INVESTIGATORY POWERS OF THE NATIONAL COMPANIES AND SECURITIES COMMISSION AND THE AUSTRALIAN SECURITIES COMMISSION†

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INTRODUCTION

This paper analyses the law relating to the investigatory powers of the National Companies and Securities Commission (NCSC) and the Australian Securities Commission (ASC). The Co-operative Scheme legislation administered by the NCSC is to be replaced by the *Corporations Act* 1989 of the Commonwealth which is to be administered by the ASC. In referring to the Co-operative Scheme legislation and the powers of the NCSC, this paper includes references to the corresponding provisions in the Commonwealth legislation and the corresponding powers of the ASC under that legislation when it commences operation after 1 July 1990.

The Co-operative Scheme legislation operates by means of a Commonwealth Act which is expressed to apply to the Australian Capital Territory and State (and Northern Territory) Application of Laws Acts which provide that, subject to local modifications, the Commonwealth Acts apply as law in their jurisdictions. The resultant State (and Northern Territory) laws are referred to as Codes.

CONSTITUTION OF THE NCSC AND ASC

The National Companies and Securities Commission (NCSC) has been constituted by section 7 of the *National Companies and Securities Commission Act* 1979 (the *NCSC Act*) as a body corporate, with perpetual succession, which must have a common seal, may acquire, hold or dispose of real and personal property, and may sue or be sued in its corporate name.

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† **Editorial Note:** the authors have kindly agreed to the reproduction of this paper, which was written to reflect the position as at 30 April 1990. The paper contains a comparative analysis of interest to those concerned with the background to the investigatory powers of the Australian Securities Commission (ASC). The review of National Companies and Securities Commission (NCSC) powers, as at 30 April 1990, is of interest to all who are concerned with the background to the powers presently conferred on the ASC.

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Subsection 6(1) of the *NCSC Act* provides that the NCSC has such powers as are conferred upon it by any Act that is a law of a kind referred to in section 122 of the Constitution. Section 122 provides that the Commonwealth Parliament may make laws for the government of any Commonwealth Territory. The High Court has described section 122 as "as large and universal a power of legislation as can be granted" ... "for every aspect and every organ of territory government" ... and "a plenary legislative power" to ensure "a full and sufficient power to legislate for all the territories".[1]

Subsection 6(2) of the *NCSC Act* provides that the NCSC shall perform any function and may exercise any powers that are conferred or expressed to be conferred upon it by any State Act.

The Co-operative Scheme legislation adminstered by the NCSC principally comprises the *Companies Act* 1981 and *Codes* (the *Companies Code*), the *Companies (Acquisition of Shares) Act* 1980 and *Codes* (CASA), the *Securities Industry Act* 1980 and *Codes* (SIA), and the *Futures Industry Act* 1986 and *Codes* (FIA).

The ASC is established by section 7 of the *Australian Securities Commission Act* 1989 (the *ASC Act*). Section 8 of the *ASC Act* provides that the ASC is a body corporate, with perpetual succession, which has a common seal, may acquire, hold and dispose of real and personal property, and may sue or be sued in its corporate name. Section 11 of the *ASC Act* provides that the ASC has such functions as are conferred upon it by or under a law of the Commonwealth of which the ASC has the general admistration and that deals with, or with matters including any or all of the following:

(a) the formation of companies or close corporations;

(b) the regulation of bodies corporate;

(c) the regulation of acquisitions of shares in bodies corporate;

(d) the regulation of the securities industry;

(e) the regulation of the futures industry;

(f) matters incidental to a matter referred to in a preceding paragraph.

The Commonwealth laws which deal with these matters (apart from the *ASC Act*) comprise the *Corporations Act* 1989 (the *Corporations Act*), the *Close Corporations Act* 1989 (the *Close Corporations Act*) and 13 related fees and levies Acts. The *ASC Act* was assented to on 27 June 1989. Part 1 of the *ASC Act* commenced on that day, and Parts 2-9, 13 and 15 were proclaimed to commence on 1 July 1989. The other Acts were assented to on 14 July 1989. Chapter 1 of the *Corporations Act* and sections 1 and 2 of the *Close Corporations Act* commenced on that day.

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1 *Spratt v Hermes* (1965) 114 CLR 226, at 242, 251 and 273 respectively; *Lamshed v Lake* (1958) 99 CLR 132, at 153; *Minister of State for Justice (W.A.); ex. rel. Ansett Transport Industries (Operations) Pty Ltd v Australian National Airlines Commission* (1976) 51 ALJR 299, at 307, 311 and 312.

ADMINISTRATIVE RESPONSIBILITIES OF THE NCSC AND THE ASC

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.

The NCSC is required to perform its functions and exercise its powers in accordance with the Formal Agreement,[2] which is set out as a Schedule to the *NCSC Act* and the corresponding State and *Northern Territory Provisions Acts* and forms part of those Acts.[3] The formal agreement contemplates delegation of the powers of the NCSC so as to decentralise administration.[4] The NCSC is empowered to delegate functions and powers to a State or Territory authority.[5] The NCSC is required to comply with the directions of the Ministerial Council.[6]

The Ministerial Council has considered that it is desirable for prosecutions for offences under the Co-operative Scheme legislation to be conducted by the persons who had been responsible for the prosecution of similar offences before the Formal Agreement was made. It therefore decided in May 1980 that proceedings for offences under the legislation, whether summary or indictable, should be conducted in accordance with the practices of individual governments as determined from time to time.[7]

The functions and powers of the ASC are derived only from Commonwealth legislation. The ASC is not subject to an agreement between the Commonwealth and the States; and operates exclusively as a Commonwealth statutory authority under the aegis of the Commonwealth Attorney General. He or she may give the ASC a written direction about the policies it should pursue or priorites which it should follow, but a direction cannot be given about a particular case. The direction must be published in the *Gazette* and laid before each House of Parliament. Before giving a direction, the Attorney General is required to notify the ASC in writing that he is considering giving the direction and give the Chairman an adequate opportunity to discuss the proposed direction.[8] The Minister, that is the Attorney General, may direct the ASC to investigate a matter.[9] Part 14 of the *ASC Act* provides for the establishment of a Parliamentary Joint Committee on Corporations and Securities. Its duties include inquiring into the activities of the ASC.[10] Generally, those provisions have been framed to reduce the danger of polictical interference in the operations of the ASC.

The ASC may delegate to a person, including a body, all or any of its powers or functions but, if the person is not a member, staff member or a prescribed person, the

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2 *NCSC Act*, s9.
3 *Companies and Securities (Interpretation and Miscellaneous Provisions) Act* 1980 and *Codes*, s7(2).
4 *NCSC Act*, Schedule cl.35(2).
5 *NCSC Act*, s45; State and Northern Territory Provisions Acts, s12.
6 *NCSC Act*, s7.
7 *NCSC Third Annual Report* (1982) 15.
8 *ASC Act*, s12.
9 *Id*, s14.
10 *Id*, ss242 and 243.

Minister's approval is necessary.[11] The Minister may make arrangements with an appropriate officer of a State or Territory in connection with the administration of a national scheme law about a delegation of the ASC's functions and powers to an authority of the State or Territory, or to an officer or employee of such an authority.[12] In exercising its powers of delegation, the ASC is required to ensure that decisions which affect a particular business community are made by people located as close to that business community as practicable, prompt and convenient access to decision-making and the ASC's facilities is provided to business communities throughout Australia, and where an arrangement between the Minister and a State or Territory authority is in force in relation to delegations national scheme laws are administered to the greatest extent practicable by the authority.[13] Delegates are subject to direction by the ASC.[14] Whether those directions will ensure more effective uniform administration than that provided by the co-operative scheme remains to be seen.

Professor Ford has succintly categorised the responsibilities of the NCSC and ASC into three broad kinds,[15] which we shall adopt with some modification. First, as companies regulators, the NCSC and ASC must oversee the formation, operations and winding up and dissolution of registered companies and maintain relevant public records. As securities regulators, the NCSC and ASC must supervise, in the interests of a fully informed and efficient market and for the protection of investors, primary markets for the issue of securities; secondary markets for trading in securities; the market for the sale of control of companies by acquisitions of shares; and continuing disclosure by companies which issue securities. As futures regulators, the NCSC and ASC must supervise arrangements for the creation of futures contracts and the market for trading in futures contracts.

Each of these categories can entail the need to exercise investigatory powers.

INVESTIGATORY POWERS OF THE NCSC AND ASC

In the absence of express legislative provisions, the NCSC and ASC would have power to conduct investigations as an incident of their expressly granted functions.[16] For example, subsection 11(4) of the *ASC Act* provides that the ASC has power to do whatever is necessary for or in connection with, or as reasonably incidental to, the performance of its functions. However, there are specific provisions which expressly confer power upon the NCSC and the ASC to conduct investigations. Their principal relevance lies in the potential they may confer upon the NCSC and the ASC to adversely impact upon the rights of citizens while conducting an investigation.

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11 *Id*, s102.
12 *Id*, s249.
13 *Id*, s102.
14 *Id*, s102(5).
15 Ford H A J, *Principles of Company Law* (5th edn, 1990) 872.
16 Ford, *op cit*, 875.

For example, section 573 of the *Companies Code* provides that where an investigation is being carried out under the Code in relation to any act or omission by a person that may constitute an offence against the Code, and the Court considers it desirable to protect the interests of persons to whom the person being investigated may become liable to pay moneys, it may, on application of the NCSC, make a variety of orders which could affect the property or liberties of the person under investigation.

Whether or not the investigative provisions may adversely affect the rights of citizens will turn on whether their terms are applicable to the investigation at hand. Accordingly, practitioners would be well advised to carefully examine the terms of the legislation under which the NCSC or ASC might purport to seek to affect the ordinary rights of their clients in the conduct of an investigation. There have been a number of important instances where the courts have upheld challenges to the exercise of powers by the NCSC.[17] Occasionally, the legislation has been amended to overcome the effect of some decisions.[18]

Recent public controversy between the Commonwealth and most of the States (except Victoria) have highlighted the constitutional basis of securities regulation in this country. Constitutional issues are likely to become significant in the event of anyone wishing to challenge an exercise of investigatory powers by the ASC.

CONSTITIONALITY OF CO-OPERATIVE SCHEME LEGISLATION

Although there have been suggestions that there are respectable traditional legal arguments based on the text of the Constitution for questioning the validity of the Commonwealth's involvement in the setting up, administering and funding of a range of co-operative joint authorities,[19] there has been no constitutional challenge to any legislation administered by the NCSC.

The suggestions of constitutional vulnerability may place too much emphasis on the alleged status of the NCSC as a "co-operative joint authority".[20] In our view, this description does not accurately reflect the status of the NCSC at law as a Commonwealth statutory authority, albeit one which by agreement between the Commonwealth and the States may exercise powers under State law. For example, in *The Broken Hill Proprietary Co Pty Ltd (No 2) v NCSC*,[21] Dawson J stated:

> It is, I think, clear that it is intended that the capacity of the Commission to exercise its powers and functions, whether they be conferred by Commonwealth law or conferred or expressed to be conferred by State law, is derived from the

17 For example, *Gibbs v NCSC* (1982) 6 ACLR 22; *Combined Investments Pty Ltd v NCSC* (1982) 6 ACLR 349; *Re Guardian Investmnets Pty Ltd* (1984) 2 ACLC 165; *Connell v NCSC* (1989) 1 ACSR 193.

18 For example, *Companies Code*, s16A.

19 For example, Rumble G A, "The Commonwealth/State Co-operative Basis for the Australian Wheat Board and the National Companies and Securities Commission: Some Constitutional Issues" (1980) 6 *The Adelaide Law Review* 348.

20 *Id*, 375.

21 (1986) 61 ALJR 124.

> Commonwealth Act. Whether or not when acting in that capacity the Commission is always representing the Crown in right of the Commonwealth or whether it may represent the Crown in right of a State either to the exclusion of the Crown in right of the Commonwealth or in conjunction with it, poses a difficult question which I do not think I need to answer here.[22]

In *The Broken Hill Pty Co Ltd v NCSC*,[23] the High Court noted that the NCSC had been sued on behalf of the Commonwealth in the original jurisdiction of the High Court under placitum 75(iii) of the Constitution and no objection had been taken to jurisdiction. While the High Court went on to say that a distinction was drawn in the legislation between functions and powers conferred upon the NCSC by the Commonwealth legislation and those expressed to be conferred by a State Act, it would seem that in each case the capacity to perform the functions and exercise the powers is derived from the Commonwealth legislation.[24]

The Co-operative Scheme legislation overcomes a defect of power in the Commonwealth to sustain an Australia-wide scheme for regulating companies and the securities and futures industries. This is achieved by one plan intended to be administered uniformly by a Commonwealth statutory authority, namely, the NCSC,[25] which has been implemented through eight pieces of complementary legislation by agreement between the Commonwealth, the States and the Northern Territory.[26]

As noted by Mr Rumble, Gibbs J has said in a slightly different context that the Constitution was not intended to prevent co-operation.[27]

CONSTITUTIONALITY OF COMMONWEALTH LEGISLATION

In *New South Wales, South Australia and Western Australia v The Commonwealth*,[28] the High Court of Australia held, in a decision handed down on 8 February 1990, that the Commonwealth has no power under placitum 51(xx) of the Constitution to regulate the incorporation of companies.

The Court held that Part 2.2 of the *Corporations Act* which provided for incorporation and registration of companies by the Commonwealth and Part 2.1 which provided that trading corporations, as defined in the Act, were not to be formed under a law of a State or Territory were invalid. The joint judgement was delivered by six Justices of the Court (Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ). Deane J delivered a dissenting judgment.

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22 *Id*, 126.
23 (1986) 160 CLR 492.
24 *Id*, at 505 per Mason, Wilson, Brennan, Deane and Dawson JJ.
25 *NCSC Act*, Schedule cl 32(1), cf. cl 35.
26 Cf. *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 52 ALJR 670, at 691 per Mason and Jacobs JJ.
27 Rumble, *op cit*, 374.
28 (1990) 64 ALJR 157.

COERCIVE POWERS IN RELATION TO NCSC AND ASC INVESTIGATIONS

Any book required to be kept by a company must be open for inspection without charge by a person authorised by the NCSC for that purpose.[29] "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 and banker's books.[30] 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.

The NCSC may, by notice in writing, give a direction to a corporation or to a person who acts in any capacity for the corporation requiring the production of books relating to the affairs of the corporation.[31]

Section 12 is the principal method used by the NCSC to obtain documents. The notice may be served in person by the authorized 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;[32]

(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;[33]

(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 criminal proceedings other than proceedings under section 14 for non-compliance with the provision.

A warrant to seize books whose production has been required may be obtained from a magistrate.[34] 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).[35] Legal professional privilege applies[36]; 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).

29 *Companies Code*, s11.
30 *Id*, ss5(1), 11.
31 *Id*, s12.
32 *Phillips v Corporate Affairs Commission (SA)* (1986) 11 ACLR 182
33 *Currency Brokers (Australia) Pty Ltd v Corporate Affairs Commission (NSW)* (1986) 10 ACLR 623
34 *Id*, s13.
35 *Id*, s14.
36 *Id*, s16.

Section 14 excludes from penalty non-compliance with a sub-section 12(2) notice where there is a reasonable excuse and this is dealt with later in this article when considering the limitations on investigative powers.

Section 16A is a pivotal provision. When the NCSC has reason to suspect that an offence under a provision of a relevant Code or 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 NCSC may make such investigation as it thinks expedient for the due administration of a relevant Code.

Section 16A was inserted after the decisions in *Gibbs v NCSC*[37] and *Combined Investments Pty Ltd v NCSC*.[38] It was held in those cases that the power to hold hearings for the performance of a function or the exercise of a power does not include "a power of inquisition, which inquisition is attended by the power and disabilities of the Commission and witnesses respectively upon the latter's attendance thereat".[39] The frank acknowledgement by counsel for the NCSC that one of the reasons for the proposed hearing was to conduct a "fishing expedition" — in which it seemed to Jacobs J that the rules of natural justice may well be in jeopardy — did nothing to deny the appellants' claim that the proposed hearing was not supported by any relevant power.[40] Section 16A is intended to give the NCSC a general power to investigate to overcome the effect of those decisions.

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*.[41]

An investigation under section 16A is permitted only if the NCSC has "reason to suspect".[42] "Reason to suspect" lays down as a prerequisite to the power the existence as a fact of a certain state of mind.[43] It is doubtful whether the NCSC could hold a hearing for the purpose of determining whether it had reason to suspect.[44] The NCSC must suspect that an offence may have been committed and have "reasonable grounds" for that suspicion.[45] It is not necessary for the Commission to nominate any particular offender offence.[46] However, section 16A does not mean that the Commission need not nominate a particular offence.[47] The nature and scope of such investigation is limited

37 (1982) 6 ACLR 22.
38 (1982) 6 ACLR 349.
39 (1982) 6 ACLR, per Sheahan J at 24.
40 (1982) 6 ACLR, at 352.
41 *BHP Co Ltd v NCSC; Elders IXL Ltd v NCSC (No.1)* (1986) 4 ACLC 375.
42 Ford, *op cit*, 876.
43 *Broken Hill Proprietary Co Ltd v NCSC* (1986) 160 CLR 492.
44 *Id*, 511.
45 *NCSC v Sim (No 2)* (1986) 11 ACLR 171.
46 *NCSC v Sim (No.2)* (1986) 4 ACLC 719; *CAC v United International Technologies Pty Ltd* (1988) 6 ACLC 637.
47 *Sim v NCSC* (1988) 6 ACLC 516.

only by what the Commission thinks is expedient for the due administration of the Code.[48]

Although if it appears to the Court that the NCSC has no reason to suspect, section 16A cannot operate to attract other provisions which give the NCSC coercive powers,[49] Professor Ford maintains that the NCSC is not bound to inform anybody as to the basis for its reason to suspect that an offence may have been committed.[50] However, the NCSC must be acting in good faith.[51] Provided this is so, the NCSC would appear to have the protection of the following dicta by the High Court:

> There is considerable force in the Commission's claim that to comply with the directions of the Federal Court would frustrate the purpose of the hearing. It is of the very nature of an investigation that the investigator proceeds to gather relevant information from as wide a range of sources as possible without the suspect looking over his shoulder all the time to see how the inquiry is going. For an investigator to disclose his hand prematurely will not only alert the suspect to the progress of the investigation but may well close off other sources of inquiry. Of course, there comes a time in the usual run of cases when the investigator will seek explanations from the suspect himself and for that purpose will disclose the information that appears to require some comment.[52]

With the proviso that the NCSC must be acting in good faith, it is exclusively a matter for the NCSC to determine what information should be disclosed to a person and, to this end, what is relevant is to secure efficacious conduct of the investigation.

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.

Securities Industry Act and Codes

The investigative powers in sections 8, 9 and Division 2 of Part II of the SIA 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 and market manipulation 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 FIA largely parallel sections 8, 9, 12 and 13 and Division 2 of Part II of the SIA.

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48 *CAC v United International Technologies Pty Ltd* per Kearney J.

49 *Re Guardian Investments Pty Ltd* (1984) 9 ACLR 162.

50 Ford, *op cit*, 876.

51 *News Corporation Limited & Ors v NCSC* (1983) 8 ACLR 338.

52 *NCSC v News Corporation Ltd* (1984) 156 CLR 296, at 323-4 per Mason, Wilson and Dawson JJ.

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.

A special investigation can be much wider than an investigation under section 16A of the *Companies Code* or corresponding provisions of the SIA and FIA: it can in the case of the *Companies Code* be an investigaition into the affairs of a corporation, and in the case of the SIA and the FIA be an investigation into matters relating to dealing in securities or futures contracts. In addition, a special investigation depends upon a direction from the Ministerial Council or a Minister; the subjectivity inherent in the NCSC having reason to suspect that a certain kind of offence may have been committed is not present.

The NCSC is to have responsibility for the appointment of inspectors and for the direction and co-ordination of investigatory activities.[53]

The fact that a special investigation has been commenced does not displace the NCSC's other functions and powers, including power to investigate, in relation to matters within the ambit of the special investigation. It is therefore possible to confine the operational scope and expense of a special investigation to major matters.

In *Bond Corporation Holdings Limited v Sulan*,[54] Ipp J held that a direction of the Ministerial Council pursuant to subsection 291(3) of the *Companies (Western Australia) Code* specifying that the matters to be investigated were the affairs of Bond Corporation Holdings Limited was, to that extent, valid. Ipp J thought that the word "matters" in paragraph 292(2)(a) meant either all the affairs of a company or the particular affairs of the company, as the case may be, and if the latter, a description in general terms of those particular affairs. The argument that the entire direction was outside the powers of the Ministerial Council because it failed to specify the "matters" that were to be investigated was unsuccessful.

Ipp J thought that the presumption that legislation is not intended to interfere with the common law rights of individuals was of limited application to companies and should not be accorded any significant weight when construing the provisions of section 291 and 292 of the *Companies Code*. Even if it were correct that Parliament intended that the principles of fairness apply to the investigation, it was not necessary at the stage that a direction under paragraph 292(2)(a) was given that the instrument containing the direction should specify with particularity the facts and circumstances to be investigated. Ipp J looked at the history and wording of the provisions. He concluded that there was an absence of any logical distinction between "affairs" and "matters" in those sections, and that no substantial difference was intended by the use of the word "matters". "Matters" in any context was a word of wide import. If "matters" were to be given a narrower meaning than "affairs", it would be extraordinarily difficult, if not impossible,

53 *NCSC Act*, Schedule cl 16(b).

54 Heard 3 May 1990; delivered 11 May 1990.

to specify every "matter" to be investigated so as to ensure that all the affairs of a company could be investigated as contemplated by subsection 291(3).

However, the references in the direction to an investigation into the affairs of related corporations were not valid because the Ministerial Council was not entitled, under sections 291 and 292, to direct that an investigation into the affairs of of companies related to the company, the subject of the primary investigation, be carried out if the investigator, who was yet to be appointed, were subsequently to consider it necessary for the investigation to be widened. The invalid parts of the instrument were held severable from the remainder.

Hence, directions by the Minister or the Ministerial Council under subsection 291(1) and (3) respectively directing the NCSC to arrange for a special investigation must nominate each corporation or company, as the case may be, intended to be the subject of the special investigation. Further, a Ministerial Council direction under subsection 291(3) may only direct the NCSC to arrange for an investigation into the affairs of "a company"; as a corporation which is incorporated outside Australia is not a company, the NCSC or the inspector, after an investigation into the company has commenced, must seek the written consent of the Ministerial Council under section 293 to investigate the affairs of an overseas related corporation of the company. Once written consent is given, the investigation into the affairs of the corporation is deemed to be carried out pursuant to the original direction of the Ministerial Council. However, it is not possible to include the corporation in the original direction.

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 CJ and Brennan J 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 *NCSC Act* should be conducted.[55] *Snelgrove v CAC (NSW)*[56] 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 but 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.

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

56 (1987) 5 ACLC 779.

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*[57] the NCSC authorized 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.

In *Friedrich v Herald & Weekly Times Ltd*,[58] the full Supreme Court of Victoria refused an appeal against a decision refusing to prohibit the publication of material given under examination pursuant to section 541. It was held that a public examination should be preferred under section 541 on the basis that publicity would act as a deterrent to fraud and enforce commercial morality. The general object of section 541 was to inform liquidators and the public of the affairs of failed companies. Publicity given in public examination was conducive to the liquidator gathering information concerning the winding up of a company; and conducive to enabling evidence and information to be obtained in relation to the bringing of criminal charges. They were two important public purposes in the structure of section 541. The public examination of a person already charged with an offence should be disallowed only in specific circumstances. A general order prohibiting publlication would be unreasonable to those who properly published reports of the examination as well as being contrary to the purpose of section 541.

Some aspects of evidence given in a section 541 hearing may be particularly confidential and it is possible for the court to conduct this portion in private and the remainder in public.[59]

Hearings (pursuant to the *NCSC Act*)

The NCSC may hold hearings for the purpose of the performance if any of its functions on the exercise of any of its powers.[60] To ensure that the NCSC will have similar powewr in relation to functions and powers arising in State legislation, the *NCSC (State Provisions) Act* of each State contains a similar provision.[61] Professor Ford points out that since the NCSC has many functions and powers under the co-operative scheme, it has the power to hold hearings for many purposes.[62]

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57 (1989) 7 ACLC 220.

58 (1989) 1 ACSR 277.

59 *Companies Code*, s541(4); *Spargos Mining NL v Standard Chartered Australia Ltd* (1989) 1 ASCR 311.

60 *NCSC Act*, s36(1).

61 s7(1).

62 Ford, *op cit*, 878.

The NCSC's powers that relate to the holding of hearings may be delegated to a member of the NCSC.[63] Where the Commission or a Division of the Commission conducts the hearing, the hearing may be convened by the NCSC Chairman at a place and time determined by him.[64] If the hearing is conducted by the full Commission, three members of the NCSC must be in attendance; however, if the Commission does not consist of more than three members, only two members need to be in attendance.[65] Where the hearing is conducted by a Division of the Commission, two members must be in attendance.[66] The Chairman would preside at all hearings where he is present.[67] If the Chairman is not present, the Deputy Chairman would preside if he is present.[68] Where the Commission constitutes a Division to conduct a hearing, if the Chairman is not a member of the Division, the resolution constituting the Division must specify a member of the Division as Chairman of that Division.[69] Where the NCSC has delegated the power to hold a hearing to an authority of a State or Territory or to an officer of such an authority, the delegate may authorise a specified person, such as an officer of the NCSC or a Corporate Affairs Commission to hold the hearing.[70]

At a private hearing the NCSC may give directions as to the persons who may be present[71] 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 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 give directions preventing or restricting the publication of evidence given before the Commission or of matters contained in documents lodged with the Commission.[72]

At a hearing, the proceedings are to be conducted with as little formality and technicality, and with as much expedition, as practicable. The NCSC is not bound by the rules of evidence. The NCSC may, upon conditions, permit a person to intervene in the proceedings. The NCSC must observe the rules of natural justice.[73]

The provision of a transcript to a witness at a hearing is not an immutable dictate of the rules of natural justice.[74] Ordinarily, a witness will be supplied with a transcript of his or her evidence at a hearing as soon as is practicable, provided he or she meets the costs involved. The NCSC has not considered itself under an obligation to prepare a transcript for provision to a witness if one is not available. The NCSC has declined to provide a transcript in the middle of an investigation where it has considered that to do so is likely to hamper investigations. However, the NCSC cannot unduly postpone

63 *NCSC Act*, s45(1A) and (6A).
64 *NCSC Act*, s20(1), 38(1).
65 *NCSC Act*, s20(4), 38(1)(e).
66 *NCSC Act*, s21(5) and 38(1)(f).
67 *NCSC Act*, s20(5) and 38(1)(e).
68 *NCSC Act*, s20(6) and 38(1)(e).
69 *NCSC Act*, s21(1A) and 38(1)(f).
70 *NCSC Act*, s45(4) and (5); NCSC (State Provisions) Act, s12(4) and (5).
71 *NCSC Act*, s36(5).
72 *Id*, s36(6).
73 *Id*, s38.
74 *Adler v Cantwell* (1989) 7 ACLC 624.

providing a transcript of a witness's evidence to the witness and the onus appears to be on the NCSC to demonstrate that the effectiveness of a hearing would be prejudiced by providing the transcript in any specific instance. *Prima facie*, fairness requires that a transcript be provided to a witness.[75] In so far as the decision of Marks J in *Adler v Cantwell*[76] might suggest a less stringent test, it would be prudent of the NCSC to treat the decision with some caution.

A person summoned to a hearing is required to attend.[77] 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[78]. 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 of misleading evidence.[79]

In some cases, the NCSC is required to conduct a hearing: for example, under section 62P of the SIA and section 80P of the FIA before refusing to grant, revoking or suspending, or imposing or varying conditions or restrictions in respect of a licence; under subsection 18(8) and 20(10) of the *Companies Code* before refusing to register a person as an auditor or liquidator; and under subsection 66(9) of the Companies Code before revoking a licence authorising a company to omit "Limited" from its name.

These examples are illustrations of adjudicative hearings, where the purpose of the hearing is to make a decision on a specific issue which will affect legal or substantive rights of some person.[80] In those cases, where the NCSC holds a hearing before making a decision which will affect rights, Gibbs CJ has expressed the view that one might sensibly speak of an issue to be determined, although not of an issue between contending parties.[81]

This category of hearing can be contrasted with where the NCSC endeavours to use its hearings power to conduct an investigative hearing in order to obtain sufficient information to enable it to decide whether further action should be taken. Thus, the NCSC may seek to conduct a hearing in connection with its power of investigation to determine whether a person has committed an offence or whether the NCSC should make an application to the Court. There is there no issue to be decided; the hearing is designed to discover facts which may or may not lead to further action being taken; no finding of fact or decision of law need be made; and the procedure is not an adversary one but inquisitorial.[82] It has been held that in the case of such hearings the word

75 *NCSC v Bankers Trust Aust Ltd* (1989) 1 ACSR 330.
76 (1989) 7 ACLC 624.
77 *Id*, s39(1).
78 *Id*, s39(2).
79 *Id*, s39(5).
80 *NCSC v News Corporation Ltd* (1984) 156 CLR 256, per Gibbs J at 309; Ford, *op cit*, 878.
81 156 CLR, at 309.

"hearing" has no significance other than to indicate that Part VI of the *NCSC Act* applies:

> the word is not used for the purpose of prescribing, implicitly, the procedure which the Commission must follow at a hearing or of indicating that persons who may be affected by a hearing have rights similar to those of parties at a trial. Its use is a convenient description of a procedure the incidents of which are described in Part IV of the *NCSC Act*.[83]

The dicta indicates that persons who seek to interrupt the progress of an investigative hearing by arguing that it has to be conducted in a manner which ensures minimal jeopardy to their potential rights will recieve unsympathetic treatment in a Court. It also supports the proposition that with the enactment of section 16A, the NCSC must be held to have the power to conduct an investigative hearing.

In *Adler v Cantwell*,[84] it was held that the hearing being inquisitorial, the NCSC would not make orders or directions which could affect rights, and though findings might have a bearing on the plaintiff's rights at a later time, there were protective mechanisms found in subsection 39(5) of the *NCSC Act*, relating to incriminating evidence. The Court held that the NCSC in conducting the hearing was performing a function of some importance: the NCSC should not lightly be the subject of intervention by the Court at the risk of frustrating its purpose and efficacy.[85]

In *The Broken Hill Co Pty Ltd v NCSC*,[86] injunctions were sought to restrain the NCSC from holding a hearing, or alternatively a public hearing, into the acquisition of BHP shares by an Elders subsidiary and the acquisition by BHP of convertible bonds in a wholly owned subsidiary of Elders and certain preference shares issued by Elders.

The High Court held that it was clearly within the NCSC's functions and powers to proceed with the hearing in order to determine if the conduct in question complied with the law, whether it was against the public interest and if, as a consequence, there should be a change to the law; and to determine if the conduct was or was not acceptable within the meaning of that expression in section 60 of CASA and, if not, what remedial action was appropriate.[87] It therefore refused to grant the injunctions sought by the applicants and dismissed their applications.

The Court noted that under subsection 6(3) of the *NCSC Act*, the powers of the NCSC included the power to make recommendations to the Ministerial Council for new laws or for changes to existing laws relating to companies and the regulation of the securities industry. The High Court observed that the law reform function of the NCSC was wide, although it was unnecessary for the purposes of the case to determine its ultimate scope.[88]

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82 *Ibid.*
83 *Id*, 311-2.
84 (1989) 7 ACLC 624.
85 *Id*, 627.
86 (1986) 160 CLR 492.
87 *Id*, 509 per Mason, Wilson, Brennan, Deane and Dawson JJ.
88 *Ibid.*

The Court also noted that under section 60A of CASA, the NCSC itself, where it had made a declaration under section 60 of CASA, could make orders similar to the wide-ranging orders that could be made by a court, but within a more limited range and only for the duration of a limited period of 30 days. The making of a declaration under section 60 which could have far-reaching effects, required the NCSC to be satisfied of certain matters upon which the NCSC might clearly need to inform itself. If for this purpose, the NCSC wished to hold a hearing, it was empowered to do so under subsection 61(1) of the *NCSC Act*.[89]

The Court referred to clause 32(1) of the Formal Agreement which provided that subject only to directions from time to time of the Ministerial Council, the NCSC shall have and exercise responsibility for the entire area of policy and administration with respect to company law and the regulation of the securities industry. It thought that while the NCSC had a wide variety of functions which could well entail responsibility for this entire area, clause 32(1) could not be regarded as an independent source of power. Notwithstanding this, the effect of clause 32(1) was somewhat more than mere description because it provided a plain indication of the width of the role that the NCSC was intended to play. This was having regard to section 9 of the *NCSC Act* which required the NCSC to perform its functions and exercise its powers in accordance with the Agreement. It provided the context in which those functions and powers must be interpreted and indicated their wide scope.[90]

Nevertheless, the High Court thought that it was clear that the NCSC was not entitled to enter upon hearings at large. In order to ensure that the NCSC was acting within the ambit of the legislation, it was desirable when the NCSC proposed a hearing that it should as soon as possible identify the powers and functions upon which it relied, even if subsequent events were to require a widening of the scope of its inquiry.[91]

The Court held that it was beyond the NCSC's powers to hold the hearing in order to inquire if the conduct of the various parties was acceptable and not against the public interest, to reassure the market and to restore confidence in the honesty, efficiency and fairness of the securites market. In including this item, the NCSC was acting upon a somewhat broader view of clause 32(1) than the Court thought justified. Nevertheless, those matters could in appropriate cases be properly taken into account in performing a specific function conferred upon the NCSC.[92]

Section 16A appeared intended to restrict the power to investigate under that section by laying down a prerequisite, namely, the existence of a state of mind, rather than to confer a function upon the NCSC. The Court thought that it would be unusual to contemplate a hearing for the purpose of forming a suspicion and that the powers of inspection given to the NCSC under Division 1 of Part II of the Code probably was the intended method for the initial investigation of the commission of offences.[93]

89 *Id*, 510.
90 *Id*, 507-8.
91 *Id*, 508.
92 *Id*, 508-9.
93 *Id*, 511.

The alternative claim that the NCSC be restrained from holding the hearing in public was dismissed because the applications were based on the plaintiffs' contention that the NCSC lacked power to hold a public hearing and not upon the basis of any wrongful exercise of a discretion. The argument which was put to the Court, however, went to discretion and the Court considered that it was inappropriate to deal with it.[94]

COMMONWEALTH SCHEME

Professor Ford has drawn attention to the a degree of duplication in the provisions of the Co-operative Scheme dealing with powers of investigation and coercive powers which support an investigation. He contrasts them to the Commonwealth scheme under which these general provisions are generally retained in substance, but rationalised into a systematic form.[95]

Part 3 of the *ASC Act* deals with investigations and information-gathering by the ASC. The Report of the Joint Select Committee on Corporations Legislation, under the chairmanship of Mr Ron Edwards MHR, noted that the ASC Bill set out to deal comprehensively with all aspects of information gathering including investigations, examination of persons, inspection of books, disclosure of information about securities and futures contracts, and hearings.[96]

While the NCSC has the power to require a person to answer questions (though the answers are not required to be given on oath) with respect to certain securities and futures dealings, and to answer questions on oath in the context of a special investigation, an NCSC hearing or pursuant to a court order, the ASC has the power to investigate on oath whenever it has reason to suspect a contravention of a national scheme law, or a contravention of a law concerning the management or affairs of a body corporate, or involving fraud or dishonesty relating to a body corporate, securities or futures contracts. Presumably, this will give the ASC the facility to secure more reliable answers to questions asked in an investigation as a result of the perjury laws being made applicable to those answers. Furthermore, the ASC has power to examine a person for the purpose of determining whether or not to make an application to the Corporations and Securites Panel, where the ASC has reason to suspect that unacceptable circumstances have or may have occurred.[97]

Professor Ford therefore believes that, in relation to the investigation of persons, the ASC will have broader powers of investigation than the NCSC.[98] We proceed to consider these provisions.

Where the ASC, on reasonable grounds, suspects or believes that a person can give information relevant to a matter that it is investigating, or is to investigate, it may, by

94 *Id*, 511-2.
95 Ford, *op cit*, 878.
96 Edwards Committee Report 25.
97 *ASC Act*, ss13 and 19.
98 Ford, *op cit*, 878.

written notice in the prescribed form given to the person, require the person to give to the ASC all reasonable assistance in connection with the investigation and to appear before a member or staff member of the ASC for examination on oath and to answer questions.[99] The ASC's notice is required to state the general nature of the matter under investigation.[100] The examinee is required to answer only if the question is relevant to that matter;[101] and is entitled to legal representation[102] and to a copy of the written record of investigation which he or she may be required to sign.[103]

Division 6 of Part 3 of the *ASC Act* makes provision with respect to hearings by the ASC. Those provisions differ from the Co-operative Scheme legislation in a number of important respects.

The ASC may, of its own motion or at a person's request, refer a question of law arising at the hearing to the Court (constituted by at least 3 judges) for decision.[104] The provision appears designed with the NCSC's experience in mind where, in the course of conducting hearings, it has frequently faced challenges to its jurisdiction or conduct. The ASC will be able to take the initiative where it considers it appropriate and not have to wait for a recalcitrant party to institute proceedings on its time-table and terms.

However, the NCSC has not been impeded by the absence of an equivalent provision in conducting hearings. The NCSC has insisted that the parties before a hearing comply with its orders until a superior tribunal determines that the orders are not sound at law. It has not sought to hide from parties their legal rights to challenge orders and to seek to injunct the hearing. If the onus had been put upon the NCSC to prevent wilful disobediance of a direction at a hearing by obtaining an appropriate Court order, irretrievable damage might occur before the order could be obtained: an illustration would be provided by the unauthorised disclosure of sensitive evidence given at a hearing.

The quasi-judicial character of a hearing is recognised by section 40 of the *NCSC Act*. In particular, paragraph 40(d) provides that a person shall not do an act that would, if the Commission were a court of record, constitute contempt of that court. The emanation of the judicial power encompasses compliance with a court order; it is for a superior court to set aside the order on grounds of the absence of a firm statutory basis. Until that is done, a party dissatisfied with the order must pursue his or her remedies in the courts.

The requirement that a question of law referred by the ASC be heard by a Court constituted by at least three Judges appears to impose an excessive burden upon the Court and the ASC. Appeals from NCSC decisions have been heard by a single Judge at first instance. The requirement constitutes an unnecessary intrusion by the legislature on

99 *ASC Act*, s19(1) and (2).
100 *Id*, s19(3)(a).
101 *Id*, s21(3).
102 *Id*, s23(1).
103 *Id*, s24; *cf.Adler v Cantwell* (1988) 7 ACLC 624.
104 *Id*, s61.

the judicial prerogative to determine the manner in which cases brought before the Court are to be heard. Preservation of this prerogative is essential if the scarce resources of the Court are to be most effectively allocated in dispensing justice to litigants who will usually have no interest in questions of law referred by the ASC.

In exercising its discretion to direct whether a hearing takes place in public or private, the ASC is required to have regard to the confidentiality of matters that may arise during the hearing or to whether they involve the alleged or suspected commission of an offence; any unfair prejudice to a person's reputation that would be likely if there is a public hearing; the public interest in having a public hearing; and any other relevant matter.[105] Exercises of discretion under these guidelines may become a fruitful source of litigation in the years ahead. It is even foreseeable that one party may argue that public interest mandates the hearing being held in public, whereas another party will argue unfair prejudice unless the hearing is in private.

Hearings into whether there should be a change in the law are more likely to be suitable for a public hearing. In this regard, the ASC has power to advise the Minister on law reform in relation to a national scheme law.[106] However, hearings into law reform will not arise in a vacuum: they are likely to raise issues of whether there has been compliance with the existing statutory and regulatory requirements. Those issues are likely to raise conduct by specific persons in particular cases. It might be undesirable for those issues to be canvassed in public. The person presiding at a public hearing into law reform will have to remain conscious that sensitive issues might be raised with little, if any, notice; issues which would more appropriately be mentioned in private session.

By contrast with hearings into law reform, hearings relating to possible refusal, revocation or suspension of, or the imposition or variation of conditions on, licences of securities dealers, investment advisers, futures brokers and futures advisers which the ASC is required to provide an applicant or licensee by virtue of section 837 and 1200 of the *Corporations Act* must take place in private in accordance with paragraph 2(a) of those sections.

A type of hearing which could raise difficult questions as to whether it should be conducted in public or private is the hearing required by subsection 1033(3). Subject to being able to make an interim order, the ASC is prohibited without holding a hearing from making an order directing that no further securities to which a prospectus relates may be issued because it appears to the ASC that the prospectus substantially contravenes the prospectus requirements of Part 7.12 Division 2, the prospectus contains false, misleading or deceptive subject-matter or the prospectus contains a material misrepresentation. In connection with the requirement to hold a hearing, the ASC must give a reasonable opportunity to any interested person to make oral or written submissions on whether the order should be made.

105 *Id*, s52.
106 *ASC Ac*, s11(3), 148.

The corporation whose securities would be made subject to the order might think that it had a legitimate interest to have the hearing held in private, so as to minimise any resultant damage, especially if the allegations were not to be established; and refuting the allegations might require providing commercially sensitive information. The quintessential private hearing is one which is not announced to the public. However, that would be inconsistent with the requirement to give any interested person a reasonable opportunity to make submissions.

Once the public has notice of the hearing, the corporation must be interested in access to all oral and written submissions: access can facilitate its representatives in comprehensively rebutting any case for the order; but there may be persons who wish their submissions to the ASC to be confidential.

Finally, the wide range of persons who may be civilly liable in connection with the prospectus, pursuant to subsection 1006(2), surely could have an interest in whether the ASC issues the order: these persons might wish to have access to all submissions to advance their several purposes.

The extent to which this type of hearing should be held in public or in private and the persons who should be given access to "private" submissions are likely to pose difficult problems and present conflicting legitimate interests; their resolution will require careful judgment.

The ASC may give directions preventing or restricting the publication of matters arising at the hearing.[107] The provision over-rides the decision of Foster J in *Bankers Trust Australia Limited & Ors v NCSC*[108], since set aside by the Full Federal Court on appeal in *NCSC v Bankers Trust Australia Limited.*[109] The grounds for exercising this discretion are similar to those with respect to the holding of a public or private hearing. Only time will tell whether those grounds will provide a more fruitful source of litigation than would have been the case after the Full Federal Court decision if the legislation continued to correspond with the *NCSC Act* provisions at issue there. It would also appear somewhat difficult for a person (not before a private hearing) whose reputation might be in jeopardy if matter disclosed in the hearing were publicised, to initiate action against the absence of an ASC decision prohibiting publication of the material. The onus is upon the ASC to actually make a decision prohibiting publication; and a person may not become aware of the absence of such a decision and its possible prejudice to him or her until after publication with resultant damage to the person's reputation. A heavy onus would therefore rest on the ASC to be vigilant in protecting the reputations of third parties and, if necessary, give those persons a right to be heard before refraining from making decisions to prohibit publications impacting adversely upon them.

107 *Id*, s55.
108 (1989) 7 ACLC 431.
109 (1990) 8 ACLC 1.

The ASC may not hold a hearing for the purposes of exercising its investigative powers.[110] Consequently, the investigative hearings which have been a feature of the NCSC's administration will not be permitted by the Commonwealth scheme. Nevertheless, Professor Ford has concluded that the broadened power of investigation of persons, coupled with the ASC's other coercive powers, will make it possible for the Commission to achieve results similar to an investigatory hearing. He says that the distinction between an investigation in which persons are examined on oath, and a hearing, is not entirely clear. He thinks that a hearing may involve some continuity of procedure, whereas an investigation may be conducted from time to time without any formal sittings or sequence.

Professor Ford identifies two important legal differences between an investigation and a hearing under the *ASC Act*.[111] These are that an examination of a person during an investigation is required to take place in private and there are provisions limiting the persons entitled to be present.[112] There is no express obligation up an examiner to comply with the rules of natural justice. However, an obligation to observe the rules of natural justice may be implied where an administrator has the power to make a decision affecting rights and is under a duty to act judicially. The circumstances in which the rules of natural justice will apply have been progressively expanded by the courts. Their decisions suggest that an administrator exercising investigative powers may be subject to the rules of natural justice, though the contents of those rules will fluctuate from case to case.[113]

For example, a requirement to act fairly may be imputed in administrative or investigative proceedings: it is not confined to judicial or quasi-judicial proceedings. However, in applying this requirement to investigative proceedings, an inspector will not be subject to any set rules of procedure: he will be free to act at his own discretion provided that he has shown that he intends to act fairly. If the inspector is disposed to condemn or criticise anyone in a public report, he must first give him a fair opportunity to correct or contradict the allegation. This can be done by drafting the proposed passage of the report and putting it before him before including it: but usually an inspector would not be compelled to adopt this procedure; an outline of the charge would suffice.[114]

If an inspector neither condemns or criticises publicly, but prepares a confidential report on a complaint; although the report could lead to charges, he might not have to put any suspicions to the suspect.[115] Every public officer who has to decide whether to prosecute should first decide whether there is a prima faice case, but justice does not require that he must first seek the comments of the accused on the material before him.[116]

110 *Id*, s51.

111 Ford, *op cit*, 881.

112 *ASC Act*, s22.

113 *Mahon v Air New Zealand* (1984) 50 ALR 193; *Re Pergamon Press Ltd* [1971] Ch 388; *Brettingham-Moore v St Leonard's Municipality* (1969) 121 CLR 509; cf*Testro Bros Pty Ltd v Tait* (1963) 109 CLR 353.

114 *Re Pergamon Press* [1970] 3 All ER 535.

115 *Furnell v Whangarei High Schools Board* [1973] 1 All ER 400.

It is therefore likely that the requirement for the ASC's investigative powers to be exercised not by hearing, but by private examination by an inspector will reduce the scope for persons who are subject to examination to obtain an outline of any adverse findings proposed to be included in the inspector's report.

Legal professional privilege

Section 69 of the *ASC Act* deals with legal professional privilege. It corresponds to section 69 and 308 of the *Companies Code*, section 11 and 32 of the SIA, and section 15 and 25 of the FIA. The section entitles a lawyer to refuse to disclose privileged information unless the person for whom the information was communicated consents to the disclosure. However, the lawyer is required to disclose the name and address of the person, and to identify any document or book containing the communication.

Disclosure of these details should not enable the ASC to obtain access to privileged information, unless the person who has the privilege chooses to waive it. In *Baker v Campbell,*[117] the High Court held (by a majority of 4 to 3) that the doctrine of legal professional privilege was not confined to judicial and quasi-judicial proceedings: in the absence of some legislative provision restricting its application, legal professional privilege was applicable to all forms of compulsory disclosure of information.

However, the compass within which the doctrine of legal professional privilege operates is narrow, having regard to the principle which it protects.[118] Legal professional privilege is confined to material which is brought into existence for the sole purpose of receiving or providing legal advice or for use by a legal adviser in litigation.[119] A document which would in any event have been brought into existence for another purpose, even if that purpose is not the dominant purpose, is not privileged.[120] There is no privilege for physical objects other than documents and there is no privilege for documents which are the means of carrying out, or are evidence of, transactions which are not themselves the giving or receiving of advice or part of the conduct of actual or anticipated litigation.[121] Communications which would otherwise be privileged lose their immunity from disclosure if they amount to a crime or fraud.[122] A court has power to examine a document for which a claim for privilege is made to determine whether the claim is made out.[123]

Thus, the ASC should be able to compel disclosure of significant amounts of information from lawyers and their clients; contracts, agreements and extracts of other transactions cannot attach legal professional privilege.[124]

116 *Wiseman v Borneman* [1971] AC 297, at 308 per Lord Reid.
117 (1983) 153 CLR 52.
118 *Id*, 123 per Dawson J.
119 *Grant v Downs* (1976) 135 CLR 674.
120 *Ibid.*
121 *Baker v Campbell* (1983) 153 CLR 52, 122-3 per Dawson J.
122 *Id*, 123.
123 *Grant v Downs* (1976) 135 CLR 674.
124 *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1, 24 per Mason J.

Directions by the Minister

The Minister may give the ASC a written direction to investigate a matter relating to corporations, securities or futures where he or she is of the opinion that it is in the public interest for the matter to be investigated.[125] In its submission to the Edwards Committee on the effect of the then clause 14 of the ASC Bill, the NCSC pointed out that under the Co-operative Scheme legislation a direction by the Minister is required to be published in the *Gazette* so as to ensure that he or she is accountable for such a direction. The NCSC argued:

> ... in view of the fact that the ASC is obliged to comply with such a direction, irrespective of its other priorities, and that such directions may be of considerable political significance, and also that such directions could be expected to be rare, it appears desirable in the interests of accountability, that they be published.[126]

The Edwards Committee agreed that on the basis of the NCSC experience that Ministerial directions were rare, it could see no reason why the Minister should not be obliged to publish a copy of a direction in the same manner as the requirement to publish a direction pursuant to subsection 12(5) of the *ASC Act*.[127]

Interim Reports

In response to the NCSC's concern that clause 16 of the ASC Bill, as it then was would require, in almost every investigation, that the investigator prepare an interim report suitable for Ministerial scrutiny and which was sufficiently comprehensive to be a self contained document to the satisfaction of officers of the Minister's Department,[128] the Edwards Committee recommended amendments. It proposed that clause 16 should be redrafted so as to provide that an interim report be made by the ASC when the ASC has formed the opinion that a serious contravention of the law has been committed. In particular, it wanted subclause 16(2) redrafted so as to make it obligatory upon the ASC to advise or notify the Attorney General when it has formed an opinion that such a serious contravention has been committed, and that the ASC advise the Attorney General of the nature of the offence, the evidence upon which such an opinion has been formed and when it was formed. The Committee thought that subclause 16(2) should also give the ASC discretion to notify other relevant bodies of a serious contravention.[129] Those recommendations have been implemented.[130]

Examination of persons

The NCSC recommended that the ASC Bill be amended to make it clear that the ASC's powers relating to the examination of persons may be delegated. The recommendation was not accepted by the Edwards Committee. The Committee noted that clause 102 empowered the ASC to delegate its investigative functions, including its powers of

125 *ASC Act*, s14.

126 Submission No 30 p31.

127 Edwards Committee Report 26. We understand that the Minister's written directions to the ASC to investigate a matter will have to be tabled before the Parliamentary Committee.

128 *Id*, par 37.

129 Edwards Committee Report 28-9.

130 *ASC Act*, ss16 and 18.

examination.[131] However, we observe that because section 102 of the *ASC Act* is limited to delegations to an ASC member, ASC staff member or a person prescribed by regulations, the ASC ordinarily would be unable to delegate its investigative functions to external counsel to conduct an investigation analogous to special investigations under the Co-operative Scheme.

Record of examination — clause 24

The NCSC put to the Edwards Committee that clause 24 of the ASC Bill which required an inspector who is conducting an examination to supply a witness with a transcript of any evidence he or she gave to the inspector, could impede the effectiveness of investigations. The NCSC pointed out that in at least two investigations conducted in the previous three years by the NCSC or its officers, significant advances were made when witnesses were re-examined and contradicted the statements they made at earlier examinations. The NCSC noted that the question had been litigated twice and that the courts had held on both occasions that the provision of a transcript during an investigation is not necessarily required by the rules of natural justice. A transcript must, however, be provided so as to enable a person subject to investigation to comment before the finalisation of a report that criticised him or her and to persons actually charged with an offence.[132]

The Attorney General's Department responded that the purpose of clause 24 was to provide a fair method of protecting the interests of the examinee in ensuring fair administrative practice:

> For example, it would assist in maintaining the validity of the record and the evidence of a willing examinee can be required to be placed on record in (sic) notwithstanding an arbitrary inspector or in response to unjustified allegations.[133]

The Department considered that while the courts were capable of resolving the competing interests of effective enforcement compared with fairness to individuals in particular cases, there was a resources cost to be considered. The advantage of clause 24 was its certainty. The question of whether natural justice on a particular occasion would require a transcript to be provided to an examinee would vary with the circumstances and may only be able to be resolved by the court. The Department referred to two conflicting court decisions on the subject.[134]

The Committee considered the respective arguments of the NCSC and the Department concerning clause 24 and concluded that it should not be amended.[135] Consequently, to the extent that *Adler v Cantwell* might have survived *NCSC v Bankers Trust Australia Ltd*, it will have no scope for operation under section 24 of the *ASC Act*.

131 Edwards Committee Report 30.
132 Submission No 30, par 56 and 57.
133 Attorney-General's Department comments, Part 2, Page 3.
134 *Ibid.*
135 Edwards Committee Report 32.

Record of examination — section 27

Section 27 of the *ASC Act* obliges the ASC to attach copies of transcripts of examination to any reports to which that transcript relates. The NCSC recommended to the Edwards Committee that it saw this requirement as administratively burdensome and possibly prejudicial to confidentiality and privacy; and therefore that it should be deleted.[136]

The Commonwealth Attorney General's Department argued that the ASC had a discretion, but not an obligation, to give a copy of the report, or part of the report, to a person to whose affairs it materially related. It also argued that possible prejudice to confidentiality and privacy, or the administration of justice, would be a factor that should be taken into account by the ASC and the Minister in exercising their respective discretions.[137]

The Edwards Committee was not convinced that clause 27 of the ASC Bill, as it then was, needed to be amended or deleted.[138]

Arguments based on the discretionary nature of the powers do not allay the concerns expressed by the NCSC. Exercises of discretions by administrative bodies and Ministers are reviewable. Practitioners might have to be cognisant of the provisions of section 27 in protecting the interests of their clients. Will the discretion to give a copy of a report, or part of a report, to a person to whose affairs it materially related, contribute towards the decision in *Furnell v Whangarei High Schools Board*[139] being distinguished?

Notice to produce books

Section 30 of the *ASC Act* empowers the ASC to require the production, at a specified time and place, of specified books relating to the affairs of a body corporate. It should be read with section 87 which provides that the specification of the time and place must be reasonable, and that if it is reasonable, that specification may be to produce the books forthwith.

The NCSC suggested that such a specific requirement, whilst probably adding nothing to the law, would give to those who are interested in delaying or frustrating an investigation, a ground or argument to forestall proceedings by the ASC. To prevent such delaying tactics undesirably impeding law enforcement, the NCSC suggested that clause 78, as it then was, be deleted and that clause 30 be amended to make it clear that the ASC's powers extended to requiring the production of books "forthwith". The Edwards Committee supported the Commonwealth Attorney General's Department's arguments opposing these amendments to the ASC Bill and noted that the NCSC recognises that the qualifications in question were probably implicit in the current requirement.[140]

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136 Submission No 30, par 61.
137 Attorney General's Department comments, Part 2 Page 7.
138 Edwards Committee Report 33.
139 [1973] 1 All ER 400.
140 *Id*, 34.

Market surveillance power

Division 4 of Part 3 of the *ASC Act* deals with requirements to disclose information about securities or futures contracts. Sections 41, 42, 43, 45 and 46 replace equivalent provisions under the existing SIA and FIA. They empower the ASC to ascertain the identity of the clients and the nature of the instructions given by the clients in relation to securities and futures dealings.

The NCSC regards this information as essential to any program of market surveillance. It is usually obtained and assessed as part of the process of deciding whether any further investigation is required. The existing practice is for queries of this nature to be made routinely by facsimile, telex or telephone and to be answered in the same way. Hundreds of such queries are made by the NCSC each year.

The NCSC suggested to the Edwards Committee that the inclusion of these powers in the same Division as the more significant powers of the ASC under section 43 and 46 produces unintended consequences that will prevent the ASC from continuing the routine market surveillance activities of the NCSC.

Under section 47, those routine disclosures are required to take place in private and a staff member is not allowed to be present unless he or she has been approved by the ASC, instead of by telephone, facsimile or telex. In addition, under section 48, the lawyer of a person making disclosure may be present.

Section 43 and 46 confer more extensive powers of investigation meant to be available only in relation to more serious circumstances. They correspond to existing provisions in the SIA and FIA Acts. However, section 47 and 48 are entirely new. There has been no situation in which it has been alleged that the equivalent powers to those conferred by sections 43 and 46 have been inappropriately used or that the constraints imposed by sections 47 and 48 are necessary to prevent abuses.

The NCSC recommended to the Edwards Committee that clauses 47 and 48 of the ASC Bill (as it then was) be deleted.[141] The Commonwealth Attorney General's Department responded that the procedures required by clauses 47 and 48 would only apply when a party declined to voluntarily co-operate with an ASC investigation.[142] To premise a significant new encroachment into the exercise of the investigative powers of a major agency from the proposition that it will only operate where there has been no voluntary compliance is to lose sight of the fact that it is precisely there where it becomes essential for the investigative process to operate unimpeded by a new layer of procedural requirements.

The Edwards Committee believed that any unintended consequence of the sort suggested by the NCSC would be undesirable. It wished any doubt as to the extent of the ASC's market surveillance power, particularly the day-to-day power to monitor market movements, to be resolved. It therefore recommended that clauses 41, 42, 44 and 45,

141 Submission No 30, pars 71-80.

142 Attorney General's Department comments, Part 2 Page 9.

and clauses 47 and 48 of the ASC Bill (as it then was) be reviewed to ensure that the day-to-say market surveillance role of the ASC is not unduly restricted.[143] To date, the provisions remain in spite of the NCSC's objections.

Bringing proceedings in a person's name

Section 50 of the *ASC Act* provides that where, as a result of an investigation or from a record of an examination, it appears to the ASC to be in the public interest for a person to begin and carry on a federal proceeding for the recovery of damages for fraud, negligence, default, breach of duty, or other misconduct, committed in connection with a matter to which to which the investigation or other matter related, or for recovery of property of the person, the ASC may cause the proceeding to be begun and carried on in the person's name. However, if the person is *not* a company, the person's written consent *must* be obtained.

Section 50 corresponds with the existing subsection 306(11) of the *Companies Code* and subsection 36(9) of the FIA. There is, however, one major difference. The existing provisions do not contain any requirement for the NCSC to obtain the consent of the person in whose name the action is brought. Originally, clause 50 of the ASC Bill was drafted to require the ASC to obtain the person's consent whether or not the person was a company.

The NCSC's comment to the Edwards Committee was that such proceedings often have to be brought in the name of the company since, as a matter of law, it was the company that was regarded as the victim of the misappropriation. The NCSC maintained that the effect of clause 50 was that the ASC would be unable to bring proceedings to recover misappropriated money or property when the persons controlling the company were amongst the persons from whom recovery would be sought or were associates of such persons or under their influence.

Where, on the other hand, the controllers of the company are truly independent of the persons against whom civil proceedings would be brought, it would normally be a decision for them as to whether proceedings were worth while in the interests of the members of the company and the ASC would not, except in the most exceptional circumstances, have any reason to believe bringing such proceedings was in the public interest.[144]

The NCSC asserted that the effect of the new requirement for written consent was to deprive the ASC of the ability to bring recovery proceedings where it was most needed in the interests of investors. No explanation had been given why the existing legislation was considered to be defective. The NCSC recommended that clause 50 be amended by deleting the expression ",with the person's written consent".

The Edwards Committee accepted the view that clause 50 should be amended. It recommended that clause 50 should be redrafted so as to allow the ASC to commence

143 Edwards Committee Report 36.
144 Submission No 30, par 87.

proceedings in accordance with the clause withut the written consent of a company's directors. Where the ASC considered that such proceedings should be taken in other cases, clause 50 should still provide that a person's written consent was required before action was commenced by the ASC.[145]

Self Incrimination

Section 68 of the *ASC Act* is substantially based on a number of corresponding provisions of the co-operative scheme legislation,[146] but extends the privilege against self-incrimination. If before making a statement, signing a record or producing a book a person claims that the statement, record or book might tend to incriminate him or her or make him or her liable to a penalty, neither the statement, record or book, nor anything obtained as a result of the person making the statement, signing the record or producing the book, is admissible in evidence against the person in a criminal proceeding or proceeding for the imposition of a penalty, other than a proceeding in respect of the falsity of a statement made or contained in a record. Self-incrimination is not a reasonable excuse to refuse to give information.

The privilege against self-incrimination has been regarded as one of the bulwarks of citizens' civil liberties. It has been proclaimed judicially to be a safeguard of conscience and human dignity and freedom of expression; as registering an important advance in the development of liberty and one of the great landmarks in man's struggle to make himself civilised; and as reflecting many of our fundamental values and most noble aspirations.[147]

On the other hand, it has been asserted:

> It is not putting it too highly to say that if the privilege against self-incrimination is allowed to continue, there will be a whole class of highly intelligent people in our community who will be able to perpetrate massive criminal schemes with impunity. Their belief that they can do so has already arisen as is shown by the massive taxation fraud of the last decade.[148]

A claim has been made that many of the attributes of the privilege are uncertain and outmoded and that it is time to re-examine our attitudes toward the traditional formulation of the privilege and to assess whether the need which prompted its creation in the seventeenth century is an appropriate one to be acting upon now.[149]

The NCSC submitted to the Edwards Committee that section 68 of the ASC Bill would make the compulsive powers of the ASC "virtually useless" and noted that:

145 Edwards Committee Report 38.

146 *Companies Code*, ss14(6) and (7), and 296(7) and (8); SIA, ss12(3C), (3CA) and (3CD) and 19(9); FIA, ss15(6) and (7) and 25(10).

147 *Ullman v United States* (1956) 350 US 422, at 445 per Black and Douglas JJ; *Murphy v Waterfront Commission of New York Harbour* (1964) 378 US 52 at 55 per Black and Douglas JJ.

148 Meagher D R, *Organised Crime*, Papers Presented to the 53rd Congress, ANZAAS, Perth, Western Australia, 16-20 May 1983 at 106.

149 Freckelton I, "Witnesses and the Privilege Against Self-incrimination" (1985) 59 *Australian Law Journal* 204 at 205.

> In practice, the overwhelming majority of prosecutions for breaches of the companies and securities legislation are dependent on the production of such documents so that the imposition of an additional rule which prevents their use would significantly reduce the prospect of successful prosecution.[150]

and:

> If the bill were to be enacted unaltered, the ASC would need to find an alternative to its power to require the production of documents. The most practical alternative that suggest itself is the use of such warrants executed by the Australian Federal Police under the *Commonwealth Crimes Act*. Such a process would significantly alter the nature of investigation of beaches of the Companies and Securities legislation and could be expected to result in considerable opposition from the commercial community.[151]

The NCSC also submitted that the ASC would be unable to use any evidence at all, unless it could show to a court that it was not obtained as an indirect consequence of a person making a statement at an examination on oath, or producing a document or book, when required to do so, and accordingly introduces a new rule for the exclusion of evidence which is unknown to the common law in Australia and the United Kingdom, whilst bearing some resemblance to United States provisions.

The NCSC illustrated its concern as follows:

> The rule not only excludes a self-incriminating statement (which is inadmissable under the existing legislation) or the document produced (made inadmissable by sub-clause 68(3)); it also excludes all evidence gained in further investigations relying on "the lead" obtained in this way. In practice, the evidence excluded may be even wider. It will be for the Crown to prove that later acquired evidence was not obtained as an indirect consequence of the relevant admission and it may be very different for it to prove this negative.[152]

The NCSC recommended that sub-clause 68(3) be amended so that the privilege conferred by that sub-clause applied only in relation to a statement made by a person and not to a document produced, nor to any information, document, or other thing obtained as a direct or indirect consequence of the person making the statement.

The force of the NCSC's position is not weakened by an argument that there is no difference between requiring a person to answer a question orally and requiring that person to produce documentary evidence; the argument asserts that it is logical, if there is to be any privilege against self-incrimination, that it apply to any requirement to provide information within the person's possession, whether orally or in writing.

This "logic" overlooks the inherent contemporaneity with the investigative process in a respondent answering a specific question put to him or her; as contrasted with the existence of books and documents which might antedate the commencement of investigations by many years. Furthemore, the information provided by answers emanate directly from the respondent; whereas, with books and documents, their

150 Submission No 30, par 102.

151 *Id*, par 103.

152 *Ibid.*

provision to investigators may have no more connection with the summonee than that he or her is the medium into whose possession they happen to be at the time of the investigation. The argument ignores the distinction between the provision of information as an intangible thing inherently attaching to the person of the respondent and the surrender of a tangible product containing information.

The argument goes considerably beyond the standards insisted upon by the judiciary. In *Friedrich v Herald & Weekly Times Ltd*,[153] the full Supreme Court of Victoria noted that notwithstanding any claim of privilege for self-incrimination, answers at a section 541 examination that were both incriminating and prejudicial may be used to obtain further direct evidence of any matter revealed.

It has been suggested in another context that "it would be extraordinary if prosecutors and police, once put on notice of criminality by information compulsorily extracted, could not contrive to come by the same or equally damning material by their own investigations".[154] However, there might have been such an extraordinary effect upon ASC investigations arising from use of the expression "direct or indirect consequence of the person ... producing the book" in subclause 68(3).

The Edwards Committee recognized that the privilege against self-incrimination was a firmly established, and important rule of the common law which acted to prevent a person from being compelled to incriminate himself. However, it thought that it must equally be recognised that abrogation of the rule by statute was an important and valuable power of the legislature which it could use to protect the public interest. The Committee was acutely aware that the abrogation of the privilege by the legislature must be treated with extreme caution; an approach regularly confirmed in the reports of the Senate Scrutiny of Bills Committee.

The Edwards Committee believed that the balance that must be struck in the end case was enactment of a provision which would allow the ASC maximum effectiveness in achieving its investigatory function. Equally, such a provision as sub-clause 68(3) should not deny — any more than was demonstratably necessary — the protection that had always been enjoyed in Australia. One of the purposes for establishing an ASC, was to allow investigation of possible breaches of the national scheme law. The Edwards Committee believed that sub-clause 68(3) would not unnecessarily or unacceptably act to abrogate the privilege against self-incrimination, if it were amended to apply only to statements made by a person, and not to documents nor to any information, document or other thing obtained as a direct or indirect consequence of the person making the statement.

The Edwards Committee recommended that clause 68 of the ASC Bill be amended so as to allow the use in criminal proceedings of information obtained as a direct or indirect consequence of the production of books to the ASC.[155]

153 (1989) 1 ACSR 277.

154 Freckleton, *op cit*.

155 Edwards Committee Report 41.

Use of the investigative process in aid of foreign jurisdictions

We are now in an age of growing internationalisation of securities markets, so this is a very grievious omission. Jurisdictions as varied as the United States, the United Kingdom and New Zealand have all made generous provision in their legislation to promote and secure international co-operation between regulators.

For example, in the USA, the *International Securities Enforcement Cooperation Act* 1988 amended the *Securities Exchange Act* of 1934 to provide that on request from a foreign securities authority, the Securities and Exchange Commission ("the SEC") may provide assistance if the requesting authority states that it is conducting an investigation which it deems necessary to determine whether any person has violated, is violating or is about to violate any laws or rules relating to securities matters that it administers or enforces. The SEC may, in its discretion, conduct such investigation as it deems necessary to collect information and evidence pertinent to the request for assistance. Such assistance may be provided without regard to whether the facts stated in the request would also constitute a violation of the laws of the USA. In deciding whether to provide such assistance, the SEC is required to consider whether the requesting authority has agreed to provide reciprocal assistance and whether compliance with the request would prejudice the public interest of the USA.

In the United Kingdom, section 72 and 73 of the *Companies Act* 1989 provides for the use of compulsory powers for the purpose of assisting an overseas regulatory authority which has requested assistance in connection with enquiries being carried out by it or on its behalf. Whether corresponding assistance would be given in the country or territory of the overseas regulatory authority to an authority exercising regulatory functions in the United Kingdom may be taken into account in deciding whether to exercise those powers.

In New Zealand, the *Securities Act* 1978 was amended in 1988 to provide that the functions of the Securities Commission of that country include to co-operate with any securities commission or other similar body in any other country and for that purpose, but without limiting the 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. Section 18A provides that the Commission may take evidence for an overseas securities commission or body, including power to summons persons to give evidence.

By contrast with the USA, the UK and New Zealand, there is nothing approaching an analogous provision in the *ASC Act*. Subsection 127(4) of the *ASC Act* operates to provide an exception to the confidentiality requirements where the Chairperson is satisfied that particular information will enable or assist, a government, or an agency, of a foreign country to perform a function, or exercise a power, conferred by a law in force in that foreign country, the disclosure of the information to the agency or government by a person whom the Chairperson authorises for the purpose shall be taken to be authorised use and disclosure of the information.

It is important that this provision operates as an exception to the requirement to preserve confidentiality incumbent upon the ASC and its personnel. Subsection 127(4) does not confer a charter upon the ASC to co-operate with foreign securities commissions, even to the very limited extent involved in exchanges of information. Furthermore, for a disclosure of information to a foreign securities commission not to constitute a breach of the confidentiality requirements, the specific approval of the Chairperson must have been obtained. The inherent flexibility permitted by section 47 of the *NCSC Act*, where the secrecy requirements do not apply to disclosures of information to the extent necessary to perform official duties, is no longer to be available.

In its submission to the Edwards Committee, the NCSC recommended that the investigation provisions of the ASC Bill be amended to enable the ASC's powers to be exercised on the request of a foreign agency approved by the Minister and with which a reciprocal arrangement exists in relation to a matter that the foreign agency suspects constitutes, or may constitute, a contravention of a relevant law in force in that country.[156]

It should not be presumed that a regime based upon the *Mutual Assistance in Criminal Matters Act* 1987 is suitable for application to international securities regulation. Many securities commissions pursue enforcement action by seeking civil and administrative remedies. Criminal investigations are referred to other authorities and the police.

In recent years there has been a lot of activity aimed at instituting formal co-operative arrangements between the NCSC and foreign regulatory agencies, for example, the SEC, the United States Commodity Futures Trading Commission, the United Kingdom Department of Trade and Industry and Securities and Investments Board, the Ontario Securities Commission and the New Zealand Securities Commission.

At this stage the NCSC is only empowered 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.

The Edwards Committee strongly supported co-operation between Australia and overseas agencies, while recognising the importance of ensuring a necessary degree of confidentiality. The Committee also observed that if the ASC was to carry out investigations as the agent of overseas securities regulatory agencies, strict standards would need to be applied by the Minister in approving such arrangements so as to ensure that arrangements are entered into with agencies from countries with acceptable systems of legal process.[157]

The House of Representatives Standing Committee on Insider Trading in its report entitled *Fair Shares For All* stated that there was no doubt that an increase in

156 Submission No 30, par 137.
157 Edwards Committee Report 64.

transnational trading in securities, coupled with the accessability of workdwide markets and the potential for round the clock trading, had made insider trading a problem which extends beyond national boundaries. As such, the there was a definite need to promote co-operation between national regulatory agencies. It was only through international co-operation that the problem of international co-operation being perpetrated offshore could be dealt with adequately.[158]

It cited a submission from Mallesons Stephen Jaques with approval:

> Extensive co-operation between international regulatory agencies is required to deal adequately with international white collar crimes, including insider trading. It seems likely that the only long term solution lies in the establishment of a network of multilateral treaties on securities fraud, insider trading and corporate disclosure.[159]

The Committee recommended that the Australian Government pursue the development of MOUs with other countries which have active securities markets, which should provide the basis for co-operation in the detection and investigation of insider trading. Consequent upon that recommendation, the Committee recommended that the NCSC\ASC be provided with sufficient powers for the purpose of co-operating with overseas regulatory agencies in the detection and investigation of practices such as insider trading.[160]

Thus two Parliamentary Committees have over the past year prepared separate reports emphasising the need for legislative amendments to ensure that the NCSC\ASC is provided with a proper framework with which to pursue MOUs with overseas securities regulators. The *ASC Act* does not provide such a framework. It is essential that this matter is addressed in order to ensure effective securities regulation in an increasingly international market.

The importance of addressing this matter appears to be recognised by the Commonwealth Attorney General's Department, who we are informed intends to recommend legislation which would confer power upon the NCSC and ASC to use their compulsory powers to acquire evidence in response to a request from a foreign securities commission even if no breach of Australian law is involved. We understand that the legislation will make provision for the strict standards referred to by the Edwards Committee to ensure the application of acceptable legal norms.

ADMINISTRATIVE AND JUDICIAL REVIEW OF INVESTIGATIVE POWERS

Under the co-operative scheme legislation there is a general right of appeal to the Supreme Court from acts, omissions or decisions of the NCSC.[161] In general, the court has an obligation to conduct a *de novo* hearing.[162] The basis for that obligation is that an

158 Paragraph 5.5.4.

159 Evidence s76.

160 Paragraphs 5.5.6 and 5.5.7.

161 *Companies Code*, s537; SIA, s134; and FIA, s141; Note: the latter two provisions are not expressed to apply to "omissions" of the NCSC.

162 *Elders IXL Ltd & Ors v NCSC & Ors* (1986) 10 ACLR 719, at 721 per Marks J; *TNT Ltd v NCSC*

appeal from an executive authority to a court raises different considerations than does an appeal from one judicial body to another. In the former case, the court is necessarily exercising original jurisdiction, as contrasted with appellate jurisdiction. There, the court is not restricted to examining the material which the executive authority had before it. Instead, it is entitled and required to consider such relevant material as the parties desire to produce.[163]

While there has been some acknowledgement that the court should pay due regard to the decision of the NCSC, this is no assurance that the decision of the NCSC will be upheld.[164] This depends on whether the subject-matter of a decision consitutes an area where the expertise of the NCSC might be thought to have particular relevance; this circumstance affecting the weight which, on appeal, the court will give to the original decision.[165]

It has been suggested that the decision of a person authorised by the NCSC to issue notices under subsection 12(3) of the *Companies Code* requiring the production of books is not subject to appeal under section 537.[166] While it has been acknowledged that this result is anomalous, it is said to be difficult to treat the act of a "person authorised" under subsection 12(3) as the act of the NCSC itself because section 45 of the *NCSC Act* and section 12 of the *NCSC (State Provisons) Acts* are confined to delegations under those particular sections.

In our view, this suggestion ignores the distinction between a delegation and an authorisation. A delegate acts in his or her own name. Accordingly, in the absence of a specific provision to the contrary, the act of a delegatee or a person authorised by the delegatee would not on its own be considered to be the act of the delegator. The purpose of a delegation is to allow the recipient to act within the scope of the delegation on his or her own behalf. By contrast, with an authorisation, a person authorised to perform an act, ordinarily does so as the alter ego of the person who has given the authorisation. Accordingly, it is unnecessary for section 12 of the *NCSC Act* and section 45 of the *NCSC (State Provisions) Act* to specifically refer to acts of a "person authorised" under subsection 12(3) of the *Companies Code*.

Subsection 12(3) refers to the NCSC from time to time authorising a person to require, on producing evidence of his authority, the production of books: accordingly, where the authorisation is, pursuant to subsection 12(4), of general application there is a kind of "floating" authorisation which affixes at each specific time that an authorised person requires the production of books and produces evidence of his authority. Where the authorisation is of specific application, the NCSC must act in that instance to require the production of books. The NCSC, being a body corporate, can only act through the

(1986) 11 ACLR 59, at 61 per Gobbo J; *Humes Ltd v Unity APA Ltd* (1987) 11 ACLR 641, at 673 per Beach J; *Dwyer v NCSC* (1988) 15 NSWLR 285, at 288 per McLelland J.

163 *Ex p Australian Sport Club Ltd; Re Dash* (1947) 47 SR (NSW) 283, at 283-4 per Jordan CJ.

164 For example, *TNT Ltd v NCSC* (1986) 11 ACLR 59.

165 *Dwyer v NCSC* (1988) 15 NSWLR 285 at 289 per McLelland J.

166 *Spargos Mining NL v Standard Chartered Australia Limited (No 2)* (1989) 1 ACSR 314 at 319 per McLelland J.

medium of a natural person who it authorises for that purpose; therefore, it is illusory to suggest that, whether the authorisation is of a specific or general nature, an act of the authorised person within the scope of his authorisation does not constitute an act of the NCSC.

Otherwise, we have the anomalous result that an act of the NCSC in requiring the production of books under subsection 12(2) is subject to review under section 537, but not that of an authorised person under subsection 12(3).

Salter v NCSC

In *Salter v NCSC*,[167] orders were sought that a notice served by the NCSC pursuant to subsection 12(2) of the *Companies Code* be reversed. The notice was based on an alleged breach by the appellant of subsection 227(1) of the *Companies Code*, which provides that a person who is a bankrupt shall not be a director of a corporation. While on 14 February 1984 a sequestration order in bankruptcy had been made against the appellant, that bankruptcy was annulled on 8 December 1986. The appellant gave sworn testimony in which he denied contravening subsection 227(1). The Official Trustee's report was to the effect that the appellant had not committed any offences. The NCSC did not contest this evidence and no other evidence went before the Master to ground the NCSC's "reason to suspect".

Person aggrieved

It was held that the appellant had a genuine interest in maintaining the application for a reversal of the notice and was a "person aggrieved" for the purposes of section 537. Those words were of wide import and should not be subject to a restrictive interpretation. Failure to comply with a subsection 12(2) notice may result in either a penalty of $10,000 or imprisonment for two years or both. A person who was placed in jeopardy of prosecution for what must be regarded as a serious criminal offence by the issuing of a notice is a person aggrieved by the issuing thereof in the event of him, for whatever reason, regarding the obligation placed on him by the notice to be unreasonable or unnecessary or in some way to be an imposition upon him.[168]

Reasonable excuse

It was held that the appellant clearly had a reasonable excuse for not complying with the NCSC's section 12 notice. The NCSC's bald assertion unsuported by the evidence was insufficient to withstand an appeal *de novo*, where there was nothing before the Master to support the NCSC's "reason to believe".[169] However inconvenient to the NCSC, section 537 had an extremely wide scope and there could be no justification for construing it otherwise than in accordance with its terms.[170]

167 (1988) 6 ACLC 717.
168 *Id*, 721-2 per Olney J.
169 *Id*, 721 per Wallace J.
170 *Id*, 723 per Olney J.

Administrative Remedies Agreement

Clause 10 of the Formal Agreement provided that as at the date of the execution of the Agreement on 22 December 1978, the question of the application of Commonwealth and State laws relating to the review of administrative decisions, freedom of information and archives to the then proposed co-operative scheme had not been resolved, the question would be the subject of further enquiry and subsequent agreement between the parties.

By an agreement between the States and the Commonwealth dated 21 April 1978 known as the Administrative Remedies Agreement, arrangments were made to deal with the matters relating to review of administrative decisions and the application of administrative remedies.

Clause 9 provides that each party to the agreement is entitled to determine the laws relating to the review of administrative decisions or the application of administrative remedies which apply to decisions of the NCSC or of staff of the NCSC in relation to the performance of functions and the exercise of powers conferred on the NCSC by the laws of that party and not otherwise, with the exception in the case of the Commonwealth, to the performance or exercise of powers pursuant to subsection 6(2) of the *NCSC Act* that are conferred upon the NCSC by any State law. By clause 11 of the Agreement, the Commonwealth will not seek to apply its administrative law to acts of State Commissioners done under power delegated from the NCSC.

Under Commonwealth legislation, the administrative law which applies to the NCSC comprises the *Administrative Decisions (Judicial Review) Act* 1977 (*AD(JR) Act*), the *Ombudsman Act* 1976, the *Freedom of Information Act* 1982 (*FOI Act*), section 39B of the *Judiciary Act* 1903 and section 75(iii) of the Constitution. The principal State law which applies to the NCSC is the *Administrative Law Act* 1978 of Victoria, which is broadly similar to the *AD(JR) Act.* The presence of section 537 in the *Companies Code* and of corresponding provisions in the SIA and FIA has obviated many of the legal problems that may otherwise have arisen in seeking to ascertain the administrative law applicable to the NCSC.

Commonwealth legislation

Section 1317B of the *Corporations Act* provides that with the exception of certain "excluded decisions",[171] applications may be made to the Administrative Appeals Tribunal for review of a decision made by the ASC under the *Corporations Act.* As the ASC's investigatory powers are conferred upon the ASC by the *ASC Act*, albeit by reference to due administration of the *Corporations Act* as the major "national scheme law", exercise of the investigation and information-gathering powers of the ASC under Part 3 of the *ASC Act* may not be subject to review by the AAT. These decisions might fall within the ambit of the *Administrative Decisions (Judicial Review) Act* 1977; however, they would be excluded pursuant to paragraph (e) of Schedule 2 to that Act from the requirement in section 13 to give reasons to a person entitled to apply for review of a decision.

171 *ASC Act*, s1317C.

Not subjecting the ASC's investigatory processes to administrative review on the merits or to requirements to disclose documentation and other sensitive information, might not greatly impede a practitioner seeking to review acts of the ASC which arise out of the investigatory process as distinct from being inherent to it. While courts have been reluctant to impede the conduct of an investigation, acts initiated by an investigating authority unnecessarily impacting upon a citizen's ordinary civil liberties have seen the courts exercising vigilance to prevent excessive encroachment on those liberties. The latter kind of cases are likely to arise under national scheme laws and because of the coercive effects at issue invite review. The decision of the full Supreme Court of Western Australia in *Connell v NCSC*,[172] deserves careful attention in this regard.

On 25 November 1988, the NCSC commenced an investigation into the affairs of Rothwells Limited of which Mr Connell had been a director. Between 25 November 1988 and 3 March 1989 Mr Connell gave evidence to the investigation on several occasions. He also made two trips overseas, each time returning to Australia.

On 3 March 1989 a search warrant was executed on Mr Connell's offices. Mr Connell asked the officer-in-charge whether he could travel to London that day as he intended. Mr Connell showed the officer his return ticket and the business papers relevant to the trip and was assured that he could proceed. Later that day in the departure lounge at the airport Mr Connell was informed that an interim order under sub-section 573(1A) of the *Companies (Western Australia) Code* restraining his departure had been obtained by the NCSC. In fact the order was not obtained until shortly afterwards and no mention was made at the *ex parte* hearing for the interim order of Mr Connell's conversation with the officer or the production of his return ticket.

Pidgeon J subsequently confirmed the order finding that the prerequisite to the exercise of the court's jurisdiction contained in sub-section 573(1)(a) had been satisfied. Mr Connell appealed against the order. Mr Connell's appeal was successful.

The court held that to satisfy the requirements of paragraph 573(1)(a) it was necessary to reduce evidence of an investigation into identified acts or omissions of the appellant, being acts or omissions which constituted or may have constituted an offence under the Code. The NCSC had established no more than that an investigation into the affairs of Rothwells had commenced before which the appellant had been summoned to appear.

Malcolm CJ thought that paragraph 573(1)(a) predicated a two-pronged test. First, it was necessary to establish one of the pre-conditions in paragraphs (a), (b) or (c), namely an investigation was being carried out under the Code in relation to an act or omission that may consitute an offence; a prosecution had been instituted against a person for an offence: or a civil proceeding had been instituted under the Code. Secondly, it was necessary to show that the making of an order was necessary of desirable for the purposes of protecting the interests of any person to whom the object of the order may

172 (1989) 1 ACSR 193.

become liable. It was queried whether their needs to be an axis between the relevant offence or cause of action under the pre-conditions and the liability.

Malcolm CJ held that it was necessary to establish by evidence facts by which the relevant person "is liable or may be liable". These may or may not be facts which also establish one or other of the preconditions. Given the stage which the NCSC investigation had reached, in considering whether it was necessary or desirable to make the order this was a case in which evidence which went some distance toward establishing the appellant's liability to Rothwells or which established a prima facie case was required. In the absence of such evidence there was no other evidence which showed that it was necessary or desirable to make the order sought to protect Rothwells interests.

The case indicates a trend emerging in the courts towards drawing a demarcation between the actual conduct of an investigation, which should not be disrupted while requiring the NCSC to provide evidence indicating possible offences by a person, and the exercise of coercive powers not inherent in the actual conduct of an investigation but nevertheless conducive to it, which are going to require the NCSC to adduce evidence in the courts and meet far stricter standards.

In the latter case, the NCSC bears the onus of producing sufficient material substantiating both the requisite basis and need for the court to grant an application ordering the exercise of a coercive power against a suspect; and the more stringent the power, the heavier will be the onus.

Transposed to the ASC, while proceedings to stop or interfere with an ASC investigation *per se* might not receive sympathetic treatment in an administrative review, attempts by the ASC to use coercive powers (particularly coercive powers reserved for the courts such as those provided by section 1323 of the *Corporations Act*) will not receive support in the courts unless strict standards are met.

The *Connell* case was not brought under section 537, but concerned the construction of section 573 of the *Companies Code*. It supports the view that a formal investigation will be required for the purposes of paragraph 1323(1)(a) of the *Corporations Act*, as compared with informal investigations of an adminstrative kind which do not constitute an investigation under Part III of the *ASC Act*. This is notwithstanding the reference in paragraph 1323(1)(a) to an investigation being carried out "under this Act", as an alternative to the other prerequisite of carrying out of an investigation under the *ASC Act*. The application of *Connell* might render that alternative nugatory in that it is consistent with the approach taken in *Re Guardian Investments Pty Ltd*,[173] rather than to the more liberal approach taken by Kearney J in *CAC v United International Technologies Pty Limited*.[174]

173 (1984) 2 ACLC 165.
174 (1988) 6 ACLC 637.

In appeals generally, it will take some time to ascertain how the different review processes provided under the Commonwealth scheme will operate: replacing the courts in exercising *de novo* review by the Commonwealth Administrative Appeals Tribunal might not serve any useful purpose from the viwpoint of either the ASC or the citizen. Clause 1320 of the Corporations Bill 1988, which corresponded to section 537 of the *Companies Code*, was omitted from the *Corporations Act* enacted by Parliament in 1989 and section 1317B was enacted in its place.

Concerns of the kind intimated by Beach J in *Humes Ltd v Unity APA Ltd*[175] referring to an appeal to a federal court exercising the judicial power of the Commonwealth under Chapter III of the Commonwealth Constitution might have contributed towards the omission of clause 1320. However, the judicial power of the Commonwealth should be broad enough to comprehend a hearing *de novo*. Exercise of the judicial function might require a court to look beyond the materials before an administrative authority in determining an appeal from a decision of the authority. At any rate, clause 1320 should not have prevented a court from confining its review to the materials before the ASC if this, contrary to our opinion, were necessary to keep within the constitutional ambit. More likely, clause 1320 was omitted and substituted by section 1317B in pursuance of the Commonwealth's policy to centralise administrative review of decisions by Commonwealth agencies in the AAT.

Many ASC decisions, including those involving the exercise of its investigative powers, will arise in the context of acting as umpire in a vigorous commercial dispute; a different climate will prevail than in the usual case before the AAT where the interests of private third parties are less pronounced in hearing an appeal against a decision of a Commonwealth agency by a private citizen.

Protection of the investigative process

The ASC will be subject to the *Freedom of Information Act* 1982 of the Commonwealth. The exemption in section 47 conferred on certain documents arising out of companies and securities legislation will not be applicable to the ASC under the proposed Commonwealth scheme. In particular, the exemption in paragraph 47(1)(d) conferred on a document which relates solely to the exercise of the NCSC's functions under State law will not be applicable. However, the inapplicability of these exemptions should not impact upon the ASC's investigative documentation.

It is generally recognized 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)*[176] and *Barnes v CCA (No.2)*[177] the applicant was largely unsuccessful in obtaining material withheld by the Commissioner. In particular access to

175 (1987) 11 ACLR 641, at 669.
176 (1987) 5 ACLC 875.
177 (1987) 5 ACLC 883.

the reports under section 324C (by the receiver) and section 418 (by the liquidator) was denied.

In *Spargos Mining NL v Standard Chartered Aust Ltd*,[178] the plaintiff company served a notice on the NCSC, which objected to the production of certain documents. It was held that documents within the possession of the NCSC of a confidential nature recording information received by the NCSC relating to possible offences or irregularities, or recording such information received in the course of investigations (including the identity of informants and confidential documents recording the actual or possible course of such investigations or particulars of available or potentially available evidence), are in the public interest prima facie immune from compulsory disclosure. This was on the basis that their disclosure would be likely to seriously impede the ability of the NCSC to fulfill its function of effectively investigating possible offences and, in appropriate cases, instituting and prosecuting criminal or civil proceedings in the public interest.

In *NCSC v Bankers Trust Australia Ltd*,[179] the full Federal Court held that in aid of the express power to direct that a hearing take place privately, the NCSC was also given by necessary implication the power to take all reasonable steps which, when viewed objectively, were necessary to ensure that the hearing was conducted privately. It was therefore proper to imply in the *NCSC Act* a power in the NCSC to prevent or restrict the premature publication of evidence given at a hearing.

The ASC does not have power to conduct an investigative hearing, but the provisions of section 22 and 25 relating to the examination of persons should result in a similar power being implied in an ASC inspector.

With respect to documents relating to the investigation, they should be exempt from compellable public disclosure in response to an FOI application, although as implied by the decision in *NCSC v Bankers Trust Australia Ltd*, the exemption might not continue indefinitely.

Requirements to give natural justice should also not prevent due protection of ASC investigations. In *Clements v Bower & Ors*,[180] it was held that natural justice requires the right to be heard, the right to be given fair notice of any charge or allegation and the right to have the opportunity to meet or answer any allegation which might be the subject of the conclusions reached by an enquiry. If it is likely that a prosecution will be recommended, natural justice will require that the person be accorded the opportunity not only to make submissions against the taking of that course but also to call evidence. However, as stated earlier, the investigators are not required to put the substance of any conclusions to a witness. The Court recognised that to do so, would result in the inquiry developing into a series of mini trials.

178 (1989) 1 ACSR 311.
179 (1989) 1 ACSR 330.
180 (1989) 1 ACSR 527.

It is likely that the following passage from a judgment of Lord Denning MR, cited with approval in *Clements v Bower*, will apply to ASC inspectors conducting an examination of persons under Part 3 Division 2 of the *ASC Act*:

> They want to see the transcripts of the witnesses who speak adversely of them, and to see any documents which may be used against them. They, or some of them, even claim to cross-examine the witnesses.
>
> In all this, the directors go too far. This investigation is ordered in the public interest. It should not be impeded by measures of this kind. Witnesses should be encouraged to come forward and not hold back. ...
>
> It was suggested before us that whenever the inspectors thought of deciding a conflict of evidence or of making adverse criticism of someone, they should draft the proposed passage of their report and put it before the party for his comments before including it. But I think this also is going too far. This sort of thing should be left to the discretion of the inspectors. They must be masters of their own procedure. They should be subject to no rules save this: they must be fair. This being done, they should make their report with courage and frankness, keeping nothing back. The public interest demands it.[181]

CONCLUSION

The public interest requires effective investigative powers to be conferred upon the NCSC and the ASC. Effective investigative powers are essential to elicit facts relating to alleged breaches of securities laws and to bring those facts before the public. They are essential in the preparation and conduct of criminal or civil proceedings against persons whose performance concerning the affairs of companies falls short of the requisite standards, and in enabling decisions to be made whether to institute these proceedings where they may otherwise be in doubt. They might also be instrumental in arresting a deterioration in a company's affairs.

The results of an investigation can provide valuable material as to the causes of company failures, the dangers of particular practices, and the areas in which reform of the law is called for.

Investigative powers are also necessary to maintain public confidence in the securities market; without effective investigative powers, there is no foreseeable deterrent against wrongful behaviour regardless of the formal legal requirements and penalties. Indeed, a lack of effective investigative powers when combined with very stringent formal requirements and stiff penalties is likely to compound a loss in public confidence: the shortcomings perceived in being slow or unable to detect offences become accentuated if serious offences are involved.

Effective investigative powers are necessary to assure potential investors that misfeasance will be detected and to find out the facts. And isn't finding the facts, in essence, simply a matter of good administration?

181 *Re Pergamon Press Ltd* [1971] 1 Ch 388, at 399-400.