

The Parliament of the Commonwealth of Australia

**REPORT ON THE ANNUAL REPORTS OF THE  
AUSTRALIAN SECURITIES COMMISSION  
AND OTHER BODIES:  
1993-1994**

**PARLIAMENTARY JOINT COMMITTEE ON  
CORPORATIONS AND SECURITIES**

**23 OCTOBER 1995**

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**PARLIAMENTARY JOINT COMMITTEE  
ON CORPORATIONS AND SECURITIES**

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Mr Andrew Snedden

The Senate

Parliament House

CANBERRA ACT 2600

## DUTIES OF THE COMMITTEE

Section 243 of the *Australian Securities Commission 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.

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## 1. INTRODUCTION

- 1.1 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 (the Standards Board).<sup>1</sup> 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<sup>2</sup>.
- 1.2 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 problems<sup>3</sup>. 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'.
- 1.3 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;*
- 1.4 The Committee has examined the annual reports for the year 1993-94 for each of the bodies established by the *Australian Securities Commission Act*. In addition, the Committee held public hearings with the Australian Securities Commission on 6 February 1995 and 16 August 1995 at which

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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 *ibid.*, section 138(2).

the Committee sought further information on some of the matters contained 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 hearings with the Australian Securities Commission.

## **2. ANNUAL REPORT OF THE AUSTRALIAN SECURITIES COMMISSION**

### **A. GENERAL CONTENT OF THE REPORT**

- 2.1 In its Report to the Parliament on the ASC's 1992-93 Annual Report<sup>4</sup> the Committee indicated that future reports of the ASC should contain more analysis and interpretation of long-term developments affecting the ASC and the administration and enforcement of the Corporations Law.<sup>5</sup> The Committee notes that the ASC Annual Report provides more information about the role and activities of the ASC than in previous years. The Committee trusts that the provision of such information will continue in future years.

### **B. ISSUES RAISED AT PUBLIC HEARINGS**

#### **Consistency of ASC Administration Between the States**

- 2.2 During the Committee's hearings with the ASC, the Committee raised the issue of the level of consistency in the administration of the Corporations Law between the regional offices of the ASC. In response the Chairman of the ASC, Mr Alan Cameron, indicated that this was an issue of which the ASC was well aware. It was a matter that underlay the ASC's strategic review and the appointment of national program managers to ensure that surveillance and other programs are consistently targeted and that surveillance works equitable across Australia.

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4 Parliamentary Joint Committee on Corporations and Securities, *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*, June 1994.

5 Parliamentary Joint Committee on Corporations and Securities, *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*, June 1994, p. 9.

## NRMA

- 2.3 During the Committee's February hearing with the ASC the Committee discussed the ASC's involvement in the proposed public float of the NRMA. Committee members were concerned about the apparent inaction of the ASC when the NRMA prospectus, which was found to be misleading by the Federal Court, was distributed to 1.8 million NRMA members.
- 2.4 The ASC Chairman explained that the ASC had examined the prospectus but made a judgement that it was not misleading:

*When the Commission was faced with that decision, back at the time the prospectus was lodged for registration, the staff of the Commission, being alert to the theoretical argument that is not strictly accurate to talk about the shares as being free, nevertheless felt on balance that it was not the sort of thing that they should interfere with; that that was a legitimate way of describing it; that the qualifications were there. The court took a different view. We have to learn the lesson of that particular case.<sup>6</sup>*

*Overall, while the Commission obviously should not be satisfied with its performance - in terms that it has allowed the document to be registered and did not challenge it, yet a court has subsequently found that it was misleading and deceptive - the fact is that the court make that decision after the opposing case had been presented by Queens Counsel for some days, ... We get the prospectus lodged for registration; a statutory requirement to register it within 14 days; and, in effect, we do not get the opposing case.<sup>7</sup>*

- 2.5 The Committee is pleased to note that the ASC has taken note of the Court's decision in the NRMA case. The Committee trusts that the ASC will consider any future case which is similar to the NRMA proposal accordingly.

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6 Committee Hansard, Canberra, 6 February 1995, page 123-124.

7 Committee Hansard, Canberra, 6 February 1995, page 124-125.



## ASC/DPP Relations

- 2.6 The Committee considered the relationship between the ASC and the DPP. In evidence, the ASC Chairman indicated that the National Steering Committee on Corporate Wrongdoing meets from time to time; as it is required to do under ministerial direction. However, to date it has not had any disputes to resolve. Instead, the committee performs a useful role of enabling the two organisations to talk about matters of mutual interest.

## Simplification

- 2.7 The Committee also sought the views of the ASC on the Corporate Law Simplification Program. Mr Cameron informed the Committee that he meets regularly with the Simplification Task Force and supports the simplification program.

*From our perspective, the program seems to be working remarkably well and if it produces, as we think it will produce, a corporations law that is intelligible and understandable I think that will be a great advance.<sup>8</sup>*

## Section 50 of the Australian Securities Commission Act

- 2.8 The Chairman of the ASC raised with the Committee his concern over an interpretation by the courts of Section 50 of the Australian Securities Commission Act in a recent case arising from proceedings between the ASC and Adsteam<sup>9</sup>. Section 50 states that:

***SECTION 50 Commission may cause civil proceeding to be begun***

*50. Where, as a result of an investigation or from a record of an examination (being an investigation or examination conducted under this Part or a corresponding law), it appears to the Commission to be in the public interest for a person to begin and carry on a proceeding for:*

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<sup>8</sup> Committee Hansard, Canberra, 6 February 1995, page 131.

<sup>9</sup> *Deloitte Touche Tohmatsu v Australian Securities Commission* (1995) ACLC 161.

*(a) the recovery of damages for fraud, negligence, default, breach of duty, or other misconduct, committed in connection with a matter to which the investigation or examination related; or*

*(b) recovery of property of the person;*

*the Commission:*

*(c) if the person is a company - may cause; or*

*(d) otherwise - may, with the person's written consent, cause;*

*such a proceeding to be begun and carried on in the person's name.*

2.9 In the case the Federal Court of Australia considered the background to the *Australian Securities Commission Act* in determining the Act's intent. The court found that the Parliament intended that proceedings would be commenced in the name of a company without its consent only where the directors were not independent of the wrongdoers or there existed other "most exceptional circumstances".<sup>10</sup>

2.10 In that case Lindgren J said that:

*In my opinion the ASC was bound to take into account the policy of the general law that it is a matter for the directors of a wronged company to determine whether proceedings shall be commenced in its name for the enforcement of its rights, and whether, consistently with the policy underlying and reasons for the exception allowed for in the section, it was in the public interest for proceedings to be begun and carried on in the name of the Company.<sup>11</sup>*

2.11 The Court found that the ASC failed to take this consideration into account in deciding to initiate action. Although the case was decided on other grounds, Lindgren J. indicated that he would have granted relief on this basis.

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<sup>10</sup> Lindgren J, *Deloitte Touche Tohmatsu v Australian Securities Commission* (1995) ACLC 161 at 176

<sup>11</sup> *op cit*, at 177.

2.12 During the Committee's hearings Mr Cameron told the Committee that:

*There is no statutory warrant for that additional qualification being inserted into the section, and we would see it as considerably inhibiting the ability of the Commission to use the section in the way we understood the Parliament intended.<sup>12</sup>*

2.13 This matter is expected to come before the courts again in the near future. The Committee has requested that the ASC keep it appraised of any developments on this issue.

### **Staffing**

2.14 A recurring issue in the Committees discussions with the ASC has been its ability to recruit and retain specialist staff in a highly competitive market. In response to questions from the Committee Mr Cameron said:

*But I would continue to be concerned about our ability inside the framework of the Public Service Act employment to keep people, bearing in mind that we are competing with the private sector and are in the capital cities. It will always be difficult. People who choose to work for the Commission in Melbourne or Sydney are clearly losing money to do so. We, therefore, expect a turnover of them. What I would like to see happen - and I might have spelt it out in the report - is that we would be seen as a professional employer of choice for people who wish to practice in securities and futures markets in the future. But that is an aim that will be hard to achieve while we are so uncompetitive in salary terms.<sup>13</sup>*

2.15 At present it appears that the turnover rate of ASC staff is not out of line with the public service generally. Although it remains difficult for the ASC to attract and retain people with specialist skills, particularly in accounting, the ASC has not expressed any concerns that its effectiveness is being significantly impeded by staffing difficulties. The Committee will continue to monitor this issue.

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12 Committee Hansard, Canberra, 6 February 1995, page 108.

13 Committee Hansard, Canberra, 6 February 1995, page 112.

## Conflicts of Interest

- 2.16 The Committee discussed with the ASC Chairman the possibility of conflicts of interest arising when senior officers of the ASC are recruited from, or return to, the private sector. The nature of the ASC's activities requires that it recruit the most experienced personnel available. This will often mean recruiting experienced personnel from the private sector and facilitating their return to the private sector at the end of their appointment. The Committee endorses this practice. However, it will inevitably give rise to some possible conflicts of interest.
- 2.17 The *Australian Securities Commission Act* recognises that potential conflicts of interest may arise from time to time. The Act requires the Chairperson, members and staff to disclose any interests which may give rise to a conflict of interest (Sections 123 - 126). The ASC Chairman made the point that, placing stringent conditions on the ability of people leaving the Commission to return to their normal practice, may make it more difficult to attract people as members of the Commission.
- 2.18 The Committee notes, for example, that Mr Joe Longo a Western Australian legal practitioner, who had previously acted for Mr Alan Bond, was recruited by the Western Australian regional office of the ASC. The Western Australian Regional Commissioner made it clear at the time of Mr Longo's appointment that he would not be involved in any matters relating to investigations of the Bond companies.
- 2.19 The Committee questioned the ASC on the position of Ms Lyn Ralph in her roles as both Deputy Chairman of the ASC and a Director of the NRMA and on the arrangements the previous Chairman of the ASC, Mr Tony Hartnell, had entered into with his law firm on his appointment as Chairman. Both of these matters had been the subject of media comment and discussion. In each case the ASC Chairman assured the Committee that the individual concerned had not been involved in matters of current consideration by the ASC where a conflict of interest may have arisen.
- 2.20 In response to the Committee's question about Ms Ralph's situation, Mr Cameron said that:

*Her position on the NRMA was well known and she has, therefore, separated herself completely from decisions involving the NRMA. That was not a particularly difficult thing to do because, in the*

*ordinary course, they would not have come near her anyway. So it has never been, as I have seen it, a matter of particular difficulty.*<sup>14</sup>

2.21 In commenting on Mr Hartnell's position Mr Cameron said that:

*... the law works on the assumption that there will be conflicts of interest and provides a mechanism for ensuring that they do not impact upon our decision-making. The assumption is that the Chairman and the members of the Commission will have other interests, and we will disclose them or otherwise deal with them and exclude ourselves from making decisions in those cases. We do that, and he did that. Therefore, I do not think it ever produced quite the degree of difficulty that was reported as being generated.*<sup>15</sup>

2.22 The Committee remains uncomfortable that Mr Hartnell's arrangements with his law firm were not disclosed at the time of his appointment. The Committee is of the view that it would be appropriate that any such arrangements be disclosed. It considers that although there may have been no adverse impact on the operations of the ASC the failure to disclose those arrangements may have had the potential to affect public confidence in the ASC.

**The Committee recommends that when Commissioners or senior staff of the ASC are recruited from private enterprise they be required to make a full, confidential, disclosure of any arrangements with previous or future employers.**

**The Committee also recommends that the Attorney-General give consideration to applying the same requirement to other relevant government departments and agencies.**

### **Duration of Current ASC Investigations**

2.23 In its previous Annual Report the Commission stated that its complaints management procedure:

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14 Committee Hansard, Canberra, 6 February 1995, page 115.

15 Committee Hansard, Canberra, 6 February 1995, page 113.

*aims to ensure that all investigations into conduct identified after 1 January 1991 are completed within 12 months of the investigation being resourced.*<sup>16</sup>

- 2.24 The Committee indicated on its previous Report to the Parliament on the Annual Reports referred to it that it would review the performance of the ASC in meeting this goal. The Commission's 1993/94 Annual Report states that:

*During the year, of 137 investigations completed into alleged serious contraventions, 52 met the 12 months' target. The ASC expects to improve this performance next year.*<sup>17</sup>

- 2.25 During the Committee's February hearing the Chairman of the ASC indicated that the level of performance had further improved and that 90 per cent of investigations now met that performance indicator.<sup>18</sup> The Committee will continue to review the performance of the ASC in meeting this goal during its examination of future annual reports.

### **Continuous Disclosure**

- 2.26 The Committee also asked the Chairman of the ASC about the operation of the new continuous disclosure regime. Mr Cameron advised the Committee that the rate of disclosures was significant. Approximately 6,000 disclosures were lodged between September and December. Overall the promptness and completeness of disclosures has not been a source of considerable concern. However, he noted that these disclosures were overwhelmingly from listed companies and there may be some concern about the low rate of disclosures being received from unlisted entities.<sup>19</sup>

### **Class Orders**

- 2.27 At its Sydney hearing the Committee discussed with the ASC the use of class orders to relieve certain corporations of their obligations under the

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16 Australian Securities Commission, *Annual Report 1992/93*, page 27.

17 Australian Securities Commission, *Annual Report 1993/93*; page 24.

18 Committee Hansard, Canberra, 6 February 1995, page 122.

19 Committee Hansard, Canberra, 6 February 1995, page 130.

Corporations Law.<sup>20</sup> Committee members were concerned that the ASC has the power, by issuing class orders, to effectively amend the law without such changes being subject to the scrutiny of Parliament, or the Ministerial Council on Corporations. The Committee is also concerned about the extent to which all of the interested parties are consulted by the ASC prior to its making a class order. The Committee will continue to pursue this issue with the ASC at future hearings.

### **Abuse of the Corporate Form**

- 2.28 In its 1994 Report<sup>21</sup> the Committee commented on the abuse of the corporate form in the textile industry and indicated that it would continue to observe development on this issue and on the scope and effectiveness of ASC activity on this issue. The issue refers to the phenomenon where directors of a company, which has no substantial assets, allow the company to collapse leaving no funds to satisfy the claims of creditors and employees, and then set up a new company to continue trading in the same business.
- 2.29 In June 1995 the ASC announced that it would target “strings of companies” or “phoenix” company chains in a Community Response Project. The ASC said that it would particularly focus on directors who have a history of moving from company to company, leaving a string of debts behind them.
- 2.30 In August 1995 the Attorney-General announced that the Corporations Law Simplification Task Force would examine this issue as part of Stage 3 of the Simplification Program. It will look at how to tighten up the rules on the disqualification of people who abandon companies with unpaid debts and without winding them up. The Law Reform Committee of the Parliament of Victoria has also examined and this issue and has recommended changes to the Corporations Law to deal with this issue<sup>22</sup>.

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20 Committee Hansard, Sydney, 16 August 1995, pp 173-195.

21 Parliamentary Joint Committee on Corporations and Securities, *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*, June 1994, p. 6.

22 Law Reform Committee, Parliament of Victoria, *Curbing the Phoenix Company*, May 1995.

- 2.31 The Committee is encouraged by the interest being taken in this issue and welcomes developments since it last reported on this matter. The Committee will continue to monitor developments on this issue.

### 3. CONCLUSION AND RECOMMENDATION

- 3.1 The Committee is satisfied with the overall presentation of the ASC Annual Report.

#### **Recommendation**

**The Committee recommends that when Commissioners or senior staff of the ASC are recruited from private enterprise they be required to make a full, confidential, disclosure of any arrangements with previous or future employers.**

**The Committee also recommends that the Attorney-General give consideration to applying the same requirement to other relevant government departments and agencies.**

### 4. OTHER ANNUAL REPORTS

- 4.1 In addition to the ASC four other bodies are required to report under the ASC Act. The Committee considers that these 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.

#### *Australian Accounting Standards Board*

- 4.2 During the year the AASB finalised and issued standards on Accounting for Employee Entitlements (AASB 1028) and Half-Yearly Accounts and Consolidated Accounts (AASB 1029). In conjunction with the Public Sector Accounting Standards Board it finalised and issued an Australian Accounting Standard on Accounting for Employee Entitlements (AAS 30). The Boards was also involved in work on:



- Measuring Liabilities at Present Value;
- Comparison of Australian and International Standards;
- Depreciation of Non-Current Assets;
- Financial Institutions - disclosures;
- Financial Instruments;
- Income Tax Accounting
- Leases;
- Life Insurance Activities
- Liquidity and Solvency
- Measurement of Financial Statement Elements;
- Performance Reporting;
- Elements of Financial Statements
- Scope of Financial Reporting; and
- Self-Generating and Regenerating Assets.

4.3 The Board has also met with the Corporations Law Simplification Task Force to discuss the ways in which the Board can best assist in the simplification process.

***Companies and Securities Advisory Committee***

4.4 The Committee's 1993-94 report outlines the main activities of the Committee over that year. The main areas of activity were:

- tabling of the report *Collective Investment: Other People's Money* (Report No 65) in Federal Parliament in September 1993. The Report was prepared in conjunction with the Australian Law Reform Commission;
- publication in March 1994 of the *Report on Anomalies in the Takeovers Provision of the Corporations Law*;

- publication in March 1994 of an Issues Paper on Compulsory Acquisitions;
- in February 1994 the Committee commenced a review of the law relating to derivatives;
- the Committee met on various occasions with representatives of the Simplification Task Force to discuss simplification proposals.

***Companies Auditors and Liquidators Disciplinary Board***

- 4.5 During 1993-94 there was a significant fall in the number of matters referred to the Board by the ASC. The Board received 10 applications in 1993-94 compared to 36 in the previous year.
- 4.6 The Board has brought to the attention of the Attorney-General's Department its request for several minor legislative amendments. These amendments would:
- provide for a deputy Chairperson;
  - allow the Board to sit in two divisions;
  - clarify some of the powers of the Registrar and the Board; and
  - extend the range of orders which the Board may make.

***Corporations and Securities Panel***

- 4.7 The Panel did not receive any applications from the ASC in 1993-94. Changes to the procedures of the Panel were included in the Corporations Legislation Amendment Act 1994.

STEPHEN SMITH, MP  
CHAIRMAN

23 OCTOBER 1995