PRESENTATION OF PAPER

Dr Arthur McHugh

The National Companies and Securities Commission was not set up, of course, as a purely investigatory agency. In fact, if my memory serves me correctly, in the early days it was probably envisaged that the Commission would function as a kind of super-administrative body, making all those lovely annual returns to be processed more efficiently, licencing only fit-and-proper persons and encouraging the development of uniform administrative policies. I put to you that it has only been over a process of years that a very small investigative section has been set up within the Commission and some of the debate that we've heard tonight about the relative roles that should be exercised by, say, police forces and other agencies is not totally unfamiliar to my ears in relation to the debate that goes on within the co-operative scheme that is, the states, the Commonwealth, the Commission and the Northern Territory about the extent to which the Commission should become involved in investigative matters. So far it's been principally resolved by saying that the Commission will get involved only in those matters where there is a distinct national interest involved but since we get to decide when the national interest is involved, that tends to be whenever we want to do it.

The other point that you may need to recognise is that we are not a prosecuting agency. If the Commission develops a thesis that a person ought to be prosecuted then it is a requirement of the Ministerial Council, though not a requirement of the legislation that the Commission remit that material to the appropriate State delegate who in turn will work through whatever prosecutorial agency, such as the D.P.P, or whatever functions in that jurisdiction.

Lastly, a point that I haven't raised in the paper is just to mention with thanks, the role that the police force does carry out in assisting the Commission. Not the National Commission in its guise at 31 Queen Street Melbourne, but I believe in most of the states of Australia there are members of the Fraud Squad seconded to, for example the New South Wales Corporate Affairs Commission, and they play a most valuable role in assisting the Commission to undertake its enquiries.

I apologise for the pedestrian nature of the paper. Not having access to the other papers I had to speculate as to what might be of interest. What I've tried to do in the paper is just set out mechanically what everyone could do for themselves and that is just reading through the legislation and picking out the appropriate sections. But there is some interest in just briefly mentioning some of these. Section 11 requires a book to be inspected by the Commission, and "book" is defined very, very widely. That doesn't require the Commission to form a suspicion that any offence has taken place. So if any of you ladies or gentlemen has a family company we can come along without any explanation at all as to why we are there and say "We'd like to have a look at your corporate records, please". Now in practice of course that doesn't happen. It happens in every case where we have formed a suspicion but it is also part of the process of forming suspicion. I suspect it was put in the *Companies Code* in order to permit the Commission to inspect accounting records and just make sure

that companies were keeping proper books of account. That is expressed very generally.

Section 12 of the *Companies Act*, and their corresponding powers elsewhere, permits you to go in and not only inspect books but seize records - the originals as well as copies - where you believe that there has been a contravention of the *Code* and various other pre-requisites must be satisfied. Then when you come in under section 12, you think of a offence being committed, you seize some books and records, you can then say "Right - I want an explanation. How did these documents come into existence? Where's the property that's talked of?" So you can ask an officer of the corporation just exactly what the background is. Then of course, we have the sort of search warrant approach of obtaining information through section 13.

The next point of interest is perhaps that legal professional privilege does attach to all of our proceedings, but there is a bit of a catch to it because the practitioner is obliged to supply the name of the client if required.

The principal means by which the Commission operates its hearings powers is to form a suspicion under section 16A of the *Companies Code* that an offence has been committed. Typically, staff will write a short paper, they will develop a thesis, and will establish not necessarily the name of a person but perhaps a class of persons. For example you may suspect that the directors of a corporation may have breached s.229. You don't know which director, but you know that the company has misapplied its funds or its energies and the Commission then, on that basis, may undertake an investigation. So at this stage, staff activity ceases until the Commission says "We have formed a suspicion". A hearing may then take place (that's arguably one of the most useful investigative tools) and the hearing must be presided over by members of the Commission. Which is an interesting commentary, I suppose, because every one of the powers that I have spoken of here is delegated to the State Corporate Affairs Commissioners in each State. And they in turn have a delegating power. So it turns out rather ironically that the very least of the officers of a Corporate Affairs department may delegate, may receive these delegated hearings powers as a single person and yet within the National Commission, neither I, nor any officer of the Commission, may be so delegated. It is retained for the members and that it is not because the members don't trust us, although perhaps that is the case. It is because it is they do not have the power under our *Act* to so delegate. It seems to me to be a very significant limitation and one which I understand has been removed in the Australian Securities Commission Bill that the Commonwealth has recently pursued.

I have mentioned in the paper that there is a little bit of debate, and it is a very significant debate, about the extent to which the Commission must attach suspicion to a person and attach suspicion in relation to particular offences. As I understand the law now operates we may isolate the suspicion in terms of persons to a particular area, We can't simply suspect that somebody in all the world has committed the offence, but once we have isolated it down to say the Board of Directors or somebody in senior management, and provided that we have isolated a particular offence, then I believe that we would be unlikely to be restrained judicially

in terms of holding a hearing. Then the other great investigative power is that of commencing a special investigation. That has a rather longer history than the scheme legislation itself. At various times these investigations have taken an extremely long time to be completed and one wonders exactly that the cause of that is. But there is a very potent set of powers within the special investigation power. For example the investigations currently being undertaken into the affairs of Ariadne Australia by Mr Gotteson Q.C., into Rothwells by Mr McCusker Q.C. and others, are using the special investigation powers and though the investigations proceed on slightly different courses depending on whether they have been remitted to the Commission by a Minister through the Ministerial Council or to the Ministerial Council itself as a whole. Contrast for example the investigation into Ariadne which is a Ministerial Council investigation reporting back to the Commission, with the Rothwells's special investigation which was instigated by Mr Berrinson, The Attorney-General, and which formally, at least, reports to Mr Berrinson rather than the Ministerial Council in the first instance. And there is a little section in there - 541 - which I mentioned because there was an interesting case recently where we tried to get the New Zealand liquidators a bit of standing and I understand there was an approach from somebody in New Guinea recently to do much the same thing.

In respect of hearings, the Commission is given free reign, as it were, to conduct the proceedings as it will, but naturally that's limited by considerations of natural justice. Importantly, we are not restricted by, say, the Hearsay Rule. We can take whatever evidence we believe is relevant and the only brake on that, I suppose, if one has regard to its ultimate usefulness in proceedings, is the extent of the evidence obtained in that way.

A person who is summonsed to a hearing must attend and must bring such documents as set out in the summons. There is no privilege against self-incrimination: the person must testify, must answer the questions and if they refuse, we can obtain a court order. But if the person does answer those questions prefaced by the claim for privilege against self-incrimination, then we can't use that evidence against them in criminal proceedings other than for perjury. There are parallel provisions in each of the Codes other than the Company Code, and I've mentioned that briefly.

One of the very interesting areas of debate right now is the question of when somebody can get their transcript of evidence. Now if you are an investigator, you would hope that you could keep your cards fairly close to your chest until you are ready to reveal all. In the *Adler v Cantwell* case, we were successful in running that argument. Not quite so successful in the *B.T.* case, but I think those are distinguishable according to the fact situations. But I think that's a extremely important area and I think its quite fluent as to where the courts will come out on on procedural issues like obtaining a transcript of evidence.

Also in the *B.T.* case there was a question of whether the Commission had power in terms of conducting its own inquiry to prohibit persons from discussing their evidence with other potential witnesses and at first instance, at least, the court has held that the Commission does not have such a power. I think mainly by

comparison with some of the National Crime Authority legislation the court concluded something like this: It would be most unwise for somebody conduct themselves in a way which attempted to slant the evidence to be given by witnesses according to what had already been said, but granted that legal practitioners would not, of course, conduct themselves in that way, then the court could find no further justification for giving the Commission a power to prohibit this sort of discussion taking place at all. That has been appealed, I understand, but hasn't come on yet.

I have mentioned briefly Freedom of Information legislation because on many occasions we get applications from journalists, from people who believe they may be the subject of investigation, or indeed who are the subject of investigation, for what is known about them. I believe that the Commission has fairly substantial powers to resist the production of such materials. I have mentioned what I believe is a gap in our investigatory powers and that is using the corresponding foreign-jurisdictional powers of, for example, the Securities of Exchange Commission of the United States or the Department of Trade Industry in the U.K.. There is what is called a sort of Stage One Memorandum of Understanding (MOU for short) where you simply assist each other. And then there is the more modern Second Stage MOU. The United States at least is stating that it will not enter any Phase 1 MOUs at this stage because it will tend to water down its efforts to obtain Phase 2 agreements with other jurisdictions. The Commission is now in a bind. Two years ago we could have obtained an MOU of Phase 1 character from the United States. They now refuse to enter into that sort of MOU and they want us to be able to use our compulsory powers. There is no mandate under our legislation so to do, and therefore we are stymied at this stage. It depends where the A.S.C., the new Securities Commission legislation goes on this and how the Attorney-General's Department interprets its mandate under the 'mutual assistance in criminal matters' legislation to see how this sort of co-operative process with foreign jurisdictions can be taken further forward.

I have concluded with a brief rationale of why I believe agencies such as the Commission ought to have their own investigative enforcement powers. As a pleading of self-interest you will naturally discount it for what it is worth.