ASC INVESTIGATIONS AND ENFORCEMENT: ISSUES AND INITIATIVES

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I. INTRODUCTION

A. TENSION OF INTERESTS

To discuss the investigative and enforcement powers of the Australian Securities Commission ("ASC") inevitably invites controversy and debate. These powers bring into sharp relief the tension between the need for effective regulation (the 'public interest'), and the need to protect individuals from excessive administrative powers and actions (the 'private interest'). There is no obvious consensus on how this might best be resolved.

The tension between public and private interests is reflected in, and highlighted by, the investigative process. Persons under investigation may, quite understandably, wish to determine the nature and source of any complaints or accusations made against them, as well as the information and suspicions held by investigators, the intended purpose, scope and course of investigations, and the lawfulness of any attempt to obtain and use information through compulsory process. Equally, however, the investigative

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process may be unduly hampered by obligations on investigators to disclose these details, through the existence of complex procedural requirements for conducting investigations or by undue restrictions on the obtaining or use of information. As the High Court recognised in *NCSC v News Corporation Ltd*[1] "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."

Against this background, two issues have dominated the debate on ASC investigations since their inception: self-incrimination and legal professional privilege. Some commentators believe that recent developments, in particular the High Court decision in *CAC (NSW) v Yuill*[2] which overrides legal professional privilege to a considerable extent, and the abolition in 1992 of the self-incrimination 'derivative use' (as opposed to the 'direct use') evidential immunity[3] will result in "the critical balance between the interests of the State and individual liberties being unduly distorted in favour of the State".[4] The ASC strongly argued the need to abolish the derivative use immunity to promote effective investigation and enforcement.[5] The level of controversy over the changes to the evidential immunity is reflected in the undertaking by the Federal Attorney General to conduct an interim review by mid 1993, and the requirement introduced in the 1992 amendments that by mid 1997 a report be made to the Federal Attorney-General, and be tabled in Federal Parliament, concerning:

- how the amendments to the self-incrimination privilege have helped in the enforcement of national scheme laws;

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1 (1984) 8 ACLR 843 at 862 per Mason, Wilson and Dawson JJ.

2 (1991) 4 ACSR 624, as applied to ASC investigations commended under *ASCA* Pt 3 Div 1 in *ASC v Dalleagles Pty Ltd* unreported, Federal Court of Australia (24 June 1992).

3 The "derivative use" immunity excludes from admission in criminal or penalty exposing proceedings against an examinee any information, document or other thing obtained as a direct or indirect consequence of a person making a self-incriminating statement under compulsion. The *Corporations Law* s 597(12), (12A) and the *Australian Securities Commission Act* s 68(2)(3), as amended by the *Corporations Legislation (Evidence) Amendment Act* 1992 (Cth) no longer provide for this immunity. Only the self-incriminating statement itself carries an evidential immunity (the 'direct use' immunity). The amendments follow from the Report of the Joint Federal Parliamentary Statutory Committee on Corporations and Securities: *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law* (November 1991).

4 JP Longo "The Powers of Investigation of the Australian Securities Commission: Balancing the Interests of Persons and Companies under Investigation with the Interests of the State" *Australian Institute of Criminology Conference* (March 1992), (1992) 10 *Co & Sec LJ* 237; see also A Siopis "Statutory Investigation and Individual Rights" *Law Society of Western Australia Summer School* (February 1992).

5 See A Hartnell "Regulatory Enforcement by the ASC: an Interrelationship of Strategies" *Australian Institute of Criminology Conference* (March 1992) reported in *ASC Digest* 1992 (*Reports and Speeches* p 38 at 50-1); see also S Menzies "The Investigative Powers of the ASC" *ASC Digest* 1991 (*Reports and Speeches* 106 at 114-16).

- how the amendments have helped the ASC in making investigations and gathering information;
- the extent (if any) to which affectedpersons have been unjustifiably prejudiced through these changes; and
- any changes to administrative arrangements that have resulted from the amendments.

This will involve the ASC maintaining a continuing monitor over this aspect of its many investigations. The legislation also provides for members of the public to be given a reasonable opportunity to make submissions on any relevant matter prior to finalisation of the report.

B. COMPARATIVE REVIEW

A comparative review of the investigative powers of the ASC with those of similar commercial regulatory authorities such as the Australian Taxation Office ("ATO") and the Trade Practices Commission ("TPC") adds a further perspective to the regulatory debate. It demonstrates that in key areas of potential conflict between public and private interests, such as self-incrimination, legal professional privilege and access to private premises, there is no consistent legal response or common underlying policy.

The ASC may compel the provision of self-incriminating information.[6] A similar power resides with the TPC[7] and probably with the ATO.[8] The UK courts have also recently confirmed that their corporate investigators may compel the disclosure of self-incriminating information and with no offsetting evidential immunity.[9] However, in Australia, there is no uniform approach to the evidential consequences of compulsory disclosures. For instance, only self-incriminating statements made in ASC examinations attract an evidential immunity for their maker, and even this immunity is coming under question.[10]

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6 *ASCA* s 68(1).

7 *Trade Practices Act* 1974 (Cth) ("TPA") s 155(7). The privilege against exposure to a penalty is also excluded: *Melbourne Home of Ford Pty Ltd v TPC* (1979) 36 FLR 450; *Pyneboard Pty Ltd v TPC* (1983) 45 ALR 609; *Kotan Holdings Pty Ltd v TPC* (1991) ATPR 41-120.

8 *Stergis v Boucher* (1989) 86 ALR 174; *Donovan v DCT* (1992) 23 ATR 129 at 132ff; see further RH Woellner; TJ Vella, L Burns, R Chippindale: *Australian Taxation Law* (3rd ed, 1990) p 111.

9 *R v Seelig* [1991] BCC 569; *Re London United Investments plc* [1992] BBC 202; cf *Bank of England v Riley* [1992] 1 All ER 769; *Re Jeffrey G Levitt Ltd* [1992] BBC 137; *Re Bishopgate Investment Management Ltd* [1992] BCC 222. The *Criminal Justice Act* 1987 (UK) s 2 also provides that the investigative powers given to the UK Serious Fraud Office override the common law privilege against self-incrimination. A person may be questioned under this provision even after being charged with an offence: *R v Director of the Serious Fraud Office, ex parte Smith*, unreported, House of Lords (11 June 1992). The relevant Australian law on exercise of the investigative powers following the laying of charges is discussed in *Australian Corporation Law Bulletin* (No 21 1990) at [311] cf *Re Ardina Electrical (Qld) Pty Ltd (in liq)* (1992) 7 ACSR 297.

10 *ASCA* ss 68(3), 76(1)(a). Some commentators have proposed an abridgement of this evidential immunity to permit the admission at trial of self-incriminating statements to contradict any inconsistent evidence given by a defendant examinee in court. Currently a separate perjury action is required: *ASCA* s 68(3)(c). It is argued that an examinee who chooses at trial to give evidence has voluntarily given up his

Amendments to the national scheme laws in 1992 abolished the 'derivative use' evidential immunity, the limited documentary evidential immunity, and the right of corporations to claim the privilege either at an ASC examination or in any *Corporations Law* criminal proceedings.[11] By contrast an evidential immunity in criminal proceedings applies to both corporations and individuals who provide self-incriminating documents and statements to the TPC, pursuant to its investigative powers.[12] There is currently no statutory evidential immunity for information supplied under compulsory process to the ATO. The *Evidence Bill* 1991 (Cth) does not fundamentally alter the situation for tax investigations.[13]

The powers of the ASC to obtain legally privileged information appear to be unique. In consequence of the High Court decision in *CAC (NSW) v Yuill*, the ASC may compel any person other than a legal practitioner[14] to disclose information otherwise legally privileged, at least pursuant to its investigative powers under the *Australian Securities Commission Act* ("*ASCA*") Pt 3 Div 1.[15]

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right to silence. A precedent is s 2(8) of the *Criminal Justice Act* 1987 (UK) which provides that a statement by an examiner may be used in evidence against him on a prosecution" where in giving evidence he makes a statement inconsistent with it. See further: M Aronson "Managing Complex Criminal Trials" National Crime Authority *National Complex White Collar Crime Conference* (June 1992); GFK Santow "The Trial of Complex Corporate Transgressions - the UK Experience and the Australian Context" *NSW Regional Office of the ASC Lawyers' Forum* (June 1992). The Santow paper also questions whether directors, other fiduciaries and licenced dealers should have any evidential immunity for statements made pertaining to their relevant stewardship or conduct.

11 *Corporations Legislation (Evidence) Amendment Act* 1992 (Cth). The Act, inter alia, introduced a new s 1316A and amended *ASCA* s 68(2) to override, in this context, the decision in *Caltex Refining Co Ltd v State Pollution Control Commission* (1992) 10 ACLC 241 that corporations are entitled to claim the self-incrimination privilege; cf *Master Builders Assoc of NSW v Plumbers & Gas Fitters Union* [1987] ATPR 48,570 at 48,574-7. See R Ramsay "Corporations and the Privilege Against Self-Incrimination" (1992) 15 *UNSWLJ* 298.

12 *TPA* s 155(7).

13 The *Evidence Bill* 1991 (Cth) cl 120 provides that a court cannot compel a witness to provide self-incriminating evidence. However the clause has no application to information previously disclosed under compulsory process.

14 *ASCA* s 69. The privilege is not absolute. The lawyer is obliged to disclose the name and address of the person to whom, or by or on behalf of whom, the communication was made: *ASCA* s 69(3)(a). The practitioner is under a further obligation to furnish sufficient particulars to "identify the document or book or that part of the book" containing the privileged communication: *ASCA* s 69(3)(b), (c). Armed with this information, the ASC may seek to obtain the information from the client. Normally it will be of no comfort to clients to lodge privileged documents with legal advisers, as the ASC may direct persons to produce books within their legal "control" as well as physical possession: *Corporations Law* s 86; *ASCA* s 33. A person with legal control, but not physical custody or possession of documents, must exercise all presently enforceable legal rights to produce them. It is no bar to production of the documents that they may be subject to a solicitor's lien: *ASCA* s 37(6). Nevertheless, not all documents the subject of legal professional privilege are necessarily within the legal control of the client: see further *Wentworth v DeMontfort* (1988) 15 NSWLR 348 on the tests determining ownership and control of documents as between the lawyer and client. Applying these tests, one commentary has suggested that "it may be preferable for the solicitor to give oral advice but to record that advice in file notes kept for the solicitor's own purposes and not generally available for the client without the solicitor's consent" S Climpson and M Proctor "The ASC and Privilege" (1992) 27(4) *Australian Law News* 26.

15 See further on the implications of *CAC (NSW) v Yuill* for investigative powers and practices: *Butterworths Corporation Law Bulletin* (No 16, 1991) at [320]. In *ASC v Dalleagles Pty Ltd*

The decision has raised uncertainty over its application elsewhere in the national scheme laws,[16] as well as controversy over its policy merits eg claims that it may lessen compliance levels.[17] By contrast, legal professional privilege is fully available in tax investigations,[18] hearings by the National Crime Authority[19] and has been conceded in the context of TPC investigations.[20] These rights are based on Federal Court decisions that pre-dated the High Court judgement in *CAC v Yuill.*

Both the ATO and TPC have powers of immediate access to private premises to obtain documents.[21] The ASC has no equivalent power but must rely on more limited common law rights or cumbersome search warrant powers.[22]

These differences in investigative powers are difficult to justify. They are not the product of any comprehensive legislative design, but of isolated judicial interpretation and different legislative approaches to essentially the same policy issues. No attempt has been made to create uniform integrated laws for commercial regulators, based on clearly articulated policy principles concerning the balance of public and private interests. A 'grand strategy' law reform exercise of this nature seems well overdue.

II. ASC INVESTIGATIONS

Apart from self-incrimination and legal professional privilege other issues and initiatives have arisen in the specific context of ASC investigations which individually and collectively pose similar questions of regulatory policy involving the tension between public and private interests.

(unreported, Federal Court of Australia, 24 June 1992), French J confirmed that the principles in *CAC (NSW) v Yuill* apply to ASC investigations commenced under *ASCA* Pt 3 Div 1. The respondents were ordered to comply with notices issued under *ASCA* s 33, notwithstanding that the documents sought may otherwise have been protected by legal professional privilege.

16 Contrast, in respect to s 597, *Spedley Securities Ltd (in liq) v Bank of New Zealand* (1991) 6 ACSR 331 (privilege impliedly abrogated; *CAC v Yuill* applied) *Re Transequity Ltd (in liq)* (1991) 6 ACSR 517 (privilege not excluded; *CAC v Yuill* distinguished). In *Re BPTC Ltd (in liq)* (1992) ACSR 539, McLelland J followed *Re Transequity* over *Spedley Securities* in holding that legal professional privilege remained available to a person required to provided information under s 597.

17 N Korner "Availability of Legal Professional Privilege in Investigations by the ASC" (1991) 2(5) *Law Council of Australia, Business Law Section Newsletter* and (1991) 2(10) *International Company and Commercial Law Review*; K White "Legal Professional Privilege: The Bridling of a Common Law Right" (1991) 29(10) *Law Society Journal* 69; D Castle "Decision in Yuill damages Solicitor Client Relations" (1991) 29(11) *Law Society Journal* 43. A commonly stated argument by critics of *CAC (NSW) v Yuill* is that by being denied the right of confidential legal advice, persons may be discouraged from seeking legal advice, which thereby may result in higher incidences of breaches of the law through inadvertence or ignorance.

18 *FCT v Citibank Ltd* (1989) 85 ALR 588; *Allen Allen & Hemsley v DCT* (1989) 86 ALR 597.

19 *NCA v S* (1991) 100 ALR 151 at 156-7.

20 *Shannahan v TPC* (1991) ATPR 41,115.

21 *Income Tax Assessment Act* (1936) (Cth) ("*ITAA*") s 263; *TPA* s 155(2). See RH Woellner et al note 8 *supra* pp 95-100.

22 *ASCA* s 35, 36; *Crimes Act* (Cth) 1914 s 10. See further: Access to Premises, part II(E) *infra.*

A. PROTECTION OF INFORMANTS

(i) Voluntary informants

The ASC, like other regulatory agencies, relies upon its information sources to determine the speed and nature of its investigative response. This process would be enhanced if persons who suspect misconduct could approach the ASC without fear of legal redress. Auditors, receivers and liquidators, who are obliged to disclose possible breaches to the ASC, have the statutory protection of qualified privilege.[23] There is no equivalent statutory privilege for voluntary informants, such as corporate officers, employees or professional advisers who may suspect misconduct, but who are subject to express or implied duties or undertakings of confidentiality concerning their companies' or clients' affairs. This protective gap may have a particular significance for the ASC's market surveillance program which is reliant in part on voluntary co-operation and disclosure by persons approached.

ASCA s 92 protects informants from civil liability but only pursuant to the ASC's exercise of its statutory powers under *ASCA* Pt 3. ASC investigators may invoke *ASCA* s 92 by immediately serving voluntary informants with formal notices under *ASCA* Pt 3 Div 3 to produce books and explain their contents. Further, by initiating formal investigations under *ASCA* ss 13 or 15, informants could be interviewed pursuant to the examination powers in *ASCA* Pt 3 Div 2, with the protection of *ASCA* s 92. However investigators could not invoke the oral examination powers under *ASCA* s 13 unless and until they had "reason to suspect" that a contravention had taken place.

Short of the ASC initiating formal procedures to attract the protection of *ASCA* s 92, voluntary informants must rely on common law principles. The case law generally protects informants from legal redress, though it leaves in doubt whether, and to what extent, informants must have had reasonable grounds for their belief of misconduct.[24]

The provision of a specific statutory protection for voluntary informants would resolve these legal doubts and possibly encourage greater openness with the ASC and promote its earlier intervention. To gain the protection, informants would have to act in good faith. However, to impose any additional requirement that their suspicions or beliefs be reasonable may defeat the purpose of the reform.[25] Also, to ensure that informants do not act in breach of

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23 Eg, as regards auditors s 332(10) (obligation to report) and s 1289 (qualified privilege). The professional accounting bodies have proposed an amendment to s 332(10) to oblige auditors to report matters to the ASC where they have "reasonable grounds to suspect" malpractice. They have expressed concern that use of the current term "is satisfied" in s 332(10) may require an unduly high standard before the auditor can attract qualified privilege in reporting to the Commission: Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs: *Corporate Practices and the Rights of Shareholders* (November 1991) at [4.7.59]; recommendation 18. See generally; R Tomasic "Auditors and the Reporting of Illegality and Financial Fraud" (1992) 20(3) *Australian Business Law Review* 198.

24 *A v Hayden (No2)* (1984) 56 ALR 82 (Gibbs CJ); *AG v Heineman Publishers* (1987) 75 ALR 353 (Kirby P); *AG v Guardian Newspapers (No2)* [1988] 3 WLR 776; *Re a Company* [1989] 3 WLR 265.

25 Notes 23-24 *supra*.

law, the immunity might be made subject to compliance with any relevant secrecy provisions in other legislation.[26] Any detriment to affected persons would be minimised by the obligations of confidentiality on the ASC under *ASCA* s 127.

To avoid possible intimidation, the legislation might declare void or illegal any terms in confidentiality arrangements that inhibit free communication with regulatory authorities.[27] These arrangements in other lawful respects would not be affected.

(ii) Examinees and other addressees of notices

Persons subject to formal examinations or notices to produce books must disclose relevant information, regardless of any fiduciary, contractual or other arrangements of confidentiality: *Von Doussa v Owens*[28]. The only exemption is lawyers in possession of legally privileged information: *ASCA* s 69. To offset possible civil liability as a result of compulsory disclosure, *ASCA* s 92 covers persons providing answers or producing documents in compliance with ASC directions, whether lawful or "purported", thereby protecting an addressee who may have insufficient information to independently assess the validity of the notice: *ASC v Zarro*[29].

The ambit of *ASCA* s 92 has been placed in some doubt following the decision by the Full Court of Queensland in *Green v FP Special Assets Ltd*[30]. The then Queensland Corporate Affairs Commission ("CAC") had sought corporate documents from solicitors who had obtained them in civil discovery proceedings. The solicitors objected, claiming that to comply would breach their implied undertaking to the court in the discovery proceedings that the documents be used for that litigation, and for no other purpose. To release the documents to the CAC could constitute a contempt of court. The CAC succeeded in its application to obtain the documents partly because the relevant company did not object to their production. Shepherdson J, however, was equivocal on the applicability of *ASCA* s 92 should the company not have consented. His Honour said:

> I leave open the question whether [*ASCA* s 92] will in all cases exonerate a solicitor in a situation such as the present from contempt proceedings for breach of his implied undertaking attaching to documents received by him on discovery.[31]

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26 Eg *ITAA* s 16.

27 The *Report of Inspector on a Special Investigation into Rothwells Ltd* (1990) Part 1 at [2.11]-[2.15] refers to an externally commissioned accountant declining to report his suspicions to the NCSC on the ground that he was precluded by the Confidentiality Agreement with the company. The accountant headed a team to conduct a review of Rothwells receivables and therefore, not acting in the role of an auditor, did not have a statutory duty to report, nor the protection of qualified privilege: note 23 *supra*.

28 (1982) 6 ACLR 692.

29 (1991) 6 ACSR 385.

30 (1990) 3 ACSR 731.

31 *Ibid* at 734.

In the same case Williams J commented that the decision to order production "ought not to be regarded by the Commission as an intimation that in general they may use the [statutory] power to require production of documents from solicitors who have obtained such documents on discovery, rather than make the necessary requisition in the first instance to the companies or persons whose documents are sought".[32]

In principle, it seems inequitable to ever place recipients of notices at risk of contempt in complying with their terms. The reference in *ASCA* s 92 to a requirement "purporting to have been made", reflects the policy that protection from civil redress should not be dependent upon the lawfulness of the ASC action. Equally, to exclude certain persons in possession of documents from the investigative ambit could prejudice the process. An amendment to overcome the uncertainties arising from *Green v FP Special Assets Ltd*, by providing both an unequivocal disclosure obligation and a consequential protection, may be appropriate.

B. GROUNDS FOR AN INVESTIGATION

The *ASCA* provides three possible grounds for the ASC to commence a formal investigation:

- suspicion of a contravention or unacceptable circumstance (*ASCA* s 13);
- ministerial discretion (*ASCA* ss 14, 14A); and
- report of a receiver or liquidator (*ASCA* s 15).

For investigations commenced under *ASCA* s 13, other than for possible "unacceptable circumstances" involving takeovers, the overriding limitation is that it must be in connection with a "contravention". A partial definition of this term is found in *ASCA* s 5(1). This indicates that a "contravention" includes all ancillary as well as principal offences (*Corporations Law* s 79; *Crimes Act* 1914 (Cth) s 5). In specific limited contexts, "contraventions" also include civil liabilities.[33]

The ASC, in its submission to the House of Representatives Committee Inquiry into Corporate Practices and the Rights of Shareholders (the "Lavarch Committee") argued for an extension of its investigative mandate into civil matters. The ASC proposed that *ASCA* s 13 "should as a matter of urgency, be extended to allow investigation of.... any act or omission within the scope of the oppression remedy in s 260 of the *Corporations Law* and any breach of directors' duties, whether or not attracting criminal sanctions".[34] The ASC

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32 *Ibid* at 741.

33 Eg ss 995(3), 1073(1A),(1B).

34 ASC Submission to the *Inquiry by the House of Representatives Standing Committee on Legal and Constitutional Affairs into Corporate Practices and the Rights of Shareholders* (December 1990) p 137-8. Recent decisions, including *Southern Resources Ltd v Residues Treatment and Trading Co Ltd* (1991) 3 ACSR 207 at 226-7 and *Chew v R* (1992) 7 ACSR 481; 10 ACLC 816 have examined the duty of directors and officers to act "honestly" in s 232(2) and their duty under s 232(6) not to make "improper use" of their position. In *AWA Ltd v Daniels* (1992) 10 ACLC 933, Rogers CJ (Comm D) examined the

believed that given the importance of bringing civil proceedings for breaches of directors' duties, its powers of investigation in these civil matters should be put beyond doubt. Currently the only way that matters not involving "contraventions" could be investigated would be pursuant to a Ministerial direction under *ASCA* s 14.

The Lavarch Committee Report[35] recommended that *ASCA* s 13 be amended to allow the Commission to investigate:

- any breach of a unit trust deed (now addressed by ss 1073(1A)(1B));
- any act or omission within the scope of the oppression remedy in s 260 of the *Corporations Law*; and
- any breach of directors' duty whether or not attracting a criminal sanction (recommendation 29).

Any amendment to *ASCA* s 13 along the lines proposed by the Lavarch Committee would significantly increase the capacity of the ASC to exercise its extensive interrogation powers in pursuit of civil, as well as criminal, remedies.

The Lavarch recommendation takes on added significance, given the proposals in the *Corporate Law Reform Bill* 1992 (Public Exposure Draft) to further articulate the duties of directors, partially de-criminalise their statutory duties, and introduce civil penalty provisions. On one view, it would be counter-productive to this process if the ASC was restricted in its capacity to ensure that directors complied with their fiduciary duties. The opposing argument is that the ASC should be concerned primarily with criminal breaches, and that civil redress should remain the responsibility of the company itself and its shareholders. The ASC would not support this limitation on its role, given its frequent and strongly articulated emphasis on civil enforcement.

C. COMMENCING AN INVESTIGATION

The decision by ASC investigators to commence a formal investigation has potentially far-sweeping consequences for affected persons. For instance, in addition to requiring the production of books, investigators may conduct compulsory examinations, with wide ranging powers in the event of non-compliance. Moreover, the mere fact that the ASC has commenced an investigation may damage the reputation, and commercial position, of persons under scrutiny. Their interests, at least, would be better served by placing some procedural restraints or rights of challenge on this process.

Support for some procedural formality is found in *CAC v United International Technologies Pty Ltd*[36] where Kearney J believed that "particularly having regard to the drastic consequences resulting from the

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duty of directors under s 232(4) to exercise 'a reasonable degree of care and diligence'. See further on directors' fiduciary duties P Redmond "The Reform of Directors Duties" (1992) 15 *UNSWLJ* 86.

35 Note 23 *supra*.

36 (1988) 6 ACLC 637 at 641.

institution of an investigation, it seems.... highly desirable that some formal procedures should be applied".

In the first decision handed down under the national scheme laws, Davies J of the Federal Court in *Little River Goldfields NL v Moulds*[37] ruled that it was not necessary that the decision to commence an investigation be made formally, such as in writing by the ASC or by any of its delegated officers. Rather, "it will be sufficient that the duly authorised officer who has responsibility for the investigation has reason to suspect that a specified contravention has been committed and considers it expedient to conduct the investigation".[38] An investigation may be stayed if it is established that the ASC or its delegated officer did not hold the necessary suspicion of a contravention, though the evidential onus rests on the challenger.[39] The decision in *Little River Goldfields NL* simply reinforces the difficulties in this task: "If any challenge is made to the investigation, the Commission is not bound to justify its action. The onus lies on the challenger to establish lack of bona fides etc".[40]

There are further impediments to any challenge to the commencement of an investigation:

- the ASC is not obliged to provide an affected person with notice of, or to otherwise make submissions in advance of, any decision to commence an investigation;[41]
- the ASC has no common law or natural justice obligation to provide affected persons with a statement of reasons for commencing an investigation, or to disclose the material on which it has acted;[42]
- it is unlikely that remedies are available under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) (the "*ADJR Act*").[43]

These impediments are not confined to Australian law. In the UK case of *R v Serious Fraud Office ex part Nadir*[44] a suspect argued that he had natural justice rights both to a preliminary hearing and to obtain particulars of the transactions for which the Serious Fraud Office suspected him of criminal conduct. The Court held that whilst an investigation could prove damaging to an individual, that person had no hearing or other associated rights. According to Steyn J:

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37 (1991) 6 ACSR 299.

38 *Ibid* at 305.

39 *NCSC v Sim (No2)* (1986) 11 ACLR 171; *Sim v NCSC* (1988) 13 ACLR 191.

40 Note 37 *supra* at 309. In *ASC v Lucas* (1992) 10 ACLC 888, Drummond J reiterated that "there is a well-established principle applicable in a variety of situations that it is the person asserting impropriety in the exercise of a statutory power who has the burden of making out that challenge, difficult though the task will generally be."

41 *Norwest Holst v Department of Trade* [1978] 3 All ER 280; *Karounos v CAC* (1989) 15 ACLR 363.

42 *News Corporation v NCSC* (1983) 8 ACLR 338 at 351; 49 ALR 719 at 734 cf *Public Service Board v Osmond* (1985) 159 CLR 656.

43 See *Australian Broadcasting Tribunal v Bond* (1990) 94 ALR 11, as applied in *Little River Goldfields NL v Moulds* note 37 *supra* at 305. Note also the exclusions in schedule 2(e) of the *ADJR Act*.

44 (1991) 12(4) Company Law Digest 76.

> The applicant had no legal right to be heard on the question whether an investigation by the Serious Fraud Office should be commenced or continued, nor had he a legal right to be heard on the question of whether criminal charges should be brought.

The Court rejected the applicant's claim for particulars of the investigation. His Honour considered that it would be "contrary to the public interest to supply information which might enable a suspected fraudster to interfere with witnesses or destroy documents before the investigation had been completed".

The predominant case law therefore favours minimal regulation of the commencement process. This lessens the possibility of affected person impeding or delaying an investigation by recourse to procedural challenges. The detriment to private interests that may consequently arise has been treated as subservient to the public interest in timely administrative intervention.

D. DETAILS IN NOTICES

Under *ASCA* s 21(3) an examinee is only obliged to answer questions that are "relevant to the matter that the Commission is investigating". An examinee may be assisted by *ASCA* s 19(3)(a) which requires the ASC to provide a written notice of the examination stating the "general nature of the matter that the Commission is investigating". The utility of this requirement for an examinee depends upon how much information the ASC must provide in the notice.

On one interpretation, a notice should identify the "matter" in such a way that the recipient can perceive the general ambit of the subject matter of the investigation and its relationship to the information sought. For instance, in *Pyneboard Pty Ltd v TPC*,[45] the Federal Court held that notices under the *Trade Practices Act* 1974 (Cth) "must disclose the necessary relationship between the information sought and the matter in respect of which it is sought. This requires a sufficient description of the matter to enable the relationship to be discerned".

Similarly in *Bannerman v Mildura Fruit Juices Pty Ltd*,[46] the Full Federal Court stated that the requirement under the *Trade Practices Act* to identify the matter that constitutes or may constitute a contravention:

> provides for the recipient the point of reference by which to judge whether the notice validly requires the specified information to be furnished or the specified documents to be produced. It will only validly do so if the information and the documents specified in the notice can be seen, from the face of the notice itself, to be information or documents that relate to a matter of the kind described in [the *Trade Practices Act*] and identified in the notice.

Beyond that however, the notice need not "plead all the facts" on which the decision to commence an investigation was reached: *SA Brewing Holdings Ltd v Baxt*.[47]

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45 (1982) 39 ALR 565 at 571.
46 (1984) 55 ALR 367 at 370.
47 (1989) 89 ALR 105 at 116-18.

These principles were developed in the context of notices to produce documents and it is arguable that a less precise test might apply to oral examinations, where the information sought could only be described in general terms. For instance in *Smorgon v FCT*,[48] it was held that a notice to attend and give oral evidence before the Commissioner of Taxation need not specify precise topics.

In *ASC v Graco*,[49] Jenkinson J declined to read the requirements of ASCA s 19(3)(a) as requiring a high degree of specificity. His Honour ruled that unless the investigation was concerned with the entire life of the company, there must be some temporal boundaries. In this case the notice should have identified a time-frame, given that the investigation concerned only a particular proposed takeover bid, and not the general affairs of the company. While the information disclosed in a notice might be used as a guide in challenging the relevance of various questions put by investigators, this level of detail was not obligatory.

Some notices issued by the ASC have apparently relied on *ASC v Graco* to provide only minimal information. This practice has been criticised as leaving the examinee uninformed and therefore unprotected. It is argued that the ASC should provide reasonable information about the nature of the investigation, to give the statutory obligation to answer only "relevant" questions some practical content.[50]

This matter was further considered by Lockhart J in *Johns v Connor*.[51] An ASC notice which referred only to "an investigation into the affairs of [named person] covering the [stated] period", was challenged as not stating the general nature of the investigation as required by *ASCA* s 19. His Honour observed that while the ASC ought not be unduly fettered in the execution of its investigative functions, "some general hint must be given in the notice itself of the nature of the matter to be investigated". In this case the notice was held to be defective. By contrast, His Honour described the notice in *Little River Goldfields NL v Moulds*[52] which set out the suspected offences, as an instance of "a sufficient, though minimal statement of the general nature of the matter".

The decision in *Johns v Connor* may not satisfy all those seeking greater particularity in notices. Lockhart J expressly stated his agreement with Jenkinson J in *ASC v Graco* "that a notice issued pursuant to s 19 of the *ASC Act* does not have to state matters designed to provide a means of determining the relevance of questions for the purpose of [*ASCA*] s 21(3) (which empowers the inspectors to require the examinee to answer relevant questions put to him at the examination). A notice is not a pleading". Their Honours were clearly concerned that the legislative requirement not support "a fishing expedition" for information by examinees, or become a means of creating unjustified delays to

48 (1976) 13 ALR 481.

49 (1991) 5 ACSR 1.

50 RP Austin "Managing the Impact of the New Corporations Law" *Eighth Annual Australian Company Secretaries' Conference* (October 1991).

51 (1992) 10 ACLC 774; 7 ACSR 519.

52 Note 37 *supra*.

the investigative process. The private interests to be served in obtaining information were constrained by these public interest considerations.

E. ACCESS TO PREMISES

The various statutory powers available to the ASC to obtain documents[53] may be undermined if persons could easily secrete, destroy, or alter books in anticipation or in the face of a notice for their production. There may be circumstances where the ASC needs to act quickly and without warning to secure documents.

ASCA s 67 goes a very limited way towards dealing with this problem. It provides an offence for concealing, destroying or altering books relating to a matter that the Commission is investigating "or is about to investigate". The section might apply where say, an issued notice refers to books pertaining to an identified matter, and the recipient destroys or tampers with other books in reasonable anticipation of receiving a follow up notice on a related matter. However the provision gives little real guidance on its application to documents falling outside the terms of any investigation then on foot, or prior to the commencement of an investigation. More fundamentally, s 67 is a penalty provision and does not of itself ensure the security of documents.

The ASC lacks a specific power of access to premises to obtain relevant documents. It must rely on implied or common law access rights or the use of *ASCA*[54] or *Crimes Act*[55] search warrants. This contrasts with the express rights available to other commercial regulatory bodies such as the ATO[56] the TPC[57] or the Insurance and Superannuation Commission ("ISC")[58] to enter premises to inspect and take extracts from or copies of documents. These powers may be used without precondition or advance warning.[59]

(i) Implied access powers

Section 1300 of the *Corporations Law* and *ASCA* s 29 require that certain books be kept in a manner "available for inspection" at designated locations. Arguably, these provisions entitle ASC investigators to enter and remain on premises until the disclosure obligations are complied with. However, they could hardly be interpreted as giving investigators rights of movement throughout the premises or to exercise any reasonable force to obtain the books.

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53 *Corporations Law* ss 788, 1154; *ASCA* ss 28-33.

54 *ASCA* s 35, 36.

55 *Crimes Act* 1914 (Cth) s 10.

56 *ITAA* s 263.

57 *TPA* s 155(2).

58 *Life Insurance Act* 1945 (Cth) s 54B.

59 "In general, an investigator can exercise the [*ITAA*] s 263 power without giving advance warning to the person being required to allow access. In practice, however, advance notice is invariably given except in an unusual case eg where the ATO fears that a taxpayer receiving an advance warning may destroy records or otherwise attempt to frustrate the investigation": RH Woellner et al note 8 *supra* p 96.

In other circumstances, ASC investigators must rely on common law rights of access. These rights provide that an owner or occupier is deemed to give persons an implied licence to enter premises, unless or until that licence is withdrawn by clear contrary indication. Any person who remains on premises after having been given a direction and reasonable time to leave commits a trespass.[60] The access rights would therefore be of no assistance to investigators who may reasonably believe that documents are at risk, but are faced with a direction to leave the premises.

(ii) Search warrants

The ASC may have resort to an *ASCA* warrant or a *Crimes Act* warrant. An *ASCA* warrant suffers from the requirement of forewarning. It may be issued only where there has been a prior failure to comply with a notice to produce the books sought.[61] Investigators may be able to shorten this period by issuing a notice to produce books "forthwith" at the place of service of the notice, though only where this is "reasonable in all the circumstances".[62] However, "it is well settled that even where an act must be done "forthwith", a reasonable time is implied sufficient to enable performance to be effected": *ACE Customs Services Pty Ltd v Collector of Customs (NSW).*[63] In determining a reasonable time, the courts may take into account such factors as the events preceding the issue of the notice, including the need for expedition, the number of documents sought and their nature, ie whether they are reasonably accessible, the period of time covered by the notice, and the familiarity of the addressee with these documents.[64] Addressees of notices may also be entitled to delay compliance for a reasonable time to seek legal advice on their rights and obligations.[65] An *ASCA* warrant could not be issued until lapse of these periods.

In contrast, a *Crimes Act* warrant may be issued without forewarning. However, unlike an *ASCA* warrant, a *Crimes Act* warrant has two main restrictions on its scope and use: its non-applicability to legally privileged information, as reflected in its manner of execution (*FCT v Citibank Ltd*)[66] and the statutory requirement to specify the particular offence(s) in relation to which it is issued. This latter requirement causes particular difficulties for the use of warrants in investigations.

The case law on specification of offences is not consistent. Some judges favour detailed particularisation of the offence(s) to enable the owner or

60 *Halliday v Nevill* (1984) 57 ALR 331; *Plenty v Dillon* (1991) 98 ALR 353.

61 *ASCA* s 35(1)(b).

62 *ASCA* s 87; eg *Little River Goldfields NL v Moulds* note 36 *supra.*

63 (1991) 104 ALR 463 at 470.

64 For instance in *Wouters v FCT* (1988) 84 ALR 577 at 583-5, a notice issued under the *ITAA* was held not to be unreasonably short, given the drawn-out history of the particular investigation and the desirability of its completion as soon as possible, merely because a later date for compliance may have been preferable.

65 *Swan v Scanlan* (1982) 13 ATR 420; cf *Bhimji v Chatnani* [1991] 1 All ER 705.

66 Note 18 *supra.*

occupier to know the exact object of the search and to inhibit the invasion of private premises in pursuit of unstated or vaguely stated suspicions.[67] Other judges have exercised more latitude in recognition that particularisation of specific offences may be impractical at the investigative stage and could unduly impede that process.[68]

The recent decision of *Beneficial Finance Corporation Ltd v Commissioner of Australian Federal Police*[69] favours the flexible, rather than restrictive, interpretation of the requirement to specify offences. The Full Federal Court after reviewing the relevant authorities, ruled that the statement of an offence under a *Crimes Act* warrant need not be made with the precision of an indictment or otherwise with exactitude. The matter should be viewed broadly having regard to the terms of the warrant in the circumstances of each case. According to Pincus J "the object of the search may be able to be stated precisely enough in many instances where only an indication of the categories of offences suspected can be given".[70] His Honour also agreed with Burchett J that the precision required in a given case may vary with the nature of the offence and other circumstances. Burchett J reasoned that to require precision in the statement of the offence "would be irrational, bearing in mind the stage of investigation at which a search warrant may issue. The purpose of the statement of the offence in the warrant is not to define the issues for trial; but to set bounds to the area of search which the execution of the warrant will involve, as part of an investigation into a suspected crime".[71] According to His Honour "The question should not be answered by the bare application of a verbal formula, but in accordance with the principle that the warrant should disclose the nature of the offence so as to indicate the area of search. The precision required in the given case, in any particular respect, may vary with the nature of the offence, the other circumstances revealed, the particularity achieved in other respects, and what is disclosed by the warrant, read as a whole, and taking account of its recitals".[72]

The decision in *Beneficial Finance Corporation Ltd* falls far short of resolving the issue. Indeed, the emphasis that the court has placed on the particular factors of each case is in one way, an encouragement to further disputation and litigation. The *Crimes Act* search warrant powers will continue to be a fertile litigious ground, with the costs, uncertainties and delays that this inevitably entails.

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67 *ABC v Cloran* (1984) 57 ALR 742 at 745; *Arno v Forsyth* (1986) 65 ALR 125 at 143-4; *Parker v Churchhill* (1986) 65 ALR 107; *Ex parte Bradrose Pty Ltd* (1989) 41 A Crim R 274 at 277-9.

68 *IRC v Rossminster Ltd* [1980] AC 952 at 999, 1005, 1010, 1023; *Trimboli v Onley No 1* (1981) 37 ALR 38; *Coward v Allen* (1984) 52 ALR 320 at 331-2; *Ex parte Bradrose Pty Ltd* (1989) 41 A Crim R 274 at 281-4; *Karina Fisheries Pty Ltd v Mitson* (1990) 95 ALR 557 at 588. See particularly *OPSM v Withers* (1987) 71 ALR 269 at 274.

69 (1991) 103 ALR 167.

70 *Ibid* at 170.

71 *Ibid* at 178.

72 *Ibid* at 188.

The lack of a statutory access power and the shortcomings of the search warrant powers appear to constitute a significant weakness in the ASC's investigative capacity and suggest the need to grant it access rights similar to those of the ATO or TPC. Against this would have to be balanced the prejudice that may be caused to rights of privacy and the likelihood of administrative abuse. The experience of the ATO suggests that use of an access power without prior notice is a comparatively rare event.[73]

F. REPORTS OF INVESTIGATIONS

ASCA s 16(1)(a) provides that the ASC shall prepare an interim report where, in the course of an investigation it "forms the opinion that a serious contravention of a law.... has been up ommitted". The reference to a "serious contravention" frees the ASC from having to prepare an interim report for minor infractions of law. However the more pressing legal issue is whether this is an enabling or obligatory provision for the ASC.

The ASC has taken the view that it is obliged to prepare an interim report whenever it forms the opinion that a serious contravention has occurred, whether or not it favours this course.[74] This interpretation would assist affected persons who are entitled under the principles of natural justice to a notice of relevant proposed findings and an opportunity to respond prior to the finalisation of any report. By the ASC being required to prepare an interim report, suspected persons may obtain information otherwise denied to them and may challenge the contents of the draft report.

The ASC believes that the obligation to prepare interim reports is an unnecessary impediment or distraction in the enforcement process and has called for repeal of the provision or the granting to it of a discretion.[75]

A related question is whether the contents of reports are restricted by general relevance or probative rules. One line of authority has held that while reports prepared by inquisitorial or administrative agencies are not bound by the rules of evidence any findings of material fact contained therein "must ordinarily be based on logically probative material".[76] However this principle was modified by a majority of the High Court in *Australian Broadcasting Tribunal v Bond.*[77] Mason CJ with whom Brennan J (expressly) and Toohey and Gaudron JJ (impliedly) agreed, took the view that "at common law, according to the

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73 Note 59 *supra.*

74 *The Australian* (10 March 1992) p 1.

75 See ASC Media Release 92/37 (10 March 1992). ASC Chairman, Tony Hartnell, in calling for amendment to the provision, stated that: "Whilst a report for the purposes of this section was being written, no serious action in respect of perceived contraventions of the law could be commenced in an Australian Court. This could have the effect of delaying serious litigation for some years, which was the principal reason the ASC sought the repeal of the section."

76 *Minister for Immigration and Ethnic Affairs v Pochi* (1981) 31 ALR 666 at 689-90, per Deane J; *Mahon v Air New Zealand Ltd* (1984) 50 ALR 193; and *Australian Broadcasting Tribunal v Bond* note 43 *supra* per Deane J at 47.

77 Note 43 *supra.*

Australian authorities, want of logic is not synonymous with error of law.... So long as there is some basis for an inference - in other words, the particular inference is reasonably open - even if that inference appears to have been as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place".[78] The Court referred to the UK and Australian authorities which suggested that findings and inferences are reviewable for error of law on the ground that they could not reasonably have beeen made on the evidence or drawn from the primary facts. Mason CJ stated that "the approach adopted in these cases has not so far been accepted by this court".[79]

The consequence of *Australian Broadcasting Tribunal v Bond* is to increase the difficulties in challenging the evidential or logical basis of an ASC report. However this does not give the ASC an unfettered right to set out its observations or conclusions on the matters investigated.

A possible restriction arises from observations of the High Court in *Balog v ICAC*.[80] The case turned on statutory provisions regulating the powers of the NSW Independent Commission Against Corruption to include in its reports findings of corrupt or criminal behaviour. However the reasoning in this case may have a more general application, namely that an administrative body, in any published report, must refrain from expressing formally any conclusions it might have reached concerning the criminal liability of any persons under investigation. This is a matter for the courts alone.[81] Consistently with this, the ASC could fairly state whether, in its opinion, there is sufficient evidence for the prosecution of particular persons and the substance of that evidence. Beyond this, the powers of the ASC are unclear. It remains an open question whether the requirements in *ASCA* ss 16(1)(d) and 17(3)(a) that the ASC set out its "findings" as to contraventions or the matters investigated, do or should, override the principles in *Balog v ICAC*.

The uncertainties concerning the merits and contents of interim and final reports have been exacerbated, rather than resolved, by the national scheme legislation. The matter is compounded by the ever-burgeoning case law impinging on the natural justice or procedural fairness requirements in preparing reports. Any review of the law might need to reconsider such fundamental matters as the role and purpose of reports, whether the existing natural justice 'rights of reply' to possible accusations and adverse conclusions should be made subject to more specific legislative guidance and whether specific probative and other content requirements should apply to reports.

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78 *Ibid* at 38.

79 *Id.*

80 (1990) 93 ALR 469.

81 Compare the comments of Gibbs CJ in *News Corporations Ltd v NCSC* note 1 *supra* at 854 that publication of a report stating that a contravention of the law had occurred "might well be a contempt of the Supreme Court".

III. ENFORCEMENT

One measure of the effectiveness of the national scheme laws as a regulatory tool is its scope for public and private enforcement. These laws contain a rich mixture of administrative powers, civil remedies, and criminal enforcement mechanisms.[82] Further enforcement powers, such as statutory derivative actions, have also been proposed.[83]

The civil and criminal enforcement processes under the national scheme laws are still evolving. Recent initiatives, particularly the policy of the ASC to assist private litigants by the release of information held by it,[84] may well help change the face of civil enforcement. Equally, any move towards the introduction of UK type preparatory hearings for complex corporate criminal trials which are the responsibility of the Commonwealth DDP, may have profound consequences for criminal law enforcement. These, and other enforcement issues and initiatives, raise policy matters which again focus on the tension between public and private interests.

A. PUBLIC STATEMENTS BY ASC

In its submission to the Lavarch Committee, the ASC pointed out that notwithstanding its extensive investigative powers, its enforcement capacity was limited by its inability to inform the market without risk of defamation. The ASC argued that "a power to provide timely information to the market about improper practices is most important if the investing public is to gain the full benefits of the ASC's investigations at the earliest possible stage. In many cases, timely disclosure will assist in preventing or containing losses to investors".[85] The Lavarch Committee Report supported the ASC submission.[86]

The ASC call for qualified privilege raises some fundamental matters of public policy. On the one hand, it may be unsatisfactory that the ASC as the national regulator, has no independent power to make public statements without risk of a defamation action. Its express powers to release information are focussed mainly on litigation,[87] disclosure to other agencies[88] and reports to the

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82 Note 5 *supra*.

83 CSLRC Report No 12: *Enforcement of the Duties of Directors and Officers of a Company by means of a Statutory Derivative Action* (November 1990); Report of the House of Representatives Standing Committee note 23 *supra* recommendation 26. In the Explanatory Paper accompanying the *Corporate Law Reform Bill* 1992 (Public Exposure Draft), the Federal Attorney-General indicated that future legislative reforms may include the question of statutory derivative actions. See IM Ramsay "Corporate Governance, Shareholder Litigation and the Prospects for a Statutory Derivative Action" (1992) 15 *UNSWLJ* 149.

84 *ASC Policy Statement* 17 (March 1992).

85 ASC Submission note 34 *supra* p 116; see also p 144.

86 Report of the House of Representatives Standing Committee note 23 *supra* recommendation 2.

87 *Corporations Law* s 1330; *ASCA* ss 25, 37(4),(7), 49, 50.

88 *ASCA* s 127.

Federal Attorney General.[89] On the other hand, any proposal of this nature may adversely affect parties named, and at a minimum, increase the obligations on the ASC to afford these persons some advance opportunity to answer proposed criticisms. The ASC has recognised this problem, but stated that "the desirability of giving the ASC the power to inform the market about specific instances of manipulative conduct outweighs the disadvantages of the potentially more onerous requirements for the conduct of the investigation".[90] More consideration may need to be given to balancing natural justice "rights of reply" considerations which may considerably delay the publication process, against the need for prompt action to correct the market.

B. CRIMINAL PREPARATORY HEARINGS

At common law an accused has no right to a speedy trial or to be tried without undue delay.[91] However any judicial system with too many time-consuming procedural or other impediments may lose credibility or public confidence. Conversely reforming the criminal trial procedures may assist courts in dealing with complex corporate matters effectively and expeditiously, and thereby enhance the enforcement process.

One cause of the sometimes inordinate length and complexity of criminal trials stems from the the long-standing procedural rule which prevents the prosecution splitting its case. As reaffirmed by the High Court in *R v Chin*,[92] the prosecution must present its case completely before the defendant is called upon to indicate the nature of the defence. A trial judge's discretion to allow the prosecution to call further evidence after the close of the defence case is to be exercised only in exceptional circumstances. As a general rule, the prosecution will not be permitted to call further evidence if that led by the defence ought reasonably to have been foreseen.

Defendants in criminal trials are not obliged to make disclosures in advance of the Crown case. In consequence of this privilege and the no-splitting rule, the prosecution must anticipate and seek to meet in advance every possible line of defence as part of its own case. A great deal of evidence may be led in anticipation of matters which may never arise as issues at the trial. The effect of covering against any "ambush" defence is to unnecessarily prolong and

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89 *ASCA* ss 16, 17. The Attorney-General may publish the report in Parliament, thereby attracting absolute privilege. The Attorney-General has the sole discretion in this regard: *ASCA* s 18(4).

90 ASC Submission note 34 *supra* p 116.

91 An accused may seek a permanent stay of proceedings on the grounds that to proceed would constitute an abuse of the court process. To succeed, the accused would need to clearly demonstrate great unfairness or breach of natural justice arising from the delay eg, in the corporate context, *Cooke v Purcell* (1988) 14 NSWLR 51. The relevant principles were discussed by the High Court in *Jago v District Court of NSW* (1989) 87 ALR 577.

92 (1985) 157 CLR 671 applying the earlier leading authority of *Shaw v R* (1952) 85 CLR 365.

complicate trials and exacerbate the difficulties in dealing with complex corporate matters.[93]

Pre-trial preparatory hearings may be one means of addressing this problem and otherwise expediting the criminal trial process. The *Criminal Justice Act* 1987 (UK) provides a discretionary preparatory hearing in serious fraud cases. This legislation arose from recommendations in the Fraud Trial Committee Report (1986) (the "Roskill Report").[94]

The purpose of the UK preparatory hearing is to help resolve questions of law and evidence, reach agreement on non-contentious facts and crystalise outstanding issues before the jury trial.[95] To achieve this, the prosecution must first provide the court and the defendant with a detailed case statement.[96] The court may then order the defendant to provide the prosecution with a statement setting out in general terms the nature of the defence, the principal matters on which issue is taken and notice of any objections to the contents of the prosecution case statement.[97] Where a defendant fails to comply with an order,

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93 Mr M Weinberg QC (then Commonwealth Director of Public Prosecutions): "The Course of Evidence" *National Crime Authority Conference: The Presentation of Complex Corporate Prosecutions to Juries* (July 1991). Also, "it is impermissible to increase what is a proper sentence for the offence committed in order to mark the court's disapproval of the accused's having put the issues to proof or having presented a time-wasting or even scurrilous defence": *Gray* [1977] VR 225 at 231 applied in *Cho Hung Yam* (1991) 55 A Crim R 116.

94 *Fraud Trials Committee Report* UK (1986) pp 96-112.

95 The purposes of a preparatory hearing are set out in s 7(1) of the UK Act:

> "Where it appears to a judge of the Crown Court that the evidence on indictment reveals a case of fraud of such seriousness and complexity that substantial benefits are likely to accrue from [a preparatory hearing] before the jury are sworn, for the purpose of -
>
> (a) identifying the issues which are likely to be material to the verdict of the jury;
>
> (b) assisting their comprehension of such issues;
>
> (c) expediting the proceedings before the jury; or
>
> (d) assisting the judge's management of the trial, he may order that such a hearing may be held."

96 *Criminal Justice Act* 1987 (UK) s 9(4), requires the prosecution: "to supply the court and the defendant.... with a statement (a 'case statement') of the following -

(i) the principal facts of the prosecution case;

(ii) the witnesses who will speak to those facts;

(iii) any exhibits relevant to those facts;

(iv) any proposition of law on which the prosecution proposes to rely; and

(v) the consequences in relation to any of the counts in the indictment that appear to the prosecution to flow from the matters stated in pursuance of sub paragraphs (i) - (iv) above".

97 *Criminal Justice Act* 1987 (UK) s 9(5) provides that "where -

(a) a judge has ordered the prosecution to supply a case statement; and

(b) the prosecution has complied with the order, he may order the defendant....

(i) to give the court and the prosecution a statement in writing setting out in general terms the nature of his defence and indicating the principal matters on which he takes issue with the prosecution;

(ii) to give the court and the prosecution notice of any objections that he has to the case statement;

(iii) to inform the court and the prosecution of any point of law (including a point as to the admissibility of evidence) which he wishes to take, and any authority on which he intends to rely for that purpose;

(iv) to give the court and the prosecution a notice stating the extent to which he agrees with the prosecution as to documents and other matters to which a [case statement] relates and the reason for any disagreement.

the trial judge or the prosecution may comment adversely on this failure and invite the jury to draw such inferences as appear proper.[98]

There is no equivalent full preparatory hearing procedure in any Australian criminal jurisdiction dealing with national scheme law matters.[99] Only limited pre-trial procedures exist. For example the *Crimes Act* 1958 (Vic) s 391A, empowers a judge to hear and determine various matters before the jury is impanelled.[100] Likewise the *Criminal Code* (WA) s 611A (in force since February 1992) provides that various questions of law, procedure and fact may be dealt with before the trial.[101] *ASCA* s 79 provides for the pre-trial determination of the admission of statements made at an ASC examination. However none of these provisions expressly empowers the court to order disclosure by the prosecution and the defence. There is growing support, at least from law enforcement agencies, for the introduction of full preparatory hearings in Australia.[102] The *Crimes (Fraud) Bill* 1992 (Vic) has been tabled in the Victorian Parliament for public debate and discussion. One of the stated aims of the Bill is to simplify the prosecution of serious and complex fraud through the use of "directions" hearings based, with modifications, on the UK model.

Any introduction of full preparatory hearings, with mandatory defence as well as prosecution discloures, would obviously conflict with an accused's right to silence, and, to a lesser extent, the obligation on the prosecution to

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98 *Criminal Justice Act* 1987 (UK) s 10.

99 The various State and Territory criminal courts have cross-vested jurisdiction to try *Corporations Law* offences: *Corporations Act* 1989 (Cth) s 64; *Corporations [name of State] Act* 1989 s 55.

100 *Crimes Act* 1958 (Vic) s 391A provides that the court "may before impanelling of a jury for the trial hear and determine any question with respect to the trial of the accused person which the court considers necessary to ensure that the trial will be conducted fairly and expeditiously and the hearing and determination of any such question shall be conducted and have the same effect and consequences in all respects as such a hearing and determination would have had.... if the hearing and determination had occurred after the jury had been impanelled" cf *Crimes Act* 1900 (NSW) s 404; NSW *Supreme Court Rules* Pt 75 r 11.

101 *Criminal Code* (WA) s 611A states that in pre-trial procedures.

"(1) The court may:

(a) determine any question of law or procedure if it considers it is convenient to do so to facilitate the preparation for, or the conduct of, the trial, or its otherwise desirable;

(b) determine any question of fact which in a trial may be determined lawfully by a judge alone without a jury.

(c) permit the person committed or indicated to make admissions... notwithstanding that the person's trial has not begun".

(2) The judge constituting the court which deals with any matter under sub-section (1) need not be the judge who constitutes the court when the trial of the person committed or indicted takes place before a jury.

(3) Where a matter is dealt with under sub-section (1) before the trial of the person committed or indicted has begun, the proceedings in which the matter was so dealt with are to be taken as being part of the trial.

There is no equivalent of these sub-sections (2) and (3) in the Victorian legislation. The Western Australian provision therefore allows for a more flexible procedure.

102 See proceedings of the National Crime Authority: *National Complex White Collar Crime Conference* (June 1992).

demonstrate a prima facie case. They would represent a fundamental departure from the common law principles, reinforced by the High Court ruling in *Petty v R*,[103] that an accused is not required to submit to any pre-trial interrogation or discovery, to disclose a defence, nor otherwise assist the prosecution and that no adverse inference may be drawn from the exercise of the right to silence.

Such adherence to principle may be an unaffordable luxury in complex corporate crime trials. It is arguable that these trials would be easier to conduct, and less confusing to juries, if the issues in dispute were defined at the outset through the pre-trial disclosure process. Further, if the view is taken that trial by jury is a fundamental right of the accused and must be retained for complex corporate matters, then equally the jury is entitled to be given both relevant and intelligible evidence. The jury system functions best when issues and matters are clearly articulated and the prosecution and defence cases are presented in a coherent and comprehensible manner. Full preparatory hearings may assist that end. Conversely, abuses of the criminal justice system are more likely to occur if juries are denied this standard of presentation.

Any move towards full preparatory hearings raises some key procedural issues including:

- for what type of offences should preparatory hearings be available;
- whether to retain, and if so the relationship between, committal proceedings and preparatory hearings;
- what rights of judicial review apply to rulings at preparatory hearings and when such rights should be exerciseable;
- what sanctions, and/or procedural rights for the prosecution, should apply where a defendant fails to provide preparatory hearing disclosures or departs from them at trial or unreasonably refuses to agree on particular facts or issues at the preparatory hearing; and
- whether to allow the defence a brief right of reply to the opening of the prosecution case at trial (to highlight facts and issues in contention).[104]

In July 1992, the UK Court of Appeal upheld various appeals from conviction in the *Blue Arrow* trial, a case dealing with alleged market rigging. One ground of appeal was that the accused were unfairly prejudiced by the length and complexity of the trial. The judgements of the Court of Appeal, when

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103 (1991) 102 ALR 129.

104 See note 102 *supra*, in particular the paper by M Aronson "Managing Complex Criminal Trials" note 10 *supra*. For experiences with the UK legislation see papers presented to the National Crime Authority Conference (1991) note 93; M Hill QC "Discovery in Serious Criminal Cases and other Pretrial Problems" The University of Sydney, Institute of Criminology (1991); GFK Santow note 10 *supra*. The UK experience since 1987 suggests, for instance, that without some effective sanction mechanism for non co-operation the defence may resist disclosures, agreement on facts, and the narrowing of issues. Also UK experience indicates that full interlocutory appeal rights may considerably slow the preparatory hearing process through constant interlocutory applications.

published, may have a considerable bearing on the role of preparatory hearings and other evidential and procedural issues, in complex corporate criminal trials.

C. ADMISSIBILITY OF BOOKS

Success in criminal or civil enforcement will often depend largely on the admission and use of documents in evidence. Section 1305 of the *Corporations Law* is designed to simplify the process of admitting certain books into evidence. The provision is limited to books "kept" by a body corporate, thereby excluding from its ambit a large number of corporate and other documents.[105] The ASC has argued that:

> many company records and much correspondence extend beyond the statutory requirement in subsection 289(1) of the *Corporations Law* that the company keep accounting records that 'correctly record and explain' the transactions of the company. The investigation and prosecution of corporate misconduct would be greatly assisted if statutory provisions were introduced to reduce the emphasis that is currently necessary, particularly in criminal proceedings, on strict proof of such matters as the authorship and authenticity of particular documents; and where a corporation itself is being sued, the authority of the person in question to bind the corporation.

The ASC favoured an amendment "to expand the prima facie admissibility of a corporation's documents, whether or not kept pursuant to a specific legal requirement, along the lines of Section 1305".[106]

The current wording of s 1305 appears unnecessarily restrictive. Reform along the lines proposed by the ASC may well expedite the litigation process, without real prejudice to any party.

D. COST ORDERS AGAINST THE ASC

Under s 1330, the ASC may intervene, as of right, in any private proceedings relating to a *Corporations Law* matter. The ASC may seek cost orders as an intervener or otherwise bear its own costs.[107] However the ASC has pointed out that one factor discouraging its intervention, even when acting to assist the court, or otherwise in the public interest, is the potential for adverse cost orders.[108] The ASC also argued that a provision limiting or exempting its potential liability for costs orders would be comparable with its existing exclusions from giving undertakings as to damages in connection with injunctions under s 1324(8). The matter was noted, but not further considered, in the Lavarch Committee Report.[109]

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105 For instance, an annual report does not come within s 1305 as it is not a book "kept" by a company *Residues Treatment and Trading Co Ltd v Southern Resources Ltd* (1989) 15 ACLR 416.

106 ASC Submission note 34 *supra* p 145.

107 *Jenkins v Enterprise Gold Mines NL* (1992) 6 ACSR 539 at 563-4; ASC Policy Statement 4 (June 1991).

108 ASC Submission note 34 *supra* pp 145-6.

109 Report of the House of Representatives Standing Committee note 23 *supra* at [2.5.10].

On one view, the ASC should be encouraged to intervene in private litigation whenever this is in the public interest.[110] The ASC has indicated that it will only make selective use of this power, in particular where a matter of national significance, construction of the national scheme laws or procedures of the Commission, or the provision of information to assist the court acquired through its investigative procedures, is involved. Conversely the ASC will be reluctant to intervene in proceedings of a purely commercial nature where the various parties to the proceedings are properly able to make submissions to the court on all relevant facts.[111]

An ASC intervention could considerably increase costs to the private litigants involved. The outstanding policy question is whether, or in what circumstances, the public interest in encouraging the ASC to play a key role in the development and application of the *Corporations Law* should outweigh the possible financial burden this may impose on particular private litigants.

E. "PIGGY BACKING" BY PRIVATE LITIGANTS

The Chairman of the ASC, Tony Hartnell, has described third party civil litigation as "a major part of the enforcement weaponry available to the ASC. It clearly underpins a government philosophy to encourage enforcement of the *Corporations Law* through private actions and not just rely on action by the ASC".[112] To assist this process, the ASC may provide a private litigant (*ASCA* s 25(1)) or any other person (*ASCA* s 25(3)) with a copy of any written record of a formal examination, and copies of any related books.[113] This may include self-incriminating or otherwise legally privileged information.[114] The ASC may also permit persons to inspect books produced to or seized by it: *ASCA* s 37(7). These books may be used for the purpose of any proceedings: *ASCA* s 37(4). The ASC may also agree, pursuant to s 1330, to provide or exchange

110 *North Sydney Brick and Tile Co Ltd v Darvall* (1986) 10 ACLR 832 at 839-40; *Catto v Ampol Ltd* (1989) 15 ACLR 307 at 311-12; *Corumo Holdings Pty Ltd v Itoh Ltd* (1991) 5 ACSR 720 at 722-3.

111 ASC Policy Statement 4 (June 1991). In *BTR plc v Westinghouse Brake and Signal Co (Aust) Ltd* (1992) 7 ACSR 122 at 140-1, the Full Federal Court endorsed this role of the ASC, as stated in the Policy Statement.

112 A Hartnell note 5 *supra* pp 43-4. This approach towards mixed regulator and private litigant civil enforcement is also reflected in the ASC support for the introduction of statutory shareholder derivative actions which "would add greatly to the depth of enforcement action in the area of directors' duties and corporate practices"; ASC Submission note 34 *supra* p 128. The private litigation process is further encouraged by the introduction of representative proceedings in the Federal Court, pursuant to Part IVA of the *Federal Court of Australia Act* (Cth) 1976 and under Order 73 of the *Federal Court Rules*. These representative proceedings apply only to causes of action arising after the commencement of these provisions (4 March 1992). Also representative actions do not overcome the 'proper plaintiff' problems arising from the rule in *Foss v Harbottle* (1843) 67 ER 189. These are addressed in the proposals for a statutory derivative action, refer note 83 *supra*.

113 *ASC Policy Statement* 17 (March 1992). Note the wide interpretation the ASC has given to the term "related books", ie "not only documents formally identified and incorporated in the record of examination, but also documents referred to directly or indirectly in the record and which would assist the comprehension of the records" at [10].

114 *ASC Policy Statement* 17 at [8]-[9].

information with another litigant in a case in which it has intervened, subject to any conditions of confidentiality that it may wish to impose.[115]

The powers of the ASC to provide private litigants with information gathered in investigations, raise issues involving both the process of disclosure and the evidential use of the information released.

(i) Disclosure of information

A key question is whether the ASC is obliged to comply with requests under *ASCA* s 25 for the release of information. In *Ex Parte Wardley Australia Ltd*,[116] the Full Supreme Court of Western Australia in interpreting the forerunner of *ASCA* s 25(1) (*Companies Code* s 298(6)) held that, when requested by a private litigant, the NCSC was under a duty, rather than a discretion, to provide information, upon satisfaction of the statutory pre-conditions. It could decline disclosure only for good reason eg anticipated prejudice to a continuing investigation. However the NCSC retained a general discretion under the forerunner of *ASCA* s 25(3) (*Companies Code* s 298(8)) to provide the information to any other party.

Some doubt has been cast on whether this case is still good law in terms of *ASCA* s 25(1). The *Corporations Law* s 109ZB(3), which had no equivalent in the *Companies Code*, indicates that the word "may" in *ASCA* s 25(1) and (3) confers a discretion on the ASC whether to act. In *Johns v ASC*,[117] the Full Federal Court stated that "the enabling power [in *ASCA* s 25(1) and (3)] vests the ASC with a broad discretion to be applied consistently with the objects and purpose of the ASC Law in relation to investigations. Those objects and purposes are to be ascertained in particular from the general object provisions in [*ASCA*] s 1." Rather, the ASC would be subject to well-recognised administrative law principles governing the exercise of its discretions eg to consider individual applications on their merits rather than adopt inflexible rules of policy; not to act in bad faith nor for an improper purpose; not to take into account irrelevant considerations or fail to take into account relevant considerations.[118] Judicial review pursuant to ss 5 or 6 of the *ADJR Act* could be sought either by a rejected applicant or other "aggrieved person", eg the provider of the information to be released: *ADJR Act* s 3(4).[119] Alternatively

115 "Any information which the ASC provides to another party to the proceedings will be on a confidential basis and subject to the agreement of the other party that the ASC will exercise any overriding discretion as to whether that information is put before the Court by the ASC as an intervening party": ASC Policy Statement 4 (June 1991).

116 (1991) 5 ACSR 786 at 802-3.

117 Unreported, Full Court of the Federal Court of Australia (19 June 1992).

118 See further R Tomasic and D Fleming *Australian Administrative Law* (1991) pp 194-210 cf *Allen Allen & Hemsley v ASC*, unreported, Federal Court of Australia, Ryan J (29 May 1992). ASC Policy Statement 17 sets out the considerations the ASC will take into account in determining applications. For instance "Generally the ASC will not release information under [*ASCA*] s 25 unless the investigation to which the examination relates is completed or is sufficiently advanced so that the release of the information would not jeopardise the continuing investigation" at [6], [21].

119 R Tomasic *ibid* at 182-3.

an applicant may seek information from the ASC by way of a subpoena duces tecum. The court may enforce the subpoena, notwithstanding the general duty of confidentiality on the ASC under *ASCA* s 127.[120]

(ii) Evidential use of disclosed information

A person required to provide self-incriminating or legally privileged information to the ASC enjoys certain evidential immunities. *ASCA* ss 68 and 76(1)(a) and (d) provide that any statement made by an examinee at an ASC examination which discloses self-incriminating or legally privileged information is inadmissible against that person in later criminal or penalty-exposing proceedings.[121] Beyond that, for instance in ordinary civil proceedings, or criminal/penalty proceedings against a person other than the examinee, there is no statutory evidential immunity for statements or documents obtained by the ASC, merely because at common law, they would have attracted the self-incrimination, or legal professional, privilege.[122]

Given this, private litigants in civil cases may be able to "piggy back" on ASC investigations to obtain, and use in evidence, information otherwise unavailable to them through the ordinary discovery processes. There are well-recognised circumstances where the court may maintain an evidential privilege notwithstanding prior disclosure, eg under the "slip rule" where otherwise legally privileged information is disclosed accidentally or by fraud or trickery or where information is provided on an agreed "without prejudice" basis.[123] However recent cases do not support a similar exclusion for information otherwise obtained by the ASC and subsequently provided to private parties.

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120 *Maloney v NSW National Coursing Association Ltd* (1978) 3 ACLR 385; *Parkes Management v Perpetual Trustee Co Ltd* (1979) 4 ACLR 63; cf *FCT v Nestle Australia Ltd* (1986) 69 ALR 445. The ASC may resist the subpoena on any of the grounds available to a private litigant or a stranger to the litigation and, where appropriate, may object to production on the grounds of public interest immunity: *Zarro v ASC* (1992) 10 ACLC 831.

121 A penalty includes any civil fine or other punishment, in contrast to a civil proceeding for compensation and damages: cf *R v Associated Northern Collieries* (1910) 11 CLR 738 at 742; *Police Service Board v Morris & Martin* (1985) 58 ALR 1 at 4; *EL Bell Packaging Pty Ltd v Allied Seafoods* (1990) 4 ACSR 85.

122 The admissibility and evidential weight of written records of examination are regulated under *ASCA* ss 76(3), 77-79.

123 See in respect of the "slip rule" *ITC v Video Exchange Ltd* [1982] 3 WLR 125 at 132-3; *Kabwand Pty Ltd v National Australia Bank Ltd* (1987) 81 ALR 721; *Hooker Corp Ltd v Darling Harbour Authority* (1987) 9 NSWLR 538; *Key International Drilling Co v TNT Bulkships Operations Pty Ltd* [1989] WAR 280. In regard to "without prejudice" disclosures see *Dingle v Commonwealth Development Bank* (1989) 91 ALR 239 and *Yuill v CAC* (1990) 2 ACSR 511 at 514. In *Dingle* documents were provided by the TPC solely for the purpose of subpoena identification and subject to an express understanding of confidentiality. Similarly, in *Yuill*, documents were given to Corporate Affairs Commission inspectors upon the understanding that they not be examined until their status, and the availability of the privilege, was independently determined. In both cases the court held that these actions alone, did not constitute waiver or loss of the original privilege (though the High Court subsequently held in *CAC (NSW) v Yuill* note 2 *supra* that the privilege was not available). This contrasts with documents provided to the ASC under compulsion.

In *Marcel v Commissioner of Police of the Metropolis*,[124] a party to private litigation (the issuing party) sought documents seized by police in the course of an unrelated investigation of the other litigant. The other litigant sought to restrain disclosure on the basis that the documents were legally privileged. The Court of Appeal noted that the police were authorised under law to seize, retain and use documents only for certain public purposes. The court ruled that to disclose otherwise legally privileged documents to private litigants went beyond those public purposes and should be restrained: "the powers to seize and retain are conferred for the better performance of public functions by public bodies and cannot be used to make information available to private individuals for their private purposes".[125] Unlike the Commissioner of Police in *Marcel*, the ASC is expressly empowered under *ASCA* ss 25 and 37(4),(7) to provide information to third parties. This case is therefore distinguishable.

In *Johns v ASC*,[126] the ASC, pursuant to its compulsory examination powers under *ASCA* Pt 3 Div 2, obtained information from the plaintiff which it then made available to a Royal Commission. At public hearings of the Royal Commission some transcripts of the examination of the plaintiff were tendered. The transcripts were used in other ways by the Royal Commission, for example as proof of evidence of witnesses called in public hearings. Transcripts were also provided to the media. In an application to the Federal Court, the plaintiff argued that, by virtue of *ASCA* s 22 (examination to take place in private) and s 127(1) (confidentiality), the material obtained by the ASC under its investigative powers was given to it in confidence and that it was unlawful for it to make the material available to the Royal Commission or for the Royal Commission to permit that material to be tendered in public hearings, without the prior consent of the examinee or his right to a hearing. These *ASCA* privacy provisions have no application to examinations held in public under s 597, where any person with a legitamte interest may obtain copies of transcripts: *Re BPTC Ltd (in liq)*.[127]

The application in *Johns v ASC* was dismissed by the Federal Court. Heerey J, at first instance, ruled that notwithstanding *ASCA* s 22 and s 127(1), the actions of the ASC were lawful, being expressly authorised under *ASCA* s 25(3) and s 127(4). According to His Honour "such authority is not conditional on the consent of the person who provides the information to the ASC". His Honour noted the Full Federal Court decision in *Bercove v Hermes No 3*,[128] where an examinee, in giving evidence before a Royal Commission in camera, was told that the proceedings were confidential. The Royal Commission subsequently released a transcript of his evidence for use in Public Service disciplinary proceedings. The Full Federal Court there ruled that "since the appellant was

124 [1992] 2 WLR 50.

125 *Ibid* at 62.

126 (1992) 10 ACLC 684 (first instance); unreported Full Court of the Federal Court of Australia (19 June 1992).

127 (1992) 7 ACSR 539.

128 (1983) 51 ALR 109.

not acting as an informer or in any similar role, total confidentiality could not be assured.... It follows, in our opinion, that no total assurance of confidentiality was given to the appellant by the Commissioner".[129]

Applying the reasoning in *Bercove v Hermes (No3)*, Heerey J in *Johns v ASC* stated that

> an essential element of any claim for confidentiality in such circumstances is the giving of, and reliance on, an assurance of confidentiality .... In the present case, as I have observed, there is no trace of any such assurance. The mandatory requirement that ASC examinations be conducted in private (*ASCA* s 22(1)) does not affect this conclusion ..... I conclude therefore that the Royal Commission received the ASC material free of any obligation of confidentiality to [the applicant]".

An appeal to the Full Federal Court in *Johns v ASC* was dismissed. Black CJ and Von Doussa J, in their joint majority judgment expressed "no difficulty" in reading *ASCA* s 25 with *ASCA* s 127. Their Honours noted that *ASCA* s 127 would apply to a record of examination unless and until a decision was made under *ASCA* s 25 to disclose the record. Even so, *ASCA* s 127(1) would have a residual effect. According to their Honours, in the event that a record of examination is given to a lawyer or another person under *ASCA* s 25: "the obligation imposed by [*ASCA*] s 127(1) would extend to the ASC protecting information in that record from use otherwise than in accordance with the conditions [under *ASCA* s 25] on which the record was given."

Following from this, their Honours rejected the submission that information given by an examinee under *ASCA* Pt 3 Div 2 was immune from disclosure, ruling instead that "the record of examination may be given to parties contemplating civil proceedings against the examinee. It may be used in evidence. It may be given to law enforcement authorities." Also "the nature of the powers given to the ASC under [*ASCA*] ss 25 and 127 to make disclosure does not impose a duty on the decision-maker to afford an examinee an opportunity to be heard before a record of examination is given to another person."

In a minority judgment, Davies J was of the opinion that *ASCA* 25(3) does not override the provisions as to confidentiality appearing in *ASCA* s 22 and s 127(1) and that "the public interest which lies in the protection that the confidentiality in the ASC Law gives to transcripts of examination under [*ASCA*] s 22 is a strong one. That public interest justifies the Court in making an order protecting the statutory confidentiality which otherwise would be lost."

The Full Federal Court decision in *Johns v ASC* upholds the ASC view that its obligation under *ASCA* s 22 to conduct examinations in private and its duty of confidentiality under *ASCA* s 127 does not derogate from its express disclosure powers under *ASCA* s 25.[130] Also, examiiners have no procedural

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129 *Ibid* at 116.

130 "The ASC considers that to the extent that records of examination and related books are confidential [under *ASCA* s 127(1)], they are confidential subject to the provisions of [*ASCA*] s 25 and other provisions authorising disclosure" ASC Policy Statement 17 (March 1992) at [7]. See also J Samaha

rights concerning these disclosures. The terms of *ASCA* s 25(2) and the conditions that the ASC will impose under *ASCA* 25(3),[131] are intended to guard against possible misuse of this information.

In June 1992, the High Court granted leave to appeal from the Full Federal Court decision on two grounds:

- the relationship between *ASCA* s 25 and s 127(4); and
- whether the ASC was under any procedural fairness obligation to an examinee before release of a transcript under *ASCA* s 25.

This High Court case should prove decisive in settling the rights of, and the procedures by which, the ASC may arm litigants with information obtained through its investigative processes, for use in private civil enforcement.

IV. CONCLUSION

The law and practice of ASC investigations and enforcement are undergoing constant development, driven by both the internal philosophy and external perception of the ASC as an interventionist regulator. The abolition in 1992 of the 'derivative use' evidential immunity was undoubtedly the single most profound change to this process since the inception of the national scheme laws. There remain many other issues and initiatives, including those identified in this article, which may also shape the future of corporate regulation and the rights and obligations of affected persons.[132] Most potent perhaps, both for its potential impact on criminal enforcement and its radical departure from long-held norms, is the move towards full preparatory hearings. In time, this enforcement initiative, if continued, may rival or surpass in significance the

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"Use and Disclosure of Information Obtained in the Course of ASC Investigations" *Raiders of the Lost Account: ASC Investigations and Enforcement* Law Society of Western Australia Seminar (October 1991).

131 ASC Policy Statement 17 at [24].

132 Other issues and initiatives not covered in this paper which impringe on ASC investigations and enforcement include proposals for the use of 'Wells submissions' as a case filtering mechanism: see S Menzies note 5 *supra* at 113-14; GFK Santow note 10 *supra* at [5.1]-[5.10]; reform of the rules governing documentary and other evidence: see note 102 *supra*, and clarification of the rules governing the use at trial of charts, summaries and visual aids: see *Evidence Bill* 1991 (Cth) cl 33, 33A; *Evidence Bill* 1991 (NSW) cl 27(3). The proposal in the public exposure *Corporate Law Reform Bill* (February) 1992 for the partial de-criminalisation of directors' duties and the substitution of civil penalties, if proceeded with, will also have significant consequences for the role of the ASC, vis a vis the Commonwealth DDP, in *Corporations Law* enforcement. Santow note 10 *supra* has referred to other issues including the role of the jury in complex corporate trials, possible abolition of any evidential immunity for directors, other fiduciaries, or licensed dealers, and creation of a corporate ombudsman to deal with complaints at the ASC investigative stage.

recent changes to self-incrimination and the continuing controversy over legal professional privilege.[133]

133 See further notes 4, 15-17 *supra*; (1992) 30(6) *Law Society Journal* 13 "Balancing Justice Acts", Editorial, *The Australian Financial Review* (13 July 1992) which discusses the debate over the role of legal professional privilege in ASC and other commercial regulatory investigations.