



The Parliament of the Commonwealth of Australia

SECTION 1316
OF THE
CORPORATIONS LAW

PARLIAMENTARY JOINT COMMITTEE ON
CORPORATIONS AND SECURITIES

27 NOVEMBER 1995

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**PARLIAMENTARY JOINT COMMITTEE
ON CORPORATIONS AND SECURITIES**

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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.**

SECTION 1316 OF THE CORPORATIONS LAW

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.

TERMS OF REFERENCE

On 7 December 1994 the Committee resolved to inquire into, and report to both Houses on:

the operation of Section 1316 of the Corporations Law with particular regard to:

1. which offences under the Corporations Law (if any) should be subject to a limitation period, and how those offences should be identified;
2. what the limitation period should be;
3. whether some discretionary element such as the consent of the Attorney-General should be retained, and if so, whether that decision should be subject to review; and
4. the potential impact of limitation periods imposed by other laws.

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SUMMARY OF FINDINGS AND RECOMMENDATIONS

The Committee discusses its findings and conclusions in full in Chapter 5.

Having regard to each of the Committee's terms of reference, the Committee's findings are

Which offences under the Corporations Law (if any) should be subject to a limitation period, and how those offences should be identified

- 1 There should be no limitation period for serious or indictable offences under the *Corporations Law*.
- 2 Summary offences or minor regulatory matters under the *Corporations Law* should be subject to a limitation period.
- 3 Section 1316 of the *Corporations Law* should be amended accordingly.

What the limitation period should be

- 4 There should be no limitation period for serious or indictable offences under the *Corporations Law*.
- 5 The limitation period for summary or minor offences under the *Corporations Law* should continue to be 5 years.

Whether some discretionary element such as the consent of the Attorney-General should be retained, and if so, whether that decision should be subject to review

- 6 The present requirement in section 1316 of the *Corporations Law* that consent be sought from the Attorney-General where an extension of time is required to commence a prosecution should be abolished.

The potential impact of limitation periods imposed by other laws

7 The present effect of Section 1316 of the *Corporations Law* is to extend the limitation period imposed on prosecution for a range of summary offences by the *Crimes Act 1914* and certain State legislation to 5 years.

8 The 5 year limitation period in Section 1316 of the *Corporations Law* in relation to those offences should be retained.

In relation to other matters

9 The Committee finds that, in order that a proper level of information on corporate investigations and prosecutions is available to the Minister responsible, and to the Parliament, that both the ASC and the DPP provide more detailed information in their annual reports on matters under current investigation and prosecution in relation to

(i) the time that has elapsed since the commission of alleged offences

(ii) the time that has elapsed since the commencement of investigative and prosecutorial processes by the ASC and DPP

Recommendations

I Section 1316 of the *Corporations Law* should be amended to provide for

abolition of the limitation period on the prosecution of serious or indictable offences under the *Corporations Law*

prosecution of summary offences or minor regulatory matters under the *Corporations Law* be subject to a limitation period of 5 years

abolition of the present requirement in section 1316 of the *Corporations Law* for the consent of the Attorney-General to commencement of prosecution of offences under the *Corporations Law* more than 5 years after their alleged commission.

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✓
II Future Annual Reports of the Australian Securities Commission and the Commonwealth Director of Public Prosecutions provide detailed information showing the time that has elapsed since the commission of alleged offences under the *Corporations Law* and the time that has elapsed since the commencement of active investigative and prosecutorial processes.

1. THE COMMITTEE'S INQUIRY

Background

- 1.1 In October 1993 the Chairman of the Australian Securities Commission, Mr Alan Cameron, commented publicly 'that Section 1316 of the Corporations Law may impede the prosecution of corporate crime, particularly in complex cases.' The Committee raised this issue with Mr Cameron when he appeared before a public hearing of the Committee in April 1994. In evidence during the hearing he said:

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.¹

The difficulty is that any such decision is itself capable of being reviewed. ... 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.²

- 1.2 The Committee discussed the issue in its report to the Parliament tabled in June 1994 on the 1992-93 Annual Report of the Australian Securities Commission. In its report the Committee reviewed the evidence given by Mr Cameron in light of both the need to maintain public confidence in the Corporations Law and to ensure that individuals were not subjected to unfair process by reason of delay in bringing criminal prosecutions. The Committee reported that it had

...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

¹ Committee Hansard, 20 April 1994, page 67.

² Committee Hansard, 20 April 1994, page 67.

*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.*³

- 1.3 In response to the Committee's recommendation, the Attorney-General on 30 November 1994 wrote to the Committee and requested that it conduct an inquiry into matters raised by section 1316. The Committee adopted these matters as its terms of reference. They are reproduced at page (ix) of this Report.
- 1.4 On 7 December 1994 the Committee resolved to undertake this inquiry.

Inquiry Procedure

- 1.5 The Committee sought submissions to its inquiry by advertising in major newspapers and by writing directly to the State and Territory Attorneys-General, the Australian Securities Commission, the Commonwealth Director of Public Prosecutions, the Australian Institute of Company Directors, the Law Council of Australia, the Australian Stock Exchange, civil liberties organisations, professional bodies and other individuals and organisations who were considered likely to have an interest in the issues being considered. The Committee received ten submissions (listed in Appendix A and tabled with this report).
- 1.6 The Committee subsequently conducted two public hearings: in Canberra on 28 June and in Sydney on 16 August 1995.
- 1.7 During those hearings the Committee received evidence from the:
- Commonwealth Director of Public Prosecutions (28 June)
 - Australian Securities Commission (16 August)
 - Australian Institute of Company Directors (16 August)
 - Australian Stock Exchange (16 August)
 - Law Council of Australia (16 August)

Options Under Committee Consideration and Synopsis of Evidence

- 1.8 The options considered by the Committee in this inquiry were to

³ 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.8.

- to recommend major amendment of section 1316, repealing the present limitation period in relation to indictable offences and also repeal of the Attorney-General's discretion to allow prosecutions to be brought more than 5 years
 - to recommend minimal change to section 1316 by - for example - increasing the limitation period from 5 to 7 years, or retaining the Attorney-General's discretion, though with removal of any right of review of the exercise of the discretion
 - to recommend no change to the provision
- 1.9 The Committee's inquiry focussed on the competing arguments advanced for either a maximum change option, or for one of the minimal changes described
- 1.10 The Committee reached an 'on balance' decision that the section should be amended in accordance with the first option. The Committee's reasons are set out in Chapter 5 of this report
- 1.11 Submissions to the Committee from the Australian Securities Commission and the Director of Public Prosecutions both advocated the amendment of section 1316 to allow an unlimited period for the commencement of prosecutions for serious or indictable offences, and the consequential repeal of the Attorney-General's discretion to consent to prosecutions brought after 5 years. Both supported retention of a 5 year limitation period for summary offences.
- 1.12 Submissions from the commercial and professional community, particularly the Accounting Bodies, the Australian Stock Exchange and the Law Council of Australia Companies Committee advocated retention of the section in its current form, with the possibility that the limitation period be extended to 7 years, the current statutory period for required retention of accounting records under the *Corporations Law*.

2. APPLICATION OF SECTION 1316 OF THE *CORPORATIONS LAW*

- 2.1 In their submissions, the Commonwealth Attorney-General's Department and the Commonwealth Director of Public Prosecutions provided a detailed legislative history of the provision.⁴

State Companies Legislation Prior to 1961

- 2.2 State Companies Acts which preceded the establishment of the first uniform Australian companies code in 1961, and which were the source legislation of the uniform codes, made various provisions for a limitation period on commencement of proceedings.⁵
- 2.3 The most important relevant example of this development was the Victorian *Companies Act 1958* section 265 (2) which provided for the commencement of criminal proceedings within three years after the commission of the offence, or with the Attorney-General's consent at a later time. This provision was enacted following a report by the Victorian Statute Law Revision Committee⁶ that the existing 12 month limitation period under the then Victorian companies legislation was too short.⁷

The Uniform Companies Legislation 1961-62

⁴ See A-G's submission, and DPP's submission 4, pp. 1-10. Useful information on the apparent development of the provision was also provided in the submission from the Australian Institute of Company Directors.

⁵ The position in the other states (apart from South Australia) appear not to have had a limitation period until the commencement of the uniform code in 1961-62. See A-G's submission, para. 22, p. 5.

⁶ Victoria, *Report on Amendments of the Statute Law to deal with Fraudulent Practices by Persons Interested in the Promotion and/or Direction of Companies and by Firms*, Report, Parliamentary Papers of Victoria 1954, Vol 1, Votes and Proceedings, p. 735 at p. 753. - and see also A-G's submission 3, pp. 3-4.

⁷ The Committee noted in its report that

44. Evidence was given to the Committee of many persons suspected of offences under the Companies Acts escaping prosecution owing to the fact that most offences under the Companies Acts are punishable on summary conviction and must be prosecuted within twelve months of commission. Owing to the complicated nature of most frauds relating to companies and firms and the fact that lengthy investigation is usually necessary before a case for prosecution is ready for presentation it will be readily seen that a limitation period of twelve months is far too short.

- 2.4 The introduction of the 'uniform' companies legislation in 1961-62 resulted in the introduction of a limitation section (section 381) in Victoria, Queensland, South Australia, Western Australia and Tasmania in similar terms to the 1958 Victorian provision.
- 2.5 In New South Wales, the Australian Capital Territory and the Northern Territory, the relevant provision followed the prevailing United Kingdom provision, which provided a limitation period in respect of summary offences only. This provided for a 3 year limitation period, or longer with the consent of the Attorney-General, in respect of such offences.⁸

Companies Code 1981

- 2.6 The Commonwealth-State Scheme for Cooperative Companies and Securities Regulation was introduced in 1978. Under a Commonwealth-State agreement, the new legislative regime proposed was to be drafted, and when approved unanimously by the Ministerial Council established by the Scheme, enacted in each jurisdiction, with only minimal differences.
- 2.7 The Attorney-General's Department advised the Committee

The draft legislation developed for the cooperative scheme was based on provisions in the various versions of the Uniform Companies Acts. In the early drafts of the proposed new Companies Code, clause 381(3) contained a three year limitation provision very similar to the corresponding provision in the Victorian version of the Uniform Companies Act. However, in accordance with the Formal Agreement, the power to consent was vested in the Ministerial Council, rather than the relevant State Minister.

Since the provision in those early drafts was based on the Victorian model, the limitation would have applied to all proceedings, not merely those prosecuted by summons. A number of offences under the draft legislation could not be prosecuted in a summary way. Thus, like its predecessors in the majority of the States, the draft provision would have imposed a three year limitation period on

⁸ The submission noted

In summary, it seems clear on the face of the provisions in New South Wales and the Territories that the limitation period was imposed to ensure that an unreasonably short limitation period did not apply by virtue of the general legislation dealing with summary prosecutions. *A-G's Submission*, para. 26, p. 5.

*serious offences, many of which would not have otherwise had any limitation period in place at all.*⁹

- 2.8 The limitation provision was enacted as section 34 of the *Companies and Securities (Interpretation and Miscellaneous Provisions) (name of state or territory) Code 1981*.¹⁰ The section provided

Notwithstanding anything in any other law, proceedings for an offence against a relevant Code may be instituted within the period of 5 years after the act or omission alleged to constitute the offence, or, with the consent of the Ministerial Council, at any later time.

The Corporations Law

- 2.9 Section 1316 of the *Corporations Law* reflects the provisions of section 34 of the *Companies and Securities (Interpretation and Miscellaneous Provisions) (name of state or territory) Code 1981*, with relevant

⁹ AG's submission, paras. 28 & 29, p. 6.

¹⁰ See also A-G's submission, paras. 30 ff, p. 6.

30. A search of our records was undertaken to find material concerning the selection of the Victorian style across the board limitation provision, rather than the alternative style of provision used in New South Wales and the Territories which applied only to summary prosecutions. The objective of the search was to determine whether there was a clearly discernible policy decision behind the imposition of a limitation period on serious offences which otherwise would not have applied. We found that, in the course of developing the draft cooperative scheme legislation, concerns were raised about the adverse consequences of lengthy delays in the prosecution of serious corporate crime. The concerns were that lengthy delays in prosecution might result in inadequate community protection from fraudulent persons, prejudice to the accused because of charges over their heads for a number of years, mammoth costs to the State and a reduction in the deterrent effects of punishment. It was proposed that, in order to lessen the delays, certain serious offences under the proposed cooperative scheme legislation should be able to be dealt with summarily by the Supreme Courts. However the majority of jurisdictions did not support the inclusion of the proposal in the draft cooperative scheme legislation....

32. Our searches did not reveal any connection between concerns about the adverse consequences of delays in prosecutions and the final deliberations concerning the draft limitation provision. When officers of the Ministerial Council made a recommendation to the Ministerial Council to amend the draft provision to extend the three year period to five years, no mention was made of the fact that the draft provision would apply to offences which otherwise would not be covered by a limitation period. The reasons given for the extension of the period from three to five years were, first, that many alleged offences do not come to the attention of the authorities until a long time after they have been committed and, secondly, that there could be considerable delays in obtaining legal advice as to whether there was a prima facie case. The Ministerial Council accepted the officers' recommendation and the draft was amended to provide for a five year period across the board.

reference to the Commonwealth Attorney-General rather than the Ministerial Council.

2.10 The Explanatory Memorandum for the *Corporations Law* said that

'This provision is based on s.34 of the C & S Interpretation Act [ie, the Companies and Securities (Interpretation and Miscellaneous Provisions) ([name of state or territory]) Code 1981]and will allow, despite anything in any other law, (eg the Crimes Act 1914) for proceedings to be instituted within 5 years of the act or omission alleged to constitute the offence, or after that period with the Minister's consent.'

2.11 The Attorney-General's Department noted

The Explanatory Memorandum suggests that section 1316 of the Corporations Law was intended to operate as an extension to the limitation periods that would otherwise apply to companies offences. However, the effect of the provision on indictable offences and those summary offences punishable by maximum terms of imprisonment over six months is to impose a limit where none would otherwise exist.¹¹

2.12 The DPP's summary of the section's development was

....it appears that a limitation period on indictable offences first found its way into Victorian legislation in 1955. At the time the intention of the Parliament appears to have been to increase the limitation period that would otherwise have applied in respect of summary offences. The stated rationale at the time was a concern that offences would not be able to be discovered and prosecuted within normal limitation periods for summary offences. Of course, this rationale has no relevance to indictable offences. No mention can be found of any reason for deliberately limiting the time for commencing proceedings for indictable offences. The limitation on indictable offences appears to have been an oversight rather than planned and later legislation has tended to follow suit rather than consider the position objectively.¹²

¹¹ A-G's submission 3, para. 38, p. 7.

¹² A-G's submission 4, para. 1.21, p. 10.

2.13 The DPP enlarged on this view when he gave evidence to the Committee

There was, if one follows the legislation through, first of all an enlarging of that period-initially to three years, ultimately to five years. At the same time, the law changed to create indictable offences amongst them as well. They were swept up in the extension of time to five years so that we almost got a de facto-and I would argue that it is a de facto-limitation period on the indictable offences. When one looks to the parliamentary debates, the explanatory memoranda or any other documents that were brought into existence at the time when these events took place, one cannot see anywhere an argument that says it is wise for there to be a five-year limitation period on indictable offences. So we say that this really happened almost by accident, certainly not by stealth, and it creates what we would say is a fairly unintended and a slightly anomalous position. Anomalous, because at the same time as we are able to prosecute offences against Corporations Law, the same facts that give rise to those offences may and often do give rise to state offences which are not subject to the limitation period.¹³

Application of section 1316 - Indictable and Summary Offences

- 2.14 A significant aspect of section 1316 is that it applies to the prosecution of both summary and indictable offences.
- 2.15 Pursuant to section 4H of the *Crimes Act 1914 (Cth)*, a summary offence is one punishable by imprisonment for a period of twelve months or less or by fine only. An indictable offence is one punishable by more than 12 months' imprisonment.¹⁴
- 2.16 Section 15B of the *Crimes Act 1914* provides that offences which are punishable by maximum penalties of six months imprisonment or less (or \$15, 000 or less in the case of a body corporate) can only be commenced within one year of the commission of the offence. All those offences are

¹³ Hansard, 28 June 1995, p. 4.

¹⁴ The section reads

4H. Offences against a law of the Commonwealth, being offences which:

(a) are punishable by imprisonment for a period not exceeding 12 months; or

(b) are not punishable by imprisonment;

are summary offences, unless the contrary intention appears

- summary offences. Offences which are punishable by a term of imprisonment of more than six months (or more than \$15,000 for a body corporate) may be commenced at any time at all.¹⁵
- 2.17 The effect of the *Crimes Act* provisions is that a prosecution for an offence punishable by six months imprisonment or less, or a pecuniary penalty only, must be commenced within one year of the commission of the offence. A prosecution for an offence punishable by more than six months imprisonment may be commenced at any time.
- 2.18 Pursuant to section 1316 of the *Corporations Law*, prosecution for either summary or indictable offences must be commenced within 5 years of their commission, unless the consent of the Attorney-General is obtained.
- 2.19 The DPP advised the Committee that in the four year period since the DPP commenced the function of prosecuting offences against both the Companies Code and Corporations Law, nine applications for the Attorney-General's consent have been brought. All of those applications were in respect of offences under the Companies Code and all such applications were approved by the Attorney-General. In the same period three further matters were considered as potentially warranting prosecution. These however were reviewed within the Office and no application was made to the Attorney-General either because of the lack of strength of the case or the circumstances surrounding the matter.¹⁶

¹⁵ In its submission, the Attorney-General's Department pointed out that such offences can be either summary or indictable, and that section 15B makes it clear that another law can provide a longer time limit for the commencement of prosecutions. See A-G's submission, para. 37, p. 7.

¹⁶ DPP submission 4, para. 3.4, p. 13.

3. OPTIONS FOR AMENDMENT OF SECTION 1316

- 3.1 Support for amendment of section 1316 came from the ASC and the DPP.
- 3.2 Submissions provided by both addressed the effect section 1316 is having, and is likely to have in the future, on the detection, investigation, assessment and prosecution of corporate criminal activities.

The ASC Submission on Section 1316

The Effect of the Limitation Provision on the ASC's Investigative Role

- 3.3 As the Australian corporations and securities national regulator, the ASC has the statutory responsibility for the detection, investigation and preparation for prosecution of breaches of the *Corporations Law*. Pursuant to statutory arrangements made at the establishment of the National Scheme, the ASC also has the carriage of matters related to breaches of the Companies Code which occurred under the Cooperative Scheme.
- 3.4 The ASC's submission to the Committee on section 1316, as it affects the ASC's investigative role, focussed on the following concerns with the section's application
 - delay in instituting proceedings
 - inherent and unusual difficulties in detection and investigation of corporate crime
 - limitation period on commencement of prosecutions in other legislation

Delay

- 3.5 The ASC told the Committee that it was conscious of the view that the law as it currently stands 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.¹⁷

¹⁷ ASC submission 7, paras. 29-30, p. 5. The ASC also told the Committee

The ASC shares the concern of the Parliamentary Joint Committee about these matters and accepts that the investigation and prosecution of corporate crime cannot be subject to unreasonable delay. Clearly public funds and court time should not be spent on oppressive prosecutions, nor should defendants be

- 3.6 The ASC noted that the majority of its investigations are completed within 12 months, making the time limit imposed by section 1316 relevant to only a small percentage of the matters the ASC is required to deal with.¹⁸
- 3.7 The ASC's view is that section 1316 is not necessary as a safeguard for defendants against prosecutorial delay.
- 3.8 It noted in its submission

*.... those matters which are affected by the limitation imposed by section 1316 are precisely those in relation to which that limitation is inappropriate; that is, matters which are of particular complexity, which present significant difficulties in the collection of evidence, or which (often partly for those reasons) are not detected until some considerable time has passed.*¹⁹

Detection and Investigation

- 3.9 The ASC stressed the seriousness with which the community views corporate crime, and its consequent demand that corporate crime be pursued and prosecuted. This community view raised several important concerns in the light of the section 1316 limitation.
- 3.10 The ASC specified these concerns
- The nature of corporate crime, particularly documentary camouflage, means it often escapes early identification despite the existence of surveillance programs.
 - Even when it has become apparent that there may have been an offence committed, determining the precise form of that offence, identifying the persons involved and gathering sufficient evidence to proceed to prosecution, is often lengthy and complex.
 - Offences committed against the Corporations Law often do not become evident for a comparatively long time. This fact is exacerbated by the process whereby the ASC is alerted to the possible existence of such offences through the reports required to be submitted

tried so late after the alleged commission of offences that evidence is stale and witnesses' memories unreliable. See *A-G's submission*, para. 29

¹⁸ ASC Submission , para. 32. p. 5. See also *Australian Securities Commission Annual Report 1994/5*, p. 34 which noted that 33 out of 43 major investigations were completed within 12 months of commencement.

¹⁹ ASC Submission , para. 32., p. 5.

to it by liquidators, receivers and other external company administrators.

- It is generally the case that external administrators of companies report suspected offences in the final stages or close to the completion of their administrations. This means that the time limit imposed by section 1316 may have almost expired by the time the ASC receives notification of a possible offence.
- A practical decision is often taken to the effect that matters in relation to which the time limit has nearly expired will not be resourced in preference to more recent complaints. One of the factors that weighs in the minds of those making that resourcing decision is the fact that the relevant investigation is unlikely to be completed within the time limit and thus the consent of the Attorney-General will have to be sought.²⁰

3.11 The effect of this prevailing situation has been that the ASC has

.... on several occasions decided not to investigate a suspected contravention of the Law, or not continue with a matter following a preliminary investigation, because the combination of factors such as the complexity of such investigations and the difficulties of obtaining evidence, coupled with the time limit imposed by section 1316, have meant that there was no realistic prospect of the relevant investigation being completed and any suspected persons being charged prior to the expiry of that time limit.²¹

3.12 The ASC acknowledged that

...it is often the case that the time limit imposed by section 1316 is only one of a number of factors which may militate against the pursuit of a matter, and must be considered along with such others as the availability of resources, the volume and probative value of available evidence, and the potential regulatory impact of proceeding with a particular prosecution. The time limit is not always a reason in itself to decide against commencing or discontinuing an investigation; it may often, however, be the factor that tips the balance against the allocation of resources to an investigation.²²

²⁰ ASC Submission, para. 34-41, pp. 5-6.

²¹ ASC submission, para. 42., p. 6.

²² ASC submission, para. 43., p. 6.

Limitation periods for Indictable Offences in other Legislation

3.13 The question of how the provisions of the *Corporations Law* compared with other Commonwealth and State legislation was advanced by the ASC as a consideration of some importance.

3.14 The ASC's submission was that

The essence of an indictable offence is that it is triable in a superior court, and the trier of fact is the jury. The right to proceed against an accused person for an indictable offence is not normally extinguished by effluxion of time.

There is no limitation period for the commencement of prosecutions for indictable offences under the Commonwealth Crimes Act 1914, or under the respective Criminal Codes of the States.

Section 1316 is, therefore, at least insofar as it applies to serious corporate wrongdoing, inconsistent with the common law and with other relevant Commonwealth and State criminal legislation, which imposes no limitation on the prosecution of indictable offences.²³

3.15 The additional point made by the ASC was that, in relation to matters under Commonwealth law, and particularly where criminal prosecutions for offences under 'business or commerce' type statutes was involved, the relevant provisions were contained in the *Crimes Act 1914*, which had no limitation periods on commencement of proceedings.²⁴ The ASC characterised this situation as anomalous and inappropriate in that

..... offences involving corporations which are caught by the Corporations Law are subject to a five-year limitation period, while offences which may involve corporations or which are of comparable magnitude under other legislation are subject to no such limitation period.²⁵

²³ ASC submission, paras. 45-47, p. 7.

²⁴ ASC submission, paras. 48-51, pp. 7-8.

²⁵ ASC submission, para. 51, p. 7.

The Effect of the Attorney-General's Discretion on the Prosecution Process

- 3.16 The ASC's central submission to the Committee is that section 1316, by providing a discretionary power to the Attorney-General, has established an 'inappropriate' process.
- 3.17 The ASC indicated this was because
- a) it is not appropriate for the Attorney to be required to be involved in the prosecution process in the manner contemplated by section 1316; and
 - b) there is the potential for considerable additional difficulty and delay to be caused as a result of the fact that a decision made by the Attorney under section 1316 may be challenged under administrative review principles.²⁶
- 3.18 In elaboration of point (a), the ASC put to the Committee that, due to the separation of the roles of the Attorney-General and the DPP in the prosecution process, it is now undesirable that the Attorney continue to have a role in determining whether a prosecution proceeds and that such a decision is one for the DPP alone.
- 3.19 The ASC's point was
- The prosecution of serious offences under the Corporations Law and related legislation is generally undertaken by the Commonwealth DPP after referral of matters by the ASC. Under the arrangements between the two agencies, the ASC is responsible for the prosecution of minor regulatory offences, such as failure to keep a register, failure to lodge an annual return or failure to lodge a prescribed statement as required by the Corporations Law. These types of offences are those in respect of which the ASC submits that the retention of a 5-year limitation period is appropriate.²⁷*
- 3.20 Of importance to the relationship between the ASC and the DPP is the Memorandum of Understanding agreed between the ASC and the DPP in September 1992, and the Attorney-General's Direction of 30 September

²⁶ ASC submission, para. 64, p. 10.

²⁷ ASC submission, para. 66, p. 10.

1992 entitled "*Serious Corporate Wrongdoing: Direction relating to Investigation and Enforcement*", which envisages regular joint reviews by the ASC and the DPP of investigations and prosecutions in which the two agencies have an interest.²⁸

- 3.21 While not suggesting in its submission that the Attorney-General would exercise his discretion unfairly (a matter dealt with later), the ASC asserted that given the arrangements reached between the ASC and the DPP, the Attorney-General having the role provided by section 1316, was 'neither sensible nor justifiable on policy grounds'.²⁹
- 3.22 The ASC argued that the power of the Courts to prevent abuse of process by unfair prosecution (for whatever reason), and the existence of rights of review over decisions by the DPP to prosecute constitute adequate protection.³⁰

²⁸ The agreement provides that the ASC will refer to the DPP at least all those cases falling into any of the categories listed below, for consideration of whether prosecution is warranted:

(a) all offences capable of being dealt with on indictment;

(b) all offences involving allegations of fraud or dishonesty;

(c) those prosecutions which involve complex questions of law. Included in this category are defended cases in which the defendant is legally represented and where it is apparent that the issue is one of substance;

(d) all appeals, proposed appeals, or orders to review or proposed orders to review a decision of the court in criminal proceedings, whether by the person convicted or by the ASC or the informant;

(e) cases where the ASC knows that the DPP is conducting a prosecution or is taking criminal assets action in other matters involving offences against the laws of the Commonwealth;

(f) matters in which there is a reasonable prospect that the defendant will be sentenced to a term of imprisonment; and

(g) those cases where it is alleged that the defendant has committed both minor regulatory offences (which would otherwise be handled by the ASC) and more serious offences (which would be dealt with pursuant to these guidelines by the DPP).

²⁹ ASC submission, para. 73, p. 11-12.

³⁰ The ASC also noted that

As the law currently stands, the discretion to extend the period in which proceedings can be commenced lies solely in the hands of the Attorney; and his consent is to be given or withheld following a consideration only of the facts placed before him by the prosecuting authorities. There is case law to the effect that a potential defendant is not entitled to a hearing, to enable him or her to put a case to the Attorney, prior to the decision being made whether or not to consent to an extension of the relevant period: see for example *Nicol v AG (Vic)* (1981) 6 ACLR 270 and *Clyne v AG (Cth)* (1984) 55 ALR 624. (ASC Submission, para. 75, p. 12.)

Administrative Review of the Attorney-General's Decision.

- 3.23 A point often raised in the course of the Committee's inquiry was administrative review of the Attorney-General's decision to authorise a prosecution beyond the 5 year limitation period.
- 3.24 The ASC's view is that administrative review, if used, acts to continually delay and postpone the commencement of prosecutions

The process currently found in the Corporations Law is, in the ASC's submission, potentially too lengthy and cumbersome; and moreover involves an inappropriate decision-maker. In cases where delay on the part of the prosecuting authorities is an issue, the arguments of both parties, that is, the authorities and the prospective defendant, ought better to be considered by a Court in the context of an application for a stay of proceedings. This process would also be more likely to produce a considered and defensible outcome.³¹

- 3.25 Since the date of the ASC's written submission, proceedings have been commenced by Mr Alan Bond (an application for review to the Administrative Appeals Tribunal) and Mr Tony Oates (an appeal under the *Administrative Decisions (Judicial Review) Act*) for review of the Attorney-General's decision to authorise their prosecution more than 5 years after commission of alleged offences.³² (These proceedings did not relate to a decision under section 1316, but to the equivalent section in the Cooperative Scheme legislation.³³)
- 3.26 The particular uncertainty resulting from this situation was highlighted in ASC evidence

....those two challengeshave made plain that there is the potential for the process to be frustrated and delayed. In the particular cases that we are talking about we do have a committal date which is not very far hence. By the time the administrative challenges are dealt with and any appeals that follow, it may be that the committal date

³¹ ASC submission, para. 87, p. 13.

³² Hansard, 16 August 1995, p. CS 216; and see also detailed advice from the DPP, Hansard, 28 June 1995, p. 12. *Australian Securities Commission, Annual Report 1994/95*, p. 37; and *Commonwealth Director of Public Prosecutions, Annual Report 1994-95*, p. 57.

³³ ie, section 34 of the *Companies and Securities (Interpretation and Miscellaneous Provisions) ([name of state or territory]) Code 1981*.

*has to be adjourned or it may be that we have a committal without knowing whether, at the end of the day, the minister's decision will be upheld.*³⁴

The Courts' Power to Order a Stay of Proceedings

3.27 The ASC's submission highlighted the Courts' current power to order a stay of proceedings so as to prevent or limit prejudice to a defendant which may result from a delay in instituting proceedings.

3.28 The ASC's advice to the Committee on the law in this area was

While it is not generally acknowledged that at common law an accused has the right to a speedy trial or to be tried without unreasonable delay, (see for example Jago v District Court of NSW (1989) 168 CLR 23; Adler v District Court of NSW (1990) 19 NSWLR 317). it is accepted that an accused does have a right recognised by the general law in Australia to be tried fairly. It is on this basis that an accused may seek a permanent stay of proceedings in circumstances where to prosecute after a period of considerable delay would amount to an abuse of the Court process.

*The law in relation to the granting of stays on the grounds of abuse of process has developed significantly in recent years. The Courts have, in a line of cases, defended the rights of people to be tried fairly or not at all, and have strived to ensure that people are not subject to unfair process as a result of delay in bringing criminal proceedings. As mentioned by the Chairman of the ASC in his evidence to the Committee during its public hearing on 20 April 1994, 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.*³⁵

3.29 In balancing the rights of the accused and the public interest in matters where an abuse of process is alleged, the ASC noted that the High Court has in *Jago's* case has identified critical factors for the Courts' consideration as

a) the length of delay;

³⁴ Hansard, 16 August 1995, p. CS 217.

³⁵ ASC Submission, paras. 83 & 84, p. 15.

- b) the reasons given by the prosecution to justify the delay;
- c) the accused's responsibility for the delay and his attitude to it;
- d) the likely prejudice to the accused (ie the significance of the passage of time and the fact that witnesses' memories, almost inevitably, will have faded); and
- e) the public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime.³⁶

3.30 In evidence to the Committee, the ASC argued that, whether a limitation period is imposed on commencement of prosecutions or not, the Courts will apply relevant principles governing abuse of process.

Mr Sinclair - if you are not going to apply any limit to the time within which prosecutions should be launched, and that goes beyond the seven-year period for which you are obligated to keep records, it does create enormous problems.

Mr Procter - There are really three things to be put by way of response. First of all, whether in the particular case it creates problems is a matter of fact in the particular case. So to arbitrarily impose a cut-off point might mean that matters which could fairly be tried, and ought fairly to be tried, cannot fairly be tried.

Mr Sinclair - They could be if you had the same system we have at the moment: you could do it on application to the Attorney.

Mr Procter - Well, then we come to the other parts of the argument about delay and administrative challenge and removing it from the political process. But there are two other things I would put by way of response. The first is that the ASC and the DPP, in deciding to investigate and prosecute, have to make judgments about the availability of the evidence and the fairness, as a matter of public policy, of prosecuting someone in those circumstances. But it does not stop there, because the courts, of course, have an inherent jurisdiction to stay the proceedings where to proceed would be unfair.

³⁶ *Jago v District Court of NSW* (1989) 168 CLR 23

In anticipation of that as a concern, and I think it is a very real concern, what we have set out in our submission is something of the current state of the law as to stay of proceedings. If you look through what the High Court has said in Jago's case, the circumstances in which the High Court has said that courts ought to be prepared to stay proceedings for unfairness would, I think, pick up the sort of concern that you put where, as a matter of fact in the individual case, someone could not fairly be tried because, for example, documents that were necessary for their defence were no longer available or even because, by reason of lapse of time, memories had faded, critical witnesses had died, and so on and so forth.

Mr Sinclair - I think that is putting the cart before the horse. It is very difficult if you have to wait until you get before the court and then you have to appeal in the process. To my mind, I cannot see how you would be disadvantaged if you are going to make an ad hoc judgment in a particular instance that the prosecution should proceed and you then had to apply, albeit that it is to the Attorney-General. The Attorney-General has two roles: one is political and the other is quasi-administrative; he or she is the senior legal officer of the Commonwealth. I think that there is a problem if you have to go before the courts to substantiate your case, instead of being able to require the ASC to substantiate a case that you do have evidence. That is really where it is the reverse onus of responsibility.

Mr Cameron - But I just would not accept that that is the assumption. It is because we know that the courts can do that that there is still, in effect, an effective limitation. In other words, the ASC and the DPP would be acting irresponsibly if they were to lay a charge where there was a serious possibility that it would be stopped by the court as an abuse of process. It is not likely to happen at the moment because the five-year limitation is there to prevent it and, in a sense, if the Attorney-General has given his or her consent, it seems hardly likely the court would then say that it is still an abuse of process. But in theory that could still happen.³⁷

3.31 The ASC's summary of the position on this matter was

³⁷ Hansard, 16 August 1995, p. C 218-9.

*The Courts in Australia can deal with instances where inordinate delay is alleged by a defendant on a case by case basis to determine on the particular facts whether there will be prejudice as a result of the late institution of proceedings; and have demonstrated a willingness to exercise their power to stay such proceedings where appropriate, and to employ other discretionary powers. This scrutiny and control of trials by the Courts is recommended as an alternative to the imposition of an arbitrary time limit which discourages the investigation and prosecution of serious corporate law offences, and to the involvement of the Attorney- General and administrative review process.*³⁸

The DPP's Submission on Section 1316

- 3.32 The DPP's recommendation to the Committee was
- Remove the requirement that the Minister's consent be sought for indictable offences outside the five year time period;
 - Impose a general limitation period of five years in respect of summary offences.
 - Retain the power of the Attorney-General to consent to the institution of proceedings for offences against the Co-operative Scheme Codes outside the 5 year limitation period.
- 3.33 The DPP's detailed submission to the Committee focussed on three considerations
- the rationale for a limitation period in section 1316;
 - the special nature of corporate crime
 - the impact of section 1316 on corporate prosecutions

Rationale for a limitation period in section 1316

- 3.34 In general, the DPP observed that limitation periods in relation to criminal proceedings are intended to address and prevent delay and prejudice to a defendant in a criminal prosecution, and should be

..... resolved on a case by case basis through the exercise of prosecutorial discretion together with reliance on the courts' inherent power to stay prosecutions which amount to an abuse of process should the exercise of that discretion be misjudged . Statutory time limits if any should be kept to a bare minimum,

³⁸ ASC submission, paras. 98, p. 17.

*applying only to very minor offences and specifying realistic time limits.*³⁹

Special nature of corporate crime

3.35 The DPP's submission is that the special, or different, nature of corporate crime results from the Legislature's own recognition that, in particular cases, detection of corporate crime is often not found until some years after its commission. To allow for this situation, the Parliament specified a limitation period of five years.

3.36 The DPP made two points regarding the limitation period

In respect of summary offences, the five year limitation is an advantage, but is of limited practical utility. The DPP's view is that it was the legislature's intention that the Attorney-General's discretion be limited to serious offences only; and,

*In respect of indictable offences, the section appears anomalous when compared with other provisions of Commonwealth Law.*⁴⁰

3.37 On its approach to summary and indictable offences under section 1316, the DPP advised the Committee

Mr Rozenes- ...In summary cases in this area, as in all the areas and for all cases, we would make a qualitative assessment. Let us assume one gets to the stage of saying, 'Yes, there is evidence upon which a prima facie case can be found. Yes, we are confident there are reasonable prospects of securing a conviction.' The next question is: does the public interest require prosecution? We look at our policy document to see what matters we take into account and we have regard to all sorts of things-the age of the person, the likelihood of a penalty being imposed, the availability of alternative remedies, the cost of running the case as opposed to the penalty that is likely to be incurred. All those matters are balanced in determining whether or not any prosecution proceeds. The more serious the offence the less likely are those factors to militate

³⁹ DPP submission, para. 2.3, p. 11.

⁴⁰ The DPP also wrote to the Committee and advised that, in the period 1 January 1991 to 30 June 1995, the agency has prosecuted 4459 indictable offences, and 452 summary offences arising from breaches of the Companies Code and the Corporations Law. (Letter to the Committee from the DPP dated 16 November 1995; tabled with report.)

*against prosecution. The more trivial the offence the more likely are those factors to militate against prosecution.*⁴¹

3.38 In evidence, the DPP explained his view on section 1316

*We say, one, it is arbitrary; two, it is not a final limitation because the attorney can give consent; and three, it is unsatisfactory because it may force people to select offences in order to get within the time limit, when otherwise, if they had the capacity to think about it and to wait a bit longer, they would select the correct offence. Finally, there are in place mechanisms now, both at the ASC, with its guidelines and its prioritisation, to make sure that cases are expedited, and because the DPP does present an independent second-guess, if you like, at what cases should be advanced and how they should be advanced and, ultimately, there is the supervision of the court.*⁴²

Impact of section 1316 on corporate prosecutions

3.39 In the DPP's view, the greatest impact of section 1316 is the likelihood that an accused (or soon to be accused) would exercise their right to apply for review of the Attorney-General's decision.

3.40 In its submission, and in evidence, the DPP detailed the extent of the difficulties such a situation presented to the prosecuting authority

*The concern here is that a wealthy litigant could potentially frustrate the progress of a criminal matter by collateral attack on the decision of the Attorney-General to give his consent to a prosecution proceeding out of time. Irrespective of the merits of the application such action has the potential to delay the progress of a criminal matter while the question of the validity of the Attorney-General's exercise of discretion is litigated in the civil courts*⁴³.

3.41 The decision of the Federal Court bearing on the effect of section 1316 is the 1988 decision *Buffier v Bowen*⁴⁴. This case decided that, in the

⁴¹ Hansard, 28 June, 1995, pp. 33-34.

⁴² Hansard, 28 June 1995, p. 19.

⁴³ DPP's submission, para. 4.3. p. 14.

⁴⁴ (1988) Aust. Crim. Reports, 222.

context of the 'analogue' section to section 1316 in the Companies Code, the following were relevant

- the nature of the offence
- the allegations made against the potential defendant and their seriousness
- the sufficiency of the evidence against the potential defendant, and
- the period of time which had elapsed since the commission of the offence.⁴⁵

3.42 The DPP told the Committee that the implications of the decision were that the DPP would possibly run the risk of placing requirements on his office that are inconsistent with the DPP's role as independent prosecution authority.⁴⁶

3.43 In evidence, the Director told the Committee

The reality is that, at every stage of the prosecutorial process, the decision maker- whether it be the investigator who decides to investigate or the prosecutor who decides to prosecute-is subject to administrative review. Those who are well-heeled and bloody-minded are able effectively to stymie the usual processes by seeking to review those decisions at each and every stage. So, theoretically, the decision that I make to seek the minister's extension is a decision itself which is the subject of review... As is the decision of the minister to extend; as is the decision of the magistrate to commit; as is the decision of a magistrate to admit evidence; as is every other process along the line. We have had some experience where collateral attack has effectively derailed the system, almost to an irreparable degree. The courts invariably say, 'This is dreadful. This is undesirable. This is the worst possible fragmentation of the criminal justice system,' but, before they say that, they enable these cases to run into the system. The minute they start in the system, we fall out of the system. We lose dates in court: we sometimes have to

⁴⁵ DPP submission, paras. 4.4-4.8, pp. 15-16. The DPP also noted that

'In particular in that case the court held that the material before the Attorney-General failed to direct any attention to the question whether the delay was, in all the circumstances, to be considered inordinate and unjustifiable and whether, and if so what, prejudice in the preparation and conduct of his defence would be likely to be suffered by the defendant by reason of the delay.'

⁴⁶ These considerations include describing to the Attorney the prosecution's case, revealing counsel's advice to the DPP on the prosecution case, why the matter should go forward: all matters covered by the *Prosecution Policy of the Commonwealth*. See DPP submission, paras. 4.6-4.9, pp. 16-17.

*wait for 12 months to get back into the court after we have lost a date because of one of these reviews. If we are really concerned about delay, the delay that we suffer after charges are laid is far greater than the delay that we suffer before charges are laid.*⁴⁷

Review of Prosecutions by the Courts for Abuse of Process

3.44 The Committee has drawn attention to the discussion with the ASC that arises from the attitude of the Courts to prosecutions being commenced at an excessive time after alleged commission of the offences.

3.45 The DPP told the Committee that, following the decision in *Jago's case*⁴⁸,

*..... we have now had a good four or five years of jurisprudence in this country that caters for delay and the prejudice that runs from delay to an accused person. Certainly that was something that was not in existence when someone turned their mind to creating limitation periods, if they did turn their mind to creating a limitation period in this area in indictable offences, and we cannot find any evidence of the fact that that was done.*⁴⁹

Accountability by the DPP for Prosecution Decisions

3.46 The Committee is particularly conscious of the important principle that underlies the significant and extraordinary powers given to an independent prosecuting authority such as the DPP.

3.47 The Parliament made it clear that, in granting the DPP independence for the making of prosecution decisions, that prosecution policy and accountability for that policy was a primary matter of importance.⁵⁰ The *Prosecution Policy of the Commonwealth* is the current expression of how and under what circumstances, the DPP exercises that independent judgment.

⁴⁷ Hansard, 28 June 1995, p. 14.

⁴⁸ *Jago v District Court of NSW* (1989) 168 CLR 23

⁴⁹ Hansard, 28 June 1995, p. 8.

⁵⁰ See, *Prosecution Policy of the Commonwealth - Guidelines for the Making of Decisions in the Prosecution Process*. Commonwealth Director of Public Prosecutions. AGPS. Canberra. 1990., pp. 3-4, and *Director of Public Prosecutions Act 1983(Cth)*, section 8.

3.48 During Committee discussions with the DPP, the Committee pursued this question, in the context of corporate prosecutions

Mr Rozenes - The prosecution policy calls upon us to be fairly satisfied that we are going to get a conviction. We are conscious of the fact that we are spending public money. Until very recently the money that was being spent in cases like this was the money of the investigative agency. It now comes out of the Commonwealth DPP's budget, so we are paying for counsels' fees in particular out of our funds. We are more concerned than ever to make sure that our cases have got legs, that there are reasonable prospects of securing convictions, and that the public policy warrants that the convictions proceed. Again, that is an issue that we like to address-and address fairly firmly-before charges are laid.

Mrs Bishop-Would you like to expand on what public policy requires?

Mr Rozenes-We do the balancing exercise as to whether or not the matter is sufficiently serious to warrant the expense or as to whether or not the particular aspects of the accused are such that prosecution is not warranted. This may be the case, for example, when moneys have been repaid, or when various other public policy considerations that are set out in the policy are met that militate against prosecution. There may be an alternative to prosecution, such as civil remedy or some other remedy, that may satisfy those people who have been hurt. These are the various issues that are weighed not only in corporations prosecutions but in all prosecutions.

Mrs Bishop-So public policy does not mean government policy of the day?

Mr Rozenes-Certainly not, on the contrary. In fact, the policy document spells out quite clearly that political considerations are considerations that must not be weighed in the decision either to prosecute or not to prosecute.

These are decisions that have to be made and we feel it is important to be able to make these decisions before charges are laid. We are conscious of the fact that by charging we besmirch. There is no wisdom in charging a person and then conducting an

*investigation only to find that the charges need to be withdrawn. That just attracts public opprobrium of our performance.*⁵¹

..... The point I want to make is that it is because these prosecutions are, firstly, investigated and, secondly, prosecuted by independent statutory officers who are responsible through the Attorney to parliament for all of their activity that there is that accountability in any event.

Mrs Bishop-But you are not. He [ie, the Attorney-General] says he is at arms-length and he will not report on you at all...

Mr Rozenes-I am responsible to parliament for my conduct and I am responsible through the Attorney. That is the first issue. The second issue is that, again, one needs to see these cases in the broader context. It is not as if these are the only cases where we deploy large resources in instituting complex prosecutions many years after the event; this is one of those sorts of cases. Again, I say that there seems to be no good reason why you would select corporations cases as opposed to tax fraud cases or as opposed to any other cases to impose an extra layer of what the Law Council calls accountability when that accountability is not there for much more serious offences where people can go to jail for much longer periods of time than they can for offences under the Corporations Law.

Mrs Bishop-But, going back to that question of accountability, if I ask the Attorney-General a question about an action that you do or do not take, he is going to say, 'I am at arms-length. You make those decisions.' There is no way that that accountability works.

*Mr Rozenes-Every time I go to Senate estimates I get asked all sorts of questions...*⁵²

3.49 The Committee asked the ASC for its views on the DPP's accountability for prosecution decisions

Mrs Bishop-When the minister is required to make a decision the minister can be made accountable for it: we can ask them questions

⁵¹ Hansard, 28 June 1995, pp. 6-7.

⁵² Hansard, 28 June 1995, pp. 32-33

about it in the parliament and he has to give reasons. When the DPP makes a decision not to prosecute or to prosecute, there is nothing we can do, is there?

Mr Procter- In terms of the decision of the DPP electing to apply the Commonwealth prosecution policy, if the decision is to prosecute, it has been my experience that we have answered questions about particular matters once they have been dealt with in the courts and the courts, of course, have a capacity for hearing applications for stay. In the former case we have, on occasion, dealt with matters in camera. but it would be generally agreed that to deal publicly with a decision not to prosecute someone might be unfair to that person....⁵³

- 3.50 The Committee does not suggest that the DPP has made decisions to prosecute corporate criminal offences contrary to the *Prosecution Policy of the Commonwealth* or contrary to the principles he discussed with the Committee. However, the Committee is concerned to ensure that the DPP's accountability for his decisions is proper and adequate. The Committee comments further on this matter in its conclusions.

⁵³ Hansard, 16 August 1995, p. CS 217.

4. OPTIONS FOR RETENTION OF SECTION 1316

- 4.1 Submissions to the Committee from the Australian Stock Exchange (ASX) and the Law Council of Australia Companies Committee favoured retention of section 1316. The Australian Accounting Bodies favoured retention, with an increase in the limitation period from 5 to 7 years.

The Australian Stock Exchange Submission

- 4.2 The ASX submission to the Committee's inquiry provided the perspective of the licensed Australian securities market operator. The ASX, being responsible for surveillance and investigation of market related contraventions of the *Corporations Law*, brought a commercial perspective.
- 4.3 In its view, the essential matter for the Committee's consideration was the need and effect of a limitation period on the prosecution of corporate criminal matters. The submission noted

The law of limitations aims to encourage the timely resolution of legal controversies, and in so doing to strike a proper balance between the interests of potential claimants, potential defendants and society at large. [Alberta Law Reform Institute, Report No. 55, December 1989] The rationale for limitation periods can be thought of as a balance between natural justice on the one hand and the public interest on the other hand.⁵⁴

- 4.4 The balance between considerations of natural justice to potential defendants, and the public interest in having crime prosecuted could, the ASX submitted, be measured by reference to the *purpose* of the limitation period, including
- the encouragement of reasonable diligence in the pursuit of legal rights
 - the need to finalise the possibility of litigation; and,
 - the memory of witnesses will be more accurate and evidence will be easier to obtain if an action is brought closer to the time of the event.⁵⁵

⁵⁴ ASX submission, para. 3.1, p. 5.

⁵⁵ ASX submission, para. 3.1, p. 6. (Quoting *Hawkins v Claytons & Ors*, (1986) Aust. Torts Reports, para. 80-018)

- 4.5 Factors which the ASX identified as being important to determining an appropriate limitation period are
- Natural justice v public interest
 - Nature of the crime
 - Effectiveness of the prosecution process
 - Defence considerations (ie, the difficulty a defendant would face preparing a defence)
 - Efficient use of resources such as investigative and professional resources, and
 - Impact on a prosecutor's decision as to when to lay charges⁵⁶
- 4.6 Following canvassing of the various options for section 1316, the ASX's preferred option for the Committee's consideration was summarised as follows

Following an evaluation of the possible alternative options and having considered the [Australian Law Reform] Commission's decision concerning the limitation period for offences under the Trade Practices Act, the recommendation of ASX is to maintain the 5 year limitation period together with the Minister's discretionary power to extend.

Even if there is a lapse of time before the crime is detected, the ASC should still have sufficient time to investigate within the 5 year period. In the most exceptional of cases, e.g. where the crime is not detected until say 4 years after it occurred or where the evidential complexity is extremely high, the Minister may grant an extension of time.

Following discussions with ASX staff, involved in the surveillance and investigation of corporate contraventions, the prevailing view was that the 5 year limitation period was a very reasonable time period within which to investigate an offence. For many offences, such as market manipulation, the investigation process is relatively short. The difficulty in mounting a successful prosecution for such matters lies in the ability to get expert witnesses. No amount of time can overcome this particular problem.

The fact that a defendant can seek administrative review of the Minister's decision may be inconvenient for the prosecution.

⁵⁶ ASX submission, para 4.1, pp. 7-8.

However, it is a necessary part of the natural justice system and it is appropriate that the defendant is entitled to seek review of a decision which he/she feels is unjust.

To abolish the limitation period for offences under the Corporations Law is likely to lead to protracted investigations and prosecutions being brought any number of years after the event. This would be contrary to the principle of natural justice and often, would not be in the interests of the public.⁵⁷

- 4.7 The ASX's submission also addressed in detail the question of which offences under an extended limitation period should be in excess of five years, and how any such assessment should be made.⁵⁸
- 4.8 The Committee found this analysis of how offences under the *Corporations Law* might be classified and how a hierarchy of offences may be constructed of considerable interest. The ASX' submission was that

In summary, [various offences under the Corporations Law] when evaluated on the grounds of - moral turpitude, evidential complexity, likely economic impact/loss to individuals and impact on market confidence - merit an extension of the applicable limitation period.

- 4.9 The ASX's submission was that, when various offences under the *Corporations Law* were assessed against the nominated criteria, a limitation period of seven years would appear appropriate for the most serious offences.⁵⁹
- 4.10 The Committee asked the ASX how it responded to a principal complaint about section 1316 raised by other submissions, namely, the possibility that a determined and wealthy defendant would use remedies in the AAT and other means to postpone prosecution.

The potential for abuse has to be acknowledged. It is definitely the exchange's view that you should not remove the possibility of review of the minister's discretion, but obviously that is a different question

⁵⁷ ASX submission, para. 8, p. 20-1.

⁵⁸ ASX submission, pp. 21-27.

⁵⁹ ASX submission, p. 27 The submission also contained classification of these offences, p. 28.

from whether you remove the minister's discretion altogether. If it were a choice between these two things, we would say remove the minister's discretion altogether; do not leave his discretion but leave that non-reviewable. We have a lot of sympathy for the concerns that have been expressed in terms of use of the administrative process to delay proceedings. I understand that the submission has been made that there are relatively few cases where the minister's discretion had to be sought and also where it had been disputed.⁶⁰

- 4.11 In relation to the ability of the Courts to prevent abuse of process by a prosecution authority, the ASX told the Committee

We certainly considered the fact that the arguments have been made elsewhere to ask why these indictable offences should be treated differently. Underneath that is an assumption that indictable offences should have an unlimited scope, there should not be a time limit at all for indictable offences. Our approach was very much to ask, 'Putting aside the legislative history and the accident argument or whatever else, now in 1995 should there be a time limit there?' It was very much the view of our staff, people who are involved with investigating these kinds of matters, that five years should be enough and a good purpose is served in having the five years there.⁶¹

Australian Institute of Company Directors (AICD)

- 4.12 While the AICD did not propose retention of section 1316, it did propose that certain criminal offences should be removed from the *Corporations Law*, and be made subject to State law.⁶²

- 4.13 The AICD submission also noted

...the most serious offences should be covered by the Criminal Codes of the States and should not be dealt with under the Corporations Law. Here general rules of criminal law should apply.⁶³

⁶⁰ Hansard, 16 August 1995, p. CS 46.

⁶¹ Hansard, 16 August 1995, p. CS 47.

⁶² In relation to indictable offences, the AICD noted (in para. 4 of its submission) that 'This [the section 1316 limitation period] seems to be objectionable in principle in relation to summary offences and totally objectionable in principle to offences triable on indictment.'

⁶³ AICD submission, para. 5(1), p. 2.

and

*In relation to summary offences, there should be a provision similar to the original UK Act 1948 section 442(1). A period of five years might be appropriate here although section 15B(1)(b) of the Crimes Act 1914 (Cth) provides for a time limit of one year after commission of the offence. A longer period would seem justified in the case of corporate summary offences because of difficulty of detection in some cases.*⁶⁴

4.14 In evidence, the AICD told the Committee that

With regards to the more serious criminal indictable offences, we believe that there has been a very dangerous trend in the courts and in the legislature and in the Corporations Law in developing a quasi-criminal branch of the law within the Corporations Law.

*This is extremely dangerous and bad in legal practice. We would much prefer to see those aspects of the Corporations Law which result in or have the possibility of serious criminal indictable offences taken outside the Corporations Law and covered by the criminal codes of the various states. We think it is confusing the way they are developing within the Corporations Law and I do not think it does any great credit to the Corporations Law or the public and the market and the directors' understanding of that Corporations Law and where they stand. If it is felt that, for constitutional reasons or for some other reasons, it is not possible to take all of these actions outside the Corporations Law, we are yet to be convinced that it is not possible, then at least they should be quarantined or separated off into a separate part or chapter of the Corporations Law. If this approach is taken, then the question of the discretion falls by the wayside.*⁶⁵

4.15 Following this submission, the Committee pointed out what it regarded as considerable practical difficulties with this situation to the AICD. The Committee received other comments indicating that such a proposal was unnecessary.⁶⁶

⁶⁴ AICD submission, para 5(2), p. 2.

⁶⁵ Hansard, 16 August 1995, p. CS 50.

⁶⁶ See Hansard (Senator Neal), 16 August 1995, p. CS 51, and letter from the Law Council of Australia of 26 September 1995.

Law Council of Australia Companies Committee

- 4.16 The Law Council's submission to the Committee was in favour of retention of section 1316 in its present form.
- 4.17 Two points were central to the Law Council submission:
- that removal of the limitation period of 5 years will not lead to efficient or timely investigations of corporate crime; having a limitation period will do so
 - the role of the Attorney-General under section 1316 acts as a useful separation between the power to extend time that would be given to the ASC and DPP under an unlimited proposal, and the necessity for presentation of a clear case for extension the section now requires.
- 4.18 The Law Council provided the Committee with the following comments in relation to the limitation period, and in relation to the question of the DPP's accountability for prosecution decisions

Mrs Bishop - I am very concerned about the lack of accountability in prosecution processes generally, and I wondered whether or not the Law Council had addressed that question itself.

Mr Korner - The Law Council did address that question. The Law Council did believe that one of the reasons for leaving the power to extend time with the Attorney-General was the need for accountability. I think the Law Council view could be summarised as being to the effect that the burdens of large and complex prosecutions, at any rate, are considerable. Five years is a good prima facie limit, although obviously there will be cases where extension is justified.

The Law Council thought that it was an excellent thing that the actual exercise of that discretion be removed from the institutional process by which offences are investigated and prosecuted. The Law Council thought that it fitted in with the traditional functions of the Attorney-General which are recognised. The Law Council thought that the accountability of the Attorney-General to parliament was an excellent thing in that respect. Indeed, I think one of the points that the Law Council felt very strongly about was that part of the whole development of the new Corporations Law was an effort to get accountability back into corporate regulation....

But one of the major things that the Law Council, as it were, remembered from the debates that led up to the Corporations Law was that everyone said, and I think there was considerable truth in it, from my own experience, that there were difficulties in establishing clear lines of accountability: both at the administrative level and particularly at the prosecuting level. To elaborate a little bit, I mentioned I think a moment ago that when I was with New South Wales Corporate Affairs in the early 1980s there were some difficulties in getting the right flow-through of prosecutions. I think I could say that, because the prosecutions originated from corporate affairs, it is my belief, and I may be wrong, that the attorneys-general were reluctant to do anything other than allow them to go through. I think, in a way, because the corporate affairs system was no longer wholly under the state attorneys' control at that time, the state attorneys were relatively reluctant to exercise independent discretions. I thought that what we were trying to do when we set up the Corporations Law was to get back that element of independent discretion.

The Law Council felt quite strongly about the issue that you mentioned, particularly because it has a bearing not only on the instances where there is a challenge or the like but on the overall allocation of resources and the general style of conducting investigations. Probably in any given corporate collapse one could spend 10 or 15 years investigating every conceivable bad thing that might have happened. One could spend a lot of time going through the Corporations Law and finding things, but at the end of the day that is not the correct allocation of resources. It probably is not commensurate with the real misconduct or the real problems and damage to the economy and the community that are involved. All in all, I think what is needed is practical incentives to get on with the job, get the matter investigated, come to some conclusions, even if they are not the ultimate and total picture at the end of time; that sort of perfection is probably not attainable. Get on, get the matter into court and get the matter determined.

Delay in investigating and prosecuting matters was, I believe, one of the very serious reasons why the whole system did come into disrepute in the 1980s accountability is a good thing, and I believe that the Attorney-General, who on the one hand has traditions that give considerable scope for the exercise of principled discretion and on the other hand is separate from the investigating

*and prosecuting authorities, is a very suitable officer to exercise that discretion.*⁶⁷

Australian Accounting Bodies

4.19 The Accounting Bodies (the Australian Society of Certified Public Accountants and Institute of Chartered Accountants in Australia) made one principal submission to the Committee: that the limitation period be retained in section 1316, but that it be extended to 7 years

4.20 The Accountants' principal submission to the Committee was that a limitation period of 7 years should replace the existing 5 year provision. The submission observed that

*To create a distinction between the limitation period imposed for different offences would not serve any significant purpose and would therefore create an unnecessary level of complexity.*⁶⁸

and

*....we believe that creating distinctions between the limitation period imposed for different offences would create an unnecessary level of complexity. This is true not only of the Corporations Law, but across different laws. Further, given the obvious link in terms of investigation and evidence, it would be sensible to make the limitation period consistent with the period for which accounting and other records are required to be kept by various Acts.*⁶⁹

⁶⁷ Hansard, 16 August 1995, p. CS 59-60.

⁶⁸ Accountants' submission, para 1, p. 1.

⁶⁹ Accountants' submission, para 4, p. 2.

5. CONCLUSIONS AND RECOMMENDATIONS

Introduction

- 5.1 In considering its findings on the reference, the Committee had three principal options
- to recommend major amendment of section 1316, repealing the present limitation period in relation to indictable offences and also repeal of the Attorney-General's discretion to allow prosecutions to be brought more than 5 years
 - to recommend a minimal change by - for example - increasing the limitation period from 5 to 7 years, or by retaining the Attorney-General's discretion, though with the removal of any right to seek review of the exercise of the discretion
 - to recommend no change to the section
- 5.2 The Committee found that its discussions focussed clearly on the competing arguments advanced for either a maximum change option, or for a minimal change. Both changes involve amendment of the *Corporations Law*, and changes to the way corporate prosecutions are conducted in future.
- 5.3 Accordingly, the Committee also found that, as is often the case in inquiries into the current effectiveness of enacted legislation, to countenance only either repeal or amendment did not completely resolve issues revealed by working of current legislation.
- 5.4 The Committee's principal decision was that the status quo was unsatisfactory, as it will pose considerable problems for the proper prosecution of serious corporate crime. The conclusions reached by the Committee have been made 'on balance'. As a result, the Committee has also made recommendations regarding availability of better information on corporate prosecutions in future.
- 5.5 The Committee's recommendation is that section 1316 be amended, as described in the body of the chapter. The Committee makes certain recommendations as to how the ASC and the DPP can provide better information on the investigative and prosecutorial process in future.

Conclusions on the Terms of Reference

- 5.6 The Committee's conclusions and recommendations are as follows

Which offences under the Corporations Law (if any) should be subject to a limitation period, and how those offences should be identified.

- 5.7 Several submissions highlighted the large range and number of offences that arise under the Corporations Law. For example, the ASX in its submission suggested a classification of offences under the Corporations Law which could allow an extension of the limitation period from 5 to 7 years for particular offences.⁷⁰ The ASX's recommendation to the Committee highlighted various offences created by the Corporations Law

..... [the] various offences under the Corporations Law which when evaluated on the grounds of - moral turpitude, evidential complexity, likely economic impact/loss to individuals and impact on market confidence - merit an extension of the applicable limitation period.

and

Should extension of the limitation period for certain offences be chosen as the preferred option for the setting of a limitation period for offences, a period of seven years is suggested for offences listed...⁷¹

- 5.8 All the offences mentioned are indictable offences.
- 5.9 The ASC's view on this question was dealt with in Chapter 2. The ASC put to the Committee that the policy problem with section 1316 is that it
- misapprehends the difficulty of detecting many corporate offences and the length and complexity of the resulting investigations;
 - imposes a time limit on the prosecution of serious corporate offences which is arbitrary, anomalous and in many cases unrealistic; and
 - as a result, it prevents or impedes the effective investigation and prosecution of such offences.

And that

In the ASC's view, having regard to the typical nature of corporate crime and the difficulties surrounding its investigation, serious

⁷⁰ ASX submission, part 8. Pp. 21-27.

⁷¹ ASX submission, part 8, p. 27. The submission provided a schedule of offences under various headings: see submission p. 28, and schedules.

*corporate offences should not be excepted from the general maxim that time does not run against the Crown. There should be no limitation period on the prosecution of such offences.*⁷²

- 5.10 Evidence before the Committee on this term of reference also focussed on the distinction between indictable offences (which are subject to no general limitation period under the *Crimes Act 1914* and the special provisions in section 1316) and summary offences (which are subject to a 12 months limitation period under the *Crimes Act*).
- 5.11 Arguments advanced in submissions advocating retention of section 1316, particularly from the Law Council and the ASX, stressed that the limitation period should apply to indictable offences under the *Corporations Law* as limitation periods in general will act as a discipline on agencies to ensure expeditious investigatory and prosecuting process.
- 5.12 The section 1316 limitation period, in the submission of the Law Council, acts to focus the investigatory process which, without the section, would ‘multiply’ the number of prosecutions which would have to commence more than 5 years after alleged commission.⁷³
- 5.13 Evidence to the Committee on the growing complexity of corporate investigations and the often considerable time between the commission and detection of these offences makes it more important, if not imperative, that sufficient time be allowed for the investigatory processes carried out by the ASC pursuant to the terms of the *Australian Securities Commission Act 1989* and the *Corporations Law*, and for the commencement of prosecutions.
- 5.14 The Committee FINDS that there should be no limitation period for serious or indictable offences under the Corporations Law, and that section 1316 of the Corporations Law should be amended accordingly.**

Summary Offences

- 5.15 Submissions to the Committee as to whether summary offences should be treated differently to indictable offences primarily focussed on the

⁷² ASC submission, para. 54, p. 8.

⁷³ Law Council submission, p. 2.

necessity of indictable offences, rather than summary offences, should be subject to limitation.⁷⁴

5.16 The ASC's submission was that

*Although many minor regulatory offences, such as failures to lodge company documents, are detected, investigated and prosecuted within a relatively short time, it cannot be guaranteed that the 6-12 month time limit currently found in relevant state legislation can in all cases be complied with, particularly given the common absence of an immediate outward sign of the relevant offence. In fact, there is typically no visible indication of many summary corporate offences having been committed until some considerable time has passed.*⁷⁵

5.17 The Committee was provided with a detailed breakdown of prosecutions of both indictable and summary offences under both the Companies Code and the *Corporations Law* by the DPP.⁷⁶ The Committee observes that the figures provided to it by the DPP show that the number of summary offences prosecuted - compared to indictable offences - is quite small. The information in those figures relevant to the Committee's interest in this regard, is that the largest number of summary offences prosecuted - 289 out of 423 - were commenced more than three years after commission.

5.18 The Committee does not necessarily consider that the period currently allowed under the Crimes Act (ie, 12 months) for the commencement of prosecution is inadequate in relation to all matters; there are good grounds for ensuring that summary offences are disposed of promptly. It does, however, consider that the arguments raised by the ASC in relation to summary offences under the *Corporations Law*, which have lesser penalties but often involve quite serious breaches of proper corporate management, warrant a period of limitation longer than 12 months.

5.19 **The Committee FINDS that summary offences or minor regulatory matters under the *Corporations Law* should be subject to a limitation period.**

⁷⁴ ASC submission, paras. 55-63, pp. 8-9.

⁷⁵ ASC submission, para. 59, p. 9.

⁷⁶ Letter to the Committee from the DPP dated 16 November 1995 (referred to in FN 40).

What should the limitation period in section 1316 be?

- 5.20 The Committee has examined the nature of the offences that are currently subject to the limitation period in section 1316 above. It has concluded that indictable offences should be subject to no limitation period, and that summary offences and minor regulatory offences should be subject to a limitation period longer than 12 months.
- 5.21 The Committee has concluded that the limitation period on summary offences should reflect both the likely complexity of the matters that would need to be investigated by the ASC, and the likely course of prosecution proceedings that would follow. In relation to the question of complexity, the ASC submitted that the likelihood that a summary offence would be either relevant to the market or to the effective enforcement of the Corporations Law (unless the offence was the earliest in a number of 'serial' offences, such as failure to provide information).⁷⁷
- 5.22 The Committee concludes that, in view of the valid concern that such matters - while classified as summary offences - should be ones which the ASC can pursue if a consistently delinquent corporation is involved, an extended period beyond a limitation period of 1 year appears appropriate to the Committee. (But see as well the opinion of Senator Cooney attached to the Report.)
- 5.23 **The Committee FINDS that the limitation period for summary or minor offences under the Corporations Law should continue to be 5 years.**

Whether some discretionary element such as the consent of the Attorney-General should be retained and, if so, whether that decision should be subject to review .

- 5.24 It follows from the Committee's conclusion regarding the retention of the limitation period in section 1316, that a discretionary element, such as consent should be abolished.
- 5.25 However, the central point in submissions advocating retention of a limitation period and a discretion in the Attorney-General was that such a discretion provided enhanced accountability for the exercise of the already wide powers of the ASC and the DPP.

⁷⁷ ASC submission, para. 61, p. 9.

- 5.26 The Law Council's view that there should be '... a high level and accountable policy input into decisions to deploy large public resources in instituting complex proceedings many years after the events they concern'⁷⁸ leaves open the question as to why the legislative scheme centred around the DPP - which intentionally provides for the prosecution decision to be independent of political and other considerations (such as unacceptable financial cost) - should be different in relation to corporate law matters.
- 5.27 The Committee has detailed the arguments in favour of retention and abolition of the discretion in Chapters 2 and 3.
- 5.28 The principal consideration for the Committee has, in fact, not been the effectiveness of the Attorney-General's discretion as a principle of enhanced accountability. The principal consideration has been the need for there to be some effective brake on the commencement of oppressive, dilatory or excessive prosecutions. Arguments to the Committee stressed two important remedies to this situation: judicial or administrative review of a prosecution decision; and, decisions limiting the commencement of prosecutions due to abuse of process.
- 5.29 The Committee observes that the attitude of the Courts to both these questions has in recent decisions (referred to and discussed in Chapters 2 and 3) has indicated that suspect or offensive proceedings will not easily escape the Courts' scrutiny. The Committee does not agree that the addition of a discretion in the Attorney-General to allow an extended period for prosecution will enhance this protection, or act to the detriment of potential defendants or the justice system generally.
- 5.30 In light of these considerations, the Committee concludes that the current discretion allowed to the Attorney-General does not significantly add to the proper and desirable level of protection of persons accused under various provisions of the Corporations Law. The likelihood is that persons facing a probability of prosecution by the DPP would be aware of such a probability some considerable time before charges were preferred against them particularly where a matter has been under investigation for some time by the ASC.
- 5.31 It has been stressed to the Committee by those supporting retention of the Attorney-General's discretion, that section 1316 the limitation period

⁷⁸ Law Council submission, p. 2.

acts as a discipline against delay in investigation and prosecution of serious corporate criminal behaviour. The Committee does not accept that view. The Committee believes that the abolition of the limitation period will not offend against principles of justice or reasonableness if there continues to be proper and adequate protection of accused persons by the Courts.

- 5.32 As well, since the creation of the office of the DPP, a statutory independent prosecuting authority, it would be anomalous for the Attorney-General to retain an effective prosecutorial discretion such as that currently contained in section 1316.
- 5.33 One matter that the Committee adverted to in Chapter 3 should be the subject of some comment. That is, the accountability by the DPP for prosecution decisions.
- 5.34 While the Committee has found the arguments advocating abolition of the Attorney-General's discretion to be, on balance, convincing it considers that the discretion in section 1316 in part may operate as a means of ensuring accountability for decisions to prosecute persons after a sufficient period had elapsed to properly investigate a matter and assemble a case.
- 5.35 The existence of the remedies available to aggrieved defendants in corporate prosecutions described in the report does not automatically mean that the Attorney-General's discretion should be abolished. Part of the value of the Attorney-General's discretion is that it allows some degree of accountability for a decision to allow prosecution beyond the limitation period.
- 5.36 The Committee believes, therefore, that its proposal for the DPP to include extra information in the DPP's annual report will provide some better information on the DPP's decisions in relation to corporate offences.
- 5.37 **The Committee FINDS that the present requirement in section 1316 of the Corporations Law that consent be sought from the Attorney-General where an extension of time is required to commence a prosecution should be abolished.**

The potential impact of limitation periods imposed by other laws.

- 5.38 The Committee has considered the effect of limitation periods in other laws of the Commonwealth which could reasonably be considered to bear some similarity or equivalence to those in the Corporations Law.
- 5.39 The ASX, for example told the Committee that the Trade Practices Act 1974 provided for a three year limitation period in respect of most offences which had recently been reviewed by the Australian Law Reform Commission, which had found no real objection to the provision.⁷⁹
- 5.40 The Committee notes that in relation to the ALRC's review of the Trade Practices Act, the DPP argued substantially the same point of view in relation to prosecutions under that Act as it has in relation to matters under the Corporations Law. However, the ALRC report also noted that the Trade Practices Commission had supported the present limitation period as being the most appropriate to the system of regulation and commercial activity it was responsible for. This was not the view of the ASC in relation to matters under the Corporations Law.
- 5.41 The Committee also notes that the limitation period in other laws, including the taxation laws, are subject to no limitation period.⁸⁰ In addition, the comparability of offences created by the Corporations Law are similar to those created by other legislation, including state Crimes Acts.⁸¹
- 5.42 The Committee concludes that an anomalous position would be created if limitation periods in other legislation were to be applied to offences under the Corporations Law.

Committee's conclusions and recommendations on other matters

- 5.43 As noted earlier in this chapter, at any given time the DPP has a number of current matters referred to it by the ASC for assessment and, if the DPP considers appropriate, for prosecution in the Courts.⁸²
- 5.44 The Committee has described (in paragraph 5.35 above) the concern it has that in future a clear picture be presented each year of the number of

⁷⁹ ASX submission, paras. 6.1-6.2, pp. 18-19.

⁸⁰ ASC submission, paras. 44-51, p. 7.

⁸¹ ASC submission, para. 50, p. 7-8.

⁸² See *Director of Public Prosecutions*, Annual Report 1994-5, p. 108 & 114.

current matters in the hands of the DPP, the time that has elapsed since the alleged commission of offences that may be involved in each matter; and, the state each matter has reached in the investigation, assessment and prosecution process.

- 5.45 The Committee believes such a picture will allow the responsible Minister and the Parliament to better ensure that, if the section 1316 is amended as the Committee recommends, that there is appropriate public information on the ASC and DPP's administration of this area of their responsibilities.
- 5.46 The Committee notes that, at present, both the ASC and the DPP provide statistical information regarding the number of matters referred to the DPP in each year, and that the DPP has broken these down into indictable and summary offences. It is also important, in the Committee's view, that these figures indicate how long each matter has been active, both as a matter under investigation by the ASC, and under assessment and/or actual prosecution process in the Courts.

The Committee RECOMMENDS that Future Annual Reports of the Australian Securities Commission and the Commonwealth Director of Public Prosecutions provide detailed information showing the time that has elapsed since the commission of alleged offences under the *Corporations Law* and the time that has elapsed since the commencement of active investigative and prosecutorial processes.



STEPHEN SMITH, MP
CHAIRMAN

27 NOVEMBER 1995

APPENDIX A
SUBMISSIONS RECEIVED BY THE COMMITTEE

1. Attorney-General of Western Australia
2. Australian Bankers' Association
3. Commonwealth Attorney-General's Department
4. Commonwealth Director of Public Prosecutions
5. Insolvency Practitioners Association of Australia
6. Australian Stock Exchange
7. Australian Securities Commission
8. Australian Institute of Company Directors
9. Law Council of Australia
10. Australian Accounting Bodies (Australian Society of Certified Practising Accountants and the Institute of Chartered Accountants in Australia)

TIME LIMIT AND SUMMARY OFFENCES

OPINION OF SENATOR COONEY

In my view the prosecution of a person alleged to have committed an offence made summary under the Corporations Law should be initiated within 12 months of the date on which it is said to have occurred.

My view is based on the proposition that the criminal law ought treat all persons equally unless there is a compelling reason for it doing otherwise. Such reason has not been made out in the present instance.

Throughout the various jurisdictions within Australia the prevailing law is that the appropriate authorities must initiate the prosecution of a person said to have committed a summary offence within a year of its alleged perpetration. To vary that circumstance to the disadvantage of people because they belong to a particular group or because resources to prosecute them are sparse, or because detection of their alleged offence is delayed or because there is a popular appetite for their conviction is wrong.

Any proposal to define a period within which prosecutions under a particular piece of legislation must be instituted which is different from that which generally operates within the criminal law should be considered in the context of that law as a whole and not within a confined part of it. The issue of whether a change in a particular time limit is sound should be determined by examining the total rather than a limited spread of its application. The fact that prosecutions in respect of summary offences under the Corporations Law can now be initiated for up to five years after their commission does not by itself justify the retention of that period where the time generally allowed under the criminal law is twelve months.

The Committee, and I agree with it, has recommended that there be no time limit for the bringing of prosecutions of indictable offences under the Corporations Law. This makes the situation under that legislation the same as that for the criminal law generally. This being so it is reasonable that the same be done in respect of summary offences. There is insufficient material before the Committee to justify different courses being taken for indictable and summary offences. As the evidence stands a change ought be made for both indictable and summary offences or for neither.