

THE ASC'S REGULATORY POWERS

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The purpose of this paper is to provide an overview of the major regulatory powers that are available to the Australian Securities Commission (ASC) and the other decision-making entities established under the Australian Securities Commission Act (ASC Law) and the Corporations Law. The paper examines how these regulatory powers are exercised and the ways in which they may be challenged by aggrieved persons.

Because the paper is concerned with regulatory powers and decision-making (as opposed to investigative and enforcement powers) the majority of decisions and powers referred to will arise under the Corporations Law rather than the ASC Law.

Overview of administrative review under the former Commonwealth/States Co-operative Scheme of corporation regulation

Prior to 1991, administrative review under the former Commonwealth/State companies co-operative scheme was governed by the Administrative Remedies

Agreement between the Commonwealth and States dated 21 April 1982. Under that agreement the parties agreed that review of administrative decisions under state laws was a matter to be determined by state governments and state legislation. The principal feature of the administrative scheme put in place under the agreement was that the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) excluded from review decisions of the NCSC made in the performance of a function or the exercise of the power conferred upon it by any state Act or law of the Northern Territory and that decisions of members or delegates of the NCSC made pursuant to functions conferred by a state Act were not (for the purposes of section 9 of the ADJR Act) decisions of officers of the Commonwealth and, accordingly, not subject to review under the ADJR Act.

The main provision under which review of decisions made under the co-operative scheme could be reviewed was section 537 of the Companies Code. In summary, that section provided that a person aggrieved by the refusal of the NCSC to register or receive a document or by any other act, omission or decision of the NCSC could appeal to a state Supreme Court - which could confirm, reverse or modify the act or decision or remedy the omission.

Some examples of appeals under section 537 of the Companies Code include *Peters (WA) Limited -v- NCSC* (1986) 4 ACLC 507; *BHP -v- NCSC* (1986) 4 ACLC 265 (appeal against decision of delegate of the NCSC to register a Part A Statement); *Elders IXL Limited -v- NCSC* (1987) VR 1 (declaration by the NCSC that an acquisition of shares was unacceptable conduct).

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Other avenues of judicial review available were:

- by the High Court in the exercise of original jurisdiction where a prerogative writ or injunction was sought against a member of the NCSC or its staff as an officer of the Commonwealth or where the Commonwealth or a person being sued on behalf of the Commonwealth was a party.
- by the Federal Court in the exercise of original jurisdiction under section 39B of the *Judiciary Act 1903*.

Administrative Law review under the current corporations scheme

Section 35 of the *Corporations (name of State) Act* and section 45B of the *Corporations Act 1989* provide that the Commonwealth administrative laws (as defined) apply to the Corporations Law and the ASC Law of each State and Territory jurisdiction as if they were laws of the Commonwealth. The Commonwealth administrative law package comprises the *Administrative Appeals Tribunal Act 1975* (the AAT Act), the *Ombudsman Act 1976*, the ADJR Act, the *Freedom of Information Act 1982* (the FOI Act) and the *Privacy Act 1988*.

The explanatory memorandum to the *Corporations Legislation Amendment Bill 1990* noted that the application of the Commonwealth administrative law package was a "significant advancement on the co-operative scheme legislation which excluded the remedies provided by Commonwealth administrative law".

This paper will not address the FOI Act and will deal with issues relating to the Ombudsman Act only briefly. It does not consider the Privacy Act.

Ombudsman Act 1976

The Ombudsman's role is to investigate complaints concerning the administrative

actions of Commonwealth government departments and prescribed authorities or agencies. The ASC is a prescribed authority as defined by the Ombudsman Act.

The purpose of an investigation by the Ombudsman is to determine whether an action or decision, or the process associated with the taking of an action or decision, is defective in some way. An "action" is something broader than a decision and includes in-action and omission by the agency. Most ASC decisions are reviewable by the Ombudsman. The Ombudsman is also authorised to enquire into the manner in which an agency has dealt with the FOI Act.

The Ombudsman can make preliminary enquiries of an agency under section 7A of the Ombudsman Act to gather information regarding a complaint and to ascertain whether the matter warrants investigation or is one that the Ombudsman is authorised to investigate. For example, the Ombudsman is not authorised to investigate action taken by a minister. In practice the Ombudsman resolves many complaints at this preliminary level.

If a matter cannot be resolved in this manner an investigation is carried out under subsection 8(3) of the Ombudsman Act. This section provides that the Ombudsman may obtain information from such persons and make such enquiries as the Ombudsman thinks fit. Prior to commencing an investigation the Ombudsman is required to advise the principal officer of the agency in question (in the case of the ASC, the Chairman). Accordingly, a letter from the Ombudsman's office to the Chairman is regarded as "notification".

The Ombudsman has the power to compel the provision of information and the production of documents and records. A person is not excused from furnishing any information, producing a document or

answering a question on the ground that furnishing of the information or answering the question would contravene the provisions of any other Act, such as the ASC Law. Should an agency fail to comply with a section 9 notice the Ombudsman may apply to the Federal Court for orders directing the agency to comply, after the Attorney General has been told of the reasons for the application.

The Ombudsman may also refer a question to the Administrative Appeals Tribunal (AAT) to obtain an advisory opinion in relation to the appropriateness of action taken, or the exercise of a power, by the agency. Alternatively, the Ombudsman can recommend that the agency obtain the opinion rather than the Ombudsman taking the action.

Where an issue, usually a dispute, arises between the agency and the Ombudsman with respect to the nature and extent of a function of the Ombudsman or the exercise or proposed exercise of the power by her, either the Ombudsman or the agency can apply to the Federal Court for a determination of the issue (but again only after the Attorney General has been told of the reasons for the application).

If after conducting an investigation the Ombudsman is of the opinion that the action in question:

- appears to have been contrary to law, unreasonable, unjust or improperly discriminatory; or
- was in accordance with a rule of law but that the rule or practice may be unreasonable or unjust; or
- was based either wholly or partly on a mistake of law or fact; or
- was subject to irrelevant consideration; or
- failed to take relevant considerations into account; or

- was otherwise in all the circumstances wrong; or
- did not furnish, but should have furnished, the complainant with particulars of the reasons for deciding to exercise the power in that matter or to refuse to exercise the power;

a report will be prepared in which the reasons for the opinions are set out.

If the report is critical of the agency a draft of the report will be given to the agency for comment and the final report will take any comments into account. In the report the Ombudsman can request the agency to advise what action it proposes to take in relation to the recommendations. If the Ombudsman believes an agency has not taken adequate or appropriate action the Ombudsman may inform the Prime Minister and thereafter give the report to the President of the Senate and Speaker of the House of Representatives for presentation to both houses of Parliament.

The ASC and the Ombudsman are able frequently to resolve matters at a preliminary stage by way of oral advice. If that is not possible then the ASC requires the Ombudsman to commence an investigation.

The most common type of matter raised with the ASC by the Ombudsman concerns ASC decisions not to investigate alleged contraventions of the Corporations Law. In such matters the ASC is usually urged to pursue a course of action or re-open an investigation previously concluded.

Where the complaint to the Ombudsman concerns information confidential to a third party (ie a person other than the person who complained to the Ombudsman) or which might affect such a third party's reputation, the ASC must consider what procedural fairness to accord the third party. ASC Law (s127) and the Ombudsman Act (s8) permit the

ASC to release confidential information to the Ombudsman - but not at the expense of procedural fairness to affected persons.

The ASC has adopted the view that its procedural fairness obligations in this context will be satisfied if it:

- notifies the Ombudsman that the information is confidential, and stating why;
- obtains a representation that the information is reasonably needed by the Ombudsman to conduct a specified investigation; and
- obtains an undertaking that before the Ombudsman releases any of the information in a report or for any other reason the Ombudsman will afford anyone affected by the release the same sort of hearing and consideration as the ASC would have had to give in the same circumstances.

Since 1 July 1993 the ASC has dealt with 33 matters raised by the Ombudsman - 13 in the year to June 1994, 19 in the year to June 1995 and one since then.

Jurisdiction of the Administrative Appeals Tribunal

Under section 25 of the AAT Act the AAT is authorised to review decisions only where an enactment has specifically conferred jurisdiction so to do. Since January 1991 the AAT has had the authority, by virtue of section 1317B of the Corporations Law, to review the decisions of the Minister, the ASC and the Companies Auditors and Liquidators Disciplinary Board (CALDB) and any delegates thereof subject to a number of exceptions set out in section 1317C.

Unlike other enabling legislation, the conferral of jurisdiction on the AAT under the Corporations Law is made by way of general grant with only a limited number of exceptions. Accordingly, the power

conferred on the AAT to review ASC decisions is extremely wide. Significant difficulties have emerged for the ASC, the AAT and ASC clients in determining the precise scope of AAT jurisdiction. This point is returned to below.

Unlike the Corporations Law, the ASC Law does not confer jurisdiction upon the AAT by way of a general grant. Rather, section 244(2) of the ASC Law gives the AAT jurisdiction to review decisions of the ASC only in relation to decisions made under Division 8 of Part 3 of the ASC Law (ie decisions in relation to orders that can be made by the Commission in relation to securities and futures contracts).

A person whose interests have been affected by a decision is entitled to seek review. The term "person whose interests are affected" extends to those who are beneficially and adversely effected. The AAT has consistently indicated that it will take an expansive interpretation in relation to a person's right to apply for a review.

At the hearing the AAT "stands in the shoes of the decision-maker" - but it is not bound to take account only of that evidence and information that was before the decision-maker at the time the decision was made. It may take fresh evidence in order to undertake a merits review rather than looking to the "legality" of the decision or the decision-making process. The AAT's purpose is to reach the correct and preferable decision in the circumstances of the particular case. In so doing it looks to the facts and circumstances and the law at the time that it makes its decision. The AAT is not bound by the rules of evidence and may inform itself as it considers appropriate.

In the year to June 1994 there were 18 appeals to the AAT from ASC decisions, 20 in the year to June 1995 and 9 since then.

Review under ADJR Act

The ADJR Act provides for review by the Federal Court of decisions of an administrative character, made, proposed to made, required to made (whether in the exercise of a discretion or not) under an enactment. A person who is aggrieved by such a decision is entitled to seek judicial review. The ADJR Act exempts from its operation certain categories of decisions - however decisions of the ASC are not exempted from the operation of the ADJR Act (but as noted above, the Act did not apply to decisions of members of the NCSC or of delegates of the NCSC made pursuant to functions conferred by a State Act).

The Federal Court considers the matter at the time the decision was made. It is empowered to make a variety of orders including setting aside a decision and remitting a matter back to the decision-maker in accordance with the Law.

Section 5 of the ADJR Act sets out the grounds upon which an application for an order of review in respect of a decision to which the Act applies may be made. These grounds broadly correspond to the common law grounds of review, although there may be slight differences.

What is a decision?

Both the ADJR Act and the AAT Act provide that a reference to "decision" includes among other things:

- (a) the making, suspending, revoking or refusing to make an order for determination;
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- (d) imposing a condition or restriction;

- (e) making a declaration, demand or requirement;
- (f) retaining or refusing to deliver an article; or
- (g) doing or refusing to do other act or thing.

The leading case in relation to what is a decision in this context is the High Court decision in *Australian Broadcasting Tribunal -v- Bond* (1990) 94 ALR 11 (the Bond Case) where it was held that:

A reviewable decision is one for which provision is made by or under a statute. That will generally, but not always, entail a decision which is final or operative or determinative, at least in a practical sense, of the issue of fact falling for consideration.

Another essential quality of a reviewable decision is that it be a substantive determination.

As commentators have frequently noted, the Corporations Law is now an extremely large piece of legislation involving some 1,400 sections, a very high proportion of which involve the ASC doing something, making some decision or acting in some fashion, all of which might at first sight appear to fall within the ambit of the AAT Act and/or the ADJR Act. However, it seems clear that there are many acts or decisions which do not involve the exercise of a discretion, or are a mandatory activity for the ASC, or they are preliminary or procedural decisions where it is at least arguable that there is not a decision within the Bond test and/or the decision relates to matters of administration and form. An example of the former category (ie no discretion) might be the obligation of the ASC to allot each corporation a registration number (subsection 129(2)) and of the latter category the ability of the ASC to give written comments on documents lodged in relation to related party transactions (subsection 243W(1)).

What is the source of power?

As has been seen above, the AAT has jurisdiction over all matters under the Corporations Law (with the exception of the matters set out in section 1317C) but has only jurisdiction in relation to a very narrow range of matters under the ASC Law. It follows that if the source of the power to be exercised by the ASC is properly found in the ASC Law rather than the Corporations Law then the AAT will have no jurisdiction - although the Federal Court under the ADJR Act would have jurisdiction in either case.

The difficulties inherent in distinguishing between those powers arising under the Corporations Law and those arising under the ASC Law is well demonstrated by the difficulties that have arisen in connection with review of the ASC's decision to authorise persons under section 597 of the Corporations Law to make an application to the Court to examine officers of companies.

Occupational licensing

A significant proportion of ASC resources are applied to decision-making under the Corporations Law involving the regulation of persons who wish to carry on certain occupations and businesses. The main of these are:

- registered company auditors (CL Part 9.2)
- liquidators (CL Part 9.2)
- official liquidators (CL Part 9.2)
- securities dealers (CL Part 7.3)
- investment advisers (CL Part 7.3)
- futures brokers (CL Part 8.3)
- futures dealers (CL Part 8.3)
- trustees or representative of an approved prescribed interest trust deed (CL Part 7.12)

(a) Auditors and liquidators

In relation to the registration of auditors and liquidators (but not official liquidators) the statutory regime set out in Part 9.2 of the Corporations Law is that, on receipt of an application, the ASC "shall" register the applicant as an auditor or liquidator if the applicant has the formal qualifications specified and satisfies the ASC as to experience and capacity and that he/she is "otherwise a fit and proper person" (see sections 1280 and 1282 of the Corporations Law). Otherwise the ASC "shall" refuse the application.

By virtue of subsections 1280(8) and 1282(10) of the Corporations Law the ASC may not refuse to register a person as an auditor or a liquidator unless the person is given an opportunity to appear at a hearing and to make submissions and give evidence about the matter.

The procedures followed by the ASC in dealing with these types of applications are set out in the ASC Procedures Manual (published by the Centre for Professional Development and available to the public). In fact ASC staff would first interview an applicant whose application seemed deficient. This would be an opportunity for the applicant to fill any gaps in the application - having been advised where the application was perceived to be deficient.

If after this interview the application still appeared to be deficient the applicant would be so advised and offered the opportunity to appear at a hearing. The hearing would be convened by a senior officer of the ASC acting as a delegate of the Commission. This officer would not have been involved in the processing of the application to that date.

The hearing would be held in accordance with guidelines set out in the ASC Hearings Manual (also published by the Centre for Professional Development and also available to the public).

If, after the hearing, the delegate decides to refuse the application, the applicant must, within 14 days of the decision, be given a statement of the decision and the reasons for it (see subsections 1280(9) and 1282(11) of the Corporations Law). Note that section 109V of the Corporations Law would also require such a statement to set out the findings on material questions of fact and refer to the evidence or other material on which these findings are based.

The regime in the Corporations Law for dealing with auditors and liquidators whose conduct or ability is thought to have fallen short of the required standard is set out in section 1292 and following of the Corporations Law. On the application of the ASC the CALDB may, if satisfied as to the necessary grounds, cancel or suspend the registration of an auditor or liquidator, admonish, reprimand, require undertakings and deal with any failure to comply with undertakings.

Section 1294 of the Corporations Law requires the CALDB not to exercise its powers under section 1292 unless it gives the person concerned, and the ASC, the opportunity to appear at a hearing and make submissions to, and adduce evidence before it.

Any exercise of power by the CALDB is reviewable under the AAT Act and the ADJR Act.

The conduct of CALDB proceedings is largely set out in Part 11 Division 2 of the ASC Law. Section 218 specifically provides that the CALDB must observe the rules of natural justice "at and in connection with a hearing." Some issues which go to the content of natural justice in this context can be identified:

- There is a right to an oral hearing, but the auditor/liquidator can elect to make only oral submissions (ASC Law subsection 216(9) and Corporations Law section 1294).

- There is a right to representation by a barrister or solicitor. The ASC has a right to be represented by an employee or other person authorised by the ASC - but the auditor/liquidator may only be represented by an employee approved by the CALDB (ASC Law subsection 218(3)).
- Hearings must be in private unless the auditor/liquidator requests a public hearing (ASC Law subsections 216(2) and (3)).
- The rules of evidence do not apply (ASC Law paragraph 218(i)) - but this should not be taken to mean that some of those rules may not be appropriate in particular circumstances. For example, the tribunal should not rely on an issue and material not made known to the person concerned. The CALDB will frequently have to make decisions about what evidence to receive or not receive - and the weight to be given to it - and those decisions could form the basis of appeals to the AAT or the Federal Court. It is, perhaps, understandable that the CALDB may choose to follow, more or less, the rules of evidence.
- There is no statutory right of cross-examination - but consistent with the common law right to cross-examine where oral testimony is presented, the CALDB does permit cross-examination.
- The practice adopted by the CALDB is to require the ASC to establish its "case" before requiring the auditor/liquidator to present any "defence." The more serious the allegations made the higher the standard of proof required of the ASC will be.

In practice, the ASC initiates a matter in the CALDB by submitting a statement of "facts and contentions." This document sets out all the allegations made against the auditor or liquidator and the facts that

would support them. All supporting documentary material is subsequently made available to the auditor/liquidator before the hearing.

In fact, in virtually all cases the ASC makes available the facts and contentions and relevant documents to the auditor/liquidator prior to submission of the matter to the CALDB and will take into account any submissions made.

Following the reasoning in *Gallivan Investments Ltd -v- ASC* (9 ACLC 1324) it has been suggested that a decision of the ASC to apply to the CALDB is not a reviewable decision. The decision for the ASC is only whether the circumstances may exist which would entitle the CALDB to exercise its powers ie it is not an ultimate or operative decision. In the light of the reasoning of the Full Federal Court in *Mercantile Mutual -v- ASC* (1993) 10 ACSR 140 in relation to decisions to authorise a person to apply to the Court for a section 587 examination, it now seems likely that the Gallivan reasoning cannot be sustained.

(b) Official liquidators

The manner in which official liquidators (ie those persons who may be appointed by a court to conduct the winding up of a company) can be appointed and removed is somewhat different.

Section 1283 of the Corporations Law empowers the ASC to register as official liquidators "as many" natural persons who are already registered as liquidators "as it thinks fit."

Apart from the need for the applicant to be a registered liquidator, no other qualifications or criteria for appointment as an official liquidator are specified and there is no requirement that an applicant be given the opportunity of a hearing before the application is refused.

The ASC has published a Policy Statement (PS24) regarding its policy on

the registration of official liquidators and the ASC Procedures Manual provides that an applicant should be offered an interview to address identified areas of weakness in the application and would also be provided with a statement of reasons for a refusal.

Consistent with the dominant role played by the ASC in the registration of official liquidators, section 1291 of the Corporations Law empowers the ASC "at any time," to cancel or suspend for a specified period the registration of an official liquidator. There is no statutory right to a hearing but subsection 1291(3) requires the ASC to give a notice setting out the decision and the reasons for it within 14 days of the decision.

Again, the ASC would not attempt to remove the registration of an official liquidator without notifying him/her of the grounds upon which that course of action was being contemplated and providing him/her with an opportunity to appear, give evidence and make written or oral submissions. The matter would be dealt with in much the same way as the ASC deals with the removal of licenses from persons involved in the securities industry - which is considered below.

In any event, a decision of the ASC to refuse or cancel registration as an official liquidator would be reviewable under both the AAT Act and the ADJR Act.

It follows that, with the Commonwealth's administrative law package now applicable to decision-making of this type, comments such as those of O'Loughlin J in *Pipkin -v- Corporate Affairs Commission* [(1987) 5 ACLC 179] have much less force today. His Honour said (at p 183):-

the deliberate and separate treatment of official liquidators in the legislation - particularly the arbitrary power to cancel or suspend the registration of an official liquidator ... reinforces my view that the legislation has seen fit to repose in the Commission the absolute control over the registration of official liquidators and

the cancellation or suspension of their registration.

(c) Securities and Futures Industry participants

The procedures adopted by the ASC in processing applications for persons wanting to be licensed under Parts 7.3 and 8.3 of the Corporations Law are similar to those adopted in relation to the registration of auditors and liquidators.

Applications (under section 782 or 1144 of the Corporations Law) are considered in accordance with the requirements of the Corporations Law and relevant ASC Policy Statements. Perceived deficiencies are brought to the attention of the applicant, who is invited to address them. Likewise the standard (and any non-standard) conditions intended to be imposed on the licensee due to the nature of the business to be carried on and the circumstances of the applicant will be "offered" to the applicant. If the ASC is minded to refuse the application or to impose a condition on the license that is unacceptable to the applicant the applicant is offered the opportunity of a hearing before the final decision is made (see sections 837 and 1200 of the Corporations Law).

Unlike the case of auditors and liquidators, where the ASC considers that a licensed person in the securities or futures industry requires some form of disciplinary action (such as revocation or suspension of the license or the imposition of a condition on a license) or to ban a person from acting as a representative of a licensee, the ASC itself has the power to make such decision disciplinary decisions. There is no equivalent of the CALDB for these industry participants.

In such cases the ASC must provide the person with an opportunity for a hearing of a similar nature to that required in the original licensing situation (ie under section 837 or 1200) of the Corporations Law.

Such a hearing is, obviously, in response to some form of provisional or tentative finding of fact and/or law reached by an ASC officer to the effect that the elements of a relevant section of the Corporations Law are made out which would justify the contemplated disciplinary action. Examples of such sections are sections 020, 020, 029, 1101, 1102, 1102A but that list is by no means exhaustive.

The notice of hearing given to the person concerned must give the person sufficient particulars of the provisional findings and conclusions of the ASC which are relevant to the elements of the particular licensing section and sufficient time to prepare a case, obtain representation and appear at the hearing.

In practice the notice of hearing will contain all the allegations, facts and contentions the ASC believes the person should answer and all supporting documentary material (including statements made by potential witnesses) will be provided to the person well before the hearing.

Prospectus Stop Orders

Section 1033 of the Corporations Law empowers the ASC, where it appears that the requirements of the section are satisfied in relation to a prospectus, to issue an interim stop order, without a hearing, or a final stop order after holding a hearing. Such orders have the effect of preventing securities from being allotted, issued or sold.

For a final stop order, the obligation on the ASC is to not make the order unless it has "held a hearing and given a reasonable opportunity to any interested persons to make oral or written submissions ... on the question whether an order should be made." The interim stop order can be made if the ASC considers any delay in making an order pending the holding of a hearing would

be prejudicial to the public interest (see subsections 1033(3) and (4)).

Time will normally be of the essence when the ASC is considering whether a stop order should be made in relation to a prospectus and, consequently, the opportunity to provide a form of procedural fairness to persons affected by a stop order may be limited. Nevertheless, the ASC will normally inform the issuers of a prospectus of its concerns which may lead to the making of an interim stop order and provide a period of time (sometimes limited, but usually at least 24 hours) to respond.

Likewise, if the ASC believes that the grounds may exist for a final stop order, but an interim stop order does not appear necessary, the ASC would normally, before announcing the holding of a section 1033 hearing, give the issuer a reasonable opportunity to respond to the ASC's concerns, withdraw the prospectus or issue a supplementary prospectus.

The obligation on the ASC is to give any "interested persons" a reasonable opportunity to make submissions at a hearing. An interested person is one whose interests would be affected by the making of the stop order. Any person with a direct financial interest in the prospectus or any person who might be exposed to civil liability under Part 7.11 of the Corporations Law would meet the "interested person" test. The corporation issuing the securities, its directors, the author of any statements under scrutiny and the underwriters might all be expected to have a sufficient interest to satisfy the test.

Disqualification of directors under section 600

Section 600 of the Corporations Law is seen by the ASC as a particularly important tool in the range of measures that can be taken to protect investors and creditors from having to deal with unscrupulous or particularly inept

company directors. My remarks will be limited to some issues of process.

When the ASC believes that the requirements of section 600 are made out it can issue a Notice to Show Cause to the relevant person. This notice provides sufficient detail to inform the person of the basis on which a decision may be made - including the names of the corporations involved, the periods of directorships, dates of winding up etc. The notice will be accompanied by a Statement of Areas of Concern - which clearly particularises the areas of conduct of the person of concern to the ASC and which would appear to justify a disqualification order. The person will also, at the same time, be given copies of all the documents the ASC would rely on at the hearing. If the matter involves allegations of possible criminal behaviour the person will also be given a document setting out his/her rights under section 68 of the ASC Law.

Before the final hearing is held a preliminary conference will be held with the person and his/her representative to ensure the issues are clarified, that all relevant documents have been made available, to estimate the time needed for the final hearing, whether the person wishes to have summons issued to any witnesses etc.

The ASC believes that the procedural arrangements that it has put in place provide a high level of procedural fairness to persons who may be subject to a disqualification order.

Exemption and modification decisions

In a number of areas in the Corporations Law the ASC is given power to exempt a person from complying with a provision of the Corporations Law or to modify the operation of a provision in its application to a person or a class of persons. Examples include sections 111AT, 313, 728, 730, 1069 and 1084. Judging by the number of applications received by the

ASC for various forms of relief and the proportion of ASC resources devoted to dealing with such matters, it would seem to be no exaggeration to say that the Corporations Law could not operate satisfactorily without the regular use by the ASC of these powers.

Neither the Corporations Law nor the ASC Law specify how the ASC should carry out its functions under these various empowering sections. As has been noted, prior to 1991 the Commonwealth's administrative law package was not applicable to decision-making of this type and the number of decisions of the NCSC and its delegates challenged under section 537 of the Companies Code was small. Accordingly, the ASC and its staff and, one suspects, the AAT and perhaps the Federal Court, have been on a quite steep learning curve over the past four and a half years. Certainly, for ASC staff the steps that now need to be taken to make certain types of decisions, the time that is required to undertake them and the new issues and principles to be grappled with to ensure all concerned are accorded procedural fairness have introduced an entirely new dimension to their work.

The ASC has published a number of Policy Statements, Practice Notes and other material that attempts to set out how the ASC meets its obligations to accord procedural fairness - both when exercising exemption and modification powers and generally. In particular readers are referred to Policy Statements 35, 51, 78 and 92, Practice Note 57 and the Legal Commentary at 1993 ASC Digest LC21. This paper can provide no more than a brief overview in relation to two issues:

- the obligation to give procedural fairness to third parties where the ASC proposes to make a decision which may adversely affect a person's rights, interests or legitimate expectations in a direct and immediate way (see *Kioa -v- West* (1985) 159 CLR 550 at 582 and

Ainsworth -v- Criminal Justice Commission (1992) 106 ALR 11 at 19).

- the obligation to notify persons who are affected by a decision of the ASC of their right to appeal to the AAT as required by section 244A of the ASC Law and section 1317D of the Corporations Law.

(a) *Procedural fairness to third parties*

As is noted in Policy Statement 92, in assessing its procedural fairness obligations to third parties in a particular case, the ASC considers -

- whether any third party might be directly, materially and adversely affected by the decision - if not there is no obligation to consult any party and the application can be determined.
- whether the applicant has given sufficient reason for the ASC to expedite the application and/or treat it as confidential. If the judgement is that the detrimental effect on the applicant clearly outweighs the potential adverse effect on third parties the ASC will not consult the third parties. If the material adverse effect on third parties is not clearly outweighed by detriment to the applicant then the ASC will not determine the application until the third parties have been consulted. If the applicant refuses to permit the ASC to provide the third parties with sufficient information the ASC will refuse the application.

If the ASC determines that third parties must be given procedural fairness it must consider -

- who are the third parties who will be directly, materially and adversely affected;
- which of those parties should be notified;
- what information must be given to those third parties; and

- how much time needs to be given to them.

Inevitably, the ASC is required to balance confidentiality versus disclosure and a quick decision versus delays due to consultation

The ASC will not necessarily have to consult every person who may be affected by the proposed decision and who would be entitled to be notified of the decision after it was made - although the two categories will often be the same. Normally, the directors of a company and the trustee of a prescribed interest scheme would be taken to represent the shareholders or prescribed interest holders. See *Hawker de Havilland Ltd -v- ASC* (1991) ACSR 579 and *Magellan Petroleum Australia Ltd -v- ASC* (1993) 30 ALD 214.

Where the information that would need to be provided to the third parties is confidential the applicant will need either to waive the confidentiality or negotiate confidentiality arrangements with the third parties. The third party must be prepared to receive the information in confidence and for the purpose only of making submissions to the ASC. If the third party will not agree to such confidentiality the ASC will regard its obligations as having been fulfilled.

The time allowed third parties will obviously vary according to the circumstances. For takeover applications two business days is usually granted.

Decision-making in the context of disputed takeovers is, not surprisingly, the area that causes the ASC greatest difficulty from the point of view of consulting third parties. Time is almost always of the essence and intending offerors are almost always concerned about market impacts should news of an intending takeover get out. Equally, target companies are zealous to ensure that nothing happens that might in any way give an offeror a real or imaginary

advantage. All concerned are usually very happy to take advantage of any and all rights of review/appeal if that is seen as having some tactical advantage in the context of the commercial dynamics of the takeover - irrespective of what the parties really think about the merits of the ASC decision or the process by which the decision was made. It is fair to say that the ASC has found itself involved in hard-fought AAT and Federal Court proceedings over some decision made where none of the other parties have particular concerns about the merits of the decision.

The ASC will at times make decisions which, on the merits, might look difficult to justify and will make decisions about who and when to consult that will be found, in the light of more information and more leisurely reflection, to be incorrect. Given the competing views from applicants and other parties, the commercial pressures to determine matters quickly, the apparent impracticality of consulting all who might be affected, confidentiality restrictions on who it might contact to discover who would be affected and a general lack of information, that should come as no surprise.

(b) Notification of appeal rights

Since July 1994 the ASC has been obliged by ASC Law section 244A and Corporations Law section 1317D to notify persons who are affected by a decision of their right to appeal to the AAT. If the notification would be excessively onerous to the ASC, in light of the cost of giving notice and the way in which the persons' interests are affected, then the ASC is relieved of the obligation.

Identification by the ASC of the potentially affected parties is, of course, the most difficult aspect of this obligation. Generally speaking, where an application is refused by the ASC the only person affected will be the applicant. Where the application is granted the persons affected will vary according to the

circumstances. ASC Practice Note 57 sets out the approach of the ASC in relation to some commonly exercised powers. For example, where a company is granted relief under section 313 of the Corporations Law from complying with an accounting standard, it will be a condition of the relief that the company's accounts include a statement of review rights available.

Other ways in which the ASC attempts to identify affected persons and to notify them of their appeal rights include: -

- requiring the applicant to identify persons who might be affected, and
- publication of a standard notice in the Government Gazette in which ASC instruments are published and in the Instruments and Class Order sections of the ASC Digest.

Generally, ASC officers use either Pro Forma 89 or an ASC Information Sheet (see ASC Digest at PF997 or at INFO227) as the basis of advice to affected persons.

Although not required by law, the ASC includes in its notification information about FOI entitlements and the right to apply to the Ombudsman to review the ASC's decision-making processes.

ASC ADMINISTRATIVE LAW CHALLENGES

	Year ended June 94	Year ended June 95	Quarter ended Sep 95
FOI	73	53	12
OMBUDSMAN	13	19	1
AAT	18	20	9
ADJR	10	3	2
Applications (all types)	4 774	6 540	1 472
Securities and Futures Licensing	230	232	0
Auditors/liquidators	211	191	57
Prospectuses received	1 226	749	137
Takeover documents	140	120	40