A paper presented for The Continuing Professional Education
Department of the College of Law on 5 March 2012

Examinations under the Corporations Act and ASIC Acts

Published in Sydney by the Continuing Professional Education Department of the College of Law, 2 Chandos Street, St Leonards, NSW, Australia, 2065.

ABOUT THE AUTHORS

LESA JANET BRANSGROVE

Lesa Bransgrove is a partner of Bransgroves Lawyers. She holds a Bachelor of Laws and Bachelor of Commerce from the University of Queensland and a Master of Laws from the University of London. Lesa was admitted as a solicitor of the Queensland Supreme Court in 1996 and the UK Supreme Court in 2002 and as a barrister of the NSW Bar Association in 2009. After working at Minter Ellison Lawyers in Brisbane, Lesa spent the next ten years abroad, working at Allen & Overy and White & Case Lawyers. Following completion of her Master of Laws in international finance in 1998, Lesa has practiced in the field of finance law and finance litigation. Lesa worked on the trading floor of Morgan Stanley in London and completed the UK Securities and Investment Institute exams in Investments.

Following her return to Australia, Lesa worked at Macquarie Bank in Sydney before moving to the bar in 2009 to act as counsel in various class action litigation involving a range of financial products and banks. Lesa's crossover of skills in both banking and law meant that she was uniquely placed to apply her knowledge of the workings of financial products to advise on complex litigation involving this asset class at the bar. Lesa has written articles for the Australian Law Journal and the NSW Law Society Journal.

MATTHEW JAMES BRANSGROVE

Matthew Bransgrove holds a Bachelor of Laws and was admitted to the NSW Supreme Court in 1992. He has practised exclusively in the field of mortgage law since 1998.

He is a co-author of the 2008 LexisNexis textbook 'The Essential Guide to Mortgage Law in NSW' and the 2013 LexisNexis textbook 'The Essential Guide to Mortgage Law in Australia'. His articles in the NSW Law Society Journal and his textbook have been cited with approval by the NSW Supreme Court. Chandra v Perpetual Trustees Victoria [2007] NSWSC 694; Perpetual Trustees Victoria v Kirkbride [2009] NSWSC 377; Bank of Western Australia v Ellis J Enterprises [2012] NSWSC 313.

MARCUS WOLSTENHOLME YOUNG SC

The authors would like to acknowledge the extensive assistance of Marcus Young SC, Barrister-at-Law of University Chambers and co-author of the 2008 LexisNexis textbook 'The Essential Guide to Mortgage Law in NSW' and the 2013 LexisNexis textbook 'The Essential Guide to Mortgage Law in Australia'.in preparing this paper.

Contents

Introduction

The Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth) (the "ASIC Act") grant very extensive power to interrogate persons as part of the Australian corporate regulatory regime. However their history, nature and purpose is different. Examinations under the Corporations Act are before the court and are "a long standing feature of insolvency administration, the history, nature and purpose of which have been analysed in many cases"[1]. The examinations power under the ASIC Act is given to the regulator to ensure the proper functioning of the Australian financial system[2]. While both powers are for the purpose of information gathering and are a departure from the usual adversarial system of justice because they are inquisitorial in nature, they are exercised for different ends.

The purpose of this paper is to set out the statutory framework of the examinations procedure provided by the Corporations Act and the ASIC Act and to provide a comparison of the two forms of examination.

The nature and purpose of the examinations power

Corporations Act

The power to conduct a public examination is a special coercive power to question relevant persons in court, under oath, as to the "examinable affairs" of the company in question. The examination is inquisitorial in that there is no opportunity for the examinee to lead evidence in chief or to cross-examine. The purpose of the examination must be for the benefit of the company, its creditors or its contributories. A key restraint on the use of the power is that the company must be under some form of external administration. Otherwise every corporation would be at risk of having its examinable officers or its officers or other witnesses examined to the possible detriment of the company[3]. This key restraint is notably absent from ASIC's wider power to conduct examinations on the basis that ASIC examinations serve a wider public purpose.

There are three important purposes served by examinations. One is to enable the examiner, who is usually the liquidator, administrator or receiver, gather information which will assist him in protecting the interests of the company as a whole, its creditors or its contributories[4]. It may be used to protect the interests of creditors by assisting in the recovery of assets of the company for distribution to the creditors. The second purpose is to gather information relating to whether any person has been guilty of fraud, negligence, default, breach of trust, breach of duty or other misconduct in relation to the company and for the purpose of bringing proceedings (civil or criminal) against that person[5]. The third purpose is for the public interest in assisting the regulation of corporations. It is in the public interest that officers of corporations and those who are concerned in the examinable affairs of company impart their

[1] *Ryan v Australian Securities and Investments Commission* [2007] FCA 59 at [49]
[2] ASIC's objectives are set out in section 1(2) of the ASIC Act.
[3] *Wainter Pty Ltd, in the matter of New Tel Limited (in liq)* [2005] FCAFC 114 at [249]
[4] *Wainter Pty Ltd, in the matter of New Tel Limited (in liq)* [2005] FCAFC 114 at [247]
[5] *Hamilton v Oades* (1989) 166 CLR 486 at 496–497

knowledge of the affairs of the company in the event that the company becomes subject to administration or winding up[6].

A Corporations Act examination has been held to constitute a proceeding. In its ordinary meaning, a proceeding is an application to a court for its intervention or action[7]. It was noted by Finkelstein J in *Re Korda* [2010] FCA 1417 at [19] that a "compulsory examination has traditionally been regarded as a proceeding. By way of example I refer to *Re Beall; Ex parte Beall* [1894] 2 QB 135. That concerned a private examination under the *Bankruptcy Act 1883* (UK). It was held by the Court of Appeal that the examination was a "proceeding of the court" within the meaning of the *Bankruptcy Rules 1886* (UK) and hence the transcript of the examination was required to be placed on the court file. Likewise in *Re Appleton, French & Scrafton, Ltd* [1905] 1 Ch 749 Warrington J held that a Companies Act examination was a "proceeding in the Supreme Court" thus enabling the court to make a costs order."

However it has been noted that "the proceedings are not in the nature of legal proceedings before a court; they are more in the nature of investigative procedures where the court has a presence for the purpose, basically, of seeing fair play between the persons interrogating and the persons being interrogated"[8].

It was held in *Griffin v Pantzer* (2004) 137 FCR 209 that the *Evidence Act 1995* (Cth) does not apply to examinations under the *Bankruptcy Act 1966* (Cth). The Evidence Act applies to "all proceedings in a federal court or an ACT court": s 4(1). The Full Court accepted that the word "proceeding" can have a wide scope. But the Full Court held (at 258-9) that the proceedings contemplated by the Evidence Act are those in which there are parties and in which there are witnesses. An examination under s 81 of the Bankruptcy Act is not such a proceeding. It is not between parties. It does not involve the resolution of a dispute. It does not have parties or witnesses. It is an interrogation – a fact-finding exercise[9]. The court disagreed with the view of Kiefel J in obiter in *Re Interchase Corporation Ltd* that a Corporations Act examination was a proceeding for the purpose of the Evidence Act. The court said that "the examination may be a proceeding for the *Federal Court of Australia Act*. It does not follow that it is a proceeding in which it is intended that *evidence* be *adduced* from *witnesses*"[10]. The difference in approach was noted in *Meteyard v Love* (2005) 65 NSWLR 36 at [76-79] but did not need to be resolved because the court rules applying to examinations expressly permit a person to rely upon the provisions of the Evidence Act and so claim client legal privilege[11].

ASIC Act

ASIC examinations are also for the purpose of information gathering but their object is to help ASIC fulfil its regulatory role. The potential result is only known at the conclusion of investigations. ASIC also has in its arsenal extensive investigative and enforcement powers. All these powers are used by ASIC to investigate suspected

[6] *Southern Cross Petroleum Sales (SA) Pty Ltd (in liq) v Hirsch* (1998) 70 SASR 527
[7] *Re Korda* [2010] FCA 1417 at [16-18]
[8] *Re Monadelphous Engineering Associates (NZ) Ltd (in liq); ex parte McDonald v Watson* (1989) 7 ACLC 220 at 223.
[9] *Griffin v Pantzer* (2004) 137 FCR 209 at [202]
[10] *Griffin v Pantzer* (2004) 137 FCR 209 at [206]
[11] s.79 Judiciary Act 1903 (Cth); Part 1.9 Uniform Civil Procedure Rules

contraventions of the ASIC Act and the Corporations Act or other laws concerning the management of a company or fraud and dishonesty in relation to a company or financial products[12] and gather evidence for administrative, civil, civil penalty and/or criminal proceedings. As noted earlier, the company does not need to be in some form of external administration. The width of the power is said to be justified by the higher public purpose served in containing financial loss and disruption to the market. The erosion of privileges in ASIC examinations is therefore available in a wider range of circumstances, not limited to companies in external administration and the ASIC Act goes further than the Corporations Act in removing certain privileges. There is not the same body of case law built up over hundreds of years which discusses the rationale for the abrogation of privileges as is the case with the Corporations Act.

ASIC examinations are also inquisitorial in nature. ASIC exercises its powers to find out facts and gather documents to make an informed assessment about whether a contravention has occurred.

Both ASIC and Corporations Act powers regard the public interest as paramount. The public interest coupled with the disadvantage faced by examiners who have limited knowledge of the company's affairs has eroded many protections otherwise afforded to a defendant in ordinary private litigation.

History

Corporations Act

The examinations power with respect to the affairs of companies has been borrowed from the examinations power given to a trustee in bankruptcy to find out facts before bringing an action in connection with the affairs of bankrupts[13], so avoiding unnecessary expense. The first bankruptcy statute in England provided for the examination of third persons about a debtor's estate. It found its way into the UK companies laws in 1844 to assist liquidators in locating assets[14]. Broader powers have been conferred ever since in company laws in the UK and Australia, and extended to companies in all forms of external administration not just companies that have been wound up.

The purpose of the inquisitorial powers conferred by bankruptcy and companies legislation is much the same[15] - to help a liquidator or trustee in bankruptcy discover the truth of the circumstances connected with the affairs of the company or bankrupt to enable them to complete their functions as expeditiously as possible.

Section 597 in its present from was introduced following the 1992 amendments to the Corporations Act[16]. These amendments implemented the Report of the Australian Law Reform Commission, which described the chief purposes of inquisitorial examinations in bankruptcy and company insolvency law as follows:

---

[12] Section 13 ASIC Act; Reiterated in section 28 ASIC Act in relation to the power to compel production of documents
[13] *Highstoke v Hayes Knight GTO* (2007) 156 FCR 501 at 515
[14] Section 15 Joint Stock Companies Winding Up Act 1844 (UK)
[15] *Re Csidei; Ex parte Andrew* (1979) 39 FLR 387 at 390
[16] Corporate Law Reform Act 1992 (Cth)

> "….to facilitate the recovery of property, to discover whether conduct of the insolvent led to the insolvency and to investigate possible causes of action against third parties."[17]

The power to conduct such examinations under the Corporations Act is an extraordinary power intended to place those who conduct the examinations in a special position as compared with a normal plaintiff[18]. This is in recognition of the peculiar difficulties faced by examiners compared to the ordinary litigant. Examiners often do not know as much about a company's examinable affairs as former directors and officers and are often limited to the records of the company which may be unreliable[19]. Liquidators come to the company with limited or no knowledge of the company assets, business and affairs and are therefore disadvantaged. To address this, the examinations power places a liquidator in a privileged position to obtain information relevant to the liquidator's statutory duty to get in and maximise the assets of the company for the benefit of creditors[20].

The examination takes place in public. There is provision for an examination to take place in private if "special circumstances" exist (s 597(4)); but the simple proposition that the financial affairs of companies or individuals that would normally be private are involved would not, of themselves, constitute "special circumstances": *Re Pan Pharmaceuticals Ltd* [2003] NSWSC 1204[21].

ASIC Act

Parliament has traditionally been cautious in relation to passing laws that infringe too much with respect to individual liberties. As a result, where Parliament has statutory authorised a body such as ASIC to intrude into a person's private affairs, it has not been given a blank cheque but one confined to the requirements of statute. Nevertheless, the intrusion goes further that the context of Corporations Act examinations which requires the company to be in some form of external administration and can be utilised by ASIC as helping it fulfil its statutory role.

Statutory Framework

Corporations Act

The examination provisions are found in Chapter 5 "External Administration", which is divided into a number of Parts. Part 5.9 headed "Miscellaneous" contains the substantive provisions. Sections 596A-597B provide for public examinations of persons concerning the examinable affairs of corporations.

Who conducts examinations?

Public examinations may be conducted by ASIC (or a person authorised in writing by ASIC), a liquidator or provisional liquidator, an administrator of a company, or an

[17] Australian Law Reform Commission, Report No. 45 (1988) (The Harmer Report) paragraph 584
[18] *Hamilton v Oades* (1989) 166 CLR 486 at 497–498
[19] *Adler Group v Quintex Group Management Services Pty Limited (in Liq)* (1996) 22 ACSR 446 at 449
[20] *Grosvenor Hill (Queensland) Pty Ltd v Barber* (1994) 48 FCR 301 at 305-6
[21] Cited with approval in *Re Lift Capital Partners Pty Ltd (in liq)* [2008] NSWSC 1369 at [15]

administrator of a deed of company arrangement[22]. The persons who may be authorised by ASIC to make an application are not limited.

A person authorised in writing by ASIC may include, for example, a receiver and manager[23], a trustee of a unit trust[24], or an alleged creditor[25]. ASIC takes into account "the relationship which the person seeking authorisation has to the relevant corporation and the external management of that corporation"[26].

The Corporations Act makes no express provision for ASIC to authorise a person to make an application under Part 5.9 as an "eligible applicant". The source of ASIC's power is contained in Section 11(4) of the ASIC Act, which gives ASIC the power to do whatever is necessary for the performance of its functions[27].

The decision of ASIC to authorise a third party to apply for an examination summons can be challenged by way of judicial review either under the ADJR Act or the provisions of section 39B(1A) Judiciary Act 1903 (Cth) and the court can order discovery be made in an application to review that decision[28]. However the decision is not reviewable by the Administrative Appeals Tribunal and ASIC is not obliged to give reasons for its decision.

The Federal Court has characterised ASIC's decision as a decision in connection with civil proceedings for the issue of an examination summons and as such, ASIC has a statutory right to decline to give reasons by virtue of the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("ADJR Act") Schedule 2 paragraph (f).[29] In *Highstoke v Hayes Knight GTO Pty Ltd* [2007] 156 FCR 501, the Federal Court quashed the authorisation by ASIC since the purpose for which authorisation was sought, to examine a company not under any form of external administration or other Ch 5 process was beyond the power of the court and beyond ASIC's power to authorise. The company had simply been removed by the court as a trustee under Ch 2L of the Corporations Act. The court arrived at this conclusion by considering the context in which Part 5.9 appears in the Corporations Act and concluded that the "examination power is intended to be ancillary to the functions of the Court and/or the functions of external receivers, controllers or liquidators of corporations for which Ch 5 makes provision"[30]. The court also noted that to conclude otherwise is "inconsistent also with the history of the legislation…..the historical roots of the power lie deep in corporate insolvency law nourished by the development of the examination powers in respect of bankrupt individuals…The Explanatory Memorandum for the 1992 amendments which introduced sections 596A and 596B into the *Corporations Law* was focused on insolvency and forms of external administration…The weight of authority tends to support the proposition that sections 596A and 596B and their

[22] See definition of "eligible applicant" in section 9 and sections 596A and 596B Corporations Act.
[23] *Boys v Quigley (as receiver and manager of Geneva Finance Limited)* (2002) 20 ACLC 1,323; 41 ACSR 499
[24] *Hong Kong Bank of Australia Ltd v Murphy* (1992) 28 NSWLR 512 at 518-9
[25] *New Zealand Steel (Aust) Pty Ltd v Burton* (1994) 13 ACSR 184
[26] Re *Excel Finance Corp Limited; Worthley v England* (1994) 52 FCRC 69 at 84
[27] *Highstock v Hayes Knight GTO* (2007) 156 FCR 501 at 525
[28] *Hayes Knight GTO Pty Ltd v ASIC* (2005) 147 FCR 468 at 473
[29] *Hayes Knight GTO Pty Ltd v ASIC*(2005) 147 FCR 468
[30] *Highstock v Hayes Knight GTO* (2007) 156 FCR 501 at 527

predecessors have been seen as provisions applicable to companies in one or other form of administration and not as applicable to companies at large"[31].

Who can be examined?

There are two sets of persons liable to be summoned for examination: mandatory examinees and discretionary examinees. The examination then proceeds in the same way, irrespective of the basis on which the summons was issued.[32]

A person may be summoned for examination under section 596A or section 596B. Section 596A deals with *mandatory examinations*. The Court has *no discretion* not to summon a person for examination if an application is made[33], if that person is a provisional liquidator or an officer of the corporation, or was such a provisional liquidator or officer during the two years before the winding up or two years before the administration or company arrangement began, or otherwise two years before the application is made.

An officer means a director, secretary, executive officer, receiver, administrator, administrator of a deed of company arrangement, a liquidator, a provisional liquidator or a trustee or other person administering a compromise or arrangement[34].

Section 597A provides that in the case of a mandatory examination only, an applicant may apply for an order that certain questions be answered by affidavit. This procedure may be used to avoid the costs of an examination or as a precursor to an examination, to obtain information in advance of an examination. If such an order is made, the examinee must file an affidavit unless they have a reasonable excuse for failing to do so. Reliance on legal advice does not qualify as a reasonable excuse[35]. It has also been held that an examinee may be required to make inquiries of persons or review documents in order to file the affidavit and this is not a ground for objection[36]. If such an affidavit is provided, the Court may excuse an examinee from answering a question at an examination if the question has already been answered in the affidavit filed.

Section 596B deals with *discretionary examinations* and covers a wider class of persons. This class includes persons inside or outside the corporation, such as employees who are not officers of the corporation[37] or who were officers but more than two years before the events provided for in section 596A. It also includes valuers[38], auditors or former auditors[39], solicitors of former directors[40] and officers of an insurance company[41].

---

[31] *Highstock v Hayes Knight GTO* (2007) 156 FCR 501 at 527-8
[32] *Simionato v Macks* (1996) 19 ACSR 34
[33] *Flanders v Beatty* (1995) 13 ACLC 529 at 539; *Re Shepherds Producers Co-operative Ltd* (2006) 24 ACLC 336.
[34] Section 9 Corporations Act
[35] *ASIC v Albarran* (2008) 169 FCR 448
[36] *Re Modern Woodcraft Pty Ltd (in liq)* [1997] FCR 245
[37] *Morton v Joynson* (1999) 17 ACLC 836
[38] *Re Interchase Corp Ltd (in liq) (No 2)* (1993) 47 FCR 253
[39] *Boys v Quigley* (2002) 20 ACLC 1,323
[40] *Aquanaut Constructions Pty Limited (In Liquidation)* (2002) 20 ACLC 505
[41] *Re Interchase Corporation Pty Ltd* (1996) 139 ALR 183

This provision gives the Court a *discretion* to summon a person for examination if the Court is satisfied that the person:

(a) has taken part or been concerned in examinable affairs of the corporation and has been, or may have been, guilty of misconduct[42] in relation to the corporation; or

(b) may be able to give information about examinable affairs of the corporation.

The application for a summons for examination must be by way of an originating process if no proceedings are on foot or by way of an interlocutory notice of motion if proceedings have commenced. Such applications must be accompanied by a supporting affidavit and a draft examination summons.

Where a discretionary examination is applied for under section 596B, the affidavit must disclose fully and frankly all matters relevant to the exercise of the Court's discretion including material which might lead the Court to refuse the application[43]. Orders for examination are obtained by an ex parte application. The obligation for candour is higher than where a party is seeking an injunction ex parte because the material supporting the application is not made available to the examinee and the examinee has no right to be heard on the application[44].

The court's discretion in section 596B is unfettered but must be exercised judicially. In *Southern Cross Petroleum Sales (SA) Pty Ltd (in liq) v Hirsch* (1998) 70 SASR 527, it was noted that the court may have regard to the following matters in exercising that discretion:

- the expressed purpose of the examination;
- the importance of the information to the eligible applicant;
- the seriousness of the matters to be inquired into;
- the use to which information obtained might be put;
- the possibility of an advantage to the eligible applicant which he or she would not otherwise enjoy and the concomitant disadvantage to the prospective examinee;
- the availability of information from other sources;
- the cost to the prospective examinee in attending the examination;
- whether the information sought is so peripheral to make attendance oppressive; and

[42] "Misconduct" is defined in section 9 to include fraud, negligence, default, breach of trust and breach of duty.
[43] *Re Southern Equities Corp Ltd (in liq); Bond v England* (1997) 25 ACSR 394
[44] *Hong Kong Bank of Australia Ltd v Murphy* (1992) 28 NSWLR 512 at 520

- the wider public interest in investigating the affairs of the company.

Pursuant to section 596C(2), the affidavit is not available for inspection except so far as the Court orders. There are good reasons for withholding the affidavit from a prospective examinee. An affidavit which complies with s596C and the obligation to make full disclosure may put an examinee upon notice of the matters which are to be the subject of the examination and therefore render the examination nugatory[45].

For the Court to order inspection, the proposed examinee must establish some reason justifying access to the affidavit. The NSW Court of Appeal said in *Meteyard v Love* (2005) 65 NSWLR 36 at [141] that "an applicant for disclosure of the affidavit will generally be able to obtain access to the affidavit if he or she can demonstrate an arguable case that the issue of summons exceeded the power of the court under Section 596B and that access to the affidavit is likely to assist in determining the correctness of the challenge"[46]. In general terms, "access to the affidavit will not be granted unless it is shown that there is an arguable case that the examination summons was issued for an improper purpose"[47].

In *Ariff v Fong* [2007] NSWCA 183, the largest shareholder and major unsecured creditor of a company in the CarLovers group was appointed by ASIC as an eligible applicant to examine the administrator of the company. The Court of Appeal held that "in order to grant access to the affidavit, the court must be satisfied that the claimants have an arguable case that the examination summons had been issued for an improper purpose or involved an abuse of the court's processes"[48]. The court found sufficient evidence that there was an arguable case that the summons had been issued for an improper purpose, namely to exert pressure on the administrator to terminate the deeds of company arrangement without payment of his remuneration and hand back control of the company to the shareholders. The evidence included threats alleged to have been made, the number of examination summonses issued and the width of the notices to produce and subpoenas, which required over one million documents to be produced at a cost of nearly $350,000. The court found "a possibility that the proceedings will be embarrassing, if not oppressive"[49] and noted that "a person can be 'embarrassed' by being required to spend long hours away from that person's usual business"[50]. The court made the affidavit available to the claimant's legal representatives only, noting that should it be necessary to obtain instructions, application could then be made for wider access.

In *Re Sheahan* [2010] NSWSC 1255, the liquidators of a company, which was the sole beneficiary of a service station owning trust sought to examine the recipient of trust funds, paid in breach of an agreement between the company and the recipient. Proceedings were also commenced by the liquidators against the recipient to attack the payout. The court rejected the argument that the summons was issued

[45] *Southern Cross Petroleum Sales (SA) Pty Ltd (in liq) v Hirsch* (1998) 70 SASR 527 at 541
[46] Cited with approval in *Re Sheahan* [2009] NSWSC 1039 at [4] and accepted in *Ariff v Fong* (2007) 25 ACLC 1079 at [25-26]
[47] *Re Lift Capital Partners Pty Ltd (in liq)* [2008] NSWSC 1369 at [13]
[48] *Ariff v Fong* [2007] NSWCA 183 at [90]
[49] *Ariff v Fong* [2007] NSWCA 183 at [88]
[50] *Ariff v Fong* [2007] NSWCA 183 at [88]

predominantly to coerce the recipient into agreeing to settle the dispute on the liquidator's terms, evidenced by the alleged threat to raise the subject of an ATO investigation concerning the recipient in the examination. The court believed the liquidator's explanation that he raised this matter solely to indicate to the recipient that he had taken into account the difficulties in recovering the full amount of any judgment against the recipient and unless settlement discussions proceeded, litigation would continue and an examination would be conducted. The court further noted that "the fact that a party to litigation takes a step in prosecuting that litigation while settlement discussions are continuing does not, in itself, constitute an abuse of process even though taking that step has the effect of putting some pressure on the other side to come to agreement or else join battle in Court"[51].

In *Excel Finance Corporation Ltd (Receiver and Manager Appointed); Worthley v England* (1994) 52 FCR 69, the Full Court of the Federal Court of Australia stated, at 94, that the purpose of making an order under s 596C, making an affidavit available for inspection was not so as to enable a party to "*fish*" for information that would establish that the examination summons had been issued for an improper purpose. There must be material before the Court from which it appears that the applicant has an arguable case, to which the material is relevant, before the discretion should be exercised in favour of that applicant.

Having raised an arguable case, the preferable approach explained in *Ariff v Fong* [2007] NSWCA 183 at [91] is for the court then to examine the affidavit and if the court's view is that the material in the affidavit is material to the question whether there has been an abuse of process, allow access to it, subject to any restrictions appropriate.

> Not only should the claimants be entitled to rely on the contents of the affidavit if it does support their case, the court determining the application should be placed in the position where, it having been established that there is an arguable case of abuse of process, it can properly assess that claim by having regard to all the material which is relevant to that determination.[52]

The contents of a summons

Section 596D(1) provides that a summons is to require the person to attend before the court to be examined on oath about the corporation's examinable affairs at a specified place, time and day that is reasonable in the circumstances. A person who is summoned must not, without reasonable excuse, fail to attend as required by the summons or until the conclusion of the examination: s597(6).

If the applicant obtains a summons without reasonable cause, the court may order that the applicant pay the costs of the person summoned[53]. However given that all that is required is a belief that the examinee may have relevant information, this order is unlikely to be made by the court.

---

[51] *Re Sheahan* [2010] NSWSC 1255 at [31]
[52] *Ariff v Fong* [2007] NSWCA 183 at [92]
[53] Section 597B Corporations Act

An examinee has no general right to expenses[54]. However if the examinee is not an officer of the company, ordinarily provision should be made by the examiner in respect of their reasonable expenses of attendance, where such expenses are substantial[55].

Notice of examination

If a court summons a person for examination, the applicant who applied for it must give written notice to as many of the company's creditors as reasonably practicable and each eligible applicant (other than the person who applied for the summons)[56]. If the applicant was authorised by ASIC, notice need not be given to ASIC.

What are the examinable affairs of a company?

The concept of the examinable affairs of a company is very broad. It is contained in sections 9 and 53 of the Corporations Act.

Section 9 provides that "examinable affairs" in relation to a corporation means:

(a) the promotion, formation, management, administration or winding up of the corporation; or

(b) any other affairs of the corporation (including anything that is included in the corporation's affairs because of section 53); or

(c) the business affairs of a connected entity57 of the corporation, in so far as they are, or appear to be, relevant to the corporation or to anything that is included in the corporation's examinable affairs because of paragraph (a) or (b).

The definition of "examinable affairs" in section 9 includes any affairs of a body corporate covered by section 53 and is extremely wide. It includes the company's business, transactions, dealings, property, finances, the audit of those finances, internal management, ownership, control, creditors and other persons having a financial interest in the company.

Where the corporation is a trustee of a trust, such as a managed investment scheme, the definition of "examinable affairs" includes any matters concerning the scheme or the member's investment contract as well as the identity of members and their rights and payments received under the trust, the ownership of interests, the circumstances of acquisition or disposal of such interests and any audit of the scheme.

Further, the section only requires the court to be satisfied that the person may be able to give information about examinable affairs. The person need not have direct knowledge[58] and may not be able to give a great deal of information.

---

[54] *Fox Home Loans Pty Ltd; D'Angelo* [2005] NSWSC 1050 at [4]
[55] *Spedley Securities Limited (in liquidation); ex parte Australian National Industries Limited* (1991) 4 ACSR 322 at 325 to 326
[56] Section 596E Corporations Act
[57] Section 9 defines "connected entity" to mean a related body corporate under section 50 (which in turn refers to holding or subsidiary corporations), and an entity that is, or has been, connected (as defined in section 64B) with the corporation.
[58] *S&V Nominees Pty Ltd (in liq) v Rabobank Australia Ltd* [2010] FCA 429 at [35]

Examinable affairs has also been held to include:

- the company's potential causes of action for any breach of duty which it might be owed[59];
- the prospects of success of potential litigation by the company[60]; and
- the insurance policies of the company in relation to its assets, its officers and auditors, including the results of any investigations leading to the denial of liability by an insurer[61].

Potential causes of action

Examinable affairs includes the property of the corporation (section 53(a)). The definition of property in section 9 includes choses in action, which would, in turn, include any cause of action vested in the corporation by reason of any breach of duty which it might be owed[62]. In *Re Interchase Corp Ltd* (1996) 68 FCR 481, Kiefel J said (at 485) that information "about" a company's choses in action included information which:

> [A]llows some estimation of the value of the chose and, as a result, assists the liquidators to decide whether to prosecute the action. Logically I cannot see why information about whether the judgment resulting has any worth, by reason that it will or will not likely be met by payment, is not also then "about" that property. And whilst it may also be said to be "about" the contract of insurance between insurer and insured, this does not prevent it from having the necessary connection with the company's property and then coming within the scope of an examination under s 596B.

Prospects of success

Kiefel J relied substantially on the decision of the Full Federal Court in *Grosvenor Hill (Queensland) Pty Ltd v Barber* (1994) 48 FCR 301 that dealt with essentially the same factual situation as *Re Interchase Corp Ltd* (1996) 68 FCR 481. The Full Court in *Grosvenor Hill* made quite clear, at 650, that information that sheds light on the prospects of success of contemplated litigation by the corporation would be information with respect to "examinable affairs" for the purpose of s 596B. The financial resources including tax returns of potential defendants are examinable so a practical assessment can be made as to the likelihood of a tangible benefit beyond a mere judgment at the conclusion of litigation[63].

In *Re Interchase*, a liquidator had commenced an action for damages, in a very large amount, against the valuers of a shopping centre, alleging that the company had relied on their incorrect valuation in outlaying moneys for the centre. It was ascertained that

---

[59] *Morton v Joynson* [1999] FCA 530 at [21]
[60] *Grosvenor Hill (Queensland) Pty Ltd v Barber* (1994) 48 FCR 301 at 306-7
[61] *Meteyard v Love* (2005) 65 NSWLR 36
[62] The definition of "property" in section 9 includes a thing in action, and *Morton v Joynson* [1999] FCA 530 at [21]
[63] *Grosvenor Hill (Queensland) Pty Ltd v Barber* (1994) 48 FCR 301 at 306-7

the defendant valuers held a policy of professional indemnity insurance, and claims for indemnity were notified to the insurers. The primary insurer advised that it reserved its position - apparently on grounds relating to non-disclosure, late notification, and that the conduct complained of was more serious than negligence - although one of the insurers maintained that the terms of the reservation of position were confidential. The liquidator sought to examine officers of the insurers for the purpose of determining whether the insurers would indemnify the defendant in the event that the liquidator's action was successful. The examinees failed to have the examination summonses discharged.

It is within the power to order the production of insurance policies to ascertain whether the potential defendant has a right to indemnity from an insurer. It is also permissible "to investigate the merits of a dispute between insurer and insured, as to whether an insurance policy has been avoided or whether the conditions of indemnity in the policy have been fulfilled on the basis that these are matters which are part of the examinable affairs at least of the insured"[64].

The company's own insurance policies

The insurance policy between the company and its insurer are part of the examinable affairs of the company on the authority of *Meteyard v Love* (2005) 65 NSWLR 36.

Meteyard v Love (2005) 65 NSWLR 36 was an appeal from the decision of Young J in *Re Southland Coal Pty Ltd* [2005] NSWSC 259. In that case, the receivers and managers of a coalmine sought to examine various officers of the insurer and experts retained by the insurer to decide whether or not to sue the insurer in respect of a fire at the coalmine and claims made under the policy. The insurer denied liability on the basis of an exclusion clause of the policy in relation to loss arising out of certain mining conditions. The purpose of the examination was not to expose misconduct but to provide information to advance the external administration of the company[65] in deciding whether to commence proceedings against the insurer. The insurer and experts applied to the court to set aside the summonses on the grounds that their subject matter did not constitute "examinable affairs" of the company, they were oppressive and an abuse of process in that they were sought for the sole purpose of gaining a forensic advantage and any oral examination would not produce new information, which had not already been provided to the receivers or was subject to client legal privilege. Surprisingly, the insurers and experts did not seek access to the section 596C affidavit to establish oppression and abuse.

At first instance, Young CJ found no abuse of process or oppression and refused to set aside the summonses and orders for production. The insurer appealed the trial judge's decision. The trial judge's decision in relation to the examination summonses was upheld by the Court of Appeal. However the summonses for production of documents were set aside on the basis that they were subject to legal professional privilege.

The Court of Appeal clarified that:

1. there are limits to what constitutes a company's "examinable affairs"; and

[64] *Korda (Receiver and Manager) in the matter of South Eastern Secured Investments Limited* [2010] FCA 1417 at [29]
[65] *Meteyard v Love* [2005] NSWCA 444 at [6]

2. client legal privilege can be claimed by experts who are expressly retained by the client's lawyers rather than the client if they can be classified as agents of the client.

Examinable affairs

At [36-37] in *Meteyard v Love* [2005] NSWCA 444, the NSW Court of Appeal said:

> "The authorities support the proposition that the examinable affairs of a corporation include:
>
> (a) the existence of an insurance policy relating to the assets of the corporation;
>
> (b) the terms and conditions of such a policy;
>
> (c) where a claim has been made, the decision of the insurer with respect to the claim; and
>
> (d) where a claim has not been determined, the potential value of the claim.

However the Appeal Court cautioned that it should not be read so broadly as to include "any information which may affect the value of the property"[66] of the company.

The Appeal Court went on to state the four elements of section 596B(1)(b)(ii):

(a) "the proposed examinee may have "information" to give;

(b) the information must be relevant in the sense that it is about "examinable affairs of the corporation";

(c) the information should be information not within their knowledge, although the extent of knowledge will not be precisely definable, and

(d) there must be a factual basis for the Court to form a reasonable state of satisfaction that a proposed examinee may have relevant information."

In this case, the experts had been retained by the insurer to investigate the cause of the fire and the claims made, and focussed on whether exclusion clauses in the policy applied and whether there had been non-disclosures by the insured. The Appeal Court concluded that the internal assessment of the experts did not fall within the "examinable affairs" of the company and therefore amounted to an abuse of process even though the result of that assessment may be relevant to the insurer's decision and hence to the value and even solvency of the company. Such an assessment needs to be distinguished from the insurer's decision with respect to the claim and its grounds for refusal and from the information being assessed and the insurer's knowledge of particular information, all of which form part of the examinable affairs.[67]

---

[66] *Meteyard v Love* [2005] NSWCA 444 at [42]
[67] *Meteyard v Love* (2005) 65 NSWLR 36 at [43]

The court likened the adviser's internal assessment to the imposition of statutory regulation on the company, which would not constitute part of the company's examinable affairs, even though such actions may affect the company's affairs, including the value of its assets[68]. The court noted that the definition of "examinable affairs" relating to the affairs of a connected entity supports this because it is not sufficient that the connected entity's affairs have the potential to affect the value of the company's assets – the connected entity must be one over which the company can exercise control or material influence or one indebted to the company.[69]

In summary, the insurer's investigations, including the experts it hires for the purpose of investigating a claim and the information obtained from those investigations, are part of the examinable affairs of the company – the internal assessment by the insurer and the experts is not. Experts retained by an insurer can be examined to assist in the company's receiver deciding whether or not to institute proceedings against the insurer in respect of claims denied under the company's insurance policy, as information relevant to the company's management and administration and so part of its examinable affairs[70].

The appeal court noted that information relevant to instituting proceedings includes:

(a) "information necessary to assess the justification or otherwise of the denial, and

(b) in an appropriate case (of which this is not one) information as to the worth of the potential defendant in such proceedings"[71].

The court found that the following information would constitute information about the examinable affairs of the company because it would assist the receivers in deciding whether to pursue a claim under the policy[72]:

1. any material obtained by the insurer, through inquiries by its experts, to identify whether the exclusion clause under its policy operated;

2. the results of the insurer's investigations about any alleged non-disclosures by the insured;

3. any other potential issues as between the insured and the insurer; and

4. more broadly, information related to the state of the land, the mine and mining operations.

The court held that it could reasonably be inferred that material relevant to the above issues would have been collected by the experts and could be the subject of summonses, if not privileged and if not already provided[73].

[68] *Meteyard v Love* [2005] NSWCA 444 at [41]
[69] *Meteyard v Love* [2005] NSWCA 444 at [42]
[70] *Meteyard v Love* [2005] NSWCA 444 at [47]
[71] *Meteyard v Love* [2005] NSWCA 444 at [47]
[72] *Meteyard v Love* [2005] NSWCA 444 at [48-51]
[73] *Meteyard v Love* [2005] NSWCA 444 at [51-52]

Accordingly the Appeal Court upheld the examination summonses and left the scope of questioning and issues of oppression and abuse to be dealt with during the course of the examinations.

The question of privilege arose because the experts, retained by the lawyers, provided their reports to the lawyers so that they could provide advice to the insurer. The Appeal Court confirmed the well-established principle that client legal privilege applies to examinations and held that the reports were privileged, even though they had been commissioned by the lawyers and not the insurer. The Appeal Court held the trial judge had erred in holding that the reports were not privileged and set aside the orders for production. The reasoning of the Appeal Court was that it could be inferred that the experts were agents of the insurer because their fees were ultimately paid by the insurer and this permitted the experts to successfully claim client legal privilege.

The question of whether privilege may be claimed in relation to documents ordered to be produced should be disclosed to the court in the section 596C affidavit. This will allow the court to frame orders to omit the privileged documents or deal with claims for privilege in the usual way. In later proceedings, fresh orders for fewer documents were made[74], allowing this process to be utilised.

ASIC Act

The examination provisions are found in Part 3 headed "Investigations and Information Gathering" and Division 2 of that Part contains the substantive provisions. The provisions provide for private examinations of persons that ASIC suspects or believes on reasonable grounds can give information relevant to a matter that ASIC is investigating or is to investigate.

What precedes an examination?

Before ASIC decides to examine a person, it must be investigating or will investigate a matter and suspect or believe that a person can give relevant information in relation to such matter[75]. ASIC makes an investigation where it suspects a contravention of the ASIC Act, the Corporations Act or a contravention of a law that concerns a company or a managed investment scheme or involves fraud or dishonesty in relation to a company, a managed investment scheme or financial product[76]. Once triggered, an investigation and any examination is not limited in its scope to these contraventions[77]. ASIC's suspicion may be based on information provided by an informant.

Who conducts examinations?

ASIC may by prescribed written notice require such person to give ASIC all reasonable assistance in connection with the investigation and to appear before a specified member or staff member for examination on oath and to answer questions[78]. This means that notices can be issued to persons who just happen to possess information relevant to an investigation involving the conduct of other persons[79].

---

[74] *Re Southland Coal Pty Ltd (recs and mngrs appt)(in liq)* (2006) 58 ACSR 113
[75] Section 19(1) ASIC Act
[76] Section 13(1) ASIC Act
[77] See "Grounds for challenging an ASIC examination".
[78] Secton 19(2) ASIC Act
[79] *Australian Securities Commission v Lucas* (1992) 36 FCR 165 at 171

Who can be examined?

Any person who ASIC suspects or believes can give relevant information to an investigation can be examined[80].

Notice of examination

The notice must be in the prescribed form[81]. The prescribed form requires attendance at a certain place and time and that all reasonable assistance be given to ASIC in connection with the investigation. The prescribed form does not specify any particular assistance but contemplates that after service, ASIC may make particular requests. There is no legislative requirement that each request for assistance must be by way of a fresh notice in the prescribed form provided it relates to the same investigation[82].

The notice must state the "general nature" of the matter being investigated[83]. It has been repeatedly held that this expression "invites both comprehensiveness and brevity in description of the matter": *Australian Securities Commission v Graco* (1992) 29 FCR 491; *Johns v Connor* (1992) 35 FCR 1 at 13; *Johns v Australian Securities Commission* (1992) 35 FCR 146 at 167; *Kennedy v Australian Securities and Investments Commission* (2005) 52 ACSR 301 at 324.

In *Johns v Connor* (1992) 35 FCR 1, the notice was held invalid and an injunction was granted to restrain ASIC from taking any further steps in relation to the notice. The Federal Court held the notice invalid because it said nothing about any possible contravention that some company or person may have committed or the particular "affairs" that were the subject of investigation. It simply stated that the matter being investigated were the company's affairs over a 3 month period and affairs is a word of the widest import and adds very little. The only words of limitation were those specifying a 3 month period and this was held insufficient.

The court distinguished *Australian Securities Commission v Graco* (1992) 29 FCR 491, where the court indicated that if the notice, which simply identified the company and said nothing more, had specified a particular time period in the history of the company's affairs, that would have been sufficient. The court distinguished the case on the basis that the comments were made in the context of what was sufficient to enable the examinee to determine the relevance of questions and not was sufficient for the notice[84]. In addition the reason in *Graco* for the notice being held invalid was the lack of direct evidence that the precondition to issuing an examination notice had been satisfied, namely a suspicion that a contravention may have been committed.

In *Johns v Australian Securities Commission* (1992) 35 FCR 146 at 167-168, the court noted that a notice must identify the matter in such a way that the recipient can "perceive the general ambit of the subject matter of the investigation" and will usually include a reference to the specific law suspected of being contravened. The court held in the context of an investigation made pursuant to a ministerial direction under section 14, specifying a time period without more was sufficient on the facts of the case and is distinguishable on that basis. However it was noted at page 168 that a

[80] Section 19(1) ASIC Act
[81] Section 19(2) ASIC Act and Form 1 Schedule 1 ASIC Regulations 2001 (Cth)
[82] *ASIC v Sigalla (No. 2)* [2010] NSWSC 792 at [44]
[83] Section 19(3) ASIC Act
[84] *Johns v Connor* (1992) 35 FCR 1 at 14

notice issued to investigate "the possible contravention of a specific law…… will usually include a reference to that law"[85].

In *Stockbridge v Ogilvie* (1993) 43 FCR 244, it was held that a s 19 notice did not have to identify the person suspected of the contravention.

In *Kennedy v ASIC* (2005) 142 FCR 343 at 367-368, the contraventions were listed with much great particularity, giving the body of facts supporting each contravention and the notice was held to be valid. In *ASIC v Sigalla (No. 2)* [2010] NSWSC 792 at [105], the court held it was not necessary to particularise every suspected contravention being investigated.

From the authorities cited, it appears that key features of valid notices in terms of stating the general nature of the matter sufficiently are a reference to the corporation under investigation, the specification of a time period in relation to the conduct being investigated, the suspected contravention as it relates to the examinee in question and the body of facts or conduct that constitute the contravention. A summary of the conduct was provided in the notices in *Little River Goldfields NL v Moulds* (1991) 32 FCR 456. The conduct or facts constituting the contravention are not needed if the provision itself is sufficiently specific to disclose the conduct. However if the provision is broad (eg. offence of conspiracy), then the notice may need to narrow the reference to the section by including some words of limitation or explanation[86].

If the notice completely misstates the matter to which the request relates, that mistake will invalidate the notice.

The notice must also notify the examinee[87] of the effect of sections 23(1) and 68 ASIC Act, namely (a) the examinee's right to have their lawyer present, who may address the inspector and re-examine[88] and (b) the abrogation of self incrimination privilege[89].

Grounds for challenging

Corporations Act

To successfully challenge an examination summons, the examinee must show that it is arguable that the examiner had an improper purpose and that there are no discretionary reasons why access to the affidavit should be refused[90]. The test can be difficult to apply and must be viewed in light of the statutory framework.

First, it is beyond the power of the court issue an examination summons if the company is not or has not been affected by a process of external administration or any of the Chapter 5 processes (winding up, administration, receivership or deed of arrangement)[91]. The examinations power must be characterised as incidental to the

[85] Cited with approval in *Boys v Australian Securities Commission* (1997) 80 FCR 403 at 424
[86] *Australian Securities Commission v Avram* (1996) 70 FCR 481 at 485
[87] Section 19(3)(a) and (b) ASIC Act
[88] Section 23(1) ASIC Act
[89] Section 68 ASIC Act
[90] *Fetzer v Irving* (2005) 91 SASR 54 at [27]
[91] *Highstoke v Hayes Knight GTO* (2007) 156 FCR 501

exercise of judicial power to fall within the Commonwealth's legislative power and it has been so characterised on the basis that it is in aid of external administration. If the examination is not in aid of some process of external administration, the Commonwealth's powers are exceeded and the principle of separation of powers is breached[92]. Every company would be at risk of having its officers or other witnesses examined to the possible detriment of the company. The examination procedure is to aid persons who have the responsibility of the external administration of the company in carrying out its duties[93].

Second, it is an abuse of process if the examination power is being used for a purpose foreign to the purpose for which it was given. The legitimate purposes of an examination which emerge from the legislation and the authorities are as follows:

1. to enable the applicant to gather information to assist it in the administration of the company;

2. to assist in the identification of company assets and liabilities;

3. to protect the interests of creditors;

4. to obtain evidence and information in support of civil and criminal proceedings against officers of the company and other persons;

5. to assist the regulation of companies by providing a public forum for examinations[94].

If the examinations power is used for a purpose foreign to these, it will be regarded as an abuse of process.

The process of examination is designed to "make the corporation's examinable officers and other persons …accountable to those who are obliged to act in the interests of the corporation"[95].

The onus of satisfying the court that there is an abuse of process is on the party alleging it and that party must establish that the improper purpose is the predominant one[96]. The courts have an inherent jurisdiction to stay proceedings which are an abuse of process.

While such extraordinary powers of public examination need to be conducted for a proper purpose, the idea of proper purpose cannot be constrained by any narrow concept[97]. An examination may be conducted with a view to recovering property, to obtain information to assist in deciding whether to commence or continue with litigation[98] (including against former professional advisers of the company such as

[92] *Highstoke v Hayes Knight GTO* (2007) 156 FCR 501 at 535
[93] *Wainter Pty Ltd, in the matter of New Tel Limited (in liq)* [2005] FCAFC 114 at [245]
[94] *Evans v Wainter Pty Ltd* (2005) 145 FCR 176 at [252]
[95] *Evans v Wainter Pty Ltd* (2005) 145 FCR 176 at [251]
[96] *RE D W Marketing Pty Ltd (in liq)* [2009] VSC 663 at [42]
[97] *Flanders v Beatty* (1995) 16 ACSR 324
[98] *Morton v Johnson* [1999] FCA 530.

accountants, against directors or former directors of the company, or even against the examinee), to obtain information to support criminal charges[99], to assess whether to bring proceedings against the company's insurer in relation to a denial of liability or to assess the worth of the potential defendant[100].

The examination will not be improper merely because it assists in gathering evidence which will help other parties such as creditors in litigation or possible litigation[101]. Questions of a fishing nature are permitted and provided the predominant purpose is not to advance other litigation, any admissions or material obtained in an examination are available for use in evidence in other civil proceedings[102]. It was held in a Queensland Supreme Court case that the ground that an examination may give the other side further lines of inquiry and be said to prejudice those other proceedings is not sufficient to support an adjournment because that would frustrate the statutory purpose of examinations and negate the statutory removal of self incrimination privilege[103].

Whether the circumstances amount to an abuse will depend upon the purpose of the examination rather than the result and that purpose must be the predominant purpose rather than a by-product[104].

The examination must be relevant to the statutory duty being performed by the liquidator or other examiner. A liquidator may seek information in connection with proceedings which might be able to be brought, proceedings in contemplation, proceedings decided to be brought and proceedings already brought if done for the purpose for which the examination power was given[105]. That having been said, the distinction between a proper and improper purpose can be a fine one.

What is an improper purpose was discussed in *Williams v Spautz* (1992) 174 CLR 509 and the proposition is set out in the headnote as follows:

> Proceedings are brought for an improper purpose and thus constitute an abuse of propose where the purpose of bringing them is not to prosecute them to a conclusion, but to use them as a means of obtaining some advantage for which they are not designed or some collateral advantage beyond what the law offers.[106]

The fundamental question is whether the examination power is being used for a purpose foreign to the purpose for which it was given. If it is, then it is an abuse of process for that reason. It is not possible to catalogue all the circumstances which might constitute an abuse of process but cases have indicated that it would be an abuse of process if the following purposes of the examination are found to be the predominant purpose.

---

[99] *Hamilton v Oades* (1989) 166 CLR 486 at 498
[100] *Meteyard v Love* [2005] NSWCA 444 at [44]
[101] *New Zealand Steel (Aust) Pty Ltd v Burton* (1994) 13 ACSR 184
[102] *Morton v Johnson* [1999] FCA 530 at [7]
[103] *Re Ardina Electrical (Qld) Pty Ltd (in liq*) (1992) 10 ACLC 606
[104] *In the matter of Idoport Pty Ltd (in liq)* [2011] NSWSC 322 at [173]
[105] *Bell Group Ltd (in liq) v Westpac* (1998) 28 ACSR 343
[106] Cited in *Re Sheahan* [2010] NSWSC 1255 at [27]

First, it is an abuse of process to examine a person for a purpose unconnected with the legitimate purposes identified above[107].

Second, it is an abuse of process to examine about extraneous matters (information of or in relation to third parties) and not the examinable affairs of the company[108].

Third, it is an abuse of process to examine about matters in relation to which the examiner already has full knowledge, noting however that an examiner is entitled to investigate whether the same information previously given by an examinee would be given on oath[109].

Fourth, it is an abuse of process to assist the applicant to obtain information that would assist the applicant in other litigation brought for the benefit of that applicant alone and not for the benefit of the company, its creditors or contributories[110], whether or not that litigation has commenced.

The following examples of examinations for purely private purposes have been held to be an abuse of process:

(a) an examination to obtain evidence in defamation proceedings involving the examinee[111];

(b) an examination of directors to get information purely to aid the examiner's private litigation[112];

(c) an examination to obtain information that would assist in an action brought for the benefit of one creditor unless it benefits the company, contributories or creditors as a whole[113].

There can be no objection to the use of an examination by a creditor whose purpose is to ensure that their debt is paid because that purpose operates for the benefit of the company and all creditors. In *Excel Finance Corporation Ltd (Receiver and Manager Appointed); Worthley v England* (1994) 52 FCR 69, the Full Court of the Federal Court of Australia stated, at 93:

> "After all, if the creditor were unsecured the interests of that creditor are no different from the interests of all other creditors who share rateably in the distributable assets of the company. Even in a case where the creditor was a secured creditor, the fact that the purpose of the examination was to aid the ultimate recovery of the secured debt, by, for example, the ascertaining of the existence of assets, would operate to the benefit of the company by ensuring that it paid out the

[107] *Evans v Wainter Pty Ltd* (2005) 145 FCR 176 at [252]
[108] *In the matter of Idoport Pty Ltd (in liq)* [2011] NSWSC 322
[109] *Re Godfrey as Liquidator of Pobjie Agencies Pty Ltd (in liq)* [2007] NSWSC 138 at [68]
[110] *Evans v Wainter Pty Ltd* (2005) 145 FCR 176 at [252]
[111] *Flanders v Beatty* (1995) 16 ACSR 324 at 335
[112] *Re Imperial Continental Water Corporation* (1886) 33 Ch D 314.
[113] *New Zealand Steel (Australia) Pty Ltd v Burton* (1994) 13 ACSR 610 at 616 per Hayne J

> secured creditors and that there was then revealed what other assets (if any) were available for distribution to unsecured creditors."

Similar reasoning applies such that there can be no objection to the use of an examination by a liquidator whose purpose is to protect the assets available in a winding up even if this assists a creditor to pursue their own interests[114].

Fifth, it is an abuse of process to allow the applicant to use the examination solely to obtain a forensic advantage[115]. For example, if the examinee or the examinee's probable witnesses in a pending or subsequent action were examined simply for the purpose of destroying their credit[116] or as a dress rehearsal for their cross-examination in such pending or subsequent action, that would be an improper purpose[117]. Such an inference of improper purpose will be more likely if at the time of the summons, the pending action is ready or almost ready for trial[118]. Likewise, seeking to obtain the discovery of documents after a discovery order has been refused or to obtain answers to interrogatories where leave has been refused[119].

However an improper purpose is not established simply because litigation is pending or proposed against the examinee[120] or simply because a forensic advantage will be gained by an applicant for an examination order in the capacity of litigant provided the predominant purpose is to benefit creditors, contributories or the public[121]. An examiner is entitled to use the power to gain an incidental forensic advantage and obtain information which might assist in the conduct of litigation[122]. The fact that litigation is funded on the condition that an examination occur does not establish an improper purpose[123]. There is ample authority applying the principle that a liquidator is given this special advantage not available to ordinary litigants, through the power of examination, to compensate for the fact that a liquidator is disadvantaged in gathering reliable information about the company[124]. The question is whether the liquidator might be going beyond an investigation of matters to enable him to carry out the liquidation more effectively and is instead seeking to obtain an unfair advantage in other litigation so as to amount to injustice. The likelihood of injustice must be a practical reality; a theoretical tendency is not sufficient[125].

In *Re Southland Coal Pty Ltd (in liq)* [2005] NSWSC 259 at [39], Young J noted that while an examination that would disclose "defences or amount to de facto discovery may be restrained as an abuse of process, it does not follow that the examination must be restrained if there is a chance that this will occur".

---

[114] *Re Laurie Cottier Productions Pty Ltd* (1992) 9 ACSR 513
[115] *Re New Tel Ltd (in liq); Evans v Wainter Pty Ltd* (2005) 145 FCR 176 at [252]
[116] *Re Hugh J Roberts Pty Limited (lin liquidation)* [1970] 2 NSWLR 582 at 585
[117] *Re Normans Wines; Harvey v Burfield* (2004) 88 SASR 541 at 552 [42] per Mullighan J
[118] *Fetzer v Irving* (2005) 91 SASR 54 at [31]
[119] *New Zealand Steel (Aust) Pty Ltd v Burton* (1994) 13 ACSR 610 at 617
[120] *Re New Tel Ltd (in liq); Evans v Wainter Pty Ltd* (2005) 145 FCR 176 at [262]
[121] *Hong Kong Bank of Australia v Murphy* (1992) 28 NSWLR 512 at 519
[122] *Hong Kong Bank of Australia v Murphy* (1992) 28 NSWLR 512 at 513
[123] *Fetzer v Irving* (2005) 91 SASR 54
[124] *Hamilton v Oades* (1989) 166 CLR 486 at 449; *Re Quintex Group Management Services Pty Ltd (in liq)* [1997] 2 Qd R 91 at 94
[125] *Spedley Securities Limited (in liquidation) v Bank of New Zealand* (1990) 3 ACSR 366, 9 ACLC 124

It was further noted in *Re Hugh Roberts Pty Ltd* [1970] 2 NSWR 582 at 541-2 that:

> "very often the gathering of information quite properly involves testing the reliability or credit of the examinee from whom the information is being obtained". Nevertheless "the fact that current proceedings are pending makes it necessary for the court to be alert to the possibility that a proposed application might be used for an improper purpose"[126].

The investigation of facts to ascertain whether or not a cause of action might exist against the examinees or other officers is a proper purpose of an examination. The Court of Appeal cited with approval at 518, Street J in *Re Hugh Roberts Pty Ltd* [1970] 2 NSWR 582 at 541:

> "A liquidator needs information concerning his company just as much in connection with current or contemplated litigation as in connection with other aspects of its affairs. ……It is immaterial in basic substance whether the private examination is sought to be used by a liquidator to gather information in connection with proceedings he believes he might be able to bring, proceedings he contemplates bringing, proceedings he has decided to bring, and proceedings he has already brought."

In that case, the new trustees of the Estate Mortgage Trusts were authorised by the Australian Securities Commission to examine certain persons about the affairs of the old trustee, now wound up. At that time, proceedings had been brought by the new trustees against the examinees in relation to their involvement in alleged breaches of trust by the old trustee. The examinees sought to have their examination orders set aside on the ground that they were obtained for an impermissible purpose, namely pre-trial interrogation and discovery for the benefit of the new trustee in its private litigation. The Court of Appeal upheld the lower court's finding that there was no abuse of process. The purpose of the examination by the new trustee was to gather information, which may assist in prosecuting causes of action pleaded in current litigation for the benefit of all those owed money as a consequence of the financial failure of the trust. That was a legitimate purpose[127].

The Court of Appeal noted in *Hong Kong Bank of Australia v Murphy* (1992) 28 NSWLR 512 at 519 that "whilst the court will not permit a liquidator, or other eligible person, to abuse its process by using an examination solely for the purpose of obtaining a forensic advantage not available from ordinary pre-trial procedures, such as discovery or inspection, on the other hand, the possibility that a forensic advantage will be gained does not mean that the making of an order will not advance a purpose intended to be secured by the legislation". The very nature of the proceedings allow for the real possibility that an applicant will obtain an evidentiary advantage or a forensic advantage not otherwise available to other parties to other litigation. That is accepted because it is perceived that a liquidator or administrator is at a real disadvantage in investigating the affairs of a company and ascertaining the whereabouts and value of assets and responsibility for the collapse of the company[128].

---

[126] *Hong Kong Bank of Australia v Murphy* (1992) 28 NSWLR 512 at 519
[127] *Hong Kong Bank of Australia v Murphy* (1992) 28 NSWLR 512 at 520
[128] *Southern Cross Petroleum Sales (SA) Pty Ltd (in liq) v Hirsch* (1998) 70 SASR 527

Challenging an examination summons depends upon the applicant's purpose in seeking the examination and all of the surrounding circumstances. A further determination of whether this helps the applicant obtain some advantage in the pending or subsequent litigation is not necessary if the fundamental finding is that the power is being used for a purpose foreign to the purpose for which it was given.

Sixth, it is an abuse of process to exert pressure by inflicting costs, or causing undue inconvenience or embarrassment to the examinee[129]. However an examinee can be examined more than once if the liquidator has an ongoing interest in monitoring or the information obtained is now out of date[130].

Seventh, it is an abuse of process to obtain de facto discovery where a discovery order has been refused in proceedings already on foot[131] or to overcome refusal to answer interrogatories.

Eighth, it is an abuse of process to be vexatious, oppressive or abusive[132] For example, it is relevant whether the examiner has demonstrated himself to be an impartial person to be entrusted with such powers or someone inclined to take an adverse view reflecting some degree of personal emotion, ill feeling[133] or malice arising for previous personal dealings with the examinee or accusations against the examinee. Evidence of threats[134] to use the examinations process to inflict adverse publicity and the number of summonses issued has been held sufficient to establish an arguable case of improper purpose[135]. Liquidators should take care to avoid inferences of abuse of power based on a creditor's or funder's improper influence in the examinations process.

ASIC Act

An examination can be challenged if the examinee proves that it was exercised for an unauthorised purpose, namely a purpose foreign to ASIC's examinations power or in bad faith[136].

The examinations power must only be exercised in a formal investigation, where ASIC suspects or believes that a person can give relevant information to a matter being investigated or a matter that will be investigated. The examinations power can be challenged if that precondition is not satisfied or the investigation is not authorised for a section 13(1) purpose[137].

---

[129] *Re Qintex Group Management Services Pty Ltd (in liq)* [1997] 1 Qd R 91
[130] *Jagelman v Sheahan (as liq) of Moage Limited* [2002] NSWSC 419 at [4]
[131] *New Zealand Steel (Australia) Pty Ltd v Burton* (1994) 13 ACSR 610
[132] *Meteyard v Love* (2005) 56 ACSR 487 at [45]
[133] *In the matter of Idoport Pty Ltd (in liq)* [2011] NSWSC 322 at [180]
[134] *Re Bauhaus Pyrmont Pty Ltd (in liq)* [2006] NSWSC 543 at [91]. The creditor funding the liquidator made threats to the directors to use the examination to pressure them into settling his claims and the court held the liquidator shared the creditor's purpose and was abusing his powers.
[135] *Ariff v Fong* [2007] NSWCA 183
[136] *Australian Securities Commission v Lucas* (1992) 36 FCR 165
[137] In *ASIC v Sigalla (No. 2)* [2010] NSWSC 792, the court held that the use of material on a production order was not limited to the original contravention of the Corporations Act triggering the investigation, namely a contravention of section 1323 but could be used in contempt proceedings, which was a purpose authorised by section 28.

An investigation can only be exercised where ASIC suspects a contravention of the type described in section 13(1) ASIC Act but once enlivened, the investigation is not so restricted and extends to such investigation as ASIC thinks expedient for the due administration of the corporations legislation and extends to contraventions of the general law and additional matters[138]. The potential wide scope of the investigation therefore permits an examination of similar scope. There is nothing is sections 13 or 19 to limit the scope of the investigation or examination except that that the investigation be what ASIC thinks expedient for the due administration of the corporations legislation.

As a consequence, material obtained in an examination can be used in relation to an additional contravention, in addition to the original suspected contravention stated in the notice triggering the investigation and to pursue a sanction that is not the sanction specifically provided for in the corporations legislation in relation to the original suspected contravention[139].

ASIC's power to compel production of documents must only be exercised for a section 28 purpose which are similar to the purposes for which an investigation is made and also include the purpose of carrying out an investigation[140] and ensuring compliance with the ASIC Act and the Corporations Act[141]. The potential wide scope of the section 28 purposes therefore permits a production notice of similar scope. The power to retain and use those documents goes further to include using those documents for the purpose of any proceeding in court[142].

A challenge can be made as to the formal validity of the examination notice at common law and under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (the "ADJR Act")[143].

A notice issued by way of a deliberate abuse of power is unenforceable, but mere careless exercise of power does not in itself invalidate a notice[144]. If, however, the notice does not state at least the general nature of the matter being investigated in an accurate and comprehensive fashion (although not necessarily at length), it may be challenged.

The test is whether the breach frustrates the purpose of the statutory requirement by preventing the recipient being in a position to assess the general ambit of the subject matter of the investigation[145]. If that test is not satisfied, the notice may be held invalid. From the authorities cited, it appears that key features of valid notices are the specification of the particular provisions of the law that the examinee is said to have contravened together with further information (such as the specification of a time

[138] *ASIC v Sigalla (No. 2)* [2010] NSWSC 792 at [31] and [78]
[139] *ASIC v Sigalla (No. 2)* [2010] NSWSC 792 at [31]
[140] Section 28(a) and (d) ASIC Act
[141] Section 28(b) ASIC Act
[142] Section 37(5) ASIC Act
[143] The decision to commence an investigation is not so reviewable because it lacks sufficient finality to constitute a reviewable decision for the purposes of the ADJR Act *(Little River Goldfields NL v Moulds* (1991) 32 FCR 456).
[144] *Potato Marketing Board v Merricks* [1958] 2 QB 316 at 333-4
[145] *Johns v Australian Securities Commission* (1992) 35 FCR 146 at 167-168

period) to indicate, at least in a general fashion, when or in what circumstances the contraventions occurred.

It is not settled in the case law as to whether the purpose of the test is to provide a means of determining the relevance of questions put to the examinee. One approach is that is does not because the notice is not a pleading[146]. The other approach is that the purpose of the test does involve the provision of such information as to allow the examinee to determine the likely questions to be asked and to come prepared[147].

The latter approach recognises a great degree of flexibility in ASIC's investigatory role but not an unrestricted flexibility. The Federal Court in *Australian Securities Commission v Avram* (1996) 70 FCR 481 at 487 said:

> "Had that been intended, the ASC would have been given power to summon persons without having to state the purpose of the summons. The power to command attendance at an examination is a mighty power. Not only does it interfere with a citizen's general interest in privacy and liberty, but it abrogates, albeit to a defined degree, the citizen's right to remain silent. The requirement that the notice define the general nature of the matter under investigation or to be investigated appears to be a legislative attempt to protect the interest of a citizen in knowing the purpose for which a public agency may be requiring the citizen's attendance for examination. Given the intrusion into the life and affairs of a citizen which the examination entails, it is not likely that the legislature intended to preclude a court, in determining whether the notice states the general nature of the investigation, from considering whether a notice forewarns the examinee of the likely questions to be asked."

Evidence obtained through the invalid notice may be held inadmissible as having been improperly obtained pursuant to section 138 Evidence Act unless the desirability of admitting it (which depends on the seriousness of the charges and the probative value of the evidence) outweighs the undesirability of admitting it. One situation in which this will be likely is if ASIC is found to have carelessly issued the notice, in circumstances where a notice could readily have been given that was within ASIC's power[148].

Conduct

Corporations Act

Section 597(4) provides that an examination is to be held in public except to such extent (if any) as the Court considers that, by reason of special circumstances, it is desirable to hold the examination in private.

Special circumstances have been held to mean "something abnormal about the particular case" and "something sufficiently different from the ordinary case'[149].

---

[146] *Australian Securities Commission v Graco* (1991) 29 FCR 491 at 495; *Johns v Connor* (1992) 35 FCR 1 at 13

[147] Australian Securities Commission v Avram (1996) 70 FCR 481 at 487

[148] *ASIC v Sigalla (No. 2)* [2010] NSWSC 792 at [128]

[149] *Corporate Affairs Commission v Lombard Nash International Pty Limited (No 4)* (1988) 6 ACLC 135 at 138.

The following factors do not constitute special circumstances:

- the fact that the examinee has also been charged with criminal offences relating to the company which is the subject of the examination;
- that there has been a large amount of publicity surrounding the matter;
- that there is a reasonable expectation that the public examination will be reported in the newspapers[150];
- that a creditor may gain information not otherwise available to it for use in litigation in relation to its debt;[151]
- that the financial and tax affairs of the examinee would normally be private;[152] or
- that the information obtained might be embarrassing[153].

The court has also indicated a reluctance to issue orders prohibiting the publication of proceedings except in the most exceptional circumstances because the policy behind the legislation is that the honest conduct of a company's affairs is a matter of great public concern[154]. Since no dispute is resolved upon the hearing of an examination, the benefit must be seen in the general publication of the proceedings. This might lead to further information being provided from other sources and deter improper activities of company officers by publicity.

Nevertheless the court retains the power under section 596F of the Corporations Act and its inherent powers to control the examination to avoid injustice to the examinee[155]. Pursuant to these powers, the court may direct that the examination be held in private, that publication of information about the examination or access to records of the examination be restricted; and that questioning not be oppressive, unjust or irrelevant. It is an offence for a person to contravene a direction given by the court.[156]The penalty for contravention is a maximum of 100 penalty units ($11,000) or imprisonment for 2 years. The court should not direct the examiner to notify the examinee about the matters to be covered at the examination[157].

The court may give a direction about who may be present at an examination. It may be undesirable for one examinee to hear the evidence of another examinee before being examined. Questioning directed to compelling an examinee to disclose defences to a pending trial, to give pre-trial discovery or to establish guilt may be restrained by the court as an abuse of process[158]. However the types of questions that may warrant court intervention should not be predicted in advance of their being asked. While a question designed to elicit a direct admission of guilt may be restrained, an answer to

[150] *Corporate Affairs Commission v Lombard Nash International Pty Limited (No 4)* (1988) 6 ACLC 135 at 138.
[151] *Lamb v Fixler* (1994) 13 ACSR 447
[152] *Re Pan Pharmaceuticals Ltd* [2003] NSWSC 1204; *Re Lift Capital Partners Pty Ltd (in liq)* [2008] NSWSC 1369 at [15]
[153] *Topp v Imagine Un Limited Pty Ltd* [2009] NSWSC 661 at [36]
[154] *Friedrich v Herald & Weekly Times Ltd* (1989) 1 ACSR 277 at 288
[155] *Hamilton v Oades* (1989) 166 CLR 486 at 498-9
[156] Section 596F(3)
[157]*Freshkept Technology Pty Ltd (in liq) v Goodwin [2000] VSC 500 at 597*
[158] *Hamilton v Oades* (1989) 166 CLR 486 at 498-9

a question which may tend to incriminate the examinee is not enough in itself to create oppression or injustice[159].

The question is whether there is a real or substantial risk that the particular question and answer will, if published, cause serious injustice (for example, collusion of witnesses, effect on pending criminal trial, use of confidential documents) which outweighs the need for publicity being an essential element of the purposes of examinations[160]. The theoretical possibility that the criminal trial of an accused may be prejudiced cannot justify restraining questioning into matters of public interest simply because they relate in some way to the subject of a charge unless that public interest can be still be met without further examination of the accused[161]. In this regard, it is irrelevant to make assumptions about whether questions and answers in evidence will be misreported. Inaccurate reporting is no basis for a general order prohibiting publication. If this occurs, the appropriate remedy is contempt proceedings and the seeking of an injunction.

ASIC and any other eligible applicant may take part in the examination whether or not that particular eligible applicant actually applied for the examination[162] and their lawyer may therefore put questions to an examinee and request access to documents produced.

The range of questions which may be put to an examinee is a matter for the discretion of the Court[163]. The court has an obligation to ensure that the examiner is limited to questions relating to the examinable affairs of the corporations and that no questions go outside those affairs[164].

ASIC Act

An ASIC examination must be held in private[165] and the inspector may give directions about who might be present[166]. The examinee is permitted to have a lawyer present[167] but their role is limited. The lawyer may address the inspector and re-examine the examinee about matters examined but only at such times as the inspector permits[168]. If the inspector believes that the lawyer is trying to obstruct the examination, they may require the lawyer to cease participating in the examination and if they fail, the lawyer is liable to a fine of $550[169].

---

[159] *Hamilton v Oades* (1989) 166 CLR 486 at 498

[160] *Friedrich v Herald & Weekly Times Ltd* [1990] VR 995 at 1007. In that case the court held no injustice would be done by fair and accurate reporting of the examination, despite the examinee's pending criminal trial taking account of the fact that the criminal trial was many months after the examination and appropriate directions would be given at the trial. The court also noted that other remedies exist if the reporting is not fair and accurate.

[161] *Hammond v Commonwealth* (1982) 152 CLR 188 at 199. In that case, the High Court held that the public interest in the Royal Commission inquiry could still be met without further examination of the plaintiff because it was not simply an inquiry into allegations against the plaintiff but industry wide malpractices. An injunction was granted to retrain further examination.

[162] Section 597(5A)

[163] Section 597(5B)

[164] *Southern Cross Petroleum Sales (SA) Pty Ltd (in liq) v Hirsch* (1998) 70 SASR 527

[165] Section 22(1) ASIC Act

[166] Section 22(1) ASIC Act

[167] Section 23(1) ASIC Act

[168] Section 23(1) ASIC Act

[169] Sections 23(2) and 63(4) ASIC Act

The inspector also has an implied power to exclude a particular lawyer if he believes that the lawyer's attendance will likely prejudice the investigation[170]. This is an extraordinary power and it is the author's view that it would be preferable for the power to be statutorily limited to certain situations. For example, if one lawyer represents a number of examinees in the same investigation, there is a risk that a lawyer might inadvertently divulge to one examinee what occurred in the examination of another and this could be specified by statute.

A lawyer should be able to object on behalf of the examinee as to the relevance of ASIC's questions and either to remind the examinee or to claim on the examinee's behalf those privileges that can be claimed during the examination and to make submissions at the end of the examination as to how the examinee's testimony should be viewed. However there is no recognition in the ASIC Act of these rights and the extent of the lawyer's participation is subject to the views of the inspector under section 23 of the ASIC Act. In the author's view, this is entirely unsatisfactory and should be subject to reform.

ASIC also has implied power[171] to issue non-disclosure orders as to what was discussed during the examination but they must be limited in time, and in practice, the date of cessation given is the date the investigation concludes.

ASIC has a duty to accord natural justice in relation to at least certain aspects of an examination because its publicity can prejudice the private, commercial and business reputation of a proposed examinee. However the content of the rules take account of the power being exercised[172].

The requirements of procedural fairness in the context of an ASIC examination were identified by the High Court in *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296 and cited with approval in *Boys & Ors v Australian Securities Commission & Ors* [1997] FCA 519. The News Corporation case involved a hearing by the Commission's predecessor ("the NCSC"). The High Court categorised the hearing as being inquisitorial rather than adversarial. The Court held that the NCSC complied with its statutory mandate when it stated that it would allow each person called at the hearing to have legal representation during his examination, the right to be re-examined by his representative if he so wished, that it would provide each witness with a copy of the transcript of his evidence and that if at the conclusion of the hearing the NCSC proposed to publish any matter adverse to or critical of any such person, it would afford him an opportunity to be heard and call evidence on such matter before proceeding further.

There is no duty to accord natural justice in relation to allegations made against the examinee because the examination is inquisitorial in nature. A lower standard applies in an examination as opposed to a trial. There is no case put against the examinee or

[170] *Gangemi v ASIC* [2003] FCA 494
[171] Implied from section 22(1) in relation to the privacy of examinations and section 24 and 25 in relation to restricting the publication of the written record of the examination (*Gangemi v ASIC* [2003] FCA 494 at [33]).
[172] *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229 at [184].

any case in reply[173]. However the rules of natural justice do require that the examinee be given a fair opportunity to correct or contradict material prejudicial to them or any possible adverse findings against them. That does not necessarily permit the examinee to cross-examine other witnesses[174].

An examinee is entitled to prior notice of any decision by ASIC to affect his statutory right to confidentiality[175] and may seek an injunction to prevent the public disclosure by ASIC of the transcripts on the basis that the Act implicitly provides that an examinee is entitled to prior notice of any decision affecting his right to confidentiality, such as a decision to release transcripts[176].

Abrogation of protections

In both Corporation Act and ASIC examinations, answers to questions must be given and this must be done on oath before the court or may be so required before the ASIC examiner[177]. There is no right to silence.

An examinee cannot refuse to answer a question on the grounds of privilege against self incrimination[178] or penalty privilege. In this regard, the Corporations Act and the ASIC Act override the Evidence Act[179]. However where the examinee has claimed privilege against self incrimination, the answer cannot be admitted in evidence in a criminal proceeding or a proceeding for the imposition of a penalty[180], excluding a penalty by way of a disqualification order or banning order[181]. Although answers are not admissible in criminal or penalty proceedings, however, they are admissible in civil proceedings against the examinee, proceedings for a disqualification order or banning order and proceedings against other persons. This is justified on the basis that examinations powers are for the purposes of the examination and once complete and civil proceedings have begun, such powers are no longer used, and privilege against self-incrimination is reinstated with respect to any new evidence given in the civil proceedings. Regardless of the cut off date for use of the examination powers, the ability to use evidence obtained in an examination continues for the purpose of subsequent litigation.

The erosion of this protection has wider implications for examinees in ASIC examinations simply by virtue of the fact that ASIC examinations can be conducted in a wider range of circumstances, namely to help ASIC fulfil its regulatory role provided a formal investigation has been launched. Where such examinees are later the subject of court proceedings, the ability of litigants to utilise confidential information or privileged information disclosed in examinations directly or indirectly

---

[173] *Ryan v Australian Securities and Investments Commission* [2007] FCA 59 at [68].
[174] *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229 at [183].
[175] In *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 422 Brennan noted that the Act "maintains the traditional privacy of examinations……out of consideration for the commercial reputation of the company and the protection of witnesses".
[176] *Ryan vAustralian Securities and Investments Commission* [2007] FCA 59 at [65].
[177] Sections 19 and 21 ASIC Act and Sections 596 and 596D of the Corporations Act
[178] Section 68(1) ASIC Act and section 597(12) Corporations Act
[179] Section 8(3) of the Evidence Act 1995 (Cth) and section 8 of the Evidence Act 1995 (NSW)
[180] Sections 68(3) and 76(1)(a) ASIC Act and Section 597(12A) Corporations Act
[181] Section 1349 Corporations Act introduced after *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129.

arises. In the case of self incrimination privilege, the abrogation applies equally to Corporations Act and ASIC Act examinations with the limited immunity provided for criminal and penalty proceedings. However the ability to claim legal professional privilege varies depending upon the nature of the examination and no satisfactory rationale exists to explain this.

Turning now to the matter of mechanics, privilege must be claimed before each question. A blanket claim for privilege at the start of the examination will not suffice. Section 68(2) requires privilege to be claimed before every question and a placard in front of the examinee can serve as a reminder.

While the direct use in evidence of the answers of the examinee is given protection in a criminal or penalty proceeding, there is no protection given to the examinee against the use of derivative or secondary evidence, that is, evidence obtained from other sources in consequence of answers given by the examinee in examination[182].

It is important to note that in the case of orders for production of documents, the Corporations Act and the ASIC Act diverge. Self incrimination privilege can be claimed to exempt a Corporations Act examinee from having to answer interrogatories or produce documents that might tend to incriminate them in criminal proceedings[183]. Self incrimination privilege is not a ground for refusing to produce books in an ASIC examination but it may be claimed to prevent the book being admissible in subsequent criminal or penalty proceedings[184].

Self-incrimination privilege can be claimed as a ground for refusing to provide assistance requested by ASIC pursuant to section 19(2) ASIC Act[185]. However this does not need to be set out in the ASIC notice and the failure to do so does not mean that such assistance as is given can be challenged as having been improperly obtained by ASIC[186].

Client legal privilege[187] can be claimed in Corporations Act examinations as a basis for refusing to answer a question or produce documents[188]. With respect to ASIC examinations, section 69(3) of the ASIC Act confers statutory protection upon an examinee who is a lawyer, the regime being that the lawyer must provide the name of the other party to the communication and identify the communication. ASIC can then issue a notice to the person identified by the lawyer and that person cannot refuse to comply on the ground of client legal privilege. However where a person is compelled to provide privileged information at an ASIC examination and claims legal client privilege, that statement is not admissible against the examinee in subsequent civil or criminal proceedings[189]. The argument that, apart from these limited statutory protections, client legal privilege does not exist in relation to ASIC examinations or

[182] *Hamilton v Oades* (1989) 166 CLR 486 at 496
[183] *Morton v Joynson* [1999] FCA 530
[184] Section 68 ASIC Act
[185] *ASIC v Sigalla (No. 2)* [2010] NSWSC 792 at [45 and 47].
[186] *ASIC v Sigalla (No. 2)* [2010] NSWSC 792 at [48]
[187] Legal client privilege in New South Wales includes privilege in respect of legal advice, litigation and evidence of settlement negotiations in ss.118, 119 and 131 of the Evidence Act 1995 (NSW).
[188] *Meteyard v Love* [2005] NSWCA 444 at [63-68]
[189] Section 76(1)(d) ASIC Act; *Council of the New South Wales Bar Association v Archer (No 9)* [2007] NSWADT 214 at [175-6]

notices to produce documents was, however, rejected by Gordon J in *AWB v ASIC* [2008] FCA 1877 at [23].

The conclusion of AWB v ASIC with respect to the existence of client privilege under the ASIC Act was the opposite of the conclusions reached by the High Court in Corporate Affairs Commission of NSW v Yuill (1991) 172 CLR 319 with respect to provisions of the Companies (New South Wales) Code governing legal professional privilege in the context of investigations by the National Companies and Securities Commission and of French J (then a justice of the Federal Court) in Australian Securities Commission v Dalleagles Pty Ltd (1992) 36 FCR 350 in relation to legal professional privilege in the context of an investigation by the Australian Securities Commission under the Australian Securities Commission Act. Although each decision construed a different Act, the provisions in each case are very similarly drafted, with the NCSC, ASC and ASIC being very similar entities performing relevantly similar functions. The fact that AWB v ASIC did not follow, seek to distinguish or even refer to Yuill, being a High Court decision on very closely analogous legislation would result in a conclusion that AWB v ASIC was wrongly decided, but that case does refer to the more recent High Court decision of Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission [2002] HCA 49; 213 CLR 543; 192 ALR 561; 77 ALJR 40.

In *Daniels* the full bench of the High Court re-considered *Yuill* in the course of examining whether legal professional privilege existed in relation to an investigation by the Australian Competition and Consumer Commission. In the course of finding that such privilege was not abrogated by the Trade Practices Act, the finding in Yuill came in for some criticism by the judges of the court, with Kirby J suggesting the case was wrongly decided, and most of the other judges drawing particular attention to the conclusions of the dissenting minority in Yuill that privilege was not abrogated. Although the majority in Daniels did not overrule Yuill (and as Kirby J noted, overruling the case was unnecessary as the legislation it interpreted had since been repealed) but rather distinguished it on the basis that the provisions of the Trade Practices Act were differently worded, Gordon J (in the author's opinion correctly) interpreted Daniels as an indication that the High Court considered Yuill should no longer be followed. As ASC v Dalleagles follwed Yuill, it can similarly be considered no longer to be persuasive authority.

In the circumstances, it is likely that the law as enunciated in AWB v ASIC with respect to client privilege is good law, and that the privilege exists in relation both to examinations and notices by ASIC to produce documents, however the point is still open to debate.

An examinee cannot refuse to produce documents acquired through the discovery process in legal proceedings and subject to an express undertaking to the court as to confidentiality. The court held in *Australian Securities Commission v Ampolex Ltd* (1995) 38 NSWLR 504 at 518 that "whatever may be the consequences for undertakings given to third persons, whether private individuals (for example, an employer) or a public body or court, the duties imposed by [the then equivalent of section 76] are not in question. They are clear. They must be complied with". This was justified by the court on the basis of the importance of the power and the urgent need for compliance. Breach of the undertaking does not constitute a reasonable

excuse for not complying with the notice to produce. Hence the duty of confidentiality has been impliedly abrogated by the Act. There can be no civil liability for breach of such a duty pursuant to section 92 ASIC Act.

The transcript and it use

Corporations Act

The Court may order the examinee to sign a written record of the questions and answers given by the examinee at the examination[190]. The written record is created upon order of the court at the commencement or conclusion of the examination, whether or not it is signed by the examinee, and is available for inspection under section 597(14A)[191]. This written record is separate from the ordinary court transcript of the examination[192]. Any such written record of the examination or any transcript of the examination may be used in evidence in any civil proceedings against the examinee[193]. This means that the examinee's answers, including admissions are admissible against them and can be used in their cross-examination in civil proceedings and derivative use[194] can be made of them in criminal proceedings. This gives to the examiner an advantage denied to the ordinary litigant.

The written record includes any documents shown to a witness in the course of the examination. It may also be used in other proceedings, even if the examination was carried out in private under section 597(4), provided the documents are being used bona fide and not some collateral purpose and are otherwise admissible[195]. A written record signed by the examinee may be inspected for free by the applicant for the examination, an officer of the corporation, or a creditor of the corporation and by anyone else on paying the prescribed fee[196], even if the examination was carried out in private. So a private examination does not limit access or publication. To obtain access to the written record, application to the court must be made by both examinees and others. The court is not permitted to deny access to the record to examinees.

If a producing party seeks to restrict access to documents produced but not used in the course of an examination or documents used during the examination, a suppression order under sections 596F(1)(e) or (f) should be sought. The onus is on the party producing to satisfy the court that access should be restricted. Access will not be restricted simply because disclosure will facilitate the prosecution of civil or criminal proceedings by third parties[197]. Extraordinary factors would need to be demonstrated for the court to impede ASIC, other government authorities and the public generally from having the benefit of a written record[198].

---

[190] Section 597(13)
[191] *Re Bill Express Ltd (No2)* [2010] VSC 639 at [79-81, 85]
[192] *Re Bill Express Ltd (No2)* [2010] VSC 639 at [77]
[193] Section 597(14)
[194] Evidence obtained from other sources as a result of answers given in an examination.
[195] *Re Southern Equities Corporation Ltd (in liq); Bond v England* (1997) 25 ACSR 394
[196] Section 597(14A)
[197] *New Cap Reinsurance Corporation Holding Ltd* [2001] NSWSC 835 at [39]; *Re Eurostar Pty Ltd (in liq) (Receivers and Managers appointed) and Ors* [2003] NSWSC 633 at [24].
[198] *Re Bill Express Ltd (No2*) [2010] VSC 639 at [88]

ASIC Act

The inspector must, if requested in writing by the examinee, provide a copy of the written record of the examination without charge and conditions may be imposed to protect the confidentiality of the investigation[199].

ASIC has a discretion to provide other persons with not only a copy of the record of the examination, but related books, where is it otherwise authorised to do so and subject to conditions.[200]. Related books are documents referred to directly or indirectly in the record[201]. Section 127 authorises the use and disclosure of confidential information where disclosure is required by other laws, to assist Australian and overseas governments and agencies and securities exchanges or to enable ASIC to perform its functions, which permits ASIC disclosure to the Director of Public Prosecutions[202].

In addition, ASIC may give a person's lawyer carrying on or contemplating a proceeding in relation to a matter examined a copy of the record and related books on condition that the information is only used or published in connection with such proceeding[203]. ASIC will generally assist litigants in this way[204] provided it does not prejudice its investigation or enforcement remedies. A further condition usually imposed is that a person who would be affected by information produced in open court should be given notice before it is used to permit them to apply for orders protecting their interests[205].

If a person is potentially directly and materially adversely affected by the disclosure, the High Court has held that the rules of procedural fairness require that the person be notified and able to make submissions on the conditions that should attach to any release[206]. Additionally, ASIC may make deletions of those portions of the information that contain privileged or confidential information to reduce or remove any potential material adverse effect[207].

Any failure to comply with conditions imposed by ASIC attracts a penalty[208].

---

[199] Section 24(2)(b) ASIC Act and Regulatory Guide 103: Confidentiality and Release of Information (Updated 26 February 1996)

[200] Section 25(3) ASIC Act. Section 127 provides for when release of information is authorised.

[201] Regulatory Guide 103: Confidentiality and Release of Information (Updated 26 February 1996) RG 103.17

[202] Regulatory Guide 103: Confidentiality and Release of Information (Updated 26 February 1996) RG 103.24

[203] Section 25(1) ASIC Act

[204] Regulatory Guide 103: Confidentiality and Release of Information (Updated 26 February 1996) RG 103.18

[205] Regulatory Guide 103: Confidentiality and Release of Information (Updated 26 February 1996) RG 103.42

[206] *Johns v ASC* (1993) 178 CLR 408 and Regulatory Guide 103: Confidentiality and Release of Information (Updated 26 February 1996) RG 103.34

[207] Regulatory Guide 103: Confidentiality and Release of Information (Updated 26 February 1996) RG 103.36

[208] Section 26 ASIC Act provides for a penalty of $1100 or 3 months' imprisonment and section 25(2) ASIC Act provides for the same penalty in relation to persons contemplating proceedings.

Production of documents

Corporations Act

Production of books[209] that are in the person's possession and are relevant to matters to which the examination relates or will relate may be required under the summons[210], by direction of the court at the examination[211] or before the examination pursuant to the ancillary powers of the court in section 68 Civil Procedure Act 2005 (NSW). Such books may be those of the company's and in the possession of accountants or solicitors. As mentioned earlier, the insurance policies of the company and potential defendants are part of the "examinable affairs" of a company and their production can be ordered[212].

ASIC Act

ASIC may require a company or responsible entity or an officer, employee, agent, banker, solicitor or auditor of the company or responsible entity[213] or indeed any person[214] with physical possession to produce certain books relating to the affairs of the company or scheme[215]. The same definition of examinable affairs under the Corporations Act applies in this context. The power of production may only be exercised for the same purposes as an investigation[216], but once books are produced, they may be used and retained for the purposes of any proceedings[217].

Similar provisions exist in relation to exchanges, clearing systems and financial service businesses or parties dealings in financial products[218]and indeed any person[219] and extends to advices and reports (including auditors report) about financial products and the financial position of the financial services business. Suppliers of a financial service may also be required to product books relating to such supply or service[220].

As a general catchall, ASIC also has the power to make an authorisation that certain specified books and/or information be produced to a member of ASIC[221].

The notice must be in the prescribed form[222], which requires ASIC to insert the nature of the matter to which the request relates and as with an examinations notice, in the case of two matters, it is sufficient for ASIC to simply state one matter only for the

---

[209] Books is defined in secton 9 Corporations Act to include documents, registers, financial records and any other record of information.
[210] Section 596D Corporations Act
[211] Section 597(9) Corporations Act
[212] *Re Korda* [2010] FCA 1417
[213] Section 30 ASIC Act
[214] Section 33 ASIC Act
[215] In the case of discovered documents in the lawyer's possession, compliance with an ASIC notice overrides the lawyer's implied undertaking to the court not to use discovered documents for collateral purpose and does not provide a reasonable excuse under section 63 ASIC Act. *Australian Securities Commission v Ampolex* (1995) 38 NSWLR 504. It also overrides any lien for unpaid fees (section 37(6) ASIC Act).
[216] Section 28 compare section 13(1) ASIC Act
[217] Section 37(5) ASIC Act
[218] Section 31 ASIC Act
[219] Section 33 ASIC Act
[220] Section 32A ASIC Act
[221] Section 34 ASIC Act
[222] Form 2 Schedule 1 ASIC Regulations 2001 (Cth)

regulation to be substantially complied with, which is the test[223]. The reason for this is that the requirement to state the matter to which the request relates is satisfied if the recipient can determine whether the notice is within ASIC's power, even if there are additional grounds for the notice which are not stated. The notice can be issued where ASIC is conducting a formal investigation or for a purpose outside of an investigation.

In the case of an investigation, the matter to which the notice relates can simply be stated as the investigation into the conduct of the former directors of company ABC[224] and does not require the suspected contraventions, the subject of the investigation itself to be stated as required in an examination notice[225]. In *ASIC v Sigalla (No. 2)* [2010] NSWSC 792 at [90], the court said as follows:

> "It would place an impossible burden on ASIC to describe all of the possible purposes to which a request for production of documents relates. Inevitably an investigation can expand as it proceeds. There is no reason that documents produced or information obtained at one stage of the investigation can only be used for the investigation of the particular contravention that ASIC has reason to suspect at the time a notice is issued. That is partly because, in my view, the scope of the investigation is not limited to the investigation of such particular suspected contraventions. But in any event, ASIC is entitled to use information gathered by it in an investigation for the performance of any of its functions (*Johns v Australian Securities Commission* (1992) 178 CLR 408 at 425)."

Consequences of non-compliance

Corporations Act

Failure to comply with a summons to attend an examination or produce documents without reasonable excuse will constitute contempt of court.

ASIC Act

Failure to attend an examination or produce documents attracts severe penalties[226] unless the examinee has a reasonable excuse, as does providing false or misleading information, unless the examinee believed on reasonable grounds that it was true[227]. "Reasonable excuse" is broadly defined by the case law as including any matter the court considers to be an adequate reason for non-compliance[228].

Destroying, concealing, altering or removing books attracts even greater penalties[229] unless it was done without intent to defeat, delay or obstruct ASIC. A person must not

---

[223] *ASIC v Sigalla (No. 2)* [2010] NSWSC 792 at [96]. The court noted that even if it were wrong in holding the requirements had been substantially complied with, the notice would not be invalid since the seriousness of the charge and the high probative value of the documents produced outweighed any non-compliance with the requirements of the notice and would not be inadmissible pursuant to section 138 Evidence Act.
[224] *ASIC v Sigalla (No. 2)* [2010] NSWSC 792 at [79]
[225] *Macdonald v Australian Securities Commission*
[226] Section 63 provides for a fine of $110,000 or imprisonment for 2 years or both
[227] Section 64 provides for a fine of a fine of $110,000 or imprisonment for 2 years or both
[228] *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319.
[229] Section 67 provides for a fine of a fine of $220,000 or imprisonment for 5 years or both

obstruct or hinder ASIC in the exercise of its powers, unless the person has a reasonable excuse[230].

Right to legal counsel

The examinee is permitted to legal representation at the examinee's own expense. However lawyers have a very different role in examinations as opposed to private litigation. Such solicitor or counsel may put to the examinee such questions as the Court considers just for the purpose of enabling an explanation or qualification of answers given[231]. It is proper for a lawyer to interview an examinee before giving evidence to ascertain what the examinee is going to say provided the lawyer does not school the examinee in relation to the evidence to be given[232]. The lawyer has the right to object to any question that amounts to an abuse of process, to advise his client of the right to claim privilege and to object to vexatious questioning.

Costs of unnecessary examination under Corporations Act

If the Court is satisfied that an examination summons or an order to answer questions by affidavit was obtained without reasonable cause the Court may order some or all of the costs incurred by the examinee to be paid by the applicant or any person who took part in the examination.[233] Courts would not lightly penalise an examiner as to costs except in the clearest case.

No-action letter in ASIC Act examinations

An examinee may ask ASIC to give it a no-action letter under Regulatory Guide 108 by making a formal application to ASIC. A no-action letter is an indication by ASIC that, as at the date of the letter on the basis of information available to it as at that date, it does not anticipate taking other regulatory action in relation to conduct regulated by the Corporations Act, the ASIC Act or any other legislation that ASIC administers. It is not legal advice and may be withdrawn or revised at any time. Generally ASIC will not publish no-action letters though reserves its right to do so.

A no-action letter provides some level of comfort to an applicant but is not a guarantee that ASIC will not take action in the future, nor does it affect the rights of third parties to take action in relation to any contravention. Third parties (including the Director of Public Prosecutions) are not precluded from taking legal action in relation to the same conduct or conduct of that kind. Nor does it prevent a court from holding that particular conduct infringes the relevant legislation.

Regulatory Guide 108 sets out ASIC's policy regarding when it will issue a no-action letter. ASIC will more likely give a no-action letter in the following circumstances[234]:

1. There is no appropriate relief available in the circumstances;

2. There is room for doubt as to whether the conduct would be lawful;

---

[230] Section 65 ASIC Act
[231] Section 597(16)
[232] *Re Spedley Securities Ltd (in liq); Reed v Harkness* (1990) 2 ACSR 117 at 127
[233] Section 597B
[234] Regulatory Guide 108: No-action letters, Table 1, page 12

3. The contravention is not serious;

4. The contravention was inadvertent and not negligent;

5. Steps have been taken to alleviate any resulting mischief;

6. There was no delay in bringing the matter to ASIC's attention;

7. Compliance history is satisfactory; and

8. Adverse effects on third parties are minimal.

Conclusion

The powers relating to investigation under the Corporations Act and the ASIC Act are extensive, and make some inroads into legal protections normally afforded to individuals. Legal professional privilege does, however, exist with respect to investigations under the Corporations Act; it probably also exists in relation to ASIC investigations, but the matter is not as clear as it should be.

Some attempts have been made in the provisions of the Acts to reduce the practical effect of the abrogation of privilege against self-incrimination, although they will be no adequate substitute from the point of view of the average examinee. The situation is a result of a policy decision by the Australian Parliament that the importance of obtaining information with respect to the misgovernment of corporations justifies a reduction in the civil liberties of individual examinees. Views on the merits of that policy are likely to differ depending upon whether they come from the examinee or the examiner.