The Parliament of the Commonwealth of Australia

USE IMMUNITY PROVISIONS IN THE CORPORATIONS LAW AND THE AUSTRALIAN SECURITIES COMMISSION LAW

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A REPORT BY THE JOINT STATUTORY COMMITTEE ON CORPORATIONS AND SECURITIES

November 1991

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A report of the Joint Statutory Committee on Corporations and Securities

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JOINT PARLIAMENTARY COMMITTEE ON CORPORATIONS AND SECURITIES

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DUTIES OF THE COMMITTEE

Section 243 of the Australian Securities Act 1989 reads as follows:

The Parliamentary Committee's duties are:

(a) to inquire into, and report to both Houses on:

(i) activities of the Commission or the Panel, or matters connected with such activities, to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; or

(ii) the operation of any national scheme law, or of any other law of the Commonwealth, of a State or Territory or of a foreign country that appears to the Parliamentary Committee to affect significantly the operation of a national scheme law;

(b) to examine each annual report that is prepared by a body established by this Act and of which a copy has been laid before a House, and to report to both Houses on matters that appear in, or arise out of, that annual report and to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; and

(c) to inquire into any question in connection with its duties that is referred to it by a House, and to report to that House on that question.

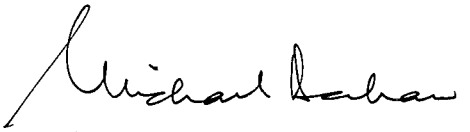
PREFACE

The statutory duties of the Joint Committee on Corporations and Securities, as outlined in the Australian Securities Commission Act 1989, include an obligation to inquire into, and report to both Houses on the operation of any national scheme law.

Following consideration of the operation of the Australian Securities Commission Act 1989 and the Corporations Act 1989 the Committee resolved in June 1991 to inquire into the effect of the use indemnity provisions in both Acts upon the ability of the Australian Securities Commission to discharge its duties.

The Committee wrote to more than fifty organisations - including State governments, law societies, bar associations and civil liberties groups - inviting them to make submissions. Thirteen submissions were received and one day of public hearings was conducted in Canberra. A list of submissions received and witnesses at the Committee's hearing is included in Attachment I.

This report outlines the findings of the Committee.



Michael Beahan
Chairman
13 November 1991

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SENATOR I CAMPBELL HAS AGREED WITH THE DISSENTING REPORT BY SENATOR B. COONEY AND MR F. FORD MP.

CHAPTER 1

INTRODUCTION

1.1 The issue which this report considers is the rights of witnesses before investigations and hearings initiated by the Australian Securities Commission (ASC) and the use which may be made of the evidence - both oral and documentary - gathered at such hearings.

1.2 The ASC is responsible for the administration and enforcement of the Corporations Law. When introducing the Australian Securities Commission Bill the Attorney-General, the Honourable Lionel Bowen, expounded upon the role and powers of the ASC.

> The powers given to the ASC will ensure that it is able to be a strong and effective regulatory body, yet one which is flexible and responsive to developments in the marketplace.
>
> The ASC Bill contains provisions which give strengthened inspection and investigation powers to the ASC compared with those of the NCSC and clarify the scope of the hearings powers.[1]

1.3 The ASC has defined its role as (among other things):

> to strive, in performing its functions and exercising its powers, to maintain the confidence of investors in Australian securities and futures markets. It is to do this by ensuring adequate protection for such investors and to take whatever action it can take and is necessary, in order to enforce and give effect to national scheme laws.[2]

1.4 However the ability of the ASC to maintain confidence in those markets under the present legislation has been called into question. The Premier of Tasmania expressed it well in a letter to the Committee:

> This government believes that there is a growing feeling of cynicism in the Australian community at the way in which corporate criminals are able to use their vast resources to frustrate the legal system and in many cases, avoid liability. This is exacerbated by the public's perception that the legal system is designed to assist these people in their endeavours.

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[1] *The Hon L F Bowen, House of Representatives Hansard, 25 May 1988 pp. 2992, 2993.*

[2] *Committee Evidence, ASC/DPP Submission, p.1.*

1.5 Effective enforcement of the law requires the ASC to be able to gather information on corporate behaviour:

> An integral feature of any corporate regulatory authority's ability to ensure compliance with the requisite law is its ability to conduct investigations into the affairs or conduct of a company or its officers.[3]

1.6 To be effective investigations into the affairs of a company must often be made 'on suspicion'. The Eggleston Committee noted that:

> it is important that there should be a power of investigation which will enable facts to be ascertained in cases where the known facts concerning the company give rise to a suspicion that the company is being mismanaged or fraudulently managed.[4]

1.7 That Committee recognised that such investigations would elicit facts which would assist in:

> the preparation and conduct of criminal or civil proceedings against persons who have been concerned in the affairs of the company and also [enable] decisions to be made whether to institute such proceedings where this might otherwise be a matter of doubt.[5]

1.8 Thus the conduct of investigations on suspicion and the use of material gained through these investigations to initiate civil or criminal proceedings is accepted as a central role of the corporate regulator.

1.9 Section 597 of the Corporations Law enables the ASC to seek to conduct examinations before the court. The ASC Law[6] gives the Commission extensive powers to conduct investigations and hearings. The ASC, the Corporations and Securities Panel and the Accountants and Liquidators Disciplinary Board are empowered to conduct hearings pursuant to their functions.

1.10 At hearings conducted under both Laws the right to silence is removed. The legislation explicitly removes the right to refuse to answer a question or provide a document on the grounds that to do so may tend to incriminate the person so doing. However persons are then indemnified against the consequences of giving evidence by making the oral evidence, and, in the case of s.68(3) of the ASC Law the signing of the

[3] *CCH Australia Ltd., Australia Corporations Law Guide, (1991), p.273.*

[4] *Eggleston Committee, Third Interim Report, Company Law Advisory Committee; quoted in Australian Corporations Law Guide, p.274.*

[5] *ibid, p 274*

[6] *Australian Securities Commission Act 1989.*

record and the production of a document, inadmissible in any criminal proceedings (other than for perjury) and, in the case of s.68(3), civil proceedings for the imposition of a penalty. This is described as use immunity.

1.11 The sections go further and indemnify the person against the use of evidence gained indirectly from 'leads' provided by the answers to questions or documents produced to the investigators. This is described as derivative use immunity.

1.12 It is claimed by the ASC and the Director of Public Prosecutions (DPP) that the practical effect of this is to place insurmountable obstacles in the way of successful criminal prosecutions. In the interests of preserving the assets of a company or otherwise minimising the loss resulting from mismanagement or fraud the ASC will seek to act quickly through civil actions in the first instance. The ASC is concerned that by using its powers to compel evidence in order to seek civil remedies it will be prevented from obtaining admissible evidence which could be used in subsequent criminal prosecution.

> ...if we are to maintain the integrity of the securities markets, we believe that we should retain the option to use both civil and criminal remedies and that it is inappropriate that our investigation in order to bring forward a civil remedy should, of necessity, jeopardise criminal prosecutions.[7]

1.13 In their joint submission to this Committee, the ASC and the DPP argue that, should any prosecution of a person so compelled arise the prosecutor must prove that the evidence being advanced was not gained directly or indirectly from the answers or documents obtained where the privilege against self-incrimination was claimed by the person being examined.

1.14 The ASC and the DPP have recommended to this Committee that:

(a) the derivative use immunity; and

(b) the use immunity in respect of the fact that a person has produced a document;

should be removed from the ASC Law and the Corporations Law.[8]

1.15 If implemented this change would, in effect, be a return to the provisions of the Companies Code which was superseded by the Corporations Law on January 1, 1991.

1.16 In support of this change it is argued by the ASC/DPP that :

(a) to remove the derivative use immunity in this context would not set a precedent;

[7] *Committee Hansard, 11 October 1991, Mr S J Menzies, p.9.*

[8] *Committee Evidence, ASC/DPP Submission, p.2.*

(b) there must be serious doubt whether public opinion would be that the derivative use immunity should be preserved in this instance; and

(c) the derivative use immunity is anathema to the ASC's regulatory function and represents a serious inconsistency within the legislation which must be redressed lest the legislature's intention as to the ASC's functions be undermined.[9]

1.17 It is also argued that the success of the ASC in conducting investigations and undertaking criminal prosecutions is vital to maintaining the confidence of both Australian and foreign investors in Australia's capital markets.

1.18 A number of submissions to the Committee have opposed the ASC/DPP proposal. There are three main grounds for opposition:

- that the current legislation corresponds to the protection offered by the common law privilege against self-incrimination in Australia and that the privilege is a fundamental right which should not be withdrawn. The importance of the privilege was emphasised by several commentators;

- that the ASC is exaggerating the difficulties it faces as a result of the immunities and that to increase its powers would encourage 'sloppy and unfair investigative techniques'; and

- that the ASC is misreading its role by placing undue emphasis on the pursuit of criminal prosecutions.

[9] *Comittee Evidence, ASC DPP Submission, p.11.*

CHAPTER 2

BACKGROUND

2.1 The Common Law Privilege Against Self-Incrimination

2.1.1 It is an established principle of the common law that individuals who are facing criminal prosecution or whose actions are being investigated cannot be compelled to incriminate themselves. They enjoy the right to remain silent. A classic statement of the principle is:

> ... no one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the deponent to any criminal charge, penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for ...[10]

2.1.2 The common law privilege has been held to extend not only to direct incrimination but also to indirect incrimination:

> The gist of the privilege is that the claimant reasonably apprehends danger as a result of giving answers or of producing the documents. It is sufficient for the claimant to demonstrate that this danger arises directly from the prospect that those answers or documents will be used in possible proceedings against him *or that it arises indirectly, in the sense that the answers or documents may provoke further inquiries to discover incriminating evidence* or that they complement other potentially incriminating evidence.[11] (Emphasis added)

2.1.3 The privilege is more than a rule of evidence - it is a common law substantive right. It may be set aside by legislation if that is the clear intention of the parliament either explicitly or implicitly expressed. A decision by the legislature to set the privilege aside generally reflects an assessment that the public interest in having access to information outweighs the private right of the individual to refuse to answer questions. The removal of the right to refuse to answer questions on the grounds of self-incrimination is generally accompanied, in Australian law, by a restriction on the uses to which information thus obtained may be put:

> ... the present-day readiness of governments to require citizens to provide

[10] *Goddard, L.J., Blunt v Park Lane Hotel Ltd [1942] KB 253 at 257.*

[11] *D.M. Byrne QC & J.D Heydon; Cross on Evidence; 3rd Australian Edition; (1989) p.621.*

all manner of information for the public good requires that those citizens be protected, so far as is consistent with that public good, from exposing themselves in public to the risk of prosecution or penalty.[12]

2.1.4 The interpretation of the scope of the privilege against self-incrimination has been considered recently in a number of jurisdictions. In *Sorby v Commonwealth,* Gibbs CJ discussed some of these developments:

> In *Kastigar v United States ((1972) U.S. 441 [32 Law Ed (2d) 212])* it was held that the privilege ... does require that the witness shall be immune from the use not only of the compelled testimony, but also of any evidence derived directly or indirectly therefrom. ...it seems to be generally accepted in that country that the privilege requires the proscription of indirect, or derivative, use, as well as direct use, of the evidence...[13]

2.1.5 Murphy J, in the same case, commented on a further development of the immunity from prosecution in the United States:

> Even immunity from derivative use is unsatisfactory, because of the problems of proving that other evidence was derivative, and because of the real possibilities of innocent or deliberate breach of the immunity. Hence the trend in the United States has been to 'transactional immunity' that is, that once a witness has been compelled to testify about an offence he or she may never be prosecuted for the offence, no matter how much independent evidence may come to light.[14]

2.1.6 Gibbs CJ also quoted Lord Wilberforce in *Rank Film Ltd v Video Information Centre [1982] A.C 380 at p. 443:*

> ... whatever direct use may or may not be made of information given, or material disclosed, under the compulsory process of the court, it must not be overlooked that ... its provision or disclosure may set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character ... The party from whom disclosure is asked is entitled, on established law, to be protected from the consequences.[15]

2.1.7 Gibbs CJ's own view of the matter was:

[12] *Cross on Evidence, p.627.*

[13] *Sorby v the Commonwealth, (1983), 152, CLR at p.293.*

[14] *Sorby v Commonwealth, at p.312.*

[15] *quoted Sorby v Commonwealth, at p.294.*

> If a witness is compelled to answer questions which may show that he has committed a crime with which he may be charged, his answers may place him in real and appreciable danger of conviction, notwithstanding that the answers themselves may not be given in evidence. The traditional objection that exists to allowing the executive to compel a man to convict himself out of his own mouth applies even when the words of the witness may not be used as an admission.[16]

2.1.8 In agreeing with the Chief Justice, Justices Mason, Wilson and Dawson stated that:

> the privilege protects the witness not only from incriminating himself directly under a compulsory process, but also from making a disclosure which may lead to incrimination or to the discovery of real evidence of an incriminating character.[17]

2.1.9 The common law interpretation of the privilege against self-incrimination appears to encompass both direct and indirect evidence gained under compulsion. The protection offered by the sections in question is consistent with this interpretation of the privilege against self-incrimination in Australia.

2.1.10 The DPP considers it probable that 'since Sorby ... the ... derivative use is part of the common law'.[18] However Mr Santow is not confident of this point:

> I do not believe Sorby's case, which really was dealing with royal commissions, is necessarily apposite in this context. Royal commissions are not ASC investigations. They are designed in the public interest to find out the facts about a matter. ... I do not think it flows automatically from the fact that the High Court said that should not be used in criminal proceedings that the same public interest issues are at stake when the ASC ... gets information under compulsion.[19]

2.2 The Corporations Law and the ASC Law

2.2.1 The ASC Law requires the ASC '...to take whatever action it can take, and is necessary, in order to enforce and give effect to national scheme laws.' (s.1(2)(g)) An essential component of the ASC's power is the capacity to initiate examination or

[16] *Sorby v Commonwealth, at p.294.*

[17] *Sorby v Commonwealth, at p.310.*

[18] *Committee Hansard, 11 October 1991, Mr G M Delaney, p.20.*

[19] *Committee Hansard, 11 October 1991, Mr G F K Santow, p.58.*

hearings into corporate conduct.[20] These inquiries may lead to criminal prosecutions or civil actions.

2.2.2 The Corporations Law currently provides for the examination of persons who have been involved in the:

> promotion, formation, management, administration or winding up of, or has otherwise taken part or been concerned in affairs of, a corporation [and who have] been, or may have been, guilty of fraud, negligence ... or other misconduct in relation to that corporation; or
>
> a person [who] may be capable of giving information in relation to any of the above to be ordered to appear before the Court on the application of the ASC.(Corporations Law, s.597(2))

2.2.3 Persons in receipt of such an order must attend and will be examined on oath and, generally, in public. They must answer questions and produce documents when directed to do so by the Court.

2.2.4 At hearings conducted under either Law the privilege against self-incrimination is removed:

> ... A person is not excused from answering a question ... on the ground that the answer might tend to incriminate him or her but, where the person claims, before answering the question, that the answer might tend to incriminate him or her, neither the answer, nor any information, document or other thing obtained as a direct or indirect consequence of the person giving the answer, is admissible in evidence against the person in criminal proceedings ...[Corporations Law, sec.597(12)]
>
> ... Neither the statement, or the fact that the person has signed the record or produced the book, as the case may be, nor, in the case or the making of a statement or the signing of a record, any information, document or other thing obtained as a direct or indirect consequence of the person making the statement or signing the record, as the case may be, is admissible in evidence against the person in:
>
> (a) a criminal proceeding; or
> (b) a proceeding for the imposition of a penalty;...[ASC Law, sec.68(3)]

2.2.5 The provisions in the ASC Law and the Corporations Law are an extension of the protection which was available under the Companies Code. There is nothing in the Hansard Debates on the Corporations Law package, or in other extrinsic material to

[20] *ASC Law, part 3. Corporations Law, part 5.9.*

suggest that the privilege was deliberately extended. It appears likely that a more modern and stronger derivative use immunity clause was inserted as a matter of routine where the power to compel witnesses to answer questions was included.

2.3 Parliamentary Consideration of Use Immunity

2.3.1 The Joint Select Committee on Corporations Legislation considered clause 68(3) of the ASC Bill in its Report of April 1989. In its submission to that committee the National Companies and Securities Commission (NCSC) foreshadowed the objections subsequently raised by the ASC and the DPP. 'The NCSC has suggested that the provision [68(3)] will make the compulsive powers of the ASC "virtually useless..."'[21]

2.3.2 The Select Committee recognised the need to strike a balance between the protection of individual rights and the public interest in an effective corporate regulatory system. Having considered the evidence before it, it concluded that clause 68(3) should be amended '...to apply only to statements made by a person, and not to documents nor to any information, document, or other thing obtained as a direct or indirect consequence of the person making the statement.' [22] This would have brought s. 68(3) into line with practice under the Companies Code.

2.3.3 Unfortunately that Committee's recommendation was not consistent with this conclusion. The recommendation proposed that '... the use in criminal proceedings of information obtained as a direct or indirect consequence of the production of books to the ASC' be allowed.[23] That recommendation, if adopted, would have meant that the derivative immunity would have continued to apply to oral evidence.

2.3.4 The Senate Standing Committee for the Scrutiny of Bills is required to draw to the attention of the Senate provisions in legislation which "... trespass unduly on personal rights and liberties". Under this heading the Committee has had a practice of commenting on clauses which abrogate the privilege against self-incrimination. Such clauses appear regularly in a wide variety of legislation. In August 1985 the then Chairman of the Committee commented that:

> ... the Committee has continued to draw attention to such clauses even though they are in standard form. The Committee remarked in its *Tenth Report* of 1983 that it is opposed in principle to any erosion of protection

[21] *Report of the Joint Select Committee on Corporations Legislation (1989), p.39.*

[22] *ibid, p.41.*

[23] *ibid. p.41.*

against self-incrimination.[24]

2.3.5 That Committee's position on self-incrimination has evolved as the 'use derivative' type of clause has become more common:

> Provisions which remove the traditional common law privilege against self incrimination have in the past been the subject of routine comment by the Committee but it has indicated more recently that such provisions may be regarded as acceptable if they prohibit the use of any information furnished under the provision and any information or thing obtained as a direct or indirect consequence of the furnishing of that information ... [25]

2.3.6 Thus that Committee clearly considers use immunity and derivative immunity as essential complements to removal of access to the privilege by legislation.

2.3.7 The Senate Standing Committee on Constitutional and Legal Affairs examined this issue in its report on *The National Crime Authority Bill 1983*. The committee favoured a use-derivative/use indemnity clause but acknowledged that:

> ... such ... indemnities provide difficulties if it is decided to prosecute a person for a crime about which he has been compelled to give such evidence.[26]

2.3.8 The Standing Committee identified exactly the problem of which the ASC and the DPP complain:

> If such a prosecution were brought, the defence would almost inevitably raise a question as to whether or not any of the evidence to be led against the defendant had been derived directly or indirectly from the testimony he had given under the protection of the indemnity.[27]

2.3.9 That committee did not think that the problem was sufficient to justify providing a reduced indemnity:

> A 'voir dire' would have to be held to determine the admissibility of the prosecution's evidence. This process would be no different from the 'voir dire' procedure relied upon in Australian criminal courts every day by

[24] *Senator Michael Tate, The Legislative Process: How Relevant? page 33; paper presented to The Australasian Study of Parliament Group, Adelaide, August 1985.*

[25] *Giles Short, Secretary, Senate Standing Committee for the Scrutiny of Bills, 1987. Unpublished note.*

[26] *The National Crime Authority Bill 1983, Report by the Senate Standing Committee on Constitutional and Legal Affairs (Canberra 1984), p.55.*

[27] *ibid, p.55*

> defendants to challenge the admissibility of what they claim is illegally obtained evidence...[28]

2.3.10 Clause 120 of the Evidence Bill 1991, introduced into the Commonwealth Parliament on 15 October 1991, reflects the common law position on an individuals right of silence. However the privilege has also been removed under some other legislation. The *Income Tax Assessment Act 1936* empowers the Commissioner to compel a person to give evidence and to furnish him with books, documents and other papers. Section 155 of the *Trade Practices Act 1974* enables the Trade Practices Commission to compel a person to furnish information, produce a document, answer questions on a notice or to answer questions before the Commission. The evidence obtained by the Commission in this way can normally be used only in a civil action, or a criminal action under the Trade Practices Act against a corporation. The uniform companies code, which is discussed below, also allowed the compelling of testimony.

2.3.11 It is clear that in Australian law the privilege against self-incrimination can be and has been varied or even removed by Parliament where it considered that action to be justified.

2.4 The Privilege Under the Companies Code

2.4.1 A number of sections of the Companies Code (1981) limited the privilege against self-incrimination: 14(6); 30H(5); 296(7); 324D(4); 457(4) and 541(12), the section comparable to 597(12) in the Corporations Law. The wording of each of these sections was similar:

> A person is not excused from answering a question put to him at an examination held pursuant to an order made under sub-section (3) on the ground that the answer might tend to incriminate him but, where the person claims, before answering the question that the answer might tend to incriminate him, the answer is not admissible in evidence against him in criminal proceedings other than proceedings under this section or other proceedings in respect of the falsity of the answer. (s.541(12))

2.4.2 No derivative use protection was provided in any of the sections listed above. The issue of whether s.541(12) provided any protection against derivative use of answers in other proceedings than those identified in the section was considered by the High Court in *Hamilton v Oades (1989) 7 ACLC*. Mason CJ noted that:

> Of course the section [541 (12)] gives no protection to the witness against the use in criminal proceedings of derivative evidence ... by enacting sec. 541 without providing such specific protection, Parliament has made its legislative judgement that such action is not required and has limited

[28] *ibid, p.55.*

specific protection to the possible consequences of direct use in evidence of the answers of the witness ...[29]

2.5 Corporations Law in the UK and the USA

2.5.1 In the United Kingdom, where the common law privilege against self incrimination evolved, the privilege has been removed in corporations matters by the *Companies Act 1985*. Section 432 of that Act allows for the appointment of an inspector to carry out an investigation. Section 434 allows that inspector to compel an officer or agent of a company or any other person who is in possession of information relating to an investigation to attend a hearing before him and allows any statements made at such a hearing to be used in evidence against him. Under s.436 it is a contempt of court for a witness to refuse to answer a question. This use of legislation was tested before the courts in the Guinness litigation and the court ruled that the statements taken by Department of Trade and Industry inspectors could be used in evidence against the witness being examined.

2.5.2 The investigation of most serious corporate crime in England, Wales and Northern Ireland is the responsibility of the Serious Fraud Office (SFO). Investigations are carried on by teams made up of accountants, lawyers and police using a wide range of powers, including the compelling of answers and information. Those answers are admissible in a subsequent criminal prosecution if the accused gives evidence which is inconsistent with the earlier answers given to the SFO.

2.5.3 The Fifth Amendment of the United States Constitution has been held to mean that nothing a person says under compulsion can be used against him in either criminal or civil proceedings. The United States Supreme Court has said on numerous occasions that the privilege also extends to derivative usage. A range of other techniques have been used to obtain admissible evidence or to obtain convictions. These include plea bargaining, the use of anti-racketeering legislation, aimed originally at corporate crime, to strip a defendant of the financial means to defend himself and the use of other criminal statutes never intended to deal with corporate crime.

2.5.4 The Securities Exchange Commission (SEC) is only empowered to initiate civil actions. However, these actions can result in the awarding of punitive damages. Criminal prosecutions are carried out by the Department of Justice whose enquiries are carefully quarantined from those of the SEC.

[29] *Hammond v Oades; CAC v Oades and Anor (1989) 7 ACLC, at p.386.*

CHAPTER 3

ISSUES RAISED BEFORE THE COMMITTEE

3.1 The ASC's Concerns

3.1.1 The ASC states its reason for bringing the matter to the attention of the Committee is to alert Parliament to what may be an unintended and serious consequence of the legislation:

> Our only concern is, as a regulator, to alert the Committee to the jeopardy now, so that if it takes three years for that judicial authority [the High Court] to find adversely, the fact that we have wasted three years of investigative effort and that we will have three years of criminal prosecutions which will almost automatically be subject to successful challenge ...[is made known at this early stage.][30]

3.1.2 The ASC advised the Committee that:

> ... if we are left with section 68(3), [we] will tend to seek out very specific civil remedies where we can use the evidence which we obtain in the exercise of our power, but there will remain the fact that there is no other criminal prosecutor who will be preparing the criminal cases, and our conduct may be jeopardising those cases which should be brought before the courts.[31]

3.1.3 The DPP observed that the evidentiary difficulties of the derivative use provisions apply not just to offences under the ASC Act and the Corporations Law but to 'any serious State Crimes Act offences that arise in the course of examinations...'[32]

3.1.4 The ASC considers the present legislative provisions involving derivative use immunity are an 'absurdity' because:

> ... section 38 confers a power and section 68 establishes dire consequences for exercising it ... because you then cannot use the material you find as a result of the answer to the question.[33]

[30] *Committee Hansard, 11 October 1991, Mr S J Menzies, p.115.*

[31] *ibid, p129.*

[32] *ibid, Mr G M Delaney, p.14.*

[33] *ibid, Mr J Samaha, p.114.*

3.1.5 The ASC cited specific examples where the danger of imperilling future criminal prosecutions has led the Commission to decide not to formally interview witnesses. Formal examination of persons associated with the Occidental Life Insurance Company of Australia Ltd and Regal Life Insurance Ltd was not proceeded with after advice from counsel that the derivative use immunity:

> ...creates a difficulty so profound ... that an examination of those who are suspected may have committed an offence should not take place until it is amended.[34]

3.1.6 Examinations under Section 597 of the Corporations Law and Section 19 of the ASC Act of executives involved in Bond Corporation and Quintex have not been pursued for similar reasons.

Specific ASC/DPP Concerns

3.2 Planning Investigations

3.2.1 The ASC provided a number of examples of specific problems in the planning and conduct of investigations which it claimed were created by the immunity provisions. The legislation in its current form obliges the ASC to anticipate the likely outcome at the commencement of an investigation and whether it will lead to civil or criminal remedies. This is an unrealistic expectation. The ASC states that as a result:

> ... we have modified our procedures in light of the jeopardy under 68(3) in two ways. Firstly, we are concentrating on cases which we believe are purely civil - on civil remedy - and from the start of the investigation discarding possible criminal prosecution.... Secondly, where we believe there is a risk of finding contraventions and we intend criminal prosecution, we are deliberately structuring an investigation plan which is much more lengthy and which has no reliance upon our examination powers. In other words, all the evidence we seek is either documentary or secondary source evidence, which means that, in substance, investigations which could be discharged within a period of months are taking periods of years.[35]

3.2.2 The ASC does not know 'at the commencement of any investigation what is in fact the substance of the investigation in terms of the contraventions alleged and the remedies which may be most appropriate.'[36] In the case of the TNT investigation, the ASC commenced the investigation in order 'to ensure that a major issue of securities was duly

[34] *Committee Evidence, ASC/DPP Submission, p.6.*

[35] *Committee Hansard, 11 October 1991, Mr S J Menzies, p.38.*

[36] *ibid, p.3.*

regulated and that information required by the securities market was available'.[37] In the course of the investigation, however, the Commission 'formed further concerns as to whether representations made to the institutional investors and to associated parties had in fact been misleading'.[38]

3.2.3 In other words, an investigation started as an inquiry into a civil matter may become an inquiry into a criminal matter, thus forcing the ASC to choose where it should put its emphasis:

> It can be quite an innocuous question which will trigger a line of inquiry which, under the present provisions of section 68(3), will have quite unforeseen and significant consequences in terms of frustration of the prosecution of major criminal offenders.[39]

3.2.4 The ASC is often forced to make such a decision under severe time constraints:

> There are two very critical time limits for us as a securities regulator. The first is that we must make any reference to the takeover panel in relation to alleged unacceptable conduct within 60 days of the date of the acquisition or conduct. The second is that we have a power, where we suspect that securities are trading on securities markets in an ill-informed market, to suspend the securities for up to 21 days. But any extension of that period is only by court order and the Commission bears the onus to produce appropriate evidence to justify the maintenance of the suspension or to otherwise obtain proper interlocutory or injunctive relief.[40]

3.2.5 In the process of investigating Titan Hills the Commission approached the Federal court for orders 'to restrain various transactions and meetings' but was unsuccessful because 'within the period of our investigation, which was seven days, we had not assembled enough evidence to convince the Court that there was a jeopardy'.[41] The Commission instituted section 19 examinations to obtain evidence to put before the takeover panel whose ruling subsequently went on appeal to the High Court. The time constraints in both matters were important.

[37] *Committee Hansard, 11 October 1991, Mr S J Menzies, p.4.*

[38] *ibid, p.3.*

[39] *ibid, p.45.*

[40] *ibid, pp. 4-5.*

[41] *ibid, p.106.*

3.3 The Use of Documents

3.3.1 The production of documents before an ASC inquiry is covered by the derivative use immunity provisions. However, the contents of documents so produced may be used. The ASC contends that this is not a great advantage because the evidentiary value of documents is not fully realised unless the documentary evidence is supplemented by oral evidence as to the content of the documents and the role of individuals with regard to the documents. This oral evidence is covered by the immunity:

> For example, if a person is required to produce financial records of a company and does so and is examined as to whether he or she authorised journal entries in the financial records and whether he or she signed certain correspondence, the documentation would still be admissible. However, evidence as to authorisation of journal entries and as to execution would have to be independently proved ... those matters would have to be proved using evidence obtained prior to the examination of the defendant [to avoid the problem of the derivative use provisions].[42]

3.3.2 Oral evidence with regard to the origin of company documents is also important because:

> ...company records are often incomplete, whether through inadvertence or, in cases of fraud, through deliberate misfeasance...[43]

> ...in the corporate law area documents often deceive and are brought into existence to deceive.[44]

3.3.3 The Commission, as well as needing to examine all documents carefully, must rely on oral evidence to understand the documents fully.

3.4 Oral Evidence

3.4.1 The availability of the indemnity sections has discouraged some prospective defendants from providing informal assistance to the ASC. They:

> ...prefer to give oral evidence under s. 19 of the ASC Law ... before producing documents if possible, so as to be in a position to invoke the derivative use immunity to the fullest possible extent.[45]

3.4.2 Any 'prospective defendant' who did not use every protection the law offered would be extremely ill-advised! The ASC is concerned throughout its written submission that the availability of the indemnity will be exploited by those under examination to prevent areas of their activity from being scrutinised or, if examined, from yielding admissible evidence.

3.4.3 In examining a person the ASC must be conscious of the possibility of the immunity quarantining significant areas of inquiry. To avoid this happening, questioning must be confined to as narrow a field as possible thus foregoing the opportunity to conduct a '...thorough and broad ranging examination.'[46] However, even the most careful framing of questions may not prevent a witness from giving answers which extend far beyond the intended scope. This could have the effect of allowing a person being interviewed on one matter from introducing, and obtaining immunity for, testimony about a wide range of other matters.

3.4.4 The ASC makes the point that 'many of the matters under investigation concern oral arrangements; they are not documented'.[47] This creates the following jeopardy:

> ... in the course of investigating the matter, we asked the simple question of one of the parties ...: 'Did you in fact come to any agreement concerning your shares with X?' The unfortunate position is that when the answer to that is, 'Yes, I did. We discussed it on two occasions; the nature of the agreement was to this effect', we cannot thereafter use not only the evidence of the person subject to examination but also the evidence of X to whom he refers.[48]

3.5 Presentation of Evidence in Court

3.5.1 The ASC and DPP consider that the derivative use immunity places the onus of proving that any particular piece of evidence was not obtained from information given by an examinee or witness, upon the prosecution. The effect of the derivative use immunity on the use of evidence is stated by the DPP to be:

> ... if there is an examination, every piece of evidence collected after that examination will be subject to debate... that is going to unduly complicate

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[42] *Committee Evidence, ASC/DPP Submission, p.10.*

[43] *Committee Hansard, 11 October 1991, Mr S J Menzies, p.7.*

[44] *ibid, p.25.*

[45] *Committee Evidence, ASC/DPP Submission, p.5.*

[46] *Ibid, p.5.*

[47] *Committee Hansard, 11 October 1991, Mr S J Menzies, p.8.*

[48] *ibid, pp.8-9.*

trials, make them prolix, there will be hearings within hearings to determine just when the document was obtained, whether its use was derivative, et cetera.[49]

3.5.2 The Queensland Bar Association observes that:

> The practical effect of the extension of the privilege may be to extend it to all documents or any information relating to the examinee not obtained prior to the examination of the person concerned.[50]

3.5.3 Mr Ehrlich challenged the ASC's interpretation of the impact of the immunities on its investigatory powers. He argues that derivative evidence is only inadmissible if it was:

> ...obtained as a direct or indirect consequence of the person [witness] making the statement. Thus, all the ASC would need to show, if objection were made ...was that its normal procedure was to issue notices to produce books in respect of all relevant documentation and that the documentation would...have been obtained by the ASC even if it had not been referred to by the witness during examination.[51]

3.5.4 Mr Ehrlich submits that relevant derivative evidence would be documentary. He also argues that in these circumstances the onus would be on the witness to demonstrate that the evidence would not have come into the ASC's possession without his or her testimony. This view was not reflected in any of the other submissions received by the Committee.

3.5.5 In response to a question asking why the ASC and DPP had not sought to bring to trial a case in which the derivative use provisions of the Laws could be tested, Mr Delaney commented:

> When we look at all the evidence, we have to make a judgement about that which will be admitted... and that which will not. If, as a consequence of that analysis, we feel that there is not a reasonable prospect of conviction, that really has to answer it for us. Otherwise we would be putting someone on trial when we do not think there would be a reasonable prospect of that person being convicted.[52]

[49] *Committee Hansard, 11 October 1991, Mr G M Delaney, p.15.*

[50] *Committee Evidence, Bar Association of Queensland, Submission, p.1.*

[51] *Committee Evidence, P. Ehrlich, Submission, p.4.*

[52] *Committee Hansard, 11 October 1991, Mr G M Delaney, p.21.*

3.6. Priority of Criminal Prosecutions

3.6.1 Submissions to the Committee argued that the primary role of the ASC is to pursue civil remedies not criminal prosecutions. Thus its inability to pursue criminal prosecutions in some cases should not be seen as a serious impediment. The ASC affirmed in evidence that it:

> does concentrate on civil remedies because as a matter of practicality, they are available more swiftly, they are available in interlocutory proceedings and, in normal circumstances, they will correctly redress market issues through prompt relief to maintain the integrity of the markets.[53]

3.6.2 However, the ASC also stated:

> ...that criminal prosecution is essential in order to maintain a deterrent net. Ultimately, people behave lawfully if they perceive the jeopardy of imprisonment where their conduct warrants it.[54]

3.6.3 Mr Santow commented on the effect of the Guinness case in the UK:

> ...what it brought home to people - and it is affecting corporate behaviour - is that it is not just a matter of putting the money back; people actually went to gaol. People like you and me in blue suits and nice shirts went to gaol.[55]

3.6.4 In contrast, the Law Institute of Victoria considers the primary objective of the ASC is that:

> ... of protecting shareholders and creditors. ... The laying of criminal charges should be seen as ancillary to the Corporation Law's fundamental objective and should not become the overriding concern of legislative authorities.[56]

3.6.5 Similarly, the Law Society of New South Wales expressed the view that the prosecution of misconduct is only one facet of the ASC's responsibilities and that the

[53] *Committee Hansard, 11 October 1991, Mr S J Menzies, p.18.*

[54] *ibid, p.18.*

[55] *ibid, Mr G F K Santow, p.61.*

[56] *Committee Evidence, Law Institute of Victoria, Submission, p.5.*

exposure of "buccaneers" involved in questionable dealings will itself serve as a salient warning to the community.[57] Mr Ehrlich also argues that as the ASC's role is primarily to pursue civil remedies the immunity provisions are not a major issue. Mr Ehrlich proposed a radical solution; that the civil and criminal functions of the ASC should be split:

> I really do believe that the solution to this whole problem is to split the functions so that the ASC can go on with investigating civil matters without fear that it is jeopardising criminal matters, and that somebody else can investigate criminal matters according to normal situations.[58]

3.6.6 The Committee also received evidence that the criminal aspect of ASC investigations may have precedence in subsequent court action. Evidence was given to the Committee that:

> ... if there is a potential for in-tandem criminal prosecutions, that that civil action that the Commission would wish to get under way to preserve assets or whatever would be stayed itself on the basis that it may involve incriminating evidence, until such time as the prosecution gets under way.[59]

3.7 Co-operation of Witnesses with ASC Enquiries

3.7.1 The concern has been raised with the Committee that any reduction of the level of protection afforded to witnesses would result in a reluctance of witnesses to co-operate with ASC enquiries. In a letter to the Committee, the Premier of South Australia said that:

> It was the experience of the South Australian Corporate Affairs Commission that witnesses frequently would not co-operate if their evidence would be likely to be self-incriminatory. Accordingly, provisions equivalent to sub-section 597(12) of the Corporations Law were inserted in the companies Codes of each state and the Northern Territory so as to enable the relevant corporate regulatory authority to obtain information from such witnesses.
>
> The primary concern of the South Australian government is that any amendments to sub-sections 597(12) and 68(3) may result in increased levels of non-cooperation by potential witnesses. Any such result will generally frustrate the investigations of the ASC and will only further restrict the ability of the ASC to pursue its regulatory responsibilities.[60]

[57] *Committee Evidence, NSW Law Society, Submission, p.14.*

[58] *Committee Hansard, 11 October 1991, Mr P L Ehrlich, p.100.*

[59] *ibid, Mr J M Gaffey, p.126.*

3.7.2 Under the existing legislation a person can be completely open and frank with the ASC during a compulsory examination. The protection afforded by the legislation ensures that no statement can result in that person facing criminal prosecution although he/she could face prosecution for perjury if they mislead the ASC.

3.7.3 Similar concerns were expressed by Mr Ehrlich and the Law Institute of Victoria:

> Such a position would lead to a situation in which the corporate regulatory mechanism would discourage witnesses from providing frank and full disclosure where the witness might be subject to criminal sanction. This would grossly undermine the objective of corporate regulation in 'getting to the bottom' of corporate transactions so as to enable shareholders and creditors to use the information obtained in civil actions for damages or other civil remedies.[61]

3.8 Scope of the Immunity

3.8.1 The Committee heard comment about the possibility of making a distinction among the categories of persons subject to ASC inquiries and able to utilise the derivative use immunity. The present provisions apply to anybody connected with the promotion, formation, management, administration or winding up of a company.

3.8.2 It was suggested that the use immunity could be removed only for the directors and officers of companies. The reasoning behind this is that only those directly involved should be subject to the more onerous requirements to provide information which would flow from the adoption of the ASC/DPP proposals. The ASC argues against such distinctions because:

> We should apply the same powers against all participants of the market, because we regulate markets and also we regulate companies.[62]

3.9 Conduct of ASC Investigations

3.9.1 Mr Ehrlich argued in evidence to the Committee that the processes used by the ASC to investigate matters 'are really a star chamber'. 'The only difference between an

[60] *Committee Evidence, Premier of South Australia, Submission, p.2.*

[61] *ibid, Law Institute of Victoria, Submission, p.6.*

[62] *Committee Hansard, 11 October 1991, Mr S J Menzies, p.130.*

ASC inquiry and the Star Chamber is that they cannot torture you, at least physically'.[63] Mr Ehrlich concluded:

> this Committee should be very careful about taking away one of the very few balances left in the system'.[64]

3.9.2 Mr Ehrlich notes that:

> On the continent... there are various safeguards introduced. One is that the defendant has the absolute right to know the charges against him and the case against him. That right does not exist in Australia. The ASC have no obligation at all to tell you what offence they are investigating. All they have to hold is a suspicion. They do not have to tell you what they are investigating...[65]

3.9.3 Mr Ehrlich argues that the ASC will become even looser in the conduct of its inquiries if the existing legislative provisions are amended:

> But if you remove this amendment, all you will do is instil sloppy investigative techniques in the ASC. They will have no need to go and look for documents; they will have no need to do the normal investigation procedures which every policeman and every investigator has used for decades.[66]

3.9.4 The extent to which normal investigation techniques could be used by the ASC and the effect of the current protection for witnesses on the possibility of securing a conviction is an important matter. The Australian Law Reform Commission observed in 1975 that:

> The final argument concentrates on countering claims that the right to silence, as exercised in Britain and the United States, has resulted in high acquittal rates for serious crimes and lower prosecution and conviction rates. In fact, almost all the empirical studies in this field indicate that such claims are mistaken. More rights for individuals do *not* necessarily result in more guilty people going free.[67]

3.9.5 One of the studies referred to in support of this statement tended to show that

[63] *Committee Hansard, 11 October 1991, Mr P L Ehrlich, p.98.*

[64] *ibid, p.92.*

[65] *ibid, p.97.*

[66] *ibid, p.99.*

[67] *Committee Hansard, 11 October 1991, quoted Senator Cooney, pp.114-115.*

the effectiveness of investigations improved when the accused were informed of their right to remain silent. The explanation was advanced that the restrictions placed on police in this respect led to more stringent and diligent investigation by other means.

3.10 Distinction Between Corporate Crime and Other Criminal Offences

3.10.1 A major issue before the Committee was the issue of whether the investigation and prosecution of criminal offences relating to corporations and securities should be treated differently to other criminal offences. The ASC considers offences involving corporate law:

> are not ordinary offences. They are committed generally with pencils and paper, through sharemarket manipulation, through deals behind closed doors... These offences do not have victims in the ordinary sense who can give evidence.[68]

Mr Santow suggests that:

> *Corporate crime is unlike conventional crime in at least three respects:*
>
> (a) the immediate victim, the company, is an inanimate legal fiction often controlled by the perpetrator at the time, unlike the human victim of theft. There is therefore typically no human victim with direct familiarity with the circumstance - so that the prosecution is forced to rely on the perpetrator for evidence, and
>
> (b) for this reason and because of the complexity of the facts documentary evidence is essential. But it is only useful if it can be identified and explained by the perpetrator and by other enquiries yielding other evidence not precluded by derivative use immunity.
>
> (c) unlike ordinary theft, the accused has generally exploited the privilege of carrying on business with limited liability using the public's money, either as shareholder or creditor.[69]

3.10.2 Mr Justice Rodgers, Chief Justice of the Commercial Division of the Supreme Court of New South Wales, recently argued that the officers of a company voluntarily enter a privileged legal position which carries with it an obligation, in the event of failure:

> to explain what happened, why it happened, what was done by the

[68] *Committee Hansard, Mr G M Delaney, pp.15-16.*

[69] *Committee Evidence, Mr G F K Santow, Submission, pp.2-3.*

executives in carrying on the business, even if the disclosures mean that civil, or criminal, liability may be proved against the person making the disclosure. Nobody forces anyone to become an officer of a company, particularly a public company, with access to funds put up by members of the public. Anyone who chooses to undertake the privileges of such office should be ready to explain the circumstances surrounding the discharge of statutory and fiduciary duties.[70]

3.10.3 A contrary view was expressed by both the Law Society of New South Wales and Mr Ehrlich. The Law Society observed that:

> equality before the law demands that crime of whatever nature, whether so-called 'blue collar' or 'white collar', should be subject to the application of egalitarian principles and procedures of investigation and prosecution and to the like preservation of the freedom of the individual from possible abuse of power in seeking to protect the public interest.[71]

[70] *Committee Evidence, quoted in ASC/DPP, Submission, p.12.*

[71] *ibid, Law Society of New South Wales, Submission, p.i.*

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS.

4.1 *This matter is in essence a policy question.* The Parliament in establishing the ASC intended to restore, and maintain at a high level, business and community confidence in the operation of the securities market and the management of companies. It was clearly envisaged that the ASC would seek civil remedies where appropriate but would also initiate, through the DPP, criminal prosecutions for breaches of the Corporations Law.

4.2 If the constraints placed on the ASC's power to investigate and prosecute (or seek civil remedies) are such as to frustrate the achievement of Parliament's objectives, then there is clearly a need for reform. Providing the ASC with the necessary legal powers is not difficult once the policy objective has been clarified.

4.3 In a letter to the Committee, the Premier of Queensland summarised the issue concisely:

> Any decision to abrogate use immunity or derivative use immunity clearly involves a choice between an encroachment on the right to privacy of the individual, on the one hand, and the need to ensure that the Australian Securities Commission is not prejudiced in the pursuit of its regulatory responsibilities, on the other...[72]

4.4 The Committee is aware of the historic development and importance of the right of an individual to remain silent. It would not lightly recommend any erosion of that right. However, the nature and complexity of some types of crime occurring today were unknown over the period that this right was evolving in the common law. This is particularly true of corporate crime.

4.5 *It has been argued earlier in this report* that corporate crime is distinctive as a result of both the legal position of the corporation and the nature of the crime itself. Companies are artificial legal entities occupying a privileged position in that all companies are protected by limited liability and public companies may seek investment from the public. They are creations of the Parliament and the conditions under which they are created and the rules governing their operations are determined by the Parliament. The Committee believes that this privileged position carries with it obligations of accountability which may require the restriction of the rights of those participating in the corporate sector, including the right to remain silent.

4.6 There are precedents for this approach. As discussed in section 2.4 of this report the Companies Code, which was superseded by the Corporations Law in January 1991, only provided immunity for answers to questions but not for derivative evidence. The Taxation and Trade Practices laws provide other examples of restrictions on the privilege

[72] *Committee Evidence, Premier of Queensland, Submission, p.1.*

against self-incrimination. The laws of the states regulating the ownership and operation of motor cars provide examples of the readiness to use compelled evidence. In England material gathered under compulsory processes by Department of Trade and Industry(DTI) inspectors investigating corporate crime is admissible in evidence against the person who gave the answers. This issue was tested and upheld by the courts in the recent Guinness prosecutions.

4.7 Although the court was considering legislation which goes much further than the proposed changes in Australia the judge's comments in that case are equally applicable to the issue before this Committee:

> ... those likely to be questioned under that statutory regime are those whose responsibilities under the Companies Act and at common law in relation to shareholders funds and the integrity of the market are reflected in the privileged position they have. It is not asking too much, in my judgement, to impose limits on their civil rights, as Parliament has done by an obligation to answer questions in circumstances where those answers may be used in criminal proceedings against them.[73]

The judges of the Appeal Court, Lord Justice Watkins, and Justices Alliot and Cresswell, found '...no flaw in the judge's reasons...'.

4.8 The nature of corporate crime also distinguishes it from 'ordinary' crime. The perpetrators of corporate crimes are generally exploiting the privileged position they occupy; they may be the only people with actual knowledge of the crime; there is no clear victim (in the sense that a victim of theft or assault has some direct knowledge of the crime) and much of the evidence will be in the form of records kept by the perpetrators.

4.9 The Committee therefore supports the view that the effective regulation of the corporate sector may include legislative provisions which vary the established common law rights available to the ordinary citizen.

4.10 The Committee is concerned that the behaviour of the corporate sector in Australia in the 1980's adversely affected the confidence of both Australian and foreign investors and the efficiency of Australia's capital markets. In part this resulted from the inability of the regulatory authorities to enforce the law effectively. This point was made strongly by Mr Santow:

> The history of Australia's securities laws is not a happy one. We have for years had ineffectual legislation and for years we have had reports, such as the one from the Rae committee, which have highlighted the fact that Australia's record is appalling.[74]

[73] *Henry J., quoted in R v Seelig and Spens; Court of Appeal, 2 May 1991; nos. 90/6231/S1 and 91/0845/S1; unreported.*

Laws which are not (or cannot be) enforced will be held in contempt and their breach will be encouraged.

4.11 The current legislation was enacted with the clear intention of correcting this problem. To do so requires that the ASC has both the necessary resources and investigatory powers. The Committee accepts the evidence of the ASC that the immunity applying to the production of documents and t he derivative immunity applying to oral evidence curtail the ASC's investigatory powers to an extent that seriously limits its capacity to discharge the responsibilities placed on it by the Parliament.

4.12 The ASC's investigative power has been described as:

> a poisoned chalice - since you get the investigative power and if you use it you kill of your ability to bring a criminal action in some cases...[75]

The increased protection granted to witnesses before ASC investigations (when compared with the Companies Code) was not addressed during Parliamentary debate on the Corporations Law. The Joint Select Committee on Corporations Legislation did consider the issue however its conclusion and recommendations were not consistant and no changes to that part of the bill resulted.

4.13 The Committee would have preferred to have seen the existing legislation tested in the courts rather than relying on legal opinions about the interpretation of the legislation and its impact on ASC investigations. It notes the reluctance of the ASC and the DPP to initiate a prosecution when the advice available to them is that the prosecution would fail. In addition conducting a case with the object of obtaining a clear and authoritative ruling could take considerable time. In the meantime any other pending cases where the issue was raised would have to be either deferred or abandoned. The Committee is persuaded that, in all the circumstances, the difficulties facing the ASC and DPP and affecting the standing of Australia's capital markets justify more immediate action.

4.14 The experience in other common law countries which have faced similar problems supports the Committee's view of this matter. Effective regulation of corporations and securities matters in the UK has been the result of a wide range of reforms including the curtailment of the right to remain silent. In contrast in the USA, while the constitutional right to remain silent has been retained, effective enforcement of the law has been the result of the use of other indirect means of extracting evidence or pleas of guilty. The Committee believes that properly regulated investigations by the ASC are preferable to such methods. Arguably, such methods represent a greater intrusion on the civil rights of the individual than the changes proposed by the ASC/DPP.

[74] *Committee Hansard, 11 October 1991, Mr G.F.K. Santow, p.48.*

[75] *Committee Hansard, 11 October 1991, Mr G F K Santow, p.117.*

4.15 The ASC/DPP submission seeks two changes to the legislation; the removal of the derivative use immunity and the use immunity applying to the fact that a person has produced a document. The latter change is relatively minor. It removes the difficulty of having to prove by other means that a person had the document in their possession and provided it to the ASC at a hearing.

4.16 The removal of the derivative use immunity is a major step. As was discussed in chapter 2 the privilege against self-incrimination in common law is interpreted by the courts to include not only direct evidence but also derived evidence. Chapter 3 of this report summarised the difficulties that the derivative use provisions impose on the ASC. The Committee accepts that the ASC is not giving undue emphasis to the pursuit of criminal prosecutions over civil action nor exaggerating the difficulties it faces in working within the existing legislation.

4.17 The Committee is concerned to ensure that ASC investigations are conducted fairly, particularly if the rights of persons being investigated are reduced. Investigations under section 597 of the Corporations Law are conducted, at the request of the ASC, before the court with all the procedural protections for witnesses that this implies. However investigations under the ASC Law are conducted by the ASC itself. The Committee has noted the claims made in the submissions it received during its public hearing and more recently in the press,[76] about the way the ASC conducts investigations.

4.18 There are protections for witnesses built into the legislation. Requests to attend an ASC examination under s.19 must be made on a form prescribed by regulation which advises the examinee of the general nature of the matter under examination, his or her right to legal representation and of the provisions of section 68 with regard to self-incrimination. The ASC has adopted the practice of issuing notices two weeks prior to an examination. Hearings under section 50 are subject to similar procedures. The Committee understands that a manual governing the conduct of investigations is being prepared by the ASC. This will be made available to the Committee for comment.

4.19 The Committee will monitor the ASC's use of its investigatory powers. It will seek regular reports from the ASC on the number of investigations conducted, the procedures adopted and any claims of abuse of the process.

4.20 The Committee therefore **recommends that section 597(12) of the Corporations Law and section 68(3) of the Australian Securities Commission Law be amended to remove the derivative use immunity provisions and that section 68(3) also be amended to remove the use immunity with regard to the fact that a person has produced a document. To ensure that the use made of this reduction in the protection available to witnesses is subject to parliamentary review the Committee further recommends that the amendments made to s.597 and s.68 lapse after five years unless the Parliament confirms the application of those sections within that period.**

[76] *Financial Review, 16, 18, 23 and 28 October 1991.*

4.21 The Committee also gave consideration to the application of the immunity in the prosecution of corporations. At present the privilege may be claimed on behalf of a corporation; where an officer or director of the corporation is appearing as a representative of the corporation he or she may claim the privilege on behalf of the corporation. The Committee is of the view that since the corporation is a legal entity and not a real person no question of civil rights is raised by its prosecution. The Committee therefore **recommends that the Corporations Law and the ASC Law be amended to ensure that neither the use immunity nor the derivative use immunity is available to corporations.**

4.22 In evidence to the Committee various witnesses suggested that the logical way out of the dilemma which the ASC acknowledged between pursuing civil and criminal remedies was to separate the two responsibilities. This would reflect U.S. practice where the Securities and Exchange Commission exercises only a civil jurisdiction and the Department of Justice investigates criminal matters. This proposal requires further detailed consideration as a longer term option.

DISSENTING REPORT PREPARED BY SENATOR BARNEY COONEY AND MR FRANK FORD MP

We have differed from the conclusions and recommendations of my colleagues for the following reasons:

1. The Balance of Public Interests

There is a balance to be struck between the public interest in bringing law breakers to justice and the public interest in preserving the rights and liberties society affords its citizens. Where that balance is set is crucial to the sort of community we live in.

Chapter 2 of the report shows that the right to silence is a high principle of Australian criminal law.

Section 68 of the Australian Securities Commission Act 1989 and section 597 of the Corporations Act 1989 take away that right in certain circumstances. However they redress that action by providing the person compelled to give answers incriminating himself or herself with an indemnity against their use as evidence in criminal proceedings and against the production in court of material discovered through those answers. In effect they place people questioned under their provisions in a similar position to that in which they would have been had their right to silence not been removed.

A modification of this position is now sought so that indemnity is limited to the answers themselves and then only so long as they do not relate to the identification of documents.

We consider the modification sought puts people's rights too much at risk. In the interests of a free and fair society there must be a limit to the methods used in carrying out investigations.

We agree with the words of Mr Justice Vincent who at the 1990 Commonwealth Law Convention in Auckland said:

> 'In many different ways and at innumerable points within our societal structures, as a consequence of both revolutionary and evolutionary processes, balances have been struck between the power of the State and the rights of the individual.
>
> These balances have not always been internally or externally consistent or, even on occasions, rationally defensible and clearly they need to be and are reassessed from time to time. The right to silence is a significant factor within the present framework. In my mind, it represents a continuing concern that the interest and power of the State should not totally eclipse those of the individual, whose privacy and dignity must be protected. As John Walker and Gordon Goldberg have stated:

> ...the political, social and legal philosophy, which underlies the Westminster system of government, always recognises the virtue, indeed the necessity, of this and other compromises.

Obviously there is a price to be paid for the achievement of an acceptable balance. A certain amount of criminal behaviour will escape detection; investigative processes will on occasions be impeded; and some criminals will escape justice. The real question is whether the price to which I have referred is excessive.

In this context I am reminded of the works of Knight Bruce VC which were quoted with approval by Stephen and Aicken JJ. in Bunning v. Cross (1978) 19 A.L.R. 633 at p.657:

> The discovery and vindication and establishment of truth are main purposes certainly of the existence of courts of justice; still, for the obtaining of those objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination,... Truth, like all other good things, may be loved unwisely -may be pursued too keenly - may cost too much.[77]

2. Lack of Empirical Evidence

As paragraph 4:13 of the Report points out it is not clear how difficult it is to successfully prosecute people under the present law. The Australian Securities Commission and the Director of Public Prosecutions are not minded to proceed in certain matters because of legal opinions that success would be unlikely. We are hesitant to see civil rights curtailed in the way sought where the move to do so is based not on empirical evidence but on less than universally held legal opinion.

3. Unhappy Precedent

We are apprehensive that in curtailing the measures taken to compensate for the abrogation of the right to silence the suggested amendment to the section 68 of the Australian Securities Commission Act and section 597 of the Corporations Act may set a precedent for changing the law governing the investigation of crime generally.

Are corporate offences more serious than murder, rape, kidnapping, incest or armed robbery? Why not compel answers from suspects or others who may be able to help solve those crimes? Yet what would that do to the sort of society we want to live in?

Why should the right to silence be given to a person when under investigation for murder, high-jacking, fraud or burglary but denied to him or her when questioned in respect of a corporate crime?

Should a man who kills his wife and children be given greater protection against self incrimination than when he commits even a relatively minor offence against the shareholders of a company he manages?

Should the right to silence be kept for a teacher under investigation for morally corrupting his young pupils but curtailed when as secretary of a small proprietary company he is examined under section 19 of the Australian Securities Commission Act?

Decision makers pondering these issues may resolve them in a way which will erode and ultimately abrogate the right to silence. They may resolve them by giving even more draconian powers to investigating authorities.

4. Alternatives

The well being of society requires that the corporate sector be trustworthy and diligent. While the sanction of the criminal law may be one way of achieving this, it should not be seen as the only or the main one. Great emphasis should be given to the role of business ethics. Community attitudes should be such as to create a climate which encourages proper corporate conduct. More reliance should be placed on the civil rather than criminal law.

5. Need For Proper Perspective

In proposing amendments to the legislation people have pointed out the bad corporate conduct of the recent past. It should be kept in mind that the great majority of company personnel have unsullied reputations and go about their work as they should. They will be affected by the suggested changes to the law in the sense that their civil rights will be less than those of their fellow citizens. Their right to silence will become a lesser one.

To those who would say this should not matter to people who are innocent, we quote the words of Mr John Coldrey, then Director of Public Prosecutions in Victoria and now a Justice of its Supreme Court when he wrote in the Anglo - American Law Review:

> It follows that I consider the proposition that the innocent person has nothing to fear from the abolition of the right to silence as one which is not sustainable.[78]

[77] Pearse v. Pearse (1846) 1 De G & Sm 12; 63 E.R. 950 at 957.

[78] Vol 20 No.1 1991 p.54

6. Economic Gain and Justice

It is said Australia's corporate image has been much damaged overseas and this has lead to its great economic harm. It is said this situation would be much redressed were some corporate criminals brought to justice.

We make two points about that:

a) There is a paucity of evidence as distinct from allegations to support that proposition. In our view this provides an insufficient basis for increasing the power of investigating authorities.

b) Even if the proposition were correct it is doubtful strategy to make a class of people more vulnerable than others to the criminal law as a means of giving Australia a better economic reputation overseas. The community would be reluctant to curb civil rights to bring about fiscal recovery. Modifying the rights of Australians to encourage overseas investment in local markets would set an unhappy precedent?

7. Legal Proof and Justice

As section 68 of the Australian Securities Commission Act 1989 and the Corporations Act 1989 now stand there are a numbers of cases in which the Authorities face considerable problems in bringing successful prosecutions for corporate crime. It is said the sections should be amended to reduce the indemnity given to people in respect of the material that becomes available to an investigator as a result of an examination of pursuant to the relevant provisions of the two Acts. This means the protection given to them to compensate for the removal of the right to silence is weakened.

The right to silence is a high principle of the law. It should not be curtailed, or, if it is the measures taken to compensate for that should not be abridged unless for a principle of comparable quality. That things should be made easier for the State to gain convictions is in our view not such a principle.

8. Whose Privilege? Whose Punishment?

It is said in paragraph 4.5 of the Report that, 'Companies are artificial legal entities occupying a privileged position in society.' and that, 'The Committee believes that this privileged position carries with it obligations of accountability which may require the restrictions of the rights of those participating in the corporate sector including the right to remain silent.'

We have difficulties with these propositions for the following reasons,

(a) In our view what is meant by companies 'occupying a privileged position in society' within the context of this inquiry is not clear. It cannot mean that they are immune from prosecution because clearly they are not.

(b) Even if a company is in a privileged position it does not follow that those associated with it are likewise privileged. Section 68 of the Australian Securities Commission Act and section 597 of the Corporations Act apply to people who cannot be described as the 'artificial legal entities' referred to in paragraph 4.5, as 'occupying a privileged position in society.' Because a particular body is accorded certain rights and liberties people associated with it should not as a matter of course have theirs diminished.

It is to be remembered that the men and women caught by the sections include stenographers and filing clerks as well as directors and managers. They include small and vulnerable shopkeepers manufacturers and service providers who have formed companies of no great size as well as rich and powerful corporate figures. In our view all are entitled to protection that the right to silence gives.

(c) It would be an unhappy outcome if society were to see business people as less entitled to civil rights than the rest of the community because they are associated with companies. Business, mainly through the corporate structure, is responsible for a vast proportion of the wealth this country produces. To repay the people who undertake it by categorising them in a way (namely as associated with a privileged organisation) which may well attract envy, hostility, and prejudice from others in the community is hardly a positive factor towards encouraging productive enterprise.

9. Growth of State Powers

The amendments will increase the capability of authorities to gather and use evidence against people.

We note with unease the growth in powers given to investigators over the last decade. Their ability to legally tap telephones has been markedly increased. Financial transaction have been opened to their scrutiny. Tax file numbers have been introduced and their use extended making it easier for bodies such as the Social Security Department to carry out surveillance.

The State must look to order and good government but must not intrude unduly on peoples rights in doing so. Were a trend to develop of allowing it whatever powers it declared were necessary for the detection of crime the sort of community we now enjoy would be devalued. Given those maxims we consider on the basis of the material before the Committee that the amendments sought are not warranted.

10. Summary

The law treats the right to silence, as a matter of high principle. The protection it provides against the power of the State should not be diminished in our view, except in accordance with a principle of comparable standing. A principal of that quality has not been advanced in this instance.

ATTACHMENT 1.

List of Submissions

Sub. No	From
1	Mr Trevor Sheehan
2	The Law Society of New South Wales
3	Hon. Terry Connolly MLA, Attorney General of the ACT
4	Hon. Micheal Field, Premier of Tasmania
5	Australian Securities Commission/Director of Public Prosecutions
6	Mr Rowan Neilson
7	Bar Association of Queensland
8	Law Institute of Victoria
9	Mr G F K Santow
10	Hon. Wayne Goss MLA, Premier of Queensland
11	Hon. J C Bannon, Premier of South Australia
12	Young Lawyers' Section, Law Institute of Victoria
13	Mr Paul Ehrlich

Witnesses at the Committee's Public Hearing on 11 October 1991

Mr T E Bostock	Chairman, Companies and Business Committee, Commercial Law Section, Law Institute of Victoria.
Mr G S Davidson	Acting Assistant Director, Corporate Prosecutions, Director of Public Prosecutions.
Mr G M Delaney	National Coordinator, Corporate Prosecutions. Director of Public Prosecutions.
Mr P L Ehrlich	Private Citizen.

Mr J M Gaffey	Member, Professional Development Committee, Young Lawyers Section, Law Institute of Victoria.
Mr S J Menzies	National Coordinator, Enforcement, Australian Securities Commission.
Mr J Samaha	Consultant, National Investigations, Australian Securities Commission.
Mr G F K Santow	Private Citizen.

ATTACHMENT 2.

CORPORATIONS ACT 1989

SECTION 597 EXAMINATION OF PERSONS CONCERNED WITH CORPORATIONS

597(1) [Prescribed person] In this section, a reference, in relation to a corporation, to a prescribed person, is a reference to an official manager, liquidator or provisional liquidator of the corporation or to any other person authorised by the Commission to make applications under this section or to make an application under this section in relation to the corporation.

597(2) [Application for court order] Where it appears to the Commission or to a prescribed person that:

(a) a person who has taken part or been concerned in the promotion, formation, management, administration or winding up of, or has otherwise taken part or been concerned in affairs of, a corporation has been, or may have been, guilty of fraud, negligence, default, breach of trust, breach of duty or other misconduct in relation to that corporation: or

(b) a person may be capable of giving information in relation to the promotion, formation, management, administration or winding up of, or otherwise in relation to affairs of, a corporation;

the Commission or prescribed person may apply to the Court for an order under this section in relation to the person.

597(3) [Examination on oath] Where an application is made under subsection (2) in relation to a person, the Court may order that the person attend before the Court on a day and at a time to be fixed by the Court to be examined on oath on any matters relating to the promotion, formation, management, administration or winding up of, or otherwise relating to affairs of, the corporation concerned.

597(4) [Public examination] An examination under this section shall be held in public except to such extent (if any) as the Court considers that, by reason of special circumstances, it is desirable to hold the examination in private.

597(5) [Ancillary directions by Court] The Court, on making an order for an examination, or at any later time, on the application of any person concerned, may give such directions as to the matters to be inquired into, and, subject to subsection (4), as to the procedure to be followed (including, in the case of an examination in private, directions as to the persons who may be present), as it thinks fit.

597(6) [Failure to attend] A person who is ordered under subsection (3) to attend before the Court shall not, without reasonable excuse:

(a) fail to attend as required by the order; or
(b) fail to attend from day to day until the conclusion of the examination.

597(7) [Failure to take oath] A person attending before the Court for examination pursuant to an order made under subsection (3) shall not refuse or fail to take an oath.

597(8) [Failure to answer question] A person attending before the Court for examination pursuant to an order made under subsection (3) shall not refuse or fail to answer a question that he or she is directed by the Court to answer.

597(9) [Failure to produce books] A person attending before the Court for examination pursuant to an order made under subsection (3), if directed by the Court to produce any books in his or her possession or under his or her control relevant to the matters on which he or she is to be, or is being, examined, shall not refuse or fail to comply with the direction.

597(10) [Liens] Where the Court so directs a person to produce any books and the person has a lien on the books, the production of the books does not prejudice the lien.

597(11) [False or misleading statement] A person attending before the Court for examination pursuant to an order made under subsection (3) shall not make a statement that is false or misleading in a material particular.

597(12) [Incriminating evidence] A person is not excused from answering a question pub to him or her at an examination held pursuant to an order made under subsection (3) on the ground that the answer might tend to incriminate him or her but, where the person claims, before answering the question, that the answer might tend to incriminate him or her, neither the answer, nor any information, document or other thing obtained as a direct or indirect consequence of the person giving the answer, is admissible in evidence against the person in criminal proceedings other than proceedings under this section or other proceedings in respect of the falsity of the answer.

597(13) [Signed written record] The Court may order the questions put to a person and the answers given by him or her at an examination under this section to be recorded in writing and may require him or her to sign that written record.

597(14) [Admissibility of record] Subject to subsection (12), any written record of an examination so signed by a person, or any transcript of an examination of a person that is authenticated as provided by the rules, may be used in evidence in any legal proceedings against the person.

597(15) [Examination before other courts] An examination under this section may, if the Court so directs and subject to the rules, be held before such other court as is specified by the Court and powers of the Court under this section may be exercised by that other court.

597(16) [Representation] A person ordered to attend before the Court or another court for examination under this section may, at his or her own expense, employ a

solicitor, or a solicitor and counsel, and the solicitor or counsel, as the case may be, considers just for the purpose of enabling the person to explain or qualify any answers or evidence given by the person.

597(17) [Adjournment] The Court or another court before which an examination under this section takes place may, if it thinks fit, adjourn the examination from time to time.

597(18) [Costs] Where the Court made the order under subsection (3) for an examination is satisfied that the order for the examination was obtained without reasonable cause, the Court may order the whole or any part of the costs incurred by the person ordered to be examined to be paid by the applicant or by any other person who, with the consent of the Court, took part in the examination.

AUSTRALIAN SECURITIES COMMISSION ACT 1989

SECTION 68 SELF-INCRIMINATION

68(1) [Restriction on privilege against self-incrimination] For the purposes of this Part, of Division of Part 10, and of Division 2 of Part 11, it is not a reasonable excuse for a person to refuse or fail:

(a) to give information;
(b) to sign a record; or
(c) to produce a book;

in accordance with a requirement made of the person, that the information, signing the record or production of the book, as the case may be, might tend to incriminate the person or make the person liable to a penalty.

68(2) [Circumstances in which sec. 68(3) applies] Subsection (3) applies where:

(a) before:

(i) making an oral statement giving information;
(ii) signing a record; or
(iii) producing a book;

pursuant to a requirement made under this Part, Division 3 of Part 10, or Division 2 or Part 11 or under a corresponding law of another jurisdiction, a person claims that the statement, signing the record, or production of the book, as the case may be, might tend to incriminate the person or make the person liable to a penalty; and

(b) the statement, signing the record, or production of the book, as the case may be, might in fact tend to incriminate the person or make the person liable to a penalty.

68(3) [*Admissibility of evidence*] Neither the statement, or the fact that the person has signed the record or produced the book, as the case may be, nor, in the case of the making of a statement or the signing of a record, any information, document or other thing obtained as a direct or indirect consequence of the person making the statement or signing the record, as the case may be, is admissible in evidence against the *person in*:

(a) a criminal proceeding; or
(b) a proceeding for the imposition of a penalty;

other than a proceeding in respect of:

(c) in the case of the making of a statement - the falsity of the statement; or
(d) in the case of the signing of a record - the falsity of any statement contained in the record