

If a contravention of the Corporations Law (\*1) is detected, the Australian Securities Commission can issue both civil (recovery/preservation) proceedings or criminal proceedings.

The powers of the ASC to investigate possible breaches of the Corporations Law are broadly defined and enable the ASC to investigate upon suspicion. The methods the ASC uses to gather information are defined by the legislation. The use of the information gathered as evidence is limited and determined by whether civil or criminal proceedings are brought by the ASC. In the course of an investigation, the ASC can require persons under investigation and witnesses to answer questions and produce documents. This article will briefly outline these powers, the safeguards provided and the proposals for reform.

The investigative powers of the ASC are contained in Part 3 of the ASC Law (\*2). Section 19 gives the ASC

power to conduct an examination upon giving notice to any person con-

connected with an investigation.

The person may be examined under oath (s21) and a formal record of examination is made (s24). The examinee may have a lawyer present who may be permitted to address the inspector and examine the examinee in accordance with s23. S21(3) requires the examinee to answer any question put by an inspector and s63 provides that it is an offence not to comply with this provision. Sections 30-34 contain the requirements for production of books about the affairs of a corporation upon notice to the ASC. A warrant to seize books which are not produced may be obtained pursuant to s35, or s63 may be invoked and non-compliance with ss30-34 will be prosecuted as a criminal offence. The privilege of self-incrimination is dealt with in s68 which provides that it is not a reasonable excuse for a person to refuse information, sign a record of examination or produce a

book on the grounds that it might tend to incriminate the person or render that person liable to a penalty. This is qualified by subsections (2) and (3) which allow a person to make objection that information given may be self-incriminating. Such an objection will render the statement or document *inadmissible* in evidence in a criminal proceeding or a proceeding for the imposition of a penalty. Objection must be made by the person being examined and made prior to giving the information required. The Corporations Law contains a similar protection for a witness who claims the privilege of self-incrimination in court proceedings in s597(12).

The use of information which is obtained by the ASC by exercise of these powers is presently substantially confined to civil matters where the ASC is seeking to preserve assets or recover assets on behalf of aggrieved shareholders or creditors.

criminal offences have been committed. The claim of self-incrimination will render important evidence inadmissible and a prosecution may fail. The ASC has argued that s68(3) should be amended to remove the restriction on using derivative evidence where the privilege of self-incrimination has been claimed.

The House of Representatives Joint Statutory Committee on Corporations and Securities considered the ASC's submission in its report released in November 1991 (\*2). The Committee has recommended that s587(12) of the Corporations Law be amended to enable evidence indirectly obtained from an examination in court to be admissible and that s68(3) be amended to remove the privilege claim from documents which are produced. An amendment bill is expected to be introduced this year.

The Corporations Law contains provisions which have sought to blend

# ASC and the privilege of self-incrimination

by Jan Speirs, Regional General Counsel, ASC (NT)

the preservation of an accused person's rights

The privilege of self-incrimination has never been recognised as relevant to civil cases where no penalty is imposed. Thus the ASC may use a record of examination as evidence in civil proceedings for orders to preserve or recover assets. In criminal matters the ASC is unable to use as evidence information for which the privilege of self-incrimination has been claimed. Neither is the ASC permitted to use evidence which can be linked to the privileged information, which implicates the person who gave the information, ie *derivative use immunity* applies. The record of examination can be a vital link to other evidence such as documentary evidence and if it is privileged this may also render the documentary evidence inadmissible, particularly where the document was obtained after the examination. This is a problem for the ASC because it may only become apparent later in the course of an investigation that

in criminal trials with provisions enabling effective action to preserve corporate assets pending the thorough investigation of suspected contraventions of the law.

The Parliamentary Committee heard submissions that corporate crime should be distinguished from other criminal offences and the rules of evidence be treated differently.

It remains to be seen whether such a view will be accepted by public and judicial opinion.

*Footnotes: (\*1) The Corporations Law is set out as s82 of the Corporations (name of state) Act 1989. The sections of the Corporations Law are numbered Section 1-1369 and should not be confused with sections of the Act; (\*2) Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law, a report by the Joint Statutory Committee on Corporations and Securities, November 1991.*