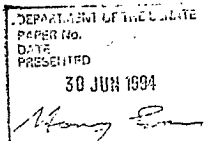


The Parliament of the Commonwealth of Australia



**REPORT ON THE ANNUAL REPORTS OF
THE AUSTRALIAN SECURITIES COMMISSION,
THE COMPANIES AND SECURITIES
ADVISORY COMMITTEE, THE COMPANIES
AUDITORS AND LIQUIDATORS DISCIPLINARY
BOARD AND THE AUSTRALIAN ACCOUNTING
STANDARDS BOARD
1992 - 1993**

**PARLIAMENTARY JOINT COMMITTEE ON
CORPORATIONS AND SECURITIES**

JUNE 1994

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**PARLIAMENTARY JOINT COMMITTEE ON
CORPORATIONS AND SECURITIES**

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Mr Lindsay Tanner MP

Secretary

**Andrew Snedden
The Senate
Parliament House
CANBERRA ACT 2600**

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INTRODUCTION

1. The *Australian Securities Commission Act 1989* established the Australian Securities Commission (ASC), the Companies and Securities Advisory Committee (CASAC), the Corporations and Securities Panel (the Panel), the Companies Auditors and Liquidators Disciplinary Board (the Disciplinary Board) and the Australian Accounting Standards Board (AASB).¹ The Act requires annual reports from the ASC, the Advisory Committee, the Panel, the Disciplinary Board and the Standards Board to be tabled in both Houses of the Parliament.²

2. The ASC is required by Section 138 of the ASC Act to include in its report information on its goals, progress toward achieving those goals, priorities, and problems³. The statutory requirement to report to the Parliament on problems is explicit: the annual report is to 'describe any matters that, during the year, have adversely affected the Commission's effectiveness or have hindered the Commission in pursuing any of those goals and objectives'.

3. Section 243(b) of the ASC Act states that the Committee's duties are:

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;

4. The Committee has examined the annual reports for the year 1992-93 for each of the bodies established by the ASC Act. In addition, the Committee held a public hearing with the ASC on 20 April 1994 at which the Committee sought further information on some of the matters mentioned in the Commission's Annual Report. The Committee has decided to report to the Parliament on its examination of the Annual Reports and on issues raised during its public hearing with the ASC.

ANNUAL REPORT OF THE AUSTRALIAN SECURITIES COMMISSION

A. General Content of the Report

5. The Committee is concerned that the ASC Annual Report provides a limited analysis of its role and activities. The Committee considers that the annual report should be a vehicle not simply for recording statistics and major events, it should

¹ *Australian Securities Commission Act 1989*, sections 7, 145, 171, 202 and 224 respectively.

² *ibid.*, sections 138, 164, 183, 214 and 234 respectively.

³ *Australian Securities Commission Act*, Section 138(2).

also serve as a vehicle for analysing and interpreting long term developments affecting the ASC and the administration and enforcement of the Corporations Law.

B. Specific Matters

Staffing

6. In the *Report of the Review of Commonwealth Law Enforcement Arrangements*⁴ it was stated that the ASC 'anticipates problems retaining staff with specialist skills as the economy expands' (Review page 70). Similar problems have previously been raised with the Committee⁵ by the ASC; this matter is not mentioned in the Annual Report under review.

Surveillance Programs

7. The Annual Report states that during 1991-92, the ASC visited 284 licensed securities dealers and advisers and took remedial action against 88.7 per cent of licensees. During 1992-93 the ASC visited 338 licensees and took remedial action against 62.7 per cent (Annual Report page 15). These figures suggest a surprisingly high, if slowly declining, level of non-compliance by licensees. However, the Report offers little analysis of how serious the breaches detected were, whether the persistently high incidence reflects a failure to make a significant impact on the problem and no information on the ASC plans in respect of future surveillance programs.

8. The ASC also reported examining 546 sets of financial reports. Nearly 40 per cent required remedial action compared to 41 per cent last year⁶. The ASC post-vetted 428 prospectuses and found that 23 per cent required some remedial action⁷. Ninety-one takeover documents were examined and remedial action was taken in 54 per cent of cases⁸.

⁴ Law Enforcement Review Committee, *Report of the Review of Commonwealth Law Enforcement Arrangements*, Australian Government Publishing Service, February 1994.

⁵ In briefing papers provided to the Committee in September 1991 the ASC discussed the recruitment of SES staff. It stated that:

The salary levels, combined with the inflexibility within the package, has also affected the standard of private sector applicants. The ASC has been fortunate, however, in recruiting some highly skilled people from the private sector who have accepted considerable drop in income in return for the challenges the ASC and its responsibilities offer. Attracting and keeping professional staff with relevant backgrounds, for senior and middle managements positions, will continue to be a challenge.

⁶ ASC Annual Report, page 16.

⁷ ASC Annual Report, page 18.

⁸ ASC Annual Report, page 19.

9. These surveillance programs certainly detect lamentably high levels of failure to comply with the Corporations Law and Regulations. They raise issues about how serious the problems identified are, whether the surveillance programs are helping to identify specific problem areas which are then addressed in education programs or through more specifically targeted compliance programs in future years, and whether the ASC is devoting sufficient resources to these surveillance programs.

Responses to Commercial Applications

10. The Annual Report states that the ASC has 'developed new policy and procedures to enable business to obtain faster, more predictable results when lodging commercial applications with the ASC.⁹ The report states that the number of prospectuses registered within three days of lodgement in NSW rose from 12.5 per cent to 59 per cent, handling time for trust deeds has fallen from 40 days to 14 days and that nationally the proportion of prospectuses being registered within three days of lodgement had risen from 27 per cent to 56 per cent. This improvement in handling times is a very favourable indication of efficiency in the ASC. The Committee believes that the ASC should set goals for these processing operations and report in future years on its success in achieving those goals.

ASC Co-operation with the Australian Bureau of Criminal Intelligence (ABCI)

11. In the *Report of the Review of Commonwealth Law Enforcement Arrangements* the ABCI identified a major external problem as being its inability to gain direct access to information from AUSTRAC, the ASC and the Australian Electoral Commission.¹⁰

12. Appendix 11 of the Review is entitled *Report on Intelligence and Investigative Computer Systems*. It notes as a deficiency of the existing system the inefficiency of current arrangements by which agencies access ASC data. The Review Report goes on to recommend that:

The ASC's budgetary concerns in relation to allowing law enforcement direct access to its data should be addressed so that the ASC provides this service.¹¹

13. These matters raise the more general question of the level of co-operation on day-to-day operational matters between the ASC and other Commonwealth agencies. The Committee expects that such matters will be reported in future Annual Reports.

⁹ ASC Annual Report, page 5.

¹⁰ Report of the Review of Commonwealth Law Enforcement Arrangements, page 78.

¹¹ Report of the Review of Commonwealth Law Enforcement Arrangements, page 110.

Future Reports

14. The Committee sought more information from the ASC on several matters during its public hearing with the ASC on 20 April 1994. The information not covered in the Annual Report which the Committee sought on all those matters was readily provided by the ASC to the Committee during the hearing. The Committee does consider that this material should be available to the Parliament and the public in the ASC's annual report.

C. The 'Big 16' - the ASC Major Investigations

15. During its public hearing with the ASC the Committee reviewed progress on investigation of major 1980's corporate collapses, which came to be known as the 'Big 16'. As well, the Committee heard 'in camera' evidence from the ASC, which it does not intend to publish, on the progress of these investigations. The Committee appreciates these are extremely complex matters which predate the establishment of the ASC in 1991, but it has been concerned about public perception that progress on these matters has been far too slow.

16. The ASC provided the Committee with information about the progress of these matters and outlined that in thirteen of the sixteen cases charges had now been laid and that further progress in these cases is dependant on the court process. One other matter has been concluded, the ASC having determined that there were no grounds for criminal or civil action. Of the remaining two matters, one is the subject of civil action and a report to the Minister and, in respect of the other, the ASC has concluded its investigations although consideration of the matter has not been finalised.

17. During the public hearing the Chairman of the ASC put the view that nominating a list of priority matters, such as the 'Big 16' list, had served a useful purpose at the time of their initiation but that such an approach had now served its purpose. He does not intend to report on the 'Big 16' as such as a special group in future annual reports or to nominate a similar 'hit list' of 'target investigations' in the future. The ASC Chairman said:

The view was put in the annual report that it may not be appropriate in future to continue to refer either to the 16 or to any such list. That still is a view which I hold because I think it tends to put too much emphasis in the first place on the past in the case of the top 16. Virtually each one of those, of course, is a matter that arose before the commission came into existence. I think the list has performed a useful function in focusing attention on those priority matters for investigation. But I am not sure it ought to be seen as the way in which the commission ought to be judged, either generally or in the future,¹²

¹² Committee Hansard, Melbourne, 20 April 1994, page 27.

18. The Committee is satisfied with the evidence it has received from the ASC in respect of the progress on these major investigations. The Committee supports the view of the ASC Chairman that the ASC should not in future report on these matters as a specific group.

19. The Commission also set out in the annual report that its complaints management procedure:

aims to ensure that all investigations into conduct identified after 1 January 1991 are completed within 12 months of the investigation being resourced.¹³

20. If the ASC is able to meet this goal in future investigations it will do much to allay public concern that there are excessive delays involved in the investigation of corporate crime. The Committee supports the ASC's approach in this area. The Committee will review the performance of the ASC in meeting this goal during its examination of future annual reports.

D. Relations between the ASC and the DPP

21. The Annual Report states that the new arrangements put in place as a result of the dispute between the ASC and the DPP in 1992 have been working well and that there have been no disputes requiring formal resolution by the National Steering Committee on Corporate Wrongdoing. Similar assurances have been given directly to the Committee by both the Chairman of the ASC and the Director of Public Prosecutions. Although there have been media reports of friction¹⁴ between the two organisations the Committee is satisfied that the relationship between the two organisations is basically sound and that both organisations are aware of the need to ensure that good relations are maintained.

ISSUES RAISED AT THE PUBLIC HEARING

22. Two other issues, relating to the abuse of the corporate form and the present statutory time limit on initiating actions under the Corporations Law, were raised at the public hearing by Committee members. The Committee draws the Parliament's attention to them.

¹³ ASC Annual Report, page 27.

¹⁴ A report in the Financial Review on 31 March 1994 in relation to the Bond inquiry referred to "the continuing bitter relations behind the scenes between the DPP and the ASC" which was highlighted by public dispute in 1992. The report goes on to say that "the two organisations have observed a wary and suspicious peace since".

Abuse of the Corporate Form

23. The Annual Report states that the ASC has launched a surveillance program targeting directors who are repeatedly involved in company failures¹⁵. While this program may be of some benefit in preventing repeated abuses of the corporate form, it is basically reactive. It is understandably unlikely to prevent abuses of the type that have recently been drawn to the Committee's attention.

24. The Committee has received representations regarding abuse of the corporate form in the textile industry. These representations are that businesses have been structured so that the employees of the business have been employed by a company with limited assets while assets of the business are held by a separate company. If these businesses cease the company employing group employees have no assets with which to pay accumulated holiday pay, long service leave or redundancy payments and are placed in liquidation. Principals of the business retain control of its assets in a separate company where they are not accessible to employees or creditors.

25. Representations have been made to the Committee that a NSW group of companies, the Gazal group, had structured its businesses in this way and that companies in the Gazal group have failed to pay holiday, long service leave and redundancy payments to employees.

26. As well, according to press reports, the Textile, Clothing and Footwear Union has initiated legal action against the directors of a Victorian company, Jeanswear Australia, which went into liquidation a week before Christmas 1993 with staff being told there was no money available for holiday pay, long-service leave and other entitlements.¹⁶

27. The Committee is concerned that the corporate form, while continuing to provide a simple and effective business vehicle, can be deliberately abused so as to avoid obligations to employees and creditors. The Committee will actively pursue the issue of abuse of the corporate form. The Committee will pursue with the ASC the scope and effectiveness of its monitoring program and will, if necessary, recommend amendments to the Corporations Law to prevent this type of abuse.

Statutory Limit on Initiating Actions

28. Recently the ASC Chairman has commented that Section 1316 of the Corporations Law may impede the prosecution of corporate crime, particularly in

¹⁵ ASC Annual Report 1992-93, page 31.

¹⁶ *Melbourne Age*, 13 April 1994.

complex cases.¹⁷ While this matter was not mentioned in the ASC Annual Report, the Committee raised it with the ASC Chairman during its public hearing in April.

29. Section 1316 of the Corporations Law provides that:

1316 Despite anything in any other law, proceedings for an offence against this Law may be instituted within the period of 5 years after the act or omission alleged to constitute the offence or, with the Minister's consent, at any later time.

30. In response to questioning by the Committee about the impact of this provision on the ASC's ability to launch a prosecution the ASC Chairman said that:

To my knowledge, there have been only a handful of instances where consent has been sought and it has been given in each case. But that, of course, is not really an appropriate test.¹⁸

The difficulty is that any such decision is itself capable of being reviewed. You will have noticed that the Monash speech went on to talk about aggressive defendants. The only thing that is certain is that an aggressive defendant's first ploy will be to tie us up, potentially for years, in administrative review of the Attorney-General's decision to extend the time. That is the reason we are not sure why there needs to be a special rule for corporate crime.¹⁹

Rather than putting us in the position of having to go to the Attorney-General in appropriate cases, it is putting the Attorney-General in the position of having to make a decision and having that decision potentially subject to review, which again further delays any prosecution which would be proceeded with.²⁰

We have separated the prosecution decisions from the Attorney's personal keep by creating the Director of Public Prosecutions and, indeed, by creating the Commission. This Commission, unlike its predecessor, has the right to prosecute in its own name. It is only by further statutory provision that you then tie in the director. The director has his usual rights to take over

¹⁷ Australian Financial Review, 4 October 1993; and The Australian Securities Commission as Law Enforcer and Business Facilitator - *Flip Sides of the Same Coin*, speech given by Mr Alan Cameron, Chairman of the Australian Securities Commission at Monash Law School on 12 April 1994.

¹⁸ Committee Hansard, Melbourne, 20 April 1994, page 67.

¹⁹ Committee Hansard, Melbourne, 20 April 1994, page 67. The Monash speech referred to was *The Australian Securities Commission as Law Enforcer and Business Facilitator - Flip Sides of the Same Coin*, a speech given by Mr Alan Cameron, Chairman of the Australian Securities Commission at Monash Law School on 12 April 1994.

²⁰ Committee Hansard, Melbourne, 20 April 1994, page 67.

prosecutions. So we have all of those rights separated from those of the Attorney-General. Why put him back into the process by his having to give that consent? I am just not sure it adds any value in a commercial sense.²¹

31. The Committee views this as an important issue for enforcement of the Corporations Law. There already exists a perception in the minds of many Australians that the law is incapable of dealing effectively with prominent corporate criminals, that complex matters take too long to be investigated and come to trial and that the cost of investigating and pursuing these cases is excessive. That perception is not lessened by having major cases delayed by seemingly interminable reviews of the decision to prosecute.

32. The Committee is concerned that investigation and prosecution of corporate crime not be subject to excessive delay. It is, of course, also important that public funds and court time not be wasted on inappropriate prosecutions. However, necessary checks and balances which protect people from excessive delays already exist. In his evidence given to the Committee the ASC Chairman has said that:

The courts have, in recent years, aggressively defended the rights of people to ensure that they are not subjected to unfair process by reason of delay in bringing criminal proceedings. There are some notorious cases in New South Wales, for example, of which Senator Neal would be aware where quite major prosecutions for very serious offences have been stopped in their tracks by the courts--not the statute of limitation--simply on the basis of fairness.²²

33. The Committee has not conducted any fuller inquiry into this matter to date. Such an inquiry may bring to light evidence that Section 1316 does serve a useful purpose. However, on the basis of the discussions the Committee has held on this matter with the Chairman of the ASC, it considers that the Attorney-General should give early consideration to the possible effect of Section 1316 and its role. The Committee would welcome a reference on this matter if such an inquiry would assist the Parliament in forming a clearer understanding of the application of this section of the Corporations Law.

Recommendation

34. The Committee recommends that the Attorney-General review Section 1316 of the Corporations Law.

²¹ Committee Hansard, Melbourne, 20 April 1994, page 68.

²² Committee Hansard, Melbourne, 20 April 1994, page 67.

Conclusion

35. The Committee is satisfied with the overall presentation of the ASC Annual Report. However, it would like future reports to contain more information particularly:

- * analysis and interpretation of long term developments affecting the ASC and the administration and enforcement of the Corporations Law;
- * matters which have affected the ASC's effectiveness or have hindered the ASC in pursuing its goals and objectives.

OTHER ANNUAL REPORTS

36. In addition to the ASC four other bodies are required to report under the ASC Act. The Committee considers that there reports do not raise any issues to which the urgent attention of the Parliament needs to be drawn. However, Senators and Members may be interested in some of the main features of those reports.

Companies and Securities Advisory Committee

37. The Committee's 1992-93 report outlines the main activities of the Committee over that year. The main areas of activity were:

discussions with the Attorney-General about enhanced statutory disclosure;

the Committee presented its report entitled *Collective Investments: Other People's Money* (Report No 65) to the Attorney General in June 1993;

the Committee advised the Attorney-General on the provisions of Section 232(4) of the Corporations Law (dealing with directors duties). The Committee's proposal was included in the Corporate Law Act 1992; and

the Committee released a Discussion Paper on *Anomalies in the Takeovers Provisions of the Corporations Law*.

Corporations and Securities Panel

38. The report mentions the difficulties the Titan Hills case raised for the Panel and the actions taken (including amendments to the Corporations Law) to overcome those difficulties.

Companies Auditors and Liquidators Disciplinary Board

39. During 1992-93 the Board was involved in 46 matters referred to it by the Australian Securities Commission. These resulted in 17 cancellations of registration, 2 suspensions, 2 admonitions, 1 matter being dismissed and 2 withdrawn. Twenty two matters are pending.

40. The report has suggested that consideration be given to altering the legislation to provide for the Chairperson of the Board having a deputy.

Australian Accounting Standards Board

41. During the year the AASB has been very active. It has finalised and issued 4 Standards, 3 Exposure Drafts and completed revisions of 4 Australian Accounting Standards. It is currently involved in another 11 projects.

42. An auditor is required to send to the AASB a copy of the auditor's report where it is qualified in relation to compliance with applicable accounting standards. The Board notes in its report that it:

suspects that many non-compliances with accounting standards are not notified to the AASB, contrary to the Law.

43. The report also notes that the level of non-compliance has probably decreased since *Accounting Standard AASB 1025: Application of the Reporting Entity Concept and Other Amendments* was introduced. The Committee will check future reports of the Board to determine whether this is a matter of ongoing concern to the Board.



STEPHEN SMITH, MP
CHAIRMAN

JUNE, 1994