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The Parliament of the Commonwealth of Australia

**RELATIONS BETWEEN THE
AUSTRALIAN SECURITIES COMMISSION
AND THE
COMMONWEALTH DIRECTOR OF PUBLIC
PROSECUTIONS**



**JOINT STATUTORY 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.

CONTENTS

	Page
Membership of the Committee	iii
Duties of the Committee	iv
Report	1
Appendix I	15
Appendix II	19

RELATIONS BETWEEN THE AUSTRALIAN SECURITIES COMMISSION AND THE COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS

Introduction

1.1 In the first of what will be a regular series of public hearings, this committee met the Chairman of the Australian Securities Commission(ASC), Mr Tony Hartnell, on 6 August 1992 for a public briefing on the current operations of the ASC. The discussions with Mr Hartnell ranged over a number of topics with regard to the work of the ASC including the place of criminal investigations in the priorities of the ASC, the success of criminal prosecutions and the relationship between the Director of Public Prosecutions (DPP) and the ASC. The Chairman of the ASC expressed strong views on the proper role of the ASC and its working relationship with the DPP.

1.2 The Committee subsequently invited the Director of Public Prosecutions, Mr Michael Rozenes to canvass these issues further at a hearing on 7 September 1992. As a result of Mr Rozenes' evidence the problems of the ASC/DPP relationship were widely debated in the media.

1.3 In response to the public dispute that developed the Attorney-General, the Hon Michael Duffy, met both parties to express his concern at the problems between their two agencies and their continuing failure to resolve them. In view of this failure Mr Duffy formally advised both organisations that he would use his powers under their respective Acts to give directions to ensure that they discharged their functions and exercised their powers in a manner consistent with the:

... expectation of the Government, the business community and the investing public that the Commission and the DPP should engage in the closest collaboration to ensure the optimum use of their resources and the speediest and most efficient

investigation, trial and punishment of corporate wrongdoers.¹

1.4 This encapsulates the essence of this whole matter. The direction of corporate regulation should not be determined by personal or inter-agency hostility, nor should it be inhibited by the failure of those responsible to resolve what are, for the most part, disputes over differences of interpretation or correct procedure.

1.5 The Attorney-General's direction to the two organisations was tabled in Parliament on 6 October 1992. In essence the direction affirms the Government's view that:

... civil proceedings should not, as a general rule, be regarded as an alternative to criminal proceedings but that each should be seen as complementing the other ...²

The guidelines to the direction:

- . emphasise that the two organisations will cooperate fully;
- . put in place a mechanism for resolving disputes; and
- . require the ASC to give the same consideration to identifying breaches of the general criminal law of the Commonwealth, States and Territories as it gives to the investigation of breaches of the Corporations Law.

1.6 The Committee will not seek further hearings with the protagonists at this stage. It believes that it is important that both organisations be given the opportunity to give effect to the Attorney-General's guidelines. However as part of the Committee's continuing responsibility to monitor the work of the ASC and the Corporations Law and to inform the Parliament it will review the progress that has been made in resolving these problems at a later date.

1 Letters from the Hon Michael Duffy, Attorney-General, to Mr A G Hartnell and Mr Michael Rozenes QC. Copies are attached to this report at Appendix L.

2 *Serious Corporate Wrongdoing: Direction Relating to Investigation and Enforcement*, 30 September 1992, paragraph C. The full text of the Direction is attached to this report as Appendix II.

1.7 This report provides a short summary of the matters in dispute and suggests possible solutions in some areas.

Background

1.8 At issue is a fundamental question - is serious criminal activity in the corporate sector to be prosecuted with the full weight of the law, as are other serious crimes, or is prosecution to be merely one of a number of options available to the regulators, to be used where convenient? While acknowledging the importance of this issue it is, at the same time, necessary to keep it in proportion. The ASC does initiate a significant number of criminal prosecutions though predominantly for minor offences. The relationship between the DPP and the ASC is not one of unrelieved conflict. It should be noted that Mr Hartnell stated that '... in 95 per cent of cases the organisations are working together and ... achieving results.'³

1.9 It is also important to recognise that '... the vast majority of Australian businessmen were and are honourable and honest'⁴ and that this debate concerns a relatively small number of serious breaches of the law - those that will require extensive investigation and may result in complex and costly prosecutions. The nature of the offences and of the evidence (frequently very large volumes of documents) pose special problems both for the investigator, in collecting evidence, and the prosecutor in presenting it to the court. They do not yield quick and easy results.⁵ Thus it is a mistake to leap to judgement of the ASC's success as a corporate regulator merely on the basis of some 'score-card' of criminal prosecutions.

1.10 It is this Committee's view that in reality the dispute between the two organisations has become unnecessarily polarised. The circumstances in which the ASC finds itself are unusual. The ASC is in fact being required to look both forward and backwards - putting in place the regulatory structures and practices which will carry it through the 1990's while at the same time clearing up an inherited mess not of its own making. It inherited from the 1980's a backlog of highly complex corporate problems involving presumed criminal behaviour, and an expectation on the part of both

3 Mr Tony Hartnell, *Committee Hansard*, 6 August 1992, p.14.

4 DPP Position Paper, *Committee Hansard*, 7 September 1992, p.14.

5 A brief consideration of the recent experience of Britain's Serious Fraud Office in the Blue Arrow and the various Guinness cases will demonstrate the cost, difficulty and uncertainty of this type of prosecution.

government and the public that these matters will be pursued to the full extent of the law. The ASC heightened that expectation with its identification of the 'Big 16' investigations.

1.11 The concentration of major investigations in a new organisation has, inevitably, put strains on that organisation. The pressure to conduct a number of significant and complex investigations simultaneously, virtually from the ASC's first day, has required the commitment of very large resources and made enormous demands on the skills of investigators, many of whom were new to the task. Given that the load of complex investigations leading to criminal prosecutions is probably greater than the ASC would expect to deal with in 'normal' circumstances it is not surprising that stresses have emerged.

1.12 The ASC is clearly concerned that if it gives priority to these investigations at the expense of its longer term objectives, particularly the development of the regulatory mechanisms which will underpin its role as corporate watchdog, then the achievement of those objectives will be deferred and compromised. Thus it would be unwise to make long-term decisions about the priorities of the ASC or its relationship with the DPP based on what are atypical conditions.

1.13 Having made that qualification, there are nonetheless serious medium and long term issues which must be dealt with. The long term issue is, where do criminal investigation and prosecution fit in the overall responsibilities of the ASC. The medium term question is whether the rate of progress with the current backlog of investigations and prosecutions is a result of their complexity and delays imposed by external factors (such as the WA Royal Commission into the Commercial Activities of Government) or whether some additional resources are needed to conclude them.⁶

The Role of the ASC

1.14 Mr Hartnell posed (and answered) this question for the committee:

is this organisation ... basically a criminal enforcement agency, or is it a commercial regulatory agency? I believe that it has to stand or fall as a commercial regulatory agency. Its criminal

⁶ Mr Hartnell is reported in the *Australian* newspaper of 23 September 1992 as saying that it would take a further five years to complete all the Big 16 cases.

investigative proceedings have to be ancillary to its mainstream activities.⁷

He went on to say that it was the 'very clear policy' of the ASC to seek civil remedies rather than criminal penalties and that unless the ASC had a culture of supporting the business environment it had no long term future.⁸ This perception of the ASC's role explains the organisation's preference for action through the civil courts where a breach of the corporate law is identified:

... we preserve property ..., sue for damages if that is relevant, restrain conduct or get mandatory injunctions to oblige conduct - some way to deal with the commercial situation that we are faced with today Having done that, investigations can continue and evidence will come out of the civil case anyway which may result in criminal charges.⁹

1.15 It should be noted that this initial, civil, action does not preclude criminal action at a later stage if further investigation suggests that it is appropriate. Nor does Mr Hartnell's view exclude criminal action.

1.16 The Committee gained the impression that the Chairman of the ASC believed that the ASC should have a very high degree of autonomy in deciding how to respond to breaches of the Corporations Law; whether to negotiate administrative settlements (as in the case of Adsteam), seek civil remedies or initiate criminal prosecutions. Mr Hartnell told the Committee that:

... in the complex of results that are possible out of any corporate situation - which means a choice between administrative action, civil litigation and criminal litigation - the DPP-ASC argument is a distraction rather than a help.¹⁰

7 Hartnell, op cit, p.10.

8 *ibid.*, p.10,11.

9 *ibid.*, p.11-12.

10 *ibid.*, p.21.

The criteria used to determine which course to pursue seem to reflect the ASC's own imperatives with regard to cost, resources and likely outcome.

1.17 Mr Hartnell's view of the role of the ASC and the priority to be given to civil action has brought the ASC into conflict with the DPP. There is:

... a growing perception within the DPP that the ASC does not regard criminal prosecutions as a viable element of corporate regulation.¹¹

1.18 At his appearance before the Committee on 7 September 1992 the Director of Public Prosecutions took issue with the ASC Chairman's description of the ASC's role:

We simply do not accept that the criminal investigatory proceedings should be relegated to some position ancillary to the ASC's mainstream activity of being a commercial regulatory agency. ... We do not deny that there was a regulatory function performed by the ASC, but the criminal function - the policing function that they are meant to exercise - cannot be subjected to it.¹²

Mr Rozenes, while denying the suggestion that the DPP believed that every criminal offence be prosecuted, did state that '... significant breaches of the law and all cases of fraud and dishonesty should be investigated with a view to prosecution'.¹³ The criteria used to decide whether a matter should be prosecuted should reflect some '... universal standard of fairness' and not '... the whim of a particular regulator'.¹⁴

1.19 The DPP is clearly concerned that, having taken civil action at an early stage in a particular case, the ASC will not '... devote sufficient resources to the identification, investigation and prosecution of corporate

11 DPP Position Paper, *op cit*, p.13.

12 Michael Rozenes QC, *Committee Hansard*, 7 September 1992, p.8.

13 DPP Position Paper, *op cit*, p.17.

14 Rozenes, *op cit*, p.6.

crime'.¹⁵ The perceived preference for civil remedies as being quicker and more certain is also a cause for concern within the DPP. Looking to the future, Mr Rozenes expressed concern that, if the civil penalty provisions proposed in the draft Corporate Law Reform Bill were enacted then the ASC would treat action under those provisions as the norm.¹⁶ The DPP is also firmly convinced that imprisonment is the most effective the sanction against the corporate criminal:

... the last thing the corporate criminal is afraid of [is being stripped of his or her gains] because he believes that by the time someone wakes up to the fact that he is a corporate criminal there will hardly be a dollar left in the jurisdiction that the regulators can grab and strip from him. What a corporate criminal is really afraid of is going to prison.¹⁷

1.20 The DPP also commented on the lessons of the National Companies and Securities Commission (NCSC) which, for a variety of practical reasons, favoured commercial settlement over criminal action and in consequence '... brought the criminal prosecution process into disrepute'.¹⁸ Concern exists that the initial positive moves by the ASC to overcome the legacy of the NCSC, particularly in emphasising the importance of the 'Big 16' investigations, will be undermined if the ASC is seen to favour civil action.

1.21 The Committee believes that the ASC must have an obligation to investigate matters which may involve serious criminality at least to the stage where an informed decision on whether or not to prepare a brief for the DPP can be made.¹⁹ If a situation emerges where serious criminality in one area of activity does not expose the perpetrators to criminal prosecution then the law will again be brought into disrepute. The Committee agrees with the DPP's view that the demonstrated willingness of the ASC and the

15 DPP Position Paper, op cit, p.13.

16 *ibid.*, p.17.

17 Rozenes, op cit, p.45.

18 *ibid.*, p.14.

19 The definition of 'serious criminality' is difficult. The ASC and the DPP both use the term in documents but are vague as to its precise meaning for their organisations. An official of the DPP suggested that a number of factors would have to be considered; for example, the nature of the offence - fraud; dishonesty etc; whether it was indictable; whether imprisonment was likely and what other sentencing options are available.

DPP to prosecute and seek punishment of corporate offenders is a major deterrent to criminal behaviour.

The Responsibilities of the ASC and the DPP

1.22 There are two key decisions to be made with regard to any proposed criminal prosecution. The first rests with the ASC; when investigating a breach of the law and perhaps taking civil action it must form a view as to whether a serious criminal breach may have occurred and whether it is prepared to devote the resources to investigate the matter to an extent necessary to prepare a brief for the DPP. The ASC wishes to have a discretion as to how it will handle a particular case to achieve the best outcome for shareholders, creditors and itself as a regulator.

1.23 The DPP wishes to be reassured that where a matter may involve serious criminality then it will be investigated with a view to prosecution.

The DPP is not confident that all matters appropriate for prosecution as offences under the Corporations Law are being referred to it by the ASC.²⁰

The DPP's concern is that the decision whether or not to continue the investigation with a view to prosecution will be made on the basis of criteria that reflect fairness and consistency, not the unstated, internal imperatives of the investigating agency. Clarifying the process and criteria involved in making this decision would remove much of the existing tension between the two agencies.

1.24 The existing *Prosecution Policy of the Commonwealth* provides a means of reconciling these views. The policy states that:

... fairness need not mean weakness and consistency need not mean rigidity. The criteria for the exercise of this discretion [the decision to prosecute] cannot be reduced to something akin to a mathematical formula; ... The breadth of factors to be considered in exercising this discretion indicates a candid

20 DPP Position Paper, op cit, p.22

recognition of the need to tailor general principles to individual cases.²¹

It provides ample discretion. The principal matter that must be considered is whether there is a reasonable prospect of a conviction being secured. There is no expectation that resources will be poured into the quixotic pursuit of hopeless cases.

1.25 The ASC's need for flexibility is met by the 'Factors which may arise for consideration in determining whether the public interest requires a prosecution' in para 2.10 of the *Prosecution Policy*. Among these factors are:

- . whether the offence is of a technical nature;
- . the availability and efficacy of any alternatives to prosecution;
- . whether the alleged offence is of considerable public concern; and
- . the likely length and expense of a trial.

1.26 The Committee recognises this policy applies to the decision to prosecute however it believes that the *Prosecution Policy* could, with modifications, form the basis for guidelines for the decision to investigate breaches of the law with a view to prosecution or to seek civil sanctions.

1.27 In making these decisions it is desirable that the ASC consider the views of the DPP. There will always be legitimate differences as to how best to proceed in a particular case. However, when considering factors such as the probability of a successful prosecution or the likely length of a trial it is desirable that the ASC consult the DPP and keep it advised of the decisions being taken. Equally it is important that the DPP acknowledge that the ASC is ultimately the corporate regulator and accepts that it has both the expertise and the responsibility to decide how best to respond to a particular case.

21 *Prosecution Policy of the Commonwealth*, (Canberra 1990), p.3.

1.28 The second decision to be made rests with the DPP; on the basis of the results of the investigation by the ASC will it launch a prosecution? This decision is made having regard to the *Prosecution Policy*. The DPP was at pains to emphasise the independent statutory role of his office noting that while:

... the views of referring agencies are always considered. Ultimately, however, it is the DPP which has the statutory responsibility to decide whether a prosecution proceeds. ... The DPP is independent of both political considerations and idiosyncratic views of the investigating agency when considering the question of prosecution.²²

The Working Relationship

1.29 It is at this stage that the working relationship between the ASC and the DPP is least satisfactory. The ASC complained to the Committee that situations arose where the DPP would only pursue a small number of charges from an extensive range of briefs provided by the ASC. This was both frustrating for the ASC and, as far as outcomes are concerned, a waste of resources. The DPP viewed the problem differently. It queried the extent to which work referred to the DPP was in fact complete:

In a significant number of the large and complex matters referred by the ASC to the DPP the investigation has been substantially incomplete.²³

1.30 Further, the DPP questioned the reasons for the referral of material it considered incomplete:

In a number of cases the referral of matters by the ASC to the DPP appears to have been motivated by a desire to comply with a deadline imposed internally by ASC management and publicly announced.²⁴

22 DPP Position Paper, op cit, p.11-12.

23 ibid., p.23.

24 ibid., p.23.

1.31 Matters which the DPP considers require further work are quite properly returned to the ASC for further work. It should be noted here that the DPP is not an investigatory body; it relies on referring agencies to carry out investigations. Disputes as to what constitutes material useable in a prosecution and reliable evidence are exacerbated by the view of the DPP on the proper roles for the two organisations:

... once a matter is earmarked for prosecution ... the ASC must become the servant of the process. It can no longer play a role where it makes decisions about how much, which witnesses, which barristers, which accused, what charges and when ... ²⁵

Thus where the DPP considers material to be unsatisfactory or requires further work to be done this is an added burden on the resources of the ASC. Given that the ASC meets the cost of both investigation and prosecution it is a situation almost designed to produce hostility. The ASC feels compelled to commit resources at the behest of the DPP, while the DPP feels that the ASC can interfere with its prosecutorial function by determining the level of resources available. For both agencies it is an unsatisfactory situation.

1.32 The Committee believes that the present financial arrangements with regard to funding prosecutions exacerbates the tensions between the two organisations and, is at the same time, inefficient. Once a matter has been referred to the DPP and that agency has taken the decision to prosecute then the resources necessary to conduct the prosecution should be controlled by the DPP. Decisions on how to conduct the prosecution, what charges to pursue and what barrister to use should be internal to the DPP.

1.33 In an unpublished letter to the Committee the ASC Chairman indicated that the two organisations often disagreed on what constituted reliable evidence -the ASC supplied records of evidence obtained in examination which it believes can be relied on in criminal proceedings whereas the DPP requires direct statements.

As a consequence of their view, the DPP requires the ASC to re-do the investigation process already

25 Rozenes, op cit, p.7.

completed, by the preparation of witnesses statements.

1.34 The question of the quality of the material provided by the ASC to the DPP has been in dispute for some time. The issue seems to be resolvable. In part it is a semantic dispute; the term 'brief' is used by both parties to embrace a wide range of concepts. The DPP appears to use the term in the precise sense to mean the documentation necessary to take a case to court whereas the ASC uses it somewhat more broadly to encompass investigation records and other material from which a brief (narrowly defined) may be constructed. What constitutes a brief in a criminal prosecution should not be in dispute. When a matter is transferred to the DPP for a decision on prosecution it should be in the form required by the prosecutor. Technical questions on what constitutes reliable evidence should similarly be resolved - they should never have been allowed to become a matter for public dispute in the first place.

1.35 Mr Hartnell agreed with Committee members who suggested that a system in which investigators and prosecutors were separated and did not work together throughout the process was not satisfactory. The ASC's investigatory resources were not used efficiently:

It is much better in my opinion to have a strategy which says that the prosecutors and the investigators from day one should work closely together; take strategic decisions together [and] identify the end result they are trying to get as early as possible ...²⁶

The DPP agreed that it should become involved with the ASC at a much earlier stage in investigations which will probably give rise to a criminal prosecution '... in an effort to direct the investigation towards some manageable form of trial'.²⁷

1.36 Involvement of the DPP at an earlier stage in the investigatory process would help to solve many of these problems at a practical level. Consultation on what parts of an investigation should be pursued and on the best way to present evidence would remove a lot of the friction in the

26 Hartnell, *op cit*, p.22.

27 Rozenes, *op cit*, p.5.

existing relationship. However the importance of the independent role of the DPP must be borne in mind. Committee members noted that the existing system did build in a check on over-enthusiastic investigators or prosecutors and protected the rights of the individual by having an independent prosecuting body review each brief and make a decision on whether to proceed. The application of the *Prosecution Policy* also contributes to the fair treatment of the accused. Necessary cooperation at a practical level should not compromise the independence of the agencies and remove this desirable check.

1.37 In dealing with the medium-term problem of the backup of complex prosecutions 'left over' from the 1980's changes suggested above will assist the process. However it may be necessary to provide additional short term funding to both agencies targeted at this specific issue to assist in the completion of these prosecutions. If the demands of these cases are such that the ASC is having difficulty in allocating sufficient trained investigators to them then consideration should also be given to further secondments of experienced investigators from Federal and State police forces. These secondees could assist with the national priority cases and also bolster the training resources available to the ASC to help overcome the deficiencies that the ASC recognises in such areas as presenting criminal briefs to the DPP.

1.38 In the course of the hearings a further issue was raised which contributes to the unsatisfactory relationship between the two agencies. The DPP notes that in some ASC Regional Offices restrictions have been placed on the contact between ASC investigators and DPP lawyers with the requirement that all communication be through an ASC lawyer. This seems yet another issue which common sense could resolve. The DPP clearly feels that this is an attempt to obstruct his officers. If there is a clear operational need for this practice then it should be explained to the DPP and applied in a way that minimises friction. It is also important that inter-agency practices be applied uniformly across the whole agency.

Prosecution of Corporate Crime Under State Laws

1.39 The DPP is also concerned that the ASC has placed unduly restrictive conditions on prosecutions for corporate offences under the laws of the States. Many State *Crimes Acts* contain provisions either relating specifically to corporate crime or more generally to fraud, false pretences or deception which are useful particularly where no fiduciary relationship exists between an individual and a company. The Committee did not pursue this

question. However concerns have been expressed elsewhere that State police forces are frustrated by what they perceive as a peripheral role in corporate crime and fraud. A recent article in *Business Review Weekly* claims that, because State police forces are not delegated to act under the corporations legislation, they must rely on the ASC to investigate breaches of the *Corporations Law*. It was suggested that these matters were not accorded the priority by the ASC which the police considered appropriate²⁸. The Committee may seek further evidence on this as a separate issue.

Michael Goshan
Chairman

28 *Business Review Weekly*, 4 September 1992, Watchdogs Search for Authority, p.28.



Attorney-General

The Hon. Michael Duffy M.P.
Parliament House
Canberra ACT 2600

Mr A G Hartnell
Chairman
Australian Securities Commission
GPO Box 4866
SYDNEY NSW 2001

Dear Mr Hartnell

During the last several years the Government has accorded the highest priority to putting in place a fully effective scheme for the national regulation of companies and securities and the investigation and punishment of corporate wrongdoers.

To that end the Government has placed significant financial and other resources at the disposal of your Commission and the Director of Public Prosecutions, and other agencies.

It is the expectation of the Government, the business community and the investing public that the Commission and the DPP should engage in the closest collaboration to ensure the optimum use of their resources and the speediest and most efficient investigation, trial and punishment of corporate wrongdoers.

I have received assurances from you and from the Director of Public Prosecutions from time to time that your organisations are pursuing all available avenues to achieve the Government's objectives by appropriate cooperative endeavours.

It is, however, now plain to me from recent correspondence between you and Mr Rozenes, and from the evidence each of you has recently given to the Parliamentary Joint Committee on Corporations and Securities, that the working relationship between your two organisations is, in important respects, breaking down.

The maintenance of a strong cooperative spirit, and effective collaborative arrangements, between the Commission and the DPP is essential to the proper investigation and enforcement of the Corporations Law and the general criminal law relating to corporate fraud.

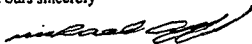
As the responsible Minister, I can no longer stand by in the hope that the Commission and the DPP will soon put their differences behind them and fulfill the Government's proper expectations of them in enforcing the law against corporate wrongdoing.

I am, therefore, of the view that I have no choice but to move in accordance with section 12 of the Australian Securities Commission Act to give a direction to the Commission that will ensure that it discharges its functions and exercises its powers in a manner consistent with the expectations outlined above.

I am preparing draft guidelines for the purposes of consultation in accordance with section 12 of the Act. I will let you have a copy of the draft guidelines as soon as practicable.

As this matter has been the subject of evidence given before the Parliamentary Joint Committee on Corporations and Securities, I am forwarding a copy of this letter to the Chairman of the Committee. In view of the publicity attaching to this matter, I propose to issue a press release attaching copies of this correspondence.

Yours sincerely



MICHAEL DUFFY



Attorney-General

The Hon. Michael Duffy M.P.
Parliament House
Canberra ACT 2600

Mr Michael Rozenes QC
Director of Public Prosecutions
Hinkler Building
25 Kings Avenue
BARTON ACT 2600

Dear Mr Rozenes

During the last several years the Government has accorded the highest priority to putting in place a fully effective scheme for the national regulation of companies and securities and the investigation and punishment of corporate wrongdoers.

To that end the Government has placed significant financial and other resources at the disposal of the Director of Public Prosecutions and the Australian Securities Commission, and other agencies.

It is the expectation of the Government, the business community and the investing public that the DPP and the Commission should engage in the closest collaboration to ensure the optimum use of their resources and the speediest and most efficient investigation, trial and punishment of corporate wrongdoers.

I have received assurances from you and from the Chairman of the ASC from time to time that your organisations are pursuing all available avenues to achieve the Government's objectives by appropriate cooperative endeavours.

It is, however, now plain to me from recent correspondence between you and Mr Hartnell, and from the evidence each of you has recently given to the Parliamentary Joint Committee on Corporations and Securities, that the working relationship between your two organisations is, in important respects, breaking down.

The maintenance of a strong cooperative spirit, and effective collaborative arrangements, between the DPP and the ASC is essential to the proper investigation and enforcement of the Corporations Law and the general criminal law relating to corporate fraud.

As the responsible Minister, I can no longer stand by in the hope that the DPP and the ASC will soon put their differences behind them and fulfill the Government's proper expectations of them in enforcing the law against corporate wrongdoing.

I am, therefore, of the view that I have no choice but to move in accordance with section 8 of the Director of Public Prosecutions Act to give a direction to the DPP that will ensure that it discharges its functions and exercises its powers in a manner consistent with the expectations outlined above.

I am preparing draft guidelines for the purposes of consultation in accordance with section 8 of the Act. I will let you have a copy of the draft guidelines as soon as practicable.

As this matter has been the subject of evidence given before the Parliamentary Joint Committee on Corporations and Securities, I am forwarding a copy of this letter to the Chairman of the Committee. In view of the publicity attaching to this matter, I propose to issue a press release attaching copies of this correspondence.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Michael Duffy', written in a cursive style.

MICHAEL DUFFY

PAPER BY THE ATTORNEY-GENERAL RELATING TO THE GIVING OF
DIRECTIONS TO THE AUSTRALIAN SECURITIES COMMISSION AND THE
DIRECTOR OF PUBLIC PROSECUTIONS

When this Government introduced the new national companies and securities scheme on 1 January 1991, it made a number of important commitments to investors and to Australian business.

No commitment was more important than the commitment to ensure that Australia would enter upon a new era of effective investigation and prosecution of corporate wrongdoing.

The Government, and this Parliament, have backed that commitment in the provision of extensive investigative and prosecutorial resources to the Australian Securities Commission and the Commonwealth Director of Public Prosecutions.

It is clear that both organisations are already delivering substantially on that commitment. As I recently informed the House of Representatives in answer to a Question Without Notice put to me by the honourable member for Higgins on 10 September, the record of ASC and DPP enforcement action to date is an impressive one.

In 1991-1992 alone there were 668 cases in which the ASC initiated court proceedings. Of these, 539 were criminal cases and 129 were civil cases. Some 36 significant convictions, and 314 minor convictions, were recorded in that year.

As at 30 June 1992 there were 116 serious criminal trials under way and 77 civil trials. In the 16 priority cases undertaken by the ASC, 8 criminal, and 6 civil, actions have been commenced.

That record of achievement has only been possible with collaboration and cooperation between the ASC and the DPP.

The Government recognises that it is inherent in the functions of these two organisations that there will be tensions between the Australian Securities Commission as the regulator charged with responsibility for investigations and the Director of Public Prosecutions having responsibility for the prosecution of serious offences arising from such investigations.

In particular, it is to be expected that the regulator will focus on the need to see that penalties are promptly imposed on corporate wrongdoers at the conclusion of an investigation so as to set an example to other would be wrongdoers, while the prosecutor, on the other hand, will naturally focus on the need to carefully evaluate the information collected by the investigator,

and to require supplementary investigation where appropriate, so as to ensure that only fully investigated and supportable cases are presented to the courts.

During August and September it became clear from statements by the Chairman of the ASC and the Director of Public Prosecutions – including evidence before the Parliamentary Joint Committee on Corporations and Securities – that in a small but significant number of cases disagreements had arisen that went well beyond the natural tensions I have described, and that significant philosophical and operational difficulties were threatening to disrupt the joint efforts of the organisations.

Such differences have the potential to stifle the crucial work of these organisations in achieving the Government's commitment to effective investigation and prosecution of corporate wrongdoing. Differences of this kind cannot be allowed to fester.

It is for that reason that I decided to take the action reflected in the direction which has now been tabled.

As a prelude to that action, on 10 September I handed to the Chairman of the ASC and the Director of Public Prosecutions letters advising them of my concern that the relationship between the two organisations was, in certain respects, breaking down and foreshadowing the giving by me of a direction that would ensure the fulfilment of the Government's expectations of them in enforcing the law against corporate wrongdoing.

For the purpose of consultations required by section 12 of the Australian Securities Commission Act and section 8 of the Director of Public Prosecutions Act, I wrote to the Chairman of the ASC and the Acting Director of Public Prosecutions on 25 September inviting their comments on a draft direction that I forwarded with that letter.

Each responded to me in writing offering comments and these I have taken into account in formulating the direction which has been tabled today.

The detail of the direction I have given to the ASC and the DPP is largely self-explanatory and I need not rehearse all of its provisions.

The emphasis in the direction on putting in place appropriate arrangements to ensure collaboration and cooperation and systematic joint review of investigative and prosecutorial action should, however, be noted.

Equal emphasis is given to the need for areas of disagreement to be readily identified and quickly resolved within each organisation or, failing such resolution, immediate reference to

the National Steering Committee on Corporate Wrongdoing which is to be established in accordance with the direction.

The principal role of that Committee will be to oversee compliance with the guidelines set out in my direction and to seek to resolve by conciliation any disagreements that cannot expeditiously be resolved at the inter-organisational level.

The National Steering Committee will consist of the heads of the two organisations and the Secretary to my Department who will be convenor.

The guidelines in the direction will also ensure that a proper balance is maintained between criminal and civil enforcement and that the ASC gives appropriate attention to the investigation of breaches of the general criminal law as well as to breaches of the Corporations Law.

My decision to give a direction to two independent statutory authorities of the stature of the ASC and the DPP was not taken lightly. Both the Chairman of the ASC and the Director of Public Prosecutions are aware of the acute sense of disappointment that I have felt in taking this unprecedented action.

I have proceeded with the direction because I believe the Government cannot put at risk the fulfilment of its expectations, and those of Australian investors and business, that the ASC and DPP will work harmoniously and concertedly to provide Australia with a standard of investigation and prosecution of corporate wrongdoing that is second to none.

SERIOUS CORPORATE WRONGDOING: DIRECTION RELATING TO INVESTIGATION AND ENFORCEMENT

PREAMBLE

A. It is the policy of the Commonwealth Government that the maintenance of a corporate business environment that maximises efficiency and investor confidence requires the striking of an appropriate balance between self-regulation by market participants and effective supervision, investigation and enforcement by the national regulator, the Australian Securities Commission ('ASC').

B. Where an investigation by the ASC relates to conduct that may constitute a serious offence under the Corporations Law or the general criminal law of Commonwealth or of a State or Territory, it is the view of the Government that the ASC and the Director of Public Prosecutions ('DPP') should collaborate to the fullest extent possible to expedite and facilitate the completion of that investigation and the prosecution of any serious offence the prosecution of which is supported by evidence gathered during the investigation.

C. Recognising that the enforcement powers of the ASC extend also to the institution of civil proceedings in respect of corporate wrongdoing, it is the view of the Government that civil proceedings should not, as a general rule, be regarded as an alternative to criminal proceedings but that each should be seen as complementing the other and that an assessment should be made in every case whether civil proceedings, criminal proceedings, or both, are appropriate in the interests of justice.

D. The Government considers that in every case in which there is a reasonable prospect that an investigation may disclose evidence of the commission of a serious offence, such assessment should involve the fullest consultation and cooperation between the ASC and the DPP. At the same time, the Government recognises that circumstances can arise in which the institution of civil proceedings, including the seeking of interlocutory relief, by the ASC must necessarily be taken at short notice and without the opportunity for prior consultation with the DPP.

DIRECTION

Noting that cooperation and collaboration between the ASC and the DPP has, in certain respects, fallen short of the Government's expectations, I, Michael Duffy, the Attorney-General of the Commonwealth, hereby direct, in pursuance of section 12 of the Australian Securities Commission Act 1989 and section 8 of the Director of Public Prosecutions Act 1983, the ASC and DPP to develop and implement policies for the exercise and discharge of their respective powers and functions so as to comply with the following guidelines.

GUIDELINES

Collaboration and Cooperation

1. The ASC and the DPP shall put in place forthwith and maintain in each State and mainland Territory standing arrangements for the fullest collaboration and cooperation at all levels between the two organisations in the discharge of their respective functions in relation to the investigation and prosecution of corporate wrongdoing.
2. In particular, those standing arrangements shall make provision for:
 - the regular joint review, ordinarily not less than monthly, at the senior executive level of both organisations in each region of all investigations and prosecutions

underway or under contemplation in which the ASC and the DPP have a common interest;

- the early identification of areas of disagreement between the ASC and the DPP and the speedy resolution of such disagreements at the regional level;
- the immediate reference to the Chairman of the ASC and the Director of Public Prosecutions of a disagreement that cannot be speedily resolved at the regional level; and
- keeping the National Steering Committee on Corporate Wrongdoing ('National Steering Committee') fully informed regarding compliance with these guidelines in each region.

Investigation of General Criminal Law Offences

3. In the course of an investigation into apprehended serious corporate wrongdoing, the ASC shall give the same consideration to identifying breaches of the general criminal law of the Commonwealth or a State or Territory as it gives to the examination of conduct that is a breach of the Corporations Law.

Cooperation in Respect of Investigations

4. Where, in the course of an investigation, the ASC concludes that the preponderance of corporate wrongdoing constitutes a serious offence or offences under the general criminal law rather than a serious offence or offences under the Corporations Law, and seeks the agreement of another more appropriate agency to the transfer of the investigation to that agency, the ASC shall continue the investigation into such serious offence or offences under the general criminal law unless and until that other agency accepts the transfer of the investigation.

Consultations in Respect of Civil Proceedings

5. Except where the exigencies of the particular case prevent prior consultation, the ASC shall, before taking civil enforcement action in any matter in respect of which it considers that serious corporate wrongdoing of a criminal nature may have occurred, consult with the DPP regarding the appropriateness of taking such civil proceedings in the light of the possibility that criminal enforcement action may also be available.

Resolution of Disagreements

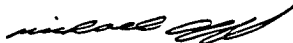
6. Where any dispute arises between the ASC and the DPP that cannot expeditiously be resolved, the ASC and the DPP shall immediately provide full reports on the matter to the National Steering Committee which will seek to resolve the matter by means of conciliation.
7. In the event that the National Steering Committee is unable expeditiously to resolve the issue, it shall refer the matter to the Attorney-General forthwith.

National Steering Committee on Corporate Wrongdoing

8. The ASC, the DPP and the Attorney-General's Department shall collaborate in the establishment of a National Steering Committee on Corporate Wrongdoing.
9. The Committee shall consist of the Secretary to the Attorney-General's Department, who shall be the Convenor, the Chairman of the ASC and the Director of Public Prosecutions.

10. The functions of the Committee will be to oversee, and report to the Attorney-General, on compliance with these guidelines and to seek to resolve all disputes referred to the Committee in accordance with these guidelines.
11. The Committee shall meet not less than quarterly and shall convene at the earliest practicable time between quarterly meetings to seek to resolve disputes that, in the opinion of the Convenor, appear to require immediate consideration.
12. The Committee will be serviced from the resources of the Attorney-General's Department.
13. The National Steering Committee shall provide a report to the Attorney-General within three months of the end of each financial year regarding its activities during that year.

Dated this *30th* day of *September* 1992.



MICHAEL DUFFY