THE LAW SOCIETY OF TASMANIA

Our ref:N3.13: LOR/TL

15 March 2016

Mr William Cox AC, RFD, ED, QC
Independent Reviewer
Independent Review of the *Integrity Commission Act* 2009
GPO Box 825
HOBART TAS 7001

Dear Mr Cox

Independent Review of the *Integrity Commission Act* 2009

Thank you for your letter of 1 February 2016 inviting the Society's submissions.

Background
The Society provided submissions to the three year review of the Commission. Subsequently the then President of the Society Mr Anthony Mihal appeared before the joint committee. The then CEO of the Commission provided a response to the committee with respect to a number of the Society's submissions.

The Society maintains the submissions made in its paper dated 18 August 2014. I attach a copy for your reference. Having regard to the oral submissions given to the joint committee the Society makes the following further submissions:

Coercive Notices
The Society maintains that the coercive powers under the Act should be exercised in accordance with the principle of proportionality enshrined in the Act and that such powers be exercised only to the extent necessary to conduct an investigation and proportionally to the nature of the matter under investigation.

The evidence provided by the CEO of the Commission to the joint committee was to the effect that this is the practice of the Commission. That being the case the Society submits that there should be no difficulty in enshrining the principle of proportionality in the legislation.

The Right to Silence
The Society's position remains that the right to silence ought to be enshrined. However, if that is not seen as appropriate then those other models providing protection to a person who is obliged to provide answers to the Commission should be investigated. The Society refers to Mr Mihal's submissions provided to the joint committee and reproduced in the committee's report, particular at pages 235 to 242.

Costs
With respect to the Commission, the CEO ought to feel free to exercise some discretion when it comes to certification of costs rather than having all bills of costs taxed.

Technical Amendments Proposed by the Commission
The Commission has identified forty six "technical issues" and recommended amendments to the Act.

- **Item No 12**
  Section 38(1) – Amend section 38 to make it clear that the CEO does not have to refer the assessor report to the agency but is only required to refer the material relevant to the misconduct allegations and the Commission's assessment allegations.

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The Commission's view is that the report prepared by an assessor is internally generated and frequently contains sensitive information.

The Society's view is that the need for procedural fairness outweighs those matters referred to by the Commission said to justify not providing the entire report.

- **Item No 17**
  Sections 46(1)(c) and 55(1). Amendments to s46 with respect to the mandatory obligations to observe the rules of procedural fairness during the investigation/assessment stage of a complaint.

  This means the adverse factual material gathered by the Commission will be put to the relevant person, generally at the time the assessor is finalising the report under s55. The opportunity to maintain a covert investigation is lost. This may compromise the ability to gather further evidence.

  The Society again is of the view that the need to provide procedural fairness is more important.

- **Item 23**
  The Commission's recommendation is to amend s52(4) and 54(1)(a). It is proposed to amend s52 with respect to the use of force so that it is consistent with s51.

  S52 authorises when entering premises the use of such force as is reasonably necessary for the purposes of entering and conducting the search. S51 provides that an investigator may with any necessary force enter premises and exercise the investigators powers.

  The Society's view is that the more appropriate amendment is to amend s51 so that it is consistent with s52. That is, the appropriate authorisation is the use of such force as is reasonably necessary not the use of any necessary force.

- **Item 32**
  Seeks to amend s68 so that the penalty for failing to comply with a requirement given at a Directions Conference without reasonable excuse be consistent with other penalties.

  Other penalties are either 2000 or 5000 penalty units. S68 is not exceeding 10 penalty units.

  The Society suggests the Commission is not comparing apples with apples. The difference in penalty may well reflect the seriousness of the conduct involved.

The Society values the opportunity to provide submissions. It does not actively seek to make an oral submission at a public hearing but is happy to do so if invited.

Yours faithfully

Luke Rheinberger
Executive Director

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Submission of the Law Society of Tasmania

Three year review of the Functions, Powers and Operations of the Integrity Commission

Joint Standing Committee on Integrity

18 August 2014

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THE LAW SOCIETY OF TASMANIA

Our ref: LOR/TL

18 August 2014

The Hon. Ivan Dean MLC
Chair
Joint Standing Committee on Integrity
Parliament House
Hobart TAS 7000

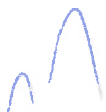
Dear Sir,

I refer to the Honourable Dr Goodwin's letter inviting the Law Society of Tasmania to make a submission to the Joint Standing Committee on Integrity to assist in its three year review of the functions, powers and operations of the Integrity Commission.

I am pleased to present the Society's submission herewith and thank you for the opportunity to do so.

If I can be of assistance clarifying any matters contained in the Submission, I would be pleased to answer any of the Committee's questions.

Yours faithfully,



Anthony Mihal
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Introduction and Executive Summary

This submission mainly considers the Integrity Commission's investigative function and the powers conferred on it by the *Integrity Commission Act 2009* ("the Act").

The Law Society of Tasmania recognises the need for broad investigative powers to reside within an effective Integrity Commission. There is the need for appropriate balances and controls particularly when such powers are used for executive rather than judicial processes. The Society has a number of reservations about the framework within which those powers sit and the controls which attach to them.

The Society is concerned that Parliament has seen fit to restrict the right to silence before the Commission, and has done so contrary to the recommendation of the Parliamentary Standing Committee which investigated the Commission's establishment. It has interfered with rights to claim privilege and constructed a procedure for the testing of such claim which is likely to be a disincentive to the making of such claim, however worthy, and an impediment to the conducting of an investigation, thereby causing delay. It has limited rights of representation and has differentiated between public officials and witnesses in respect of those rights.

The Act alters established rights to be legally represented in circumstances where there are serious issues of reputation, and consequences for a person's occupation to which the Society objects.

The Society recommends that the right to silence be reinstated and makes recommendations in respect of particular controls on the co-erosive powers under the Act.

Recommendations

RECOMENDATION 1

That the right to silence be enshrined in the Act.

RECOMENDATION 2

That only the Chief Commissioner be empowered to issue coercive notices under section 47 of the Act rather than investigators.

RECOMENDATION 3

That the coercive powers under the Act be exercised in accordance with a principle of proportionality enshrined in the Act that such powers be exercised only to the extent necessary to conduct an investigation and proportionally to the nature of the matter under investigation.

RECOMENDATION 4

That the Commission should be required to adhere to these best practice principles in the application of its coercive powers and report against them.

RECOMENDATION 5

That consideration be given to a less complex procedure to claim privileges while maintaining protections for those compelled under a section 47 coercive notice.

RECOMMENDATION 6

That investigators and an integrity tribunal be bound by the provisions of the *Evidence Act 2001* in relation to cautions and warnings and the procedures for the conduct of records of interview.

RECOMMENDATION 7

That 'witnesses' before tribunals, once properly and broadly defined by the Act, be afforded an unqualified or controlled right to legal representation.

RECOMMENDATION 8

That the requirement for witnesses' costs to be taxed in the Supreme Court before being paid by the Commission be replaced with a discretion for the CEO to require that a bill of costs be taxed enabling the CEO to agree such costs.

1. Background to the Submission

1.1 About the Law Society of Tasmania

The Society was established as a body corporate under the *Law Society Act 1962*. Its forerunners were the Southern Tasmanian Law Society and Northern Tasmanian Law Society, both established in 1888. The Society's incorporation continues under the *Legal Profession Act 2007* which confers its functions and many of its powers.

The functions and objects of the Society include representation of the view of the legal profession and the promotion of maintenance and just reform of the law[1]. It is in furtherance of those objects that this submission is made.

The Society has over 500 memberships including legal practitioners from the private profession, community legal practitioners, corporate practitioners and practitioners employed under the *State Service Act 2000*, and around 100 associate members.

The Society is a constituent body of the Law Council of Australia.

1.2 Member Submissions

The Society sought submissions from its members to assist in the preparation of this document. The request for submissions was publicised in the Society's weekly email update to members between 27 November and 18 December 2013.

1.3 Acknowledgement

This submission was prepared by members of the Council of the Society and draws on the work of a working group formed in 2010 and a submission of the Law Council of Australia to the Commonwealth House Standing Committee on Social Policy and Legal Affairs[2] in response to its inquiry into the *National Integrity Commissioner Bill 2012.*

1.4 Adoption

This submission was adopted by the Executive Committee of the Law Society of Tasmanian exercising the powers of the Society's Council. The Council is the supreme decision making body of the Society.

2. Coercive powers of investigation

The Act requires those subject to an investigation to provide information and assistance to investigators, a failure to do so constituting an offence.

Section 46 establishes the procedures that investigators may adopt in conducting investigations. Essentially, an investigator may conduct an investigation "in any lawful manner he or she considers

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[1] Section 620 *Legal Profession Act 2007*, Rule 10 *Law Society By-Laws 2010*

[2] 14 August 2012

appropriate."[3] Further, an investigator may obtain "information from any persons in any lawful manner he or she considers appropriate."[4]

By Written notice, given under s.47, an investigator may require a person to:

Provide any information or explanation that an investigator requires;

Attend and give evidence to an investigator or any person assisting the investigator; and

Produce any record, information, material or thing in the custody or possession or under the control of a person.[5]

Section 50 confers a power to enter premises: without a Warrant and against the will of any person, if it is the office of a public authority; with a Warrant or by consent, on private property. Warrants are issued by magistrates who are satisfied reasonable grounds exist to suspect that the material sought, is located at the place the subject of the application (Section 51). The Society has no particular concerns with this procedure. The right to enter upon the premises of the public authority is not controversial. What is not clear is whether private property located or concealed there may be searched or removed.

Appropriate safeguards exist in respect of entry to private premises.

Section 52 of the Act confers upon investigators various powers whilst on premises. An investigator may, amongst other things:

Search and examine the premises for anything;

Make copies, or take away, any record or information, including by Way of inspecting computers;

Direct any person on the premises to state their name, date of birth and address, and further:

Answer questions asked relevant to the investigation;

Produce material requested by the investigator; and

Give assistance an investigator reasonably requires to conduct the investigation.[6] 5

There is a further catch-all provision that permits an investigator to do "anything else reasonably necessary to obtain information or evidence for the purposes of the investigation"[7].

A person must not without reasonable excuse fail to comply with a direction or requirement of an investigator.[8] Further, a person who without reasonable excuse fails to comply with a direction or requirement under section 47 also commits an offence.[9]

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[3] Section 46(1)(a)
[4] Section 46(1)(b)
[5] Section 47(1)(a), (b) and (c)
[6] Sections 52(1)(a) to (i).
[7] Section 52(1)(k).

The Act confers a broad range of coercive powers available with significant sanctions for non-compliance with these powers and affords limited rights to witnesses. The Society is concerned that there is a lack of an appropriate balance between robust public scrutiny and the protection of the rights of participating individuals under the Act.

While the Society acknowledges the need for coercive powers for investigations and inquiries into corruption, it considers that these powers should be seen as exceptional due to their intrusive impact on an individual's rights. This is particularly the case here where such powers are used in executive rather than judicial processes analogist to powers conferred under the Commonwealth *Royal Commission Act 1901* and similar legislation.

The abrogation of the right to silence is a significant matter. That right is recognised in the common law, in the following broad terms, usefully summarised and reproduced from Report 95 of the NSW Law Reform Commission *The Right to Silence* (July 2000). It states that the concept "describes a group of rights which arise at different points in the criminal justice system", as follows:

(1) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies.

(2) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.

(3) A specific immunity, possessed by all persons under suspicion of criminal responsibility Whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.

(4) A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence and from being compelled to answer questions put to them in the dock.

(5) A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.

(6) A specific immunity (at least in certain circumstances), possessed by accused persons undergoing trial, from having adverse comment made about any failure (a) to answer questions before the trial, or (b) to give evidence at the trial.[10]

Here the right is removed notwithstanding Joint Select Committee recommendation it be enshrined in the Act. The Government acknowledged this departure from that recommendation, in terms which, with great respect, are unconvincing. The Attorney General in her second reading speech said:

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[8] Section 52(5).

[9] Section 54(1).

[10] These categories are taken from the judgment of Lord Mustill in *R v Director of Serious Fraud Office: ex parte Smith (1993) AC 1* at 30-31.

> The Joint Select Committee recommended giving witnesses a right to silence and I can see what they were trying to achieve with that. In the end though it may put a person in a worse position if they are allowed to maintain their right to silence but there is nothing to prevent an investigator or Tribunal from drawing an adverse inference as a result.[11]

The Attorney General acknowledged that this is a difficult area, and it is one in respect of which we take the view that that difficulty is itself evidence of the extreme care which should be taken before choosing to interfere with established principles of law intended for the protection of individuals, many of whom will be vulnerable to the difficulties attending involvement in these processes.

Furthermore, this applies in the context of an act which confers limited access to assistance any person, or any person skilled in advising in respect of such matters. There is no justification for this.

RECOMENDATION 1

That the right to silence be enshrined in the Act

If the right of silence is not to be enshrined in the legislation, the Society submits that section 47 notices be issued by the Chief Commissioner who must be a legal practitioner of no less than 7 years standing, rather than an investigator (who may or may not be an employee of the Commission) and that the Commission exercise its coercive powers only where necessary and in accordance with a principle of proportionality which is enshrined in the Act.

RECOMENDATION 2

That only the Chief Commissioner be empowered to issue coercive notices under section 47 of the Act rather than investigators.

The principle of proportionality as a safeguard against the misuse of coercive powers was recognised by the 'Review of Victoria's Integrity and Anti-Corruption System' (the Proust Review). This Review was commissioned by the Victorian Government in 2009 and was completed in May 2010. One of the recommendations of this review was a multi-layered Integrity model including the establishment of a Victorian Integrity and Anti-Corruption Commission (VIACC).[12] In an effort to safeguard the misuse of the coercive powers that the VIACC would have, the Proust Review recommended that VIACC's exercise of coercive powers must be proportionate to the nature of the matter under investigation.13

The Society considers that a proportionality principle like that recommended in the Proust Review, should be introduced into the Act. This would help to ensure that the exercise of the Commission's powers must be proportionate to the nature of the matter being investigated and would also help to

[11] Second Reading Speech, *Integrity Commission Bill 2009*, House of Assembly, Deputy Premier Lara Giddings, 3 November 2009.

[12] Public Sector Standards Commissioner, Review of Victoria's Integrity and Anti-Corruption System, 31 May 2010, Recommendation 1.1, p.xix. Available from http://www.vic.ipaa.org.au/sb_cache/professionaldevelopment/id/193/f/PSSC_Integrity_Review.pdf.

[13] *Ibid.*, Recommendation 1.11, p.xx.

ensure that the Chief Commissioner exercised his or her coercive powers in only the most serious matters.[14]

RECOMENDATION 3

That the coercive powers under the Act be exercised in accordance with a principle of proportionality enshrined in the Act that such powers be exercised only to the extent necessary to conduct an investigation and proportionally to the nature of the matter under investigation.

The Society submits that it is also important that further protections are applied to ensure coercive powers are applied at the operational level in accordance with administrative law values of fairness, lawfulness, rationality, transparency and efficiency. The Administrative Review Council's *Coercive Information - Gathering Powers of Government Agencies* report, which was published in May 2008[15] is a useful document in this regard. This report contains 20 best-practice principles which are generally applicable to agencies with such powers. These principles seek to strike a balance between agencies' objectives in using the coercive information-gathering powers available to them and the rights of those in relation to whom the powers are exercisable.[16]

RECOMENDATION 4

That the Commission should be required to adhere to these best practice principles in the application of its coercive powers and report against them.

3. Claims of Privilege

The Act allows for a person to claim privilege in complying with an inspector's direction or requirement under Part 6 (or a direction given by an Integrity Tribunal under Part 7). If privilege is claimed, then the investigator may withdraw the question, or alternatively issue a notice requiring compliance if the question is not withdrawn.[17]

"Privilege" is defined in the Act as including "all the privileges set out in Part 10 of Chapter 3 of the Evidence Act 2001 and the privileges of the Parliament.[18]"

Part 10 of Chapter 3 of the *Evidence Act 2001*[19] lists privileges that may be claimed in proceedings including:

- Client legal privilege;
- Religious confession;

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[14] The Law Council of Australia has made the same submission in respect of the Commonwealth *Royal Commissions Act* and National Integrity Commissioner Bill. *Op Cit* [29-40].

[15] *Administrative Review Council Report No. 48–The Coercive Information Gathering Powers of Government Agencies*, May 2008. Available from http://www.arc.ag.gov.au/Documents/a00Final+Version+Coercive+Informationgathering+Powers+of+Government+Agencies+May+2008.pdf

[16] The Law Council of Australia has made the same submission in respect of the National Integrity Commissioner Bill. *Op Cit* [41-2].

[17] Section 92(1), (2), (3) and (4).

[18] Section 4.

[19] of Tasmania. Whilst part of the Uniform Evidence Law, there are some subtle differences in the Tasmanian Act when compared with other states.

- Medical communications;
- Communication to counsellor;
- Privilege against self-incrimination in other proceedings;
- Evidence regarding settlement negotiations; and
- Matters of state.

The Act sets out a process for an application to be made to a judge of the Supreme Court to determine whether the claim of privilege is valid.[20]

If an application is made and the material is determined not to be privileged, or if no application is made and the question is not withdrawn, then a person may not claim privilege as reason to refuse to answer.[21]

There are competing issues in examining this section and the procedure it proposes. In allowing the Supreme Court to rule on a claim for privilege, frivolous or vexatious claims intended to delay or frustrate an investigation could be avoided. However, unless the Court determines applications quickly, the further delay could diminish the efficiency of an investigation.

The procedure is different from that which is utilised in other investigative procedures, for example that utilised by ASIC [see endnote[i]]. The ASIC procedure affords protection to the subject of an investigation without the delay caused by a Supreme Court procedure. The protections include specific legislative provisions excluding the admissibility of evidence disclosed under compulsion in criminal proceedings. Furthermore it avoids the need to prepare and place before the Supreme Court such materials as may be necessary to enable the Court to determine the issue, itself a task which will cause cost and possibly delay.

RECOMENDATION 5

That consideration be given to a less complex procedure to claim privileges while maintaining protections for those compelled under a section 47 coercive notice.

The Act is silent with respect to compliance with the *Evidence Act* in relation to cautions and warnings and the procedures for the conduct of records of interview. This is a significant omission and derogation from established standards and appears to be an oversight.

It requires attention as another instance where the "balance" attending the investigation of criminal matters, is inexplicably disturbed. This change satisfies no obvious need, nor does it serve any public interest. It is worthy of more detailed analysis:

The Scheme of the Act

Part 6 of the Act deals with investigations. Under section 46(1)(a), an investigator may conduct an investigation in any lawful manner the investigator considers appropriate. Pursuant to section 46(1)(c) an investigator "must observe the rules of procedural fairness".

[20] Section 92(4), (5), (6), (7) and (8) sets out the general procedure for applying to the Supreme Court. The Court may make rules in its determination of such applications, (section 94(9)).
[21] Section 92(5) to section 92(11).

Under section 48 an investigation is to be conducted in private unless otherwise authorised by the CEO of the Commission. Under section 52 an investigator who enters premises can require any person on the premises to answer any question "relevant to the investigation"[22]. Under section 54 a person who fails to comply with a section 47 direction within 14 days is liable to a fine of 5,000 penalty units.

Part 7 of the Act deals with enquiries by the Tribunal. Under section 64(1)(a) the Tribunal can require a person to attend before it, and the Tribunal can take evidence by affidavit[23] or on oath[24]. Pursuant to section 64(f), the Tribunal may require a person to answer any question the Tribunal considers relevant to its enquiry.

Division 3 sets out the Tribunal's powers after an inquiry, providing that it may "make a finding that misconduct or serious misconduct has occurred". "Misconduct" and "serious misconduct" are defined in section 4. Serious misconduct means misconduct by a public officer that could, if proved, be a crime or an offence of a serious nature. The phrase "serious nature" is not defined.

The Evidence Act

The Statutory Scheme which results in police recording interviews is found within the *Evidence Act 2001*, and it is useful to set out the relevant parts.

Section 53 of the *Evidence Act* defines "serious offence" as a case involving an adult defendant where the offence is indictable and cannot be dealt with summarily without the consent of the defendant.

Part 4 of the Evidence Act applies to admissions. Section 84 makes an admission inadmissible unless the Court is satisfied that the admission was not influenced by violent, oppressive, inhuman or degrading conduct or a threat of such conduct. Section 85 concerns the reliability of admissions in criminal proceedings, and applies to official questioning of a person or questioning by a person who can influence the exercise of a discretion to prosecute, or not. Section 85A of the Evidence Act provides that an admission in a proceeding for a serious offence is not admissible unless there is available to the Court an audio-visual record of the interview. The Prosecution can overcome the lack of an audio-visual record by proving on the balance of probabilities that there was a reasonable explanation for the lack of an audio-visual record. Alternatively an admission of the commission of a serious offence will be admissible if the Court is satisfied that there are exceptional circumstances, which in the interest of justice justify the reception of the evidence. Section 85A(2) defines four types of reasonable explanation and provides that there may be other types. It is not necessary to set these out here.

The Society's concern is that unless such requirement is enshrined in the Act, or in applicable and binding regulations or standing orders, there is a grave risk of departure from standards which are required under the Evidence Act, with the result that the prosecution of a matter which acquires a criminal flavour as an investigation progresses, may be prejudiced.

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[22] (1)(j)(ii)
[23] Section 64(1)(c).
[24] Section 64(1)(d).

RECOMMENDATION 6

That investigators and an integrity tribunal be bound by the provisions of the *Evidence Act 2001* that relate to cautions and warnings and the procedures for the conduct of records of interview.

4. Representation

4.1 The Right to Legal Representation

Section 66 of the act provides that:

(1) A public officer who is the subject of an inquiry is entitled to be represented by a legal practitioner or other agent when appearing before an Integrity Tribunal during the inquiry.
(2) A witness appearing before an Integrity Tribunal may, with its approval, be represented by a legal practitioner or other agent.

First it is noted that different "rights" are offered public officers and witnesses. A public officer who is the subject of an investigation is entitled to be represented. This is appropriate and an important protection for people who are affected by investigations. However a witness appearing before a Tribunal is not entitled to be represented without the approval of the Tribunal. Witness is not defined which is unsatisfactory.

Furthermore the right to be represented is a "controlled right" pursuant to Section 67 (1) which provides:

> "An Integrity Tribunal may allow any person or any person's legal practitioner or agent to participate in an inquiry, to the extent that the Integrity Tribunal considers appropriate."

The Society submits that there should be an absolute right to be represented, similar to the ASIC model (see endnote). No good reason exists for constraining this right. An investigation could not be affected if the typical unlimited right to be represented is not curtailed.

In circumstances where established rights such as the entitlement to remain silent have been supplanted and a complex procedure exists in order to claim privilege, it is a matter of concern that the right to representation is not preserved in an unqualified way.

RECOMMENDATION 7

That 'witnesses' before tribunals, once properly and broadly defined by the Act, be afforded an unqualified or controlled right to legal representation.

4.2 Costs

The funding of legal representation for a person who may be subject to adverse comment and cannot afford a lawyer is essential to support the requirements of natural justice and access to justice.

Part 7, division 5 of the Act makes provision with respect to costs and expenses of witnesses. Section 83(1) provides that "a witness may apply to the chief executive officer for financial assistance in relation to the witness's legal costs". For the purpose of the division, "witness" is defined but not elsewhere.

The discretion as to whether to provide "financial assistance" is vested in the CEO who is to be guided by the matters set out in section 83(2). It is noted that this section contemplates the grant of such assistance before evidence is given (see Section 82(2)(b) for example).

Financial assistance includes provision for costs and the Act stipulates those costs must be taxed by a taxing officer of the Supreme Court before being paid.[25] This is a cumbersome requirement particularly if the costs are minimal. It is preferable to incorporate a discretion in the CEO to refer the claimed costs for taxation, rather than to make the requirement operate every time. Consistently with that discretion, the Act should include a provision which enables costs to be agreed.

RECOMMENDATION 8

That the requirement for witnesses' costs to be taxed in the Supreme Court before being paid by the Commission be replaced with a discretion for the CEO to require that a bill of costs be taxed enabling the CEO to agree costs.

[25] Section 83(3)

[i] Endnote- ASIC procedure: ASIC has the power to require a person to attend to be examined if it believes, on reasonable grounds, or suspects or believes that a particular person can give information relevant to a matter that it is investigating under Division 1 of Part 3 of the *ASIC Act* (See Section 19).

The notice to the proposed person to be examined may require them to give all reasonable assistance in connection with their investigation; including answering questions put to them by the ASIC investigators or deliver up documents. There are limited protections afforded to the examinee. A person does not have an unqualified "right" to silence. A refusal to answer or provide this responsible assistance may render a person liable for contempt of ASIC or contempt of the *ASIC Act* and liable to penalty. A lawyer may attend the examination with the examinee, and a claim to the protection under Section 128 of the *Evidence Act 1995* (Commonwealth) in respect of privilege against self-incrimination is permitted. Section 68(3) of the *ASIC Act* limits the Scope of the protection against self-incrimination and excludes the proceedings specified in Section 1349 of the *Corporations Act 2001*.

Section 22 provides that the examination is to be in private- Evidence is given under oath or affirmation and failure to comply without reasonable excuse will expose the person to a penalty of $11,000.00 or 2 years in prison or both. Often there is a record of the examination and Section 24 provides that there may be a transcript and if this transcript is reduced to writing a copy will be provided to the examinee who may be required to read it and sign it.

The following notice is given by ASIC, and attention is drawn particularly to the part headed "Notice of relevant statutory provisions"

Form 1—Notice requiring appearance at an examination or reasonable assistance in connection with an investigation

(regulation 4)

Australian Securities and Investment Commission Regulations 2001

Australian Securities and Investments Commission

NOTICE REQUIRING APPEARANCE AT AN EXAMINATION OR REASONABLE ASSISTANCE IN CONNECTION WITH AN INVESTIGATION

To: [1]

In relation to an investigation of [2]

you are notified that under subsection 19(2) of the *Australian Securities and Investments Commission Act 2001* ('the Act') you are required:

(a) to appear at [3] on

[4] at

[5] before [6]

for examination on oath or affirmation and to answer questions put to you in relation to the investigation; and

(b) to give the Australian Securities and Investments Commission all reasonable assistance in connection with the investigation.

Please note the provisions of subsection 23(1) of the Act (relating to legal representation) and section 68 of the Act (relating to self-incrimination). The effect of those provisions is set out at the end of this form.

Dated [4].

Signature of person authorised

by the Commission to conduct the

examination:

NOTICE OF RELEVANT STATUTORY PROVISIONS

1. Subsection 23(1) of the Act provides that a person who is required to submit to an examination is entitled to have his or her lawyer attend the examination. It also provides that the person's lawyer may address the inspector or ask the person questions about matters raised with the person by the inspector.

2. (1) You must not fail to comply with this notice without reasonable excuse (see subsection 63(1) of the Act).

   (2) It is not a reasonable excuse for failure to comply with this notice that giving information or signing a record or producing a book might tend to incriminate you or expose you to a penalty (see subsection 68(1) of the Act).

   (3) However, if:

      (a) before making an oral statement or signing a record in answer to this notice you claim that making the statement or signing the record might tend to incriminate you or expose you to a penalty; and

      (b) making the statement or signing the record might in fact tend to incriminate you or expose you to a penalty;

   the statement, or the fact that you have signed the record, is not admissible in evidence in any criminal proceedings, or proceedings for the imposition of a penalty, against you other than proceedings in respect of the falsity of the statement or the record.

   (4) The right to make a claim of this kind is not available to a body corporate (see subsections 68(2) and (3) of the Act).

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1 *insert full name and address of the person to whom the notice is to be given*

2 *insert the nature of the matter to which the investigation relates*

3 *insert time of day*

4 *insert date*

5 *insert full particulars of the address of the place at which the requirement is to be satisfied*

6 *insert full name of the person conducting the examination*