

Government response to the

Report on the Annual Reports of the Australian Securities

Commission and other bodies: 1995-1996

of the

Parliamentary Joint Committee on Corporations and Securities

Government response to the recommendations of the Parliamentary Joint Committee on Corporations and Securities in its Report on the Annual Reports of the Australian Securities Commission and other bodies: 1995-1996

Recommendation 1

The Committee recommends that the Ministerial Council for Corporations examine whether there are any acceptable methods for avoiding prosecution delays which may be caused by the manner in which ASC-gathered material can be used in legal proceedings.

Government response

This recommendation stems from the concern of the Parliamentary Joint Committee on Corporations and Securities (the Committee) at the length of time taken in some cases between the alleged offence and the laying of charges.

The Chairman of the Australian Securities Commission (ASC), in responding to questions on notice from the Committee, pointed to a reason for the delay, namely the difficulties encountered in having signed records of examination admitted into evidence in committal hearings in that records of examination must be recast into statement form.

The Committee acknowledges, in its Report, that there is a need to protect the rights of the accused which may be prejudiced if the record of examination is admitted as evidence in court and concludes that the evidentiary use of ASC records of examination should be examined further and should be considered by the Ministerial Council for Corporations.

The ASC is currently working closely with the Commonwealth Director of Public Prosecutions to prepare, for the Government's consideration, a joint submission which will propose amendments to the law regarding the admissibility of records of examinations under Division 2 of Part 3 of the *Australian Securities Commission Act 1989*.

The Government will consider this submission before referring the issue to the Ministerial Council for Corporations.

Recommendation 2

The Committee recommends that time limits be imposed on the duration of interim orders under section 1323 of the Law, where those orders are obtained following an ex parte hearing.

Government response

The Committee's concern arises in the context of its consideration of the ASC's investigation into the affairs of Aust-Home Investments Ltd and related companies, and subsequent court action.

The Committee also refers to the response of the previous Government to a recommendation of the Senate Legal and Constitutional References Committee in its report entitled *The Investigatory Powers of the Australian Securities Commission*. In that response the previous Government indicated that it proposed to amend section 1323 to provide that where an interim order is obtained as a result of an ex parte hearing, that order is returnable on a day within 21 days of the making of the order or, in exceptional circumstances, such further date as is determined by the Court.

The Government announced on 2 September 1997 a comprehensive set of financial system reforms in response to the recommendations of the Financial System Inquiry. Part of the new regulatory

structure proposed by the Government is the establishment of the Australian Corporations and Financial Services Commission (ACFSC) to cover market integrity, disclosure and other consumer protection issues. The ACFSC will exercise all of the current powers of the Australian Securities Commission.

The Government will consider the proposed amendment of section 1323 of the Corporations Law in the development of the legislative framework needed to establish the ACFSC.

Recommendation 3

The Committee recommends that consideration be given to enabling the Companies Auditors and Liquidators Disciplinary Board to hear an application in the absence of the Chairperson.

Government response

The proposal that Part 11 of the *Australian Securities Commission Act 1989* ("the ASC Act") be amended to provide for the appointment of a deputy to the Chairman was prompted by a concern that the work of the Companies Auditors and Liquidators Disciplinary Board ("the Board") could be seriously disrupted if the Chairman had an actual, or potential, conflict of interest in a case referred to the Board for consideration. As section 210 of the ASC Act provides that the Chairman shall preside at all meetings of the Board, any conflict of interest on the part of the Chairman would effectively prevent the Board from hearing the case.

Section 208 of the ASC Act contains a mechanism that is capable of dealing with a situation in which the Chairman of the Board has a conflict of interest, as it allows the Minister to appoint an Acting Chairman during any period in which the Chairman is absent from office. However, the use of this provision to overcome any conflict of interest problems could be cumbersome, as it would require the Chairman of the Board to obtain the Minister's approval to take leave while a case is being heard.

The final report of the Working Party which reviewed the requirements for the registration and regulation of company auditors, released on 23 September 1997, addresses the need for a mechanism to deal with the situation in which the Chairman of the Board has a potential conflict of interest. The report contains a series of recommendations concerning the institutional arrangements for the Board, which would provide the Board with the flexibility needed to deal with situations of potential conflicts of interest. The more significant of these recommendations are that:

- (a) the Board should have a Deputy Chairman;
- (b) the Board should be permitted to sit in more than one Division simultaneously;
- (c) a Division of the Board should be constituted by a person nominated by an accounting body, a legal practitioner and one other person; and
- (d) the requirement that the Chairman be a legal practitioner should be removed.

These recommendations, with the other recommendations in the report, will be considered by the Ministerial Council for Corporations in due course. The Government will determine its position in respect of these recommendations in the light of the Ministerial Council's response.