

INVESTIGATORY POWERS OF THE NATIONAL COMPANIES AND SECURITIES COMMISSION

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INVESTIGATORY POWERS OF THE NCSC

The National Companies and Securities Commission (NCSC) is a body set up under Commonwealth and State law to administer co-operative scheme legislation. The legislation comprises the *Companies Act*, *Companies (Acquisition of Shares) Act*, *Securities Industry Act*, *Futures Industry Act*, *National Companies and Securities Commission Act* of the Commonwealth, ancillary legislation and the corresponding laws of the States and Northern Territory. The NCSC is responsible to the Ministerial Council for Companies and Securities (Ministerial Council) which consists of the Attorneys-General of the Commonwealth, the States and the Northern Territory.

Companies Act and *Codes* [and *Companies (Acquisition of Shares) Act* and *Codes*]

The principal investigatory powers are:

Section 11(1) Any book that is required by a provision of this Code to be kept by a company or by a registered foreign company shall be open for inspection without charge by a person authorised by the Commission for the purposes of this section.

Sub-section 5(1) states that "Books" includes any register or other record of information and any accounts or accounting records, however compiled, recorded or stored, and also includes any document.

It is important to note that the NCSC does not have to form an opinion that an offence may have been committed before inspecting these documents.

Section 12

12(1) The powers of the Commission under sub-section (2), or the powers of an authorized person under sub-section (3), to make a requirement of a corporation or person shall not be exercised except -

(a) for the purpose of -

- (i) the performance of a function, or the exercise of a power, by the Commission under a relevant Code, or
- (ii) ensuring compliance with the provisions of a relevant Code; or

- (b) where the requirement relates to a matter that constitutes or may constitute
 - (i) a contravention of, or a failure to comply with, a provision of a relevant Code;
 - (ii) a contravention of, or failure to comply with, a provision of the *Companies Act*, 1961, as in force at any time or of a previous law in force in a participating State or in a participating Territory that corresponded with that Act; or
 - (iii) an offence relating to a company that involves fraud or dishonesty or concerns the management of affairs of the company.
- 12(2) The Commission may, at any time, by notice in writing -
- (a) give a direction to -
 - (i) a corporation; or
 - (ii) a person who is or has been an officer or employee, or an agent, banker, solicitor, auditor or other person acting in any capacity for or on behalf of, a corporation (including a corporation that is in the course of being wound up or has been dissolved), requiring the production, at such time and place as are specified in the direction, of such books relating to affairs of the corporation as are so specified; or
 - (b) give a direction to any person requiring the production, at such time and place as are specified in the direction, of any books relating to affairs of a corporation (including a corporation that is in the course of being wound up or has been dissolved) that are in the custody or under the control of the person.
- 12(6) Where a person exercises a power under this section to require another person to produce books -
- (a) if the books are produced, the first-mentioned person -
 - (i) may take possession of the books and may make copies of, or take extracts from, the books;
 - (ii) may require the other person, or any person who was party to the compilation of the books, to make a statement providing any explanation that the person concerned is able to provide as to any matter relating to the compilation of the books or as to any matter to which the books relate;
 - (iii) may retain possession of the books for such period as is necessary to enable the books to be inspected, and copies of, or extracts from, the books to be made or taken, by or on behalf of the Commission; and
 - (iv) during that period shall permit a person who would be entitled to inspect any one or more of the books if they were not in the possession of the first-mentioned person to inspect at all reasonable times such of the books as that person would be so entitled to inspect; or

(b) if the books are not produced, the first-mentioned person may require the other person -

- (i) to state, to the best of his knowledge and belief, where the books may be found; and
- (ii) to identify the person who, to the best of his knowledge and belief, last had custody of the books and to state, to the best of his knowledge and belief, where that last-mentioned person may be found.

12(7) Where this section confers a power on a person to require another person to produce books relating to affairs of a corporation, the first-mentioned person also has power to require the other person (whether or not he requires the other person to produce books and whether or not any books are produced pursuant to such a requirement), so far as the other person is able to do so, to identify property of the corporation and explain the manner in which the corporation has kept account of that property.

12(9) A power conferred by this section to make a requirement of a person extends, if the person is a body corporate, including a body corporate that is in the course of being wound up, or was a body corporate, being a body corporate that has been dissolved, to making that requirement of any person who is or has been an officer of the body corporate.

Section 12 is the principal method used by the NCSC to obtain documents. The notice may be served in person by the authorised officer and may require instantaneous production or more commonly, notice is sent by post and the documents are sent to the NCSC.

It seems to be settled law that the section 12 notice

- (a) does not in general have to set out the basis upon which the NCSC claims authority to require the production of books;¹
- (b) if compliance with the notice would infringe the rights of some other person there is a need for a statement which shows the basis;²
- (c) does not have to specify the books in great detail.

The information which may be requested pursuant to sub-section 12(6) or 12(7) may not be withheld on the ground that the statement might tend to incriminate him but where the person claims before making a statement that the statement might tend to incriminate him, the statement is not admissible in evidence against him in a criminal proceedings other than proceedings under section 14 for non-compliance etc.

1. **Phillips v Corporate Affairs Commission (SA)** (1986) 11 ACLR 182

2. **Currency Brokers (Australia) Pty Ltd v Corporate Affairs Commission (NSW)** (1986) 10 ACLR 623

Section 13

13(1) If a magistrate is satisfied, on information on oath or affirmation laid by an employee of the Commission or by another person authorized in writing by the Commission, that there are reasonable grounds for suspecting that there are on particular premises in the State any books the production of which has been required under section 12 or under a provision of a law in force in a participating State or in a participating Territory that corresponds with section 12 and which have not been produced in compliance with that requirement, the magistrate may issue a warrant authorizing any member of the police force of [name of State] together with any other person named in the warrant -

- (a) to enter those premises (using such force as is necessary for the purpose);
- (b) to search the premises and to break open and search any cupboard, drawer, chest, trunk, box, package or other receptacle, whether a fixture or not, in the premises;
- (c) to take possession of, or secure against interference, any books that appear to be books the production of which was so required; and
- (d) to deliver any books possession of which is so taken into the possession of a person authorized by the Commission to receive them.

13(2) An information laid for the purposes of sub-section (1) shall state that the person laying the information suspects that there are on particular premises in the State books the production of which has been required under section 12 or under a provision of a law in force in a participating State or in a participating Territory that corresponds with section 12 and which have not been produced in compliance with that requirement and shall specify the grounds on which the person so suspects.

The use of the section 13 warrant power is rare but on occasions is very useful. There are heavy penalties for refusal or failure to comply with section 12 or 13 requirements or for providing false or misleading information (section 14). Legal professional privilege applies (see s.16) however a legal practitioner is obliged to furnish in writing to the NCSC the name and address of the person involved and particulars sufficient to identify the document(s).

Section 14 excludes from penalty non-compliance with a sub-section 12(2) notice where there is a reasonable excuse. See for example *Salter v NCSC*.³

Section 16A When the Commission has reason to suspect that -

- (a) an offence under a provision of a relevant code; or
- (b) an offence relating to a company, being an offence that involves fraud or dishonesty or concerns the management of affairs of the company,

may have been committed, the Commission thinks expedient for the due administration of the relevant Code.

3. (1988) 6 ACLC 717

This is the section which is generally employed by the NCSC to commence an investigatory hearing. However an investigatory hearing may be held in other circumstances, for example to determine whether conduct is or is not acceptable within the meaning of that expression in section 60 of the *Companies (Acquisition of Shares) Code*.⁴

The Commission must have "reasonable grounds" for suspecting that an offence *may* have been committed. It is not necessary for the Commission to nominate any particular offender.⁵ However section 16A does not mean that the Commission need not nominate a particular offence⁶. The nature and scope of such investigation is limited only by what the Commission thinks is expedient for the due administration of the Code.⁷

SPECIAL INVESTIGATIONS

Part VII of the *Companies Act and Codes* deals with the setting up and conduct of special investigations. Recent examples include the investigations into the affairs of Ariadne Australia Limited and Rothwells Limited.

Section 295

295(1) An inspector may, by notice in writing containing the prescribed matters given in the prescribed manner, require an officer of a corporation affairs of which are being investigated under this Part -

- (a) to produce to the inspector such books of the corporation and other books relating to affairs of the corporation as are in the custody or under the control of the officer;
- (b) to give to the inspector all reasonable assistance in connection with the investigation; and
- (c) to appear before the inspector for examination on oath or affirmation and to answer questions put to him, and may administer an oath or affirmation to that officer.

4. BHP Co.Ltd v NCSC; Elders IXL Ltd v NCSC (No.1) (1986) 4 ACLC 375
 5. NCSC v Sim (No.2)(1986) 4 ACLC 719; CAC v United International Technologies Pty Ltd (1988) 6 ACLC 637
 6. Sim v NCSC (1988) 6 ACLC 516
 7. CAC v United International Technologies Pty Ltd per Kearney J.

295(3) Where an inspector has reasonable grounds for believing that books in the custody or under the control of a person may be relevant to any of the matters relating to affairs of a corporation that are being investigated under this Part, the inspector may, by notice in writing containing the prescribed matters given in the prescribed manner, require that person to produce those books to the inspector.

Section 296

296(7) An officer is not excused from answering a question put to him by an inspector on the ground that the answer might tend to incriminate him but, where the officer claims, before answering the question, that the answer might tend to incriminate him, the answer is not admissible in evidence against him in criminal proceedings other than proceedings under sub-section (2), (3) or (4) or other proceedings in respect of the falsity of the answer.

Section 541

This section is principally used by liquidators to examine directors etc in relation to the affairs of companies and to obtain documents. However it does provide the NCSC with the ability to authorise persons other than official managers, liquidators or provisional liquidators to apply under the section. In *Monadelphous Engineering Associates (NZ) Ltd (in liquidation); ex parte McDonald and Watson*⁸ the NCSC authorised the liquidators of the New Zealand company to apply to the Federal Court. The application sought examination of persons resident in more than one state. The matter was remitted to the Victorian Supreme Court and was ultimately successful there. In addition the section could be used creatively perhaps where the NCSC and other parties wished to obtain information and simultaneously to inform the market of some aspect of the affairs of a corporation.

Hearings (pursuant to the *National Companies and Securities Commission Act*).

The NCSC may hold hearings for the purpose of the performance of any of its functions on the exercise of any of its powers⁹. At a private hearing the NCSC may give directions as to the persons who may be present¹⁰ and if satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason the NCSC may

- (a) direct that the hearing or a part of the hearing take place in private and give directions as to the persons who may be present; or

8. (1989) 7 ACLC 220

9. section 36(1)

10. section 36(5)

(b) give directions preventing or restricting the publication of evidence given before the Commission or of matters contained in documents lodged with the Commission [sub-section 36(6)].

Section 38

38(1) At a hearing before the Commission -

- (a) the proceedings shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of any Act or State Act and a proper consideration of the matters before the Commission permit;
- (b) the Commission is not bound by the rules of evidence;
- (c) the Commission may, upon such conditions as it thinks fit, permit a person to intervene in the proceedings;
- (d) the Commission shall observe the rules of natural justice;
- (e) except in the case of a hearing before a Division of the Commission - the provisions of section 20 (other than 20(3A) and (3B)) apply, so far as they are capable of application, as if the hearing were a meeting of the Commission; and
- (f) in the case of a hearing before a Division of the Commission - the provisions of section 20 (other than sub-sections 20(3A) and (3B)) and of section 21 (other than sub-sections 21(4A) and (4B)) apply, so far as they are capable of application, as if the hearing were a meeting of that Division.

A person summoned to a hearing is required to attend.¹¹ A person appearing as a witness shall not without reasonable excuse refuse or fail to answer a question that he is required to answer by the member presiding at the hearing, or refuse or fail to produce a document that he was required to produce by a summons.¹² It is not a 'reasonable excuse' for a person to refuse or fail to answer a question that the answer might tend to incriminate him, but where the person claims, before answering the question that the answer might tend to incriminate him, neither the question nor the answer is admissible in evidence against him in criminal proceedings other than in relation to the giving of false or misleading evidence.¹³

As the *Companies (Acquisition of Shares) Act* is to be read as one with the *Companies Act* and similarly for the corresponding State Codes, the former has no particular investigative provisions of its own.

11. section 39(1)
 12. sub-section 39(2)
 13. sub-section 39(5)

Securities Industry Act and Codes

The Investigative powers in sections 8, 9 and Division 2 of Part II of the *Securities Industry Act* and *Codes* largely parallel sections 12, 13 and 16A and Part VII of the *Companies Act* and *Codes*. In addition section 12 provides the NCSC with wide powers to obtain information regarding dealings in securities or possible offences under the insider trading, market manipulation etc provisions. The hearings mode of investigation can be triggered by section 13.

Futures Industry Act and Codes

The investigative powers in sections 13, 14, 18, 19 and Division 2 of Part II of the *Futures Industry Act* and *Codes* largely parallel sections 8, 9, 12 and 13 and Division 2 of Part II of the *Securities Industry Act and Codes*.

LIMITATIONS ON THE INVESTIGATIVE POWERS

Natural justice

Issues of natural justice presumably could arise in relation to other investigative processes but the courts have been concerned to date mainly with matters arising from NCSC hearings. The NCSC may hold a hearing when pursuing an investigation.¹⁴

Transcript

In *Adler v Cantwell*¹⁵ Marks J had to deal with a plaintiff who required transcript of his evidence at an earlier date before being heard four months later by C. The plaintiff was to be examined in relation to a suspected breach of the takeovers provisions. His Honour held *inter alia* that

- (i) provision of a transcript of evidence in the circumstances is not an immutable dictate of the rules of natural justice;
- (ii) the inquiry was inquisitorial and did not affect rights;
- (iii) findings which might later have a bearing on the rights of the plaintiff are subject to protective mechanisms in the legislation.

14. NCSC v The News Corporation Ltd (1984) 2 ACLC 301

15. 14 ACLR 658

(iv) However where a legal representative requests transcript in circumstances where it is needed by him to enable him to fulfil his role then the NCSC must comply with the request unless there are compelling reasons related to the effectiveness and integrity of the enquiry which require that the request be refused.¹⁶

Self-incrimination

In *National Companies and Securities Commission v Sim* (No.3)¹⁷ the NCSC sought an order compelling S to answer certain questions which he had refused to answer at a hearing. S was the managing director of two companies and was authorised to speak on their behalf. S argued that his "reasonable excuse" for not answering the questions was that his answers might incriminate the companies.

It was held by Nicholson J granting the order that -

- (i) S.39(5) of the *NCSC Act* refers only to individuals and the companies could not be self-incriminated because of S's evidence or in the alternative
- (ii) S.39(5) impliedly excludes the privilege against self-incrimination for companies and S as the company mouthpiece was required to answer the question.

Procedure at hearings

In *BHP v National Companies and Securities Commission*¹⁸ the NCSC decided in the course of a hearing, that counsel for Bell Resources could cross-examine certain witnesses involved in transactions on behalf of BHP. The NCSC believed that because of its close involvement in the affairs Bell could have material for cross-examination of BHP witnesses which would not be capable of ready transfer to counsel assisting the enquiry. BHP submitted that the decision constituted a denial of natural justice because it allowed two counsel to cross-examine. Woodward J refused the BHP application for an interlocutory injunction.

I note that at a recent hearing into the affairs of Rothwells, counsel for one of the parties took objection on one occasion to a 'forensic chorus' when it was disclosed that one counsel for the NCSC would examine on one set of circumstances whereas the second counsel would examine on a different set. The point was not taken further and examination proceeded as planned.

16. *Bankers Trust Australia Ltd v NCSC* (1989) 7 ACLC 431

17. (1987) 5 ACLC 500

18. (1987) 5 ACLC 698

While the NCSC has a general power to control the procedure at a hearing, it has no power to make orders for non-disclosure of evidence in private hearings before it.¹⁹ This should be compared with the ability of the National Crime Authority to direct that any evidence oral or documentary given before it shall not be published at all or not published except in such manner and to such persons whom the Authority specifies.²⁰ Similarly the Trade Practices Tribunal has power *inter alia* to "give directions prohibiting or restricting the publication of evidence given before the Tribunal whether in public or in private, or of matters contained in documents filed or lodged with the Registrar, received in evidence by the Tribunal or placed in the records of the Tribunal."²¹

The NCSC is not bound to permit persons who may be under suspicion to be present during the whole of the hearing. The NCSC is bound to give any person a fair opportunity to correct or contradict any relevant material prejudicial to them.²²

Procedure at special investigations

There may appear not to be a great deal of difference between the procedures which may be used at a hearing and those used by a special investigator. Nevertheless the High Court has stated (per Gibbs C J and Brennan concurring) that the detailed provisions regarding the conduct of examinations under Part VII of the *Companies Act* do not throw any light on the manner in which a hearing under Part VI of the *National Companies and Securities Commission Act* should be conducted.²³ *Snelgrove v CAC (NSW)*²⁴ demonstrates that one has to be careful to ensure that a witness who is suspected of having committed an offence is given every chance to put his case. In *Snelgrove*, S was examined and at the conclusion his counsel reserved the right to ask his client further questions until he had seen a transcript of the hearing. The inspector completed a draft report nearly eleven months later. At that time counsel sought to examine S by the inspector refused on the grounds that because of the lapse of time, he was entitled to assume that S did not wish to be examined by his own counsel. Needham J held that S was entitled to be examined. The inspector had not sought to enquire whether S had abandoned his rights and he was not entitled to make an assumption.

It should be noted that the special investigation in question had occupied over two and a half years. His Honour observed that "they were certainly not being conducted with any great speed". In this context, a lapse of eleven months is not exceptional.

19. *Bankers Trust Australia Ltd v NCSC*

20. sub-section 25(9)

21. section 106(2)

22. *NCSC v The News Corporation* (1989) 2 ACLC 301

23. *NCSC v The News Corporation* (1984) 7 ACLC 301

24. (1987) 5 ACLC 779

Protection of the investigative process

It is generally recognised that Freedom of Information legislation should not require an authority to produce investigative materials at all or to the suspect. See for example section 37 of the Commonwealth Act and section 31 of the Victorian Act. However there is a definite tension between the rights of third parties who may wish to use the material for presumably legitimate commercial purposes. In *Barnes v Commissioner for Corporate Affairs* (No.1)²⁵ and *Barnes v CCA* (No.2)²⁶ the applicant was largely unsuccessful in obtaining material withheld by the Commissioner. In particular access to the reports under section 324C (by the receiver) and section 418 (by the liquidator) was denied.

Use of the investigative process in aid for foreign jurisdictions

In the last two years there has been a lot of activity aimed at instituting formal cooperative arrangements between the NCSC and foreign regulatory agencies, for example SEC (USA), Department of Trade and Industry (UK), Ontario Securities Commission etc. At this stage the NCSC is only permitted by law to enter into information-sharing agreements; it is not possible for the NCSC to use its compulsory powers to investigate a matter that constitutes only a breach of some foreign law. Memoranda of Understanding have or soon will be signed with overseas agencies at the lower level of cooperation but to make significant progress, the legislation needs to be amended. Models exist in New Zealand and the USA. The recent amendments in New Zealand provide *inter alia* for an extension to the functions of the New Zealand Commission "to co-operate with any securities commission or other similar body in any other country and for that purpose, but without limiting this function, to communicate, or make arrangements for communicating, information obtained by the Commission in the performance of its functions and powers, confidential or not, to that commission or body which the Commission considers may assist that commission or body in the performance of its functions".²⁷

The Commission is entitled to take evidence under oath, or documents etc that in the Commission's opinion is likely to assist the Commission in complying with the overseas body's request. The request requires Ministerial approval. Evidence taken by the Commission pursuant to these provisions "shall be transmitted to the securities commission or body on whose behalf the request was made in such manner as the Commission thinks fit".²⁸

25. 1987 5 ACLC 875

26. 1987 5 ACLC 883

27. section 10 Securities Act

28. section 18A Securities Act

Investigatory powers not possessed by the NCSC

Unlike the SEC, the NCSC has no power to obtain access to records available from the telecommunications company, for example Telecom. In at least one instance, the NCSC was able to use its knowledge of the time and destination of a telephone call made to destroy the preliminary (fabricated) evidence given by a witness. However in this case the record was obtained from the hotel where the witness was staying. There are many occasions on which such evidence would be of great value. Doubtless the secrecy provisions relating to Telecom spring from a commendable desire to preserve personal privacy and I am not here advocating any change in these provisions.

RATIONALE FOR SPECIALISED ENFORCEMENT AGENCIES

I do not know whether it is necessary to defend the proposition that an organisation like the NCSC or the proposed ASC, needs to have its own investigative and enforcement powers. Perhaps it is self evident. However in case it is controversial. I set out some of the arguments in favour. The most compelling arguments seem to be that-

- (i) a specialised agency should be able to develop superior expertise in investigations; and
- (ii) such an agency in the commercial area, if led and directed by persons of distinction in that field, will concentrate on effective enforcement.

The superior expertise argument in turn has a human and a technical dimension. It is clear that investigators in the commercial field, particularly in takeovers and securities offences, need to understand in general terms the manner in which this area of business functions. This is gained either by direct participation in the area or by long exposure to the regulatory and investigative process. While both would be ideal, it is seldom that one finds such a person who is prepared to work for a salary determined by public sector standards. Nevertheless, a person with a solid background in accounting or law can make a very effective investigator after two or three years. A Commission such as the NCSC can then provide very satisfying work in the specialised field. Investigators need access to all the necessary data including Stock Exchange, Library and other material. The investment in computer surveillance services, for example Comnews and Bridge Data, and equipment is considerable and can only be justified if used continuously.

The second argument has a certain economic flavour to it. There are, for our purposes, virtually an infinite number of offences that have been and are being committed against Scheme legislation. Most of these are trivial in their extent and some are serious. Even taking the "serious" cases, it would be impossible with hundreds of investigators to make a detailed investigation of each matter. Hence it becomes a matter of judgement as to which cases get priority. My contention is that an agency such as the NCSC is well placed to evaluate the commercial effect of these offences. Persons with extensive commercial experience will have a good idea of how company directors, brokers, auditors, investment advisers etc will react to

prosecutions or other enforcement actions and will know the extent of the harm caused by the practice in question.

A further reason for permitting the NCSC to perform its own investigations is that the information flowing from this activity is of assistance to the Commission in carrying out its other regulatory functions. In particular this knowledge is of assistance in determining under which circumstances, the discretionary power to modify or exempt persons from the rigours of the *Companies Code* and *Companies (Acquisition of Shares) Code*, should be exercised.

CONCLUSION

The NCSC has a formidable array of investigatory tools at its disposal. Apart from the matter of co-operative arrangements with foreign regulatory agencies, the powers are entirely adequate. Getting results from the use of the investigative powers depends initially on the number and quality of the personnel entrusted with those powers.