatory Powers of the Australian Securities Commission

List of Submissions

Sub No.	Individual/Organisation	Date of Submission
1	NOT RELEASED	
2	Mr B. Mignon, Benalla, VIC	11.06.93
3	NOT RELEASED	
4	Mr Peter E. Feil, Kew, VIC	22.06.93
5	Ms Lyn Conway, Clayfield, QLD	22.06.93
6	NOT RELEASED	
7	Mrs Adele Shnier, Kew, VIC	23.06.93
8	L.V. Hosking, Sydney Futures Exchange Limited, Sydney, NSW	22.06.93
9	Mr Anthony L. Taggart, Smith Taggart, Chartered Accountants, Hampton, VIC	05.07.93
10	Mr Barry McKenzie, Barry McKenzie Pty Ltd, South Perth, WA	05.07.93
11	NOT RELEASED	
12	NOT RELEASED	
13	A.J.D. Richardson, Hall Tuckfield Richardson, Solicitors & Attorneys, Sydney, NSW	08.07.93
14	NOT RELEASED	
15	NOT RELEASED	
16	Mr David Alomes, David Alomes and Co, Rosney Park, TAS	09.07.93
17	NOT RELEASED	
18	NOT RELEASED	
19	Mr Ken Breakspear, Financial Planning Association of Aust. Ltd, Sydney, NSW	12.07.93
20	NOT RELEASED	
21	Mr Alan Kernahan, Aust. Wide Unitholders Action Group Trust, West Chatswood, NSW	14.07.93
22	NOT RELEASED	

23	Mr Peter Henry Vanderhorst, Fellow Taxation Institute of Australia, Mooroolbark, VIC	20.07.93
24	NOT RELEASED	
25	S. Pyne, Church Holdings (Aust) Limited, QLD	23.07.93
26	Ms Beatrix Julie Bell-Bradbury, QLD	23.07.93
27	A.J. McLean, Australian Shareholders' Association Ltd., Sydney, NSW	23.07.93
28	NOT RELEASED	
29	Ms Margo E. Bunt, Samford, QLD	17.07.93
30	Mr & Mrs D. & B. Miles, South Townsville, QLD	28.07.93
31	NOT RELEASED	
32	Mr Barry Green, Blackwater, QLD	02.08.93
33	Mr John J. MacKenzie, Tingalpa, QLD	02.08.93
34	Mr Phillip Ryan, Blackwater, QLD	02.08.93
35	Mr Kevin O'Connor, Human Rights Australia, Sydney, NSW	02.08.93
36	Mr Kevin B. Bradford, Ashgrove, QLD	03.08.93
37	NOT RELEASED	
38	Mr Angus MacLeod, Southport, QLD	04.08.93
39	Mr Rob Williams, Cairns, QLD	04.08.93
40	Mr Allan Harris, Blackwater, QLD	04.08.93
41	Mr & Mrs Giles, Blackwater, QLD	04.08.93
42	Mr Charles Francis Morris, Mackay, QLD	04.08.93
43	Mr T. Burton, Blackwater, QLD	05.08.93
44	M.J. Henebery, Blackwater, QLD	05.08.93
45	Mr David Bane, Blackwater, QLD	05.08.93
46	K.B. Rolls, Blackwater, QLD	05.08.93
47	L. Power, Blackwater, QLD	05.08.93
48	Mr Ralph Smither, Aust. Shareholding & Underwriting Ltd., Daylesford, VIC	05.08.93
49	Ms Carolyn Currie, University of Technology, Broadway, NSW	05.08.93
50	NOT RELEASED	
51	Mr Alan Hocking, Blackwater, QLD	05.08.93
52	Mr Brett Wass, Gracemere, QLD	05.08.93
53	R.T. Carbis, Blackwater, QLD	05.08.93
54	Mr Andrew Wade, Watchdog Association Inc. Melbourne, VIC	06.08.93
55	G.A. Nelson, Blackwater, QLD	06.08.93

56	Mr Barry Radel, Blackwater, QLD	06.08.93
57	NOT RELEASED	
58	NOT RELEASED	
59	J.M. Fitzpatrick, Sunnybank, QLD	06.08.93
60	NOT RELEASED	
61	Mr Russell Little, Blackwater, QLD	09.08.93
62	Mr Donald Schuh, Blackwater, QLD	09.08.93
63	G.D. Mathers, Alexandra Hills, QLD	09.08.93
64	Mr Ross Gorman, Blackwater, QLD	09.08.93
65	Mr & Mrs D. Wright, Mt Isa, QLD	09.08.93
66	W.J. Greensill, Mt Isa, QLD	09.08.93
67	Mr Wayne Hewitt, Mt Isa, QLD	09.08.93
68	Mr Bill Brett, Mt Isa, QLD	09.08.93
69	A.W. McCartney, Mt Isa, QLD	09.08.93
70	Mr Ron Jenner, Mt Isa, QLD	09.08.93
71	D.R. Schloss, Mt Isa, QLD	09.08.93
72	B.N. Schloss, Mt Isa, QLD	09.08.93
73	Mr Julian C. Hill, Perth, WA	09.08.93
74	J.J. & M. Dobbins, Caboolture, QLD	10.08.93
75	Mr Raymond Daly, Blackwater, QLD	10.08.93
76	NOT RELEASED	
77	R.J. Chalmers, Blackwater, QLD	10.08.93
78	T. Oltvanji, Mt Isa, QLD	10.08.93
79	E.J. Ross, Blackwater, QLD	10.08.93
80	Mr Adrian Rees, NRMA, Sydney, NSW	10.08.93
81	NOT RELEASED	
82	Mr Dale A. Roberts, Blackwater, Qld	23.08.93
83	Mr David A. Simpson, Emerald, QLD	23.08.93
84	NOT RELEASED	
85	Mr K.W. Slatter, Emerald, QLD	23.08.93
86	Mr Paul Catling, Blackwater, QLD	23.08.93
87	Mr Norman O'Bryan, Canterbury, VIC	23.08.93
88	Mr J.T.S. Corral, Bondi, NSW	23.08.93
89	Ms Kim Wicks, Association of Mining & Exploration Companies Inc., Leederville, WA	23.08.93

90	P.G. Levy, Law Council of Australia, Canberra, ACT	23.08.93
91	Mr Don Blyth, Trustee Companies Association of Aust., Melbourne, VIC	23.08.93
92	R.M. Scales, Duesburys Chartered Accountants, Melbourne, VIC	23.08.93
93	Mr W.E. Small, Price Waterhouse, Sydney, NSW	23.08.93
94	Mr J. Nelson, The Law Society of NSW, Sydney, NSW	23.08.93
95	Mr Clive Speed, Business Council of Australia Melbourne, VIC	23.08.93
96	Ms Kathleen Farrell, Australian Securities Commission Sydney, NSW	23.08.93
97	Mr Mark Williamson, Coudert Brothers, International Attorneys, Sydney, NSW	23.08.93
98	Mr I.W. Mackay, Australian Institute of Company Directors, Sydney, NSW	16.09.93
99	Mr Chris Bishop, Australian Bankers' Association Melbourne, VIC	16.09.93
100	Mr Alan Rose, Attorney-General's Department Barton, ACT	23.09.93
101	NOT RELEASED	
102	NOT RELEASED	
103	NOT RELEASED	
104	Mr Ian Langfield-Smith, Aust.Accounting Research Foundation, Caulfield, VIC	13.10.93
105	Mr Brian Dargan, National Crime Authority, Melbourne, VIC	13.10.93
106	Mr Frank Caldwell, Law Institute of Victoria, Melbourne, VIC	13.10.93
107	Mr R.S. O'Regan, QC, Criminal Justice Commission, Brisbane, QLD	18.10.93
108	Cleary Hoare Hart & Grant, Solicitors, Brisbane, QLD	23.11.93
109	Mr Peter H. MacDonald, The Queensland Justices & Community Legal Officers' Assn, Brisbane, QLD	24.11.93

110	Mr R.A. Grice & Mr G.C. Paton, Institute of Chartered Accountants in Australia & Australian Society of Certified Practising Accountants, Melbourne, VIC	24.11.93
111	Mr Graeme Hanisch	24.11.93
112	NOT RELEASED	
113	Mr Peter Jollie, The Institute of Chartered Accountants, Sydney, NSW	01.12.93
114	Mr Gerald Santucci on behalf of Carmel Charles Borg, Solicitors, Canberra, ACT	06.12.93
115	NOT RELEASED	
116	NOT RELEASED	
117	Mr Joseph P.Longo, Barristers Solicitors & Notaries, Perth, WA	04.01.94
118	Mr Brian Bambach, Split-Cycle Technology Limited, Arundel, QLD	15.02.94
119	Mr Lee Nevison, Munro Thompson, Solicitors Mooloolaba, QLD	15.02.94
120	Mr Alan Cameron, Australian Securities Commission, Sydney, NSW	15.02.94
121	Justice for the Aust. Home Group, Munro Thompson, Solicitors, Mooloolaba, QLD	15.02.94
122	Mr Tony Richardson, Hall Tuckfield Richardson (on behalf of Split-Cycle Tech Ltd) Sydney, NSW	15.02.94
123	Mr Peter MacDonald, Queensland Justices' Association, Brisbane, QLD	15.02.94
124	NOT RELEASED	
125	Ms Roslyn Allan, The Securities Institute of Australia, Australia Square, Sydney, NSW	03.03.94
126	Ms Phyllis Creswick, Strathfield, NSW	14.03.94
127	NOT RELEASED	
128	NOT RELEASED	
129	Mr Allan Cameron, Australian Securities Commission, Sydney, NSW	16.06.94

130	Mr Andrew Wade, Watchdog Association Inc., Melbourne, VIC	16.06.94
131	Mr Peter H. Vanderhorst, Fellow Taxation Institute of Australia, Mooroolbark, VIC	16.06.94
132	Mr Andrew Wade, Watchdog Association Inc. Melbourne, VIC	16.06.94
133	Mr A.C. Cullen, Australian Bankers' Association Melbourne, VIC	16.06.94
134	Mr Andrew Procter, Australian Securities Commission, Sydney, NSW	17.06.94
135	NOT RELEASED	
136	Ms Margo Bunt, Samford, QLD	24.06.94
137	Mr Russell Ware, A.L. Vincent Industries Limited, Enfield, NSW	11.07.94
138	Mr A.C. Cullen, Australian Bankers' Association Melbourne, VIC	21.07.94
139	Mr Grant Smith, Global Funds Management Group, North Sydney, NSW	26.07.94
140	Ms Ros Grady, Australian Bankers' Association Melbourne, VIC	01.08.94
141	NOT RELEASED	
142	Mr Andrew Procter, Australian Securities Commission Sydney, NSW	29.08.94
143	Mr Greg Tanzer, Australian Securities Commission Brisbane, QLD	14.10.94
144	Mr Leslie G. Church, Coombabah, QLD	21.01.95
145	Mr Andrew Procter, Australian Securities Commission Sydney, NSW	02.05.95
146	Mr Robert de Crespigny, Arnold Bloch Leibler, Melbourne, VIC	16.05.95
147	Mr Robert de Crespigny, Arnold Bloch Leibler, Melbourne, VIC	24.05.95

APPENDIX 2

Details of Meetings

APPENDIX 2

Details of Meetings and witnesses

Public Hearing: 15 February 1994, Commonwealth Governmennt Offices, Brisbane.

The meeting commenced at 10.10am

Present:
Senator B Cooney (Chair)
Senator J McKiernan
Senator W O'Chee
Senator S Spindler

Witnesses:

Australian Securities Commmission
Mr A Cameron, Chairman
Mr A Procter, National Co-ordinator, Enforcement
Mr G Tanzer, Regional General Counsel, Brisbane

Queensland Justices Association
Mr P McDonald, Acting Registrar

Split Cycle Technology Ltd
Mr A R Mayne, Director
Mr B Bambach, Chief Executive Officer
Mr T Richardson, Solicitor, Hall Tuckfield Richardson

Justice for the Aust-Home Group
Mr L Nevison, Solicitor
Mr K Bradford, Secretary/Treasurer
Mrs M Bunt, Investor/Director, Aust-Home Group
Mr J.M. Fitzpatrick, Investor/Director, Aust-Home Group
Mr R.J. Harvey

The meeting concluded at 4.40 p.m.

Private Meeting: 4 March 1994, Parliament House, Canberra.

The meeting commenced at 8.35am

Present:

Senator B Cooney (Chair)
Senator J McKiernan
Senator W O'Chee
Senator S Spindler

Other persons present
Australian Securities Commission
Mr A Procter, National Co-ordinator Enforcement
Mr Greg Tanzer, Regional General Counsel, Brisbane

The meeting concluded at 8.55 p.m.

Appendix 2

Public Meeting: 101 Collins Street, Melbourne, 16 June 1994

The meeting commenced at 10.21am

Present: Senator B Cooney
Senator J McKiernan
Senator W O'Chee

Witnesses:

National Crime Authority
Mr John Buxton

Attorney-General's Department, Business law Division
Mr David Edwards
Mr James Murphy
Ms Brendalyn Berkeley

Australian Bankers Association
Mr Alan Cullam, Executive Director

Law Institute of Victoria, Commercial Law Section
Mr Antony Greenwood
Mr Stephen Newman

Watchdog Association
Mr Andrew Wade, Co-ordinator

Mr Peter Vanderhorst

Business Council of Australia
Mr Martin Soutter Assistant Director
Mr Martin Gardini, Regulator Consultant

Australian Securities Commission
Mr Greg Tanzer, Regional General Counsel
Mr Andrew Procter, National Enforcement Co-ordinator

The meeting concluded at 4.30 p.m.

Public Meeting: State Parliament House, Macquarie Street, 17 June 1994.

The meeting commenced at 10.11 a.m.

Present:
Senator B Cooney
Senator J McKiernan
Senator W O'Chee

Securities institute of Australia
Mrs Roslyn Allan, Managing Director
Mr John Green, Councillor
Ms Alison Lansley, Councillor

NRMA
Mr Adrian Rees, General Manager, Financial Services
Mr John Abernethy, Assistant General Manager, Investment
Mr Peter Cameron

Ms Phyllis Creswick

Courdert Brothers, International Attorneys
Mr Warren Scott
Mr Norman O'Bryan

Law Society of New South Wales
Mr Kevin White, Business law Section
Mr Shaughn Morgan, Legal Officer
Mr John Currie, Councillor
Mr Geoff Sutherland, Business Law Committee

Law Council of Australia, Companies Committee
Dr Robert Austin
Mr Nick Korner

Appendix 2

Australian Securities Commission
Mr Alan Cameron, Chair
Mr Greg Tanzer, Regional General Counsel
Mr Andrew Procter, National Co-ordinator Enforcement

Mr Stephen Menzies

Mrs Margo Bunt

Mr Raymmond Bennell

Mrs Susan Wilkinson

The meeting concluded at 4.33 p.m.

On 10 October 1994 amended Standing Orders commenced operation. The Senate Legal annd Constitutional References Committee came into existence and assumed responsibility for the inquiry into the investigatory powers of the Australian Securities Commission [see para. 1.5].

Private Meeting: 7 June 1995, Committee room 1S6, Parliament House, Canberra.

Present:
Senator C Ellison (Chair)
Senator B Cooney (Deputy Chair)
Senator J McKiernan

The meeting commenced at 11.30 a.m. and concluded at 12.30 p.m.

Private meeting: 9 June 1995, Committee room 1S2, Parliament House, Canberra.

Present:
Senator C Ellison (Chair)
Senator B Cooney (Deputy Chair)
Senator B Neal
Senator S Spindler
Senator W O'Chee

The meeting commenced at 11.05 a.m. and adjourned at 12.05 p.m.

Private meeting: 20 June 1995, Committee room 1S6, Parliament House, Canberra.

Present:
Senator C Ellison (Chair)
Senator B Cooney (Deputy Chair)
Senator McKiernan
Senator S Spindler.
Senator W O'Chee

The meeting commenced at 5.40 p.m. and adjourned at 7.20 p.m.

Private Meeting: 26 June 1995, Committee room 1S6, Parliament House, Canberra.

Present:
Senator C Ellison (Chair)
Senator B Cooney (Deputy Chair)

Senator B Neal
Senator S Spindler.

The meeting commenced at 6.30 p.m. and adjourned at 7.45 p.m.

Private Meeting: 27 June 1995, room S1.108, Parliament House, Canberra.

Present: Senator C Ellison (Chair)
Senator B Cooney (Deputy Chair)

The meeting commenced at 9.00 a.m. and adjourned at 9.25 a.m.

Private Meeting: 27 June 1995, room S1.108, Parliament House, Canberra.

Present: Senator C Ellison (Chair)
Senator B Cooney (Deputy Chair)
Senator B Neal

The meeting commenced at 11.30 a.m. and adjourned at 11.50 a.m.

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.

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,

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

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,

[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.

Appendix 3

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?

Appendix 3

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]?--1 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 to .. ..inaudible.....

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

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

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 purposed 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 *Yuill*'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 *Vuill'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.

APPENDIX 5

Guidelines for Managing Allegations of Misconduct Against ASC Officers

Guidelines for Managing Allegations of Misconduct Against ASC Officers

PURPOSE

The purpose of these guidelines is to set out principles for handling of complaints made by members of the public against the conduct of ASC officers. The guidelines are directed to ensuring that officers of the ASC maintain high standards of behaviour and conduct when dealing with members of the public.

While all complaints, both oral and written, will be assessed, people wishing to lodge a complaint (complainants) are encouraged to put any complaints in writing setting out the name of the officer involved and the circumstances surrounding the alleged conduct.

CODE OF CONDUCT

ASC officers are bound by the standard of conduct set out in the *Guidelines on Official Conduct of Commonwealth Public Servants*. In brief, there are three main principles in these guidelines:

(a) an officer should perform their duties with professionalism and integrity;

(b) fairness and equity are to be observed by all officers in dealing with colleagues and members of the public; and

(c) real or apparent conflict of interest is to be avoided.

OVERVIEW

The overriding principle to be applied is that allegations are properly and impartially assessed, while at the same time procedural fairness is provided to ASC officers who are accused of improper conduct.

In the first instance, all complaints will be referred to the SES officer or divisional head responsible for the division or branch in which the staff member works. This officer will review the complaint and will determine whether the complaint warrants further investigation and, if so, how the complaint is to be assessed and by whom.

Investigations are to be conducted in a fair, open and objective manner with the purpose of establishing the facts. The officer shall be notified of

the complaint and be given an opportunity to make submissions in relation to it at the earliest time possible without jeopardising the investigation. The officer shall have a right to union or legal representation, at their own expense, in any discussions or submissions concerning the complaint, if they so elect. On conclusion of the investigation, both the complainant and the officer shall be advised in writing of the result and the complainant shall be advised that they have a right of review of the decision via the Commonwealth Ombudsman. The officer should, in most cases, be provided with a copy of the final report. An exception may be in cases where criminal prosecution has been recommended. The officer has the rights of review set out in the Public Service Act.

The ASC has set a standard of 14 days for investigation and reporting on all complaints, commencing from the time the matter is received.

Different procedures will apply depending on the seriousness of the allegation.

MORE SERIOUS ALLEGATIONS

More serious allegations involve allegations of abuse of office or powers and allegations of breach of legislation, whether criminal or not. Conduct which might fall into the category of more serious allegations would include intimidation, physical assault, using one's office for personal gain, breach of confidentiality provisions (s127 ASC Law), breach of privacy in violation of the Information Privacy Principles in the Privacy Act 1988 and fraud.

As a general rule, investigations of complaints will be conducted using ASC resources. However, where there is reasonable cause to suspect that an ASC officer may have committed offences under either state or federal law, it will usually be more appropriate to refer the matter to the Australian Federal Police.

The Regional Commissioner or equivalent will nominate an officer to carry out the internal investigation. That person will usually be an SES officer and should have had no significant previous connection with the alleged offender.

Upon conclusion of the investigation a report detailing the findings of fact, statement of reasons and a recommendation will be forwarded to the Regional Commissioner or equivalent, who will review the report and determine the appropriate course of action.

Where an investigation of alleged misconduct discloses prima facie evidence of a breach of state or federal law amounting to a criminal

offence, then the matter should be referred to the Commonwealth Director of Public Prosecutions (DPP). If the person is convicted of an offence then disciplinary action may follow. If the matter is not referred to the DPP or the DPP declines to take action or the action taken is unsuccessful, the conduct may still constitute wilful misconduct. Allegations of this sort should be dealt with according to the Public Service Act and the processes are set out in the Act.

LESS SERIOUS COMPLAINTS

Complaints about ASC staff members' conduct which are not considered to be in the category of more serious allegations, are to be dealt with by the SES officer or divisional head responsible for the division in which the staff member works. These allegations might include breaches of appropriate standards of personal conduct, for example, rude or threatening behaviour, and breaches of administrative directions and public service or ASC guidelines on official conduct.

The reviewing officer will be responsible for determining whether the complaint constitutes a serious complaint as detailed above. This officer will also be responsible for determining what action, if any, is to be taken in respect of the complaint.