

**PUBLIC EXAMINATIONS UNDER THE BANKRUPTCY ACT AND
CORPORATIONS ACT: A PRACTICAL OVERVIEW**

Table of Contents

I.	Overview	1
	Corporations Act – relevant provisions.....	2
	Bankruptcy Act	4
II.	Who may apply?.....	5
	Corporations Act – Application for Summons	5
	Bankruptcy Act	7
III.	Process of applying for a summons for public examination	7
	Corporations Act	7
	Bankruptcy Act – Application for Summons.....	11
IV.	Scope of public examinations and use of transcripts	14
	Corporations Act	14
	Bankruptcy Act	18
V.	Abuse of process	21
	Corporations Act	21
	Bankruptcy Act	24
VI.	Privilege in public examinations	25
	Corporations Act	25
	Bankruptcy Act	26
VII.	Practical tips	28
VIII.	Conclusion.....	31
	Corporations Act provisions	32
	Bankruptcy Act provisions.....	33

I. Overview

1. In the last paper delivered pursuant to the Bar Association’s CPD program,¹ the importance of the liquidator’s role in the recovery assets of an insolvent company was stressed. This paper aims to build upon that presentation by exploring the chief mechanism by which liquidators (and other practitioners dealing with companies under external administration or trustees in a personal bankruptcy) are able to obtain information about the transactions which they may wish to unwind.

¹ B Porter and B Reading, “Voidable Transactions under Division 2 Part 5.7A *Corporations Act*”.
Liability limited by a scheme approved under Professional Standards Legislation

2. In particular, this seminar will consider the statutory provisions and processes governing public examinations under the *Corporations Act 2001* (Cth) and the *Bankruptcy Act 1966* (Cth). The seminar will:
- (a) summarise how to apply for a public examination;
 - (b) provide an overview of the procedure for conducting an examination; and
 - (c) identify practical tips to enhance the effectiveness of public examinations, and to avoid common pitfalls.
3. The purpose of the seminar is to provide an overview of the subject from a practical perspective. Further material on the subject may be found in *McPhersons Law of Company Liquidation*² (**McPhersons**) and in *Australian Bankruptcy Law & Practice*³ for which texts the authors are grateful.

Corporations Act – relevant provisions

4. Public examinations under the Corporations Act provide an important mechanism by which liquidators may obtain information about matters regarding a company's affairs and management. The public examination provisions are set out in Part 5.9 of Chapter 5 of the Corporations Act. The key provisions are ss 595A and 596B, the terms of which are set out in Annexure A to this paper.
5. The provisions have their historical origin in s 15 of the *Joint Stock Companies Act 1844* (UK). The purpose of public examination provisions was summarised (in the English context) by Buckley J in *Re Rolls Razor Ltd* as follows:⁴

The powers conferred by s 268 [of the *Companies Act 1948* (UK)] are powers directed to enabling the Court to help a liquidator to discover the truth of the circumstances connected with the affairs of the company, information of trading, dealings and so forth, in order that the liquidator may be able, as effectively as possible and, I think, with as little expense as possible, to complete his function as liquidator, to put the affairs of the company in order and to carry out the liquidation in all its various aspects, including of course, the getting in of any assets of the company available in the liquidation.

6. To similar effect, Mason JC stated in *Hamilton v Oades*:⁵

² 2016, Thomson Reuters.

³ By P McQuade and M Gronow, (2016, Thomson Reuters, 6th ed).

⁴ [1968] 3 All ER 698 at 700.

⁵ (1989) 166 CLR 486 at 496.

There are the two important public purposes that the examination is designed to serve. One is to enable the liquidator to gather information which will assist him in the winding up; that involves protecting the interests of creditors. The other is to enable evidence and information to be obtained to support the bringing of criminal charges in connexion with the company's affairs...

7. *McPhersons* identifies several other, more specific purposes of the public examination regime under the Corporations Act:⁶
 - (a) **first**, the regime allows a liquidator to obtain evidence and information to support the possible initiation of criminal charges against people who were involved with or dealt with the company;
 - (b) **second**, the regime allows the liquidator (and others in certain circumstances, as discussed further below) to determine whether any substantive civil claims can or should be made against examinees; and
 - (c) **third**, the regime assists with informing the public as to the affairs of failed companies.⁷
8. As will be set out further below, ascertaining the purpose of public examination provisions is important as it assists with determining whether a particular use of the provisions amounts to an abuse of process.
9. The powers conferred under the public examination provisions are extremely broad and (unusually for common law systems) are inquisitorial in nature.⁸ Courts must be careful to ensure that a proposed examinee is not unfairly disadvantaged due to the nature of this broad power. In *Re ACN 072 081 111 Pty Ltd*⁹ Young J stated:¹⁰

It is to be remembered that, whilst sections such as s 596B play a very important role in the process of liquidators administering companies in the public interest, the liquidator and the public interest are not the only matters which need to be considered. It is often a considerable inconvenience, if not more, for a person to be forced, under penalty of law, to devote time to searching out papers, to attending a public hearing, to be cross-examined by adverse counsel, and under s 597 to have to pay any solicitor and counsel whom he has to represent him out of his own pocket. [...]

⁶ *McPhersons*, above n 2 at [15.570].

⁷ See also *Corporate Affairs Commission (NSW) v Lombard Nash International Pty Ltd (No 4)* (1987) 12 ACLR 475 per Young J.

⁸ See *Re Metropolitan Bank* (1880) LR 15 Ch D 139 at 142; *Ex parte Willey*; *Re Wright* (1886) LR 23 Ch D 118 at 129; *R v Zion* [1986] VR 609 at 614; *Rees v Kratzmann* (1965) 114 CLR 63.

⁹ (1997) 140 FLR 412.

¹⁰ at 416.

When there is such a burden put on the examinee, the court must be careful to consider the rights of both parties. It must be careful not to fetter a liquidator who is seeking to administer an insolvent company in the public interest on the one hand and, on the other hand, must be careful to see that persons to whom summonses are directed are not oppressed by the procedure.

(Emphasis added)

Bankruptcy Act

10. Section 81 of the Bankruptcy Act (the terms of which are also set out in Annexure A) provides equivalent machinery for public examinations in the context of personal insolvency. Similarly to the procedure under the Corporations Act, the purpose of the public examination procedure under the Bankruptcy Act is to allow information to be obtained about the bankrupt's property and to gather information regarding any possible offences committed by the bankrupt.¹¹
11. The public examination procedure under the Bankruptcy Act is also inquisitorial in nature and broad in scope. In *Karounos v Official Trustee*¹² the Full Federal Court stated:

The power given by s 81 of the Act is an unusual and far-reaching one (*Re North Australian Territory Company* (1890) 45 Ch D 87 at 93; *Ex parte Willey* (1883) 23 Ch D 118 at 128) and its use could easily become oppressive and vexatious if it is not approached responsibly by applicants for summonses, and controlled carefully by the Registrar and the court: see *Re Price (No 3)* (1948) 14 ABC 137 at 139-140.

...However the power is exercised in the interests of creditors, and those interests should not be defeated by an unduly technical or restrictive approach to the use of the power. The procedure is basically designed to establish what assets the bankrupt had, what has happened to those assets, and whether action should be begun (or continued) to recover them: see *Re Price (No 4)* (1948) 14 ABC 142 at 144; *Re Andrews* (1958) 18 ABC 181 at 184; *Re Poulson* [1976] 1 WLR 1023 at 1032; [1976] 2 All ER 1020 at 1029.

(Emphasis added).

12. It is important for courts to avoid examinations in personal insolvency matters occasioning unnecessary mischief or hardship.¹³

¹¹ See *Re Gordon* (1988) 80 ALR 289.

¹² (1988)19 FCR 330 at 335–6 per Forster, Woodward and Spender JJ.

¹³ *Australian Bankruptcy Law & Practice*, above n 3, at [81.0.35].

II. *Who may apply?*

Corporations Act – Application for Summons

13. An application for a public examination must be made by an “*eligible applicant*”, which is defined in s 9 of the Corporations Act to mean:
- (a) ASIC,
 - (b) a liquidator or provisional liquidator or a corporation;
 - (c) an administrator of a corporation or an administrator of a deed of company arrangement executed by the corporation (**DOCA**); or
 - (d) a person authorised in writing by ASIC.
14. It should be recalled that the public examination procedure is not limited to winding up (although it is most often invoked in liquidations). In *Hong Kong Bank of Australia Ltd v Murphy*¹⁴ Gleeson CJ stated, in the context of s 597:¹⁵

As appears from its place in the legislative scheme, and from its terms, whilst s 597 has an important role to play in relation to companies that are being wound up, and liquidators or provisional liquidators will be amongst those who most commonly take advantage of its provisions, the operation of the section is by no means confined to liquidators. The statutory context of “external administration”, in which s 597 has its place, throws light on the purposes for which the power to order examinations (or to authorise persons to apply for examination orders) is conferred. Those purposes include the protection of shareholders and creditors and of interested members of the public. They are not, however, confined to the need for such protection in the case of winding up. Winding up is only one form of external administration. The scope of s 597 is wider.

(Emphasis added).

15. His Honour went on to hold that s 597 could not be characterised as a law “*with respect to winding up*” for the purposes of what was formerly s 601 of the *Corporations Law*.
16. Creditors are not expressly listed as persons falling within the category of an “*eligible applicant*” for the purposes of requesting a summons for public examination. Nevertheless, there is nothing in principle preventing ASIC from authorising a creditor in writing to be an “*eligible applicant*” in an appropriate case. Indeed, the power to

¹⁴ (1992) 28 NSWLR 512.

¹⁵ at 521.

authorise a person to bring an application for a public examination is not circumscribed, as the following cases indicate:¹⁶

- (a) receivers were authorised as an “eligible applicant” in *Worthley v England; Ex parte Excel Finance Corp Ltd*;¹⁷
- (b) trustees of a unit trust were authorised as an “eligible applicant” in *Hong Kong Bank of Australia Ltd v Murphy*;¹⁸
- (c) creditors of a company engaged in legal action against proposed examinees were authorised as an “eligible applicant” in *New Zealand Steel (Aust) Pty Ltd v Burton*¹⁹ and *Evans v Wainter Pty Ltd*,²⁰ and
- (d) a building regulation company was considered to be an appropriate person for authorisation as an “eligible applicant” in *Queensland Building Services Authority v Australian Securities Commission*.²¹

17. In *Worthley v England, Ex parte Excel Finance Corp Ltd*²² Gummow, Hill and Cooper JJ stated (considering s 597 of the *Corporations Law*):²³

As we have already noted, the grant of authorisation under subs (1) does no more than confer standing upon the person authorised to make an application. That being the case, reference to the subject matter, scope and purpose of subs (1) leads to the conclusion that the decision-maker, in determining whether to authorise a particular person to make applications in relation to a particular corporation, will be required only to consider the relationship which that person has to the external administration and in a particular case the appropriateness of that person being given standing to apply to the Court under subs (2).

(Emphasis added).

18. The source of ASIC’s power to authorise persons is a matter of some debate.²⁴ On one view, ASIC’s power to authorise a person does not arise from the Act but from the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). The main significance of the difference of opinion rests in whether ASIC’s exercise of its

¹⁶ See *McPhersons*, above n 2, at [15.520], and the cases cited therein.

¹⁷ (1994) 52 FCR 69.

¹⁸ (1992) 28 NSWLR 512.

¹⁹ (1994) 13 ACSR 610.

²⁰ (2005) 145 FCR 176.

²¹ (1997) FCR 29.

²² (1994) 52 FCR 69.

²³ at 86F.

²⁴ *McPhersons*, above n 2, at [15.520].

powers to grant authorisation in writing is able to be reviewed by the AAT. Because the powers of ASIC are not within the scope of the AAT's reviewable decisions, any challenge would instead need to be made under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) if the source of ASIC's powers was in fact to be found in the ASIC Act.

Bankruptcy Act

19. Under the Bankruptcy Act, an application for a public examination may be made by:
 - (a) the trustee in bankruptcy;
 - (b) the Official Receiver; or
 - (c) a creditor who has a debt provable in the bankruptcy.

20. Unlike the procedure under the Corporations Act, there is no provision for ASIC, or any other regulatory body, to authorise a broader scope of persons who may apply for a public examination. The fact that creditors are expressly included as a person who may apply for an examination, however, means that on one view at least, the express examination provisions under the Bankruptcy Act are broader than those under the Corporations Act.

III. Process of applying for a summons for public examination

Corporations Act

21. Before a public examination may proceed, an applicant (usually a liquidator) must obtain a court order summoning the examinee under either ss 596A or 596B.

22. Section 596C(1) of the Act provides that an application for a summons must be accompanied by an affidavit which supports the application and which complies with the *Federal Court (Corporations) Rules 2000*. Relevantly, r 11.3(3) provides that an application:
 - (a) must be made by filing an interlocutory or originating process;
 - (b) may be made without notice to any person (although subsections (5) and (6) require notice to be given to ASIC and to the liquidator of a corporation);
 - (c) must be accompanied by a draft summons; and

- (d) must be placed (along with the supporting affidavit) in a sealed envelope marked “*Application and supporting affidavit for issue of summons for examination under section [596A or 596B] of the Corporations Act 2001*” or (if filed electronically) be accompanied by a statement setting out the words in the above quotation.
23. Section 596C(2) provides that the supporting affidavit is not to be available for inspection unless the court otherwise orders.
24. In *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd*²⁵ French J stated (albeit in *obiter*) that a construction of s 596A which allowed a public examination in relation to a company which was not in external administration would be to:
- ...confer on the Court a power which is not capable of characterisation as judicial and which, in its present application, is not incidental to the exercise of judicial power. To that extent, s 596A would exceed the legislative power of the Commonwealth.
25. Accordingly, the fact of a company being in external administration appears to be an additional requirement for a summons to be issued under ss 596A or 596B.
26. Where an application is made under s 596A, the court *must* order the summons to be issued. In *Carter v Garner; Re Gartner Wines Pty Ltd* Branson J stated:²⁶
- It is important to note that the fact that the court must issue a summons under s 596A if the criteria for issue are satisfied does not mean that a person against whom a summons is issued has no remedy if the predominant purpose of the applicant is an improper purpose. Australian superior courts have jurisdiction, ordinarily described as inherent jurisdiction but in the case of this court better described as implied jurisdiction, to stay proceedings which are an abuse of process (*Williams v Spautz* (1992) 174 CLR 509 per Mason CJ, Dawson, Toohey and McHugh JJ at 518). This jurisdiction may be invoked in an appropriate case to stay an examination pursuant to a summons issued under s 596A (*Re Bosun Pty Ltd (in liq)*; *Makris v Sheahan* at [9]; *Hill v Smithfield Service Centre Pty Ltd (in liq)* at [52]). Further r 11.5 of the Rules authorises a person served with an examination summons, within three days of service, to apply to the court for an order discharging the summons.
- (Emphasis added).
27. The intention of the legislature was that an application under s 596A would be a “*formality*” provided that the court was satisfied of the necessary prerequisites.²⁷ The Explanatory Memoranda to the 1992 *Corporate Law Reform Bill 1992* provides:²⁸

²⁵ (2007) 156 FCR 501; [2007] FCA 13.

²⁶ (2003) 130 FCR 99; [2003] FCA 653 at [27].

1155. The intention is that the Court will issue the summons where it is satisfied that the person's connection with the company is such that the person is an examinable officer, without the need to inquire further into such matters as whether that person has taken part or been concerned in the examinable affairs of the corporation, been guilty of misconduct in relation to the corporation or is able to give information about examinable affairs of the corporation. It is envisaged that the issue of a summons in such circumstances will be a formality, and that the respective Court rules may provide for execution of the function by a Registrar or equivalent official, where appropriate.

(Emphasis added).

28. While applications under 596A must be brought against either an officer²⁹ or provisional liquidator, an application under s 596B may be brought against a much wider class of persons.
29. Under s 596B a person *may* be examined if that person:
- (a) has “*taken part*” or “*been concerned*” in the examinable affairs of the company; and
 - (b) “*has been*” or “*may have been*” guilty of misconduct in relation to the company; or
 - (c) may be able to give information concerning the examinable affairs of the company.
30. Section 9 of the Act defines “*misconduct*” to include fraud, negligence, default, breach of trust and breach of duty. A person does not need to be a defendant or potential defendant in proceedings brought by or in relation to the company in order to have been involved in misconduct.³⁰ An applicant relying upon the proposed examinee falling within the categories set out in s 596B must provide reasonable grounds for the belief that the examinee has either been guilty of misconduct or may be able to give information concerning the examinable affairs of the company.³¹

²⁷ *McPhersons*, above n 2, at [15.510] citing the Explanatory Memoranda to the *Corporate Law Reform Bill 1992* at [1155].

²⁸ at [1155].

²⁹ Defined in s 9 of the Act to mean a director, secretary, *de facto* director, receiver (or receiver and manager), an administrator (or administrator of a DOCA), a liquidator or trustee administering a compromise or arrangement.

³⁰ *Re Clutha Ltd (in liq)* [2003] NSWSC 235 at [8] per Gzell J.

³¹ *Re Hall Auditorium Pty Ltd (in liq)* (1984) 68 FLR 473.

It seems to me that a reasonable construction of the section requires that an applicant should furnish to the court some reasonable ground for his belief that the respondent may have been guilty of misconduct, or may be capable of giving information, as the case may be.

31. In *Southern Cross Petroleum Sales (SA) Pty Ltd (in liq) v Hirsh*³² Lander J set out several factors a court may have regard to in exercising its discretion under s 596B:³³

The discretion is unfettered but must be exercised judicially. In exercising that discretion the court might have regard to 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 the information obtained on the examination 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 the information from other sources; the cost to the prospective examinee in attending for examination; whether the information sought is so peripheral to make the attendance of the prospective examinees oppressive; and the wider public interest in investigating the affairs of the corporation.

32. The fact that s 596B is expressly subject to s 596A means that, despite the potential breadth of persons to whom it may apply, there is often relatively narrow scope for invoking the former section. Further, the fact that a court must be satisfied as to the possibility that the person against whom a summons has been requested may have been involved in misconduct (or may be able to give information concerning the examinable affairs) means that, where possible, it will often be easier to obtain an order under s 596A.
33. The kinds of persons ordinarily examined pursuant to s 596B may include the company's accountants and auditors, the bank manager of the branch where the company's bank accounts are kept, and others such as solicitors, insurers, directors' spouses and taxation officers.³⁴
34. Section 596D provides that:

A summons to a person under section 596A or 596B may require the person to produce at the examination specified books that:

- (a) are in the person's possession; and
- (b) relate to the corporation or to any of its examinable affairs.

³² (1998) 70 SASR 527.

³³ at 536–7.

³⁴ *McPhersons*, above n 2, at [15.520].

35. Section 86 of the Corporations Act provides that “[a] thing that is in a person's custody or under a person's control is in the person's possession”.
36. Section 596E sets out that if a court summons a person for examination, the applicant for the summons must give written notice of the examination to:
- (a) as many of the corporation's creditors as reasonable practicable; and
 - (b) each eligible applicant in relation to the corporation (except the person who applied for the examination, ASIC, and any person authorised by ASIC).

Bankruptcy Act – Application for Summons

37. An application for a public examination under the Bankruptcy Act must comply with the provisions set out in Division 6.2 (examination of a “*relevant person*”) and Division 6.3 (examination of an “*examinable person*”) of the *Federal Court (Bankruptcy) Rules 2016*.³⁵ The rules establish relatively similar requirements for each type of application. Chief among those requirements are that an application:³⁶
- (a) be in accordance with Form B10; and
 - (b) be accompanied by:
 - (i) a draft of the summons applied for; and
 - (ii) an affidavit.
38. The contents of the affidavit must specify the basis upon which the application is made and (where required) provide the facts relied upon by the application to show that a person is an “*examinable person*”.³⁷ Certain confidentiality requirements (such as placing the affidavit in a sealed envelope) may apply to applications to examine an examinable person, but not to applications to examine a relevant person. An examinable person to whom a summons is issued is also entitled to conduct money and witness expenses.³⁸

³⁵ Or alternatively under the *Federal Circuit Court (Bankruptcy) Rules (2016)*. The Federal Court and the Federal Circuit Court have concurrent jurisdiction under the *Bankruptcy Act: s 27*. The examination may be held before a court but this does not in practice occur. Rule 6.07 of the *Federal Court (Bankruptcy) Rules 2016* provides that an application for a summons may be heard in the absence of a party or in closed court

³⁶ Rules 6.06 and 6.12.

³⁷ Rule 6.12(3).

³⁸ Rule 6.17

39. As set out in subsection 1B of s 81 of the Bankruptcy Act, an order for a summons may require the person to produce at the examination books (including books of an associated entity of the relevant person) that:
- (a) are in the possession of the first-mentioned person; and
 - (b) relate to the relevant person or to any of the relevant person's examinable affairs.
40. Section 5 of the Bankruptcy Act defines "*in the possession of*" to include "*in the custody of or under the control of*". The term "*books*" is widely defined in s 5(1) to include any account, deed, paper, writing or document and any record of information however compiled, recorded or stored, whether in writing, on microfilm, by electronic process or otherwise.
41. Pursuant to rule 6.03(1) a summons must be in accordance with Form B9. As to production of books Form B9 provides "*You must bring the following books with you and produce them at the examination*".
42. Cooper J in said in *Re Osenton; Ex parte Osenton v Worrell* (unreported, FCA, 3 March 1995) after referring terms of s 81(1B) that:
- There is no power to demand the production of books which do not satisfy the three criteria. The fact that the power is limited requires that the limitation appear on the face of the summons (*Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499 at 525, 538).
- The summonses in issue are bad because they purport to impose an absolute obligation to produce the books specified in the schedule attached to the summons where neither the command nor the schedule limits the books to those in the possession of the recipient of the summons.
43. Although the Form B9 summons provides "*You are required to bring the following books with you and produce them at the examination*" the reasoning of Cooper J will still apply. The limitation in s 81(1B) as to the production of the documents must appear on the face of the summons.
44. The court, however, has power to amend the summons and may order the summons to be amended to insert words to limit the production of documents to "*possession*" or "*possession or custody or control of*". That is what Cooper J ordered in *Re Osenton*.

45. In *Karounos v Official Trustee*³⁹ the Full Court said in part that a summons should specify as clearly as possible any books which the person summonsed has to produce. To the same effect is *Re Andrews*.⁴⁰
46. A summons may be discharged or set aside if it is too wide or oppressive.⁴¹ In *Re Huybrechts; Ex parte Huybrechts v Knight*⁴² Pincus J set aside a summons which was wide, general and unlimited as to time. In *Travaglini v Racculia*⁴³ Lucev FM discharged specific paragraphs that were unlimited as to time.
47. Although costs of production may be sought in the application the likely outcome is that the judge will say that is a matter to be dealt with by the Registrar when the actual costs are known. Ryan J agreed with a submission of counsel in *Re the bankrupt estates of Terry; Gould v Lamb (as Trustee of the said Bankrupt Estates)* [1999] FCA 1407 at [9] that a person served with a summons is not entitled to insist, as a condition of compliance, that his self-assessed costs of doing so be paid in advance. Recoupment of reasonable expenses of complying with the summons should be left to the proper application by the Registrar at an appropriate time during, or after, the completion of the examination.
48. The ultimate prospects of the application to discharge the summons, or the part relating to production of records, is dependent on the information that will be contained in the affidavit being prepared.
49. Rule 6.06(3)(b)(ii) states that the supporting affidavit must provide “*details of any inquiry by the applicant about the books to be produced*” and “*any refusal by the relevant person to cooperate with the inquiry*”. These requirements appear to indicate that, prior to issuing a summons for the relevant person to produce books, a request should be made beforehand.
50. Whether an entity is “*associated*” with a bankrupt depends on the type of entity concerned:
- (a) in the case of a company, s 5B provides that a company is associated with a person if that person is, amongst other things:

³⁹ (1988) 19 FCR 330.

⁴⁰ (1958) 18 ABC 181 at 186 to 187 per Clyne J.

⁴¹ *Re Andrews* (1958) 18 ABC 181.

⁴² (1991) 107 ALR 533.

⁴³ (2007) 211 FLR 127.

- (i) a company officer or is otherwise concerned, or takes part in, the company's management;
 - (ii) a member of the company;
 - (iii) in a position to cast, or control the casting of, a vote at a general meeting of the company;
 - (iv) is financially interested in the company's success or failure;
 - (v) acts as an agent for the company in any transaction or dealing; or
 - (vi) gives professional advice to the company;
- (b) in the case of a partnership, s 5D provides that the partnership will be associated with a person if that person:
- (i) is a partner in the partnership;
 - (ii) is able to control or materially influence the partnership's activities or internal affairs;
 - (iii) is financially interested in the partnership's success or failure;
 - (iv) is a creditor of the partnership;
 - (v) is employed, or engaged under a contract of services by the partnership;
 - (vi) acts as an agent for the partnership; or
 - (vii) gives professional advice to the partnership.

51. Section 5E provides similarly broad provisions regarding the definition of an "associated" person in respect of trusts. Section 5B sets out provisions regarding the definition of an "associated" person in respect of natural persons.

IV. Scope of public examinations and use of transcripts

Corporations Act

52. An examination summons issued by the Court must be personally served (or served in a manner as the Court may direct) at least 8 days before the date fixed for the

examination.⁴⁴ An examination may proceed before a registrar of either the Supreme or Federal Courts.⁴⁵ It is possible for the examination proceedings to be adjourned, once begun, to a date to a subsequent date or alternatively to a date to be fixed.⁴⁶

53. Section 597 regulates the conduct of the examination, and section 597A provides that a Court may require a person to file an affidavit about a company's "*examinable affairs*".
54. A public examination may be applied for under the Corporations Act in relation to a company's examinable affairs. The phrase "*examinable affairs*" is defined in section 9 of the Act to mean:
- (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 entity 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).
55. Section 53(a) of the Act expands the definition of "*examinable affairs*" significantly to include:
- the promotion, formation, membership, control, business, trading, transactions and dealings (whether alone or jointly with any other person or persons and including transactions and dealings as agent, bailee or trustee), property (whether held alone or jointly with any other person or persons and including property held as agent, bailee or trustee), liabilities (including liabilities owed jointly with any other person or persons and liabilities as trustee), profits and other income, receipts, losses, outgoings and expenditure of the body
56. Section 53(c) includes internal management and proceedings of the corporation, while s 53(d) includes any act or thing done while the company is in receivership, administration or winding up. Sections 53(e) to (j) include matters regarding the company's financial interests, and s 53(k) includes matters concerning audits of any of the matters referred to in the preceding subsections.
57. It is important to note that the definition of "*examinable affairs*" includes the affairs of a "*connected entity*", so long as the affairs of the connect entity are "*relevant*". In this

⁴⁴ *Federal Court (Corporations) Rules 2000* r 11.4.

⁴⁵ See Schedule 1B of the *Uniform Civil Procedure Rules (1999)* (Qld); Schedule 2 of the *Federal Court (Corporations) Rules 2000*.

⁴⁶ Section 597A(17).

regard, it is worth noting that the term “*relevant*” has been broadly defined.⁴⁷ The term “*connected entity*” is defined in s 9 to mean:

- (a) a body corporate that is, or has been, related to the corporation; or
- (b) an entity that is, or has been, connected (as defined by section 64B) with the corporation.

58. In *Simionato v Macks*⁴⁸ Lander J stated:

...the examinable affairs of a corporation are very wide and when that corporation is connected to other corporations, then the ambit of a corporation’s examinable affairs becomes wider ... it is clear that the legislation is designed to allow an eligible applicant the right to inquire into a corporation and its dealings with other corporations in the widest possible circumstances.

(Emphasis added).

59. Thus, examinable affairs have been held to encompass the following.⁴⁹

- (a) information regarding a company’s rights in choses in action;⁵⁰
- (b) information with respect to whether litigation initiated or contemplated by a liquidator on behalf of a company is likely to be successful;⁵¹
- (c) information with respect to whether a judgment resulting from a liquidator’s action has any worth;⁵²
- (d) information regarding the affairs and documents of a third party, including:
 - (i) the company’s former solicitors;⁵³
 - (ii) insurers;⁵⁴ and
 - (iii) the insurers of those against whom the company might have a claim.⁵⁵

⁴⁷ See *Grosvenor Hill (Qld) Pty Ltd v Barber* (1994) 48 FCR 301 at 305 per Beaumont, Spender and Cooper JJ.

⁴⁸ (1996) 19 ACSR 34.

⁴⁹ *McPhersons*, above n 2, at [15.700] and the cases cited therein.

⁵⁰ *Grosvenor Hill (Qld) Pty Ltd v Barber* (1994) 48 FCR 301.

⁵¹ *Evans v Wainter Pty Ltd* (2005) 145 FCR 176.

⁵² *Re Interchase Corp Ltd* (1996) 68 FCR 481.

⁵³ *Re GPI Leisure Corp Ltd* (1994) 12 ACLC 815 at 817.

⁵⁴ *Re Southland Coal Pty Ltd (in liq)* (2006) 24 ACLC 1254; [2006] NSWSC 184 at [58].

⁵⁵ *Re Southland Coal Pty Ltd (in liq)* (2006) 24 ACLC 1254; [2006] NSWSC 184 at [58].

60. In *Gerah Imports Pty Ltd v Duke Group Ltd (in liq)*⁵⁶ a liquidator was held to have been acting properly when seeking orders for the examination of partners of an accounting firm against whom a claim was being brought by the company for damages for negligence.⁵⁷
61. Section 597(13) of the Corporations Act provides that the Court may order a transcript of the questions put to a person and the answers given by him or her to be signed by the examinee. Subsection (14) goes on to state that, subject to subsection 12(A) (regarding privilege) any written record of an examination so signed by an examinee “*may be used in evidence in any legal proceedings against the person*”. As will be seen, the language of subsection (14) is somewhat narrower than the equivalent under the Bankruptcy Act.
62. In *Douglas-Brown v Furzer*⁵⁸ Malcolm CJ (with whom Ipp and Anderson JJ agreed) stated, in respect of these subsections:⁵⁹

In my opinion, when one reads s 597(14) and (14A) in the context of the provisions as they now appear, the patent object is to enable the liquidator or any creditor of the corporation to have access to the written record or authenticated transcript of an examination and use it in evidence in any proceedings against the person being examined. Taking all the provisions together, the intention of the legislation appears to be that such examination should now be carried out in such a way which will facilitate not only investigations but also the prosecution of civil or criminal proceedings, whether contemplated or already commenced, including civil proceedings by individual creditors. The intention is that the persons who are eligible applicants and any other relevant persons are given a forensic advantage which the court can prevent being abused by its control over the conduct of the examination.

(Emphasis added).

63. Whether a written record is admissible in other legal proceedings is a matter for the court hearing those proceedings and the applicable rules of evidence.⁶⁰
64. As mentioned above, it is an appropriate use of the public examination provisions to ask an examinee to provide a statement of their financial assets and affairs in order to

⁵⁶ (1993) 61 SASR 557.

⁵⁷ See also *Grosvernor Hill (Qld) Pty Ltd v Barber* (1994) 48 FCR 301 at 310.

⁵⁸ (1994) 11 WAR 400.

⁵⁹ (1994) 11 WAR 400 at 408.

⁶⁰ *McPhersons*, above n 2, at [15.850].

determine whether it is worth pursuing claims against them. In *Grosvenor Hill Pty Ltd v Barber* the Full Federal Court stated:⁶¹

The question is whether the Court is limited by the section to ordering an examination the purpose of which is to go no wider than to determine whether or not there are reasonable grounds, including evidence, to litigate a case to a successful judgment, or whether, the Court has power to order an examination, the purpose of which is to ascertain the likelihood of any judgment being satisfied; that is, whether it is a permitted purpose to inquire as to the worth of a potential defendant so as to be able to make a practical assessment as to the likelihood of a return to the company of the fruits of any favourable judgment and the necessary legal costs expended in obtaining it. Is the Court empowered under the section to order an examination or the production of documents to test the likelihood of the creditors in the winding up receiving a tangible benefit from the satisfaction of any judgment obtained and to enable the liquidator to determine whether it is prudent to commence or maintain litigation with knowledge as to the real likelihood of obtaining any tangible benefit beyond a mere judgment, including a judgment for costs, at the conclusion of the litigation?

In our view, the Court has such a broad power. Additionally, it is a power of long standing.

Bankruptcy Act

65. A public examination may proceed before the Registrar of the Federal Court or a Magistrate.⁶² Magistrate is defined in s 5 of the Bankruptcy Act to mean a person who holds office as a Magistrate of a State.⁶³ The examinations are ordinarily conducted before a Registrar. If an application for an examination under the Corporations Act is made to the Supreme Court in Queensland, the examination will ordinarily be conducted by a Magistrate in the Magistrates Court in Queensland. An applicant for a summons must, at least 8 days before the date fixed for the examination, serve the summons on the relevant person and give notice of the time and place fixed for the examination.⁶⁴ The applicant must also give notice to “*each person known to the applicant to be a creditor of the relevant person.*”⁶⁵ The examination, once begun, may be adjourned to a date to be fixed.
66. The examination procedure under the Bankruptcy Act is substantially similar to that under the Corporations Act. The public examination takes place before the court,

⁶¹ (1994) 48 FCR 301 at 307 per Beaumont, Spender and Cooper JJ.

⁶² *Bankruptcy Act 1966* (Cth) s 81(1A).

⁶³ Although an arrangement pursuant to s 17B(1) of the Act must have been entered into in relation to that Magistrate.

⁶⁴ *Federal Court (Bankruptcy) Rules 2016* r 6.09(a).

⁶⁵ *Federal Court (Bankruptcy) Rules 2016* r 6.09(b).

Registrar of the Federal Court, or a magistrate, and is held in public. Those who are being examined are entitled to be represented by legal counsel.

67. Questions must be answered on oath, which questions may be asked by the court, Registrar or magistrate, as well as by the trustee in bankruptcy, Official Receiver or creditor. Questions may not, however be asked by the bankrupt.⁶⁶
68. An application may be brought against the bankrupt person (referred to as the “*relevant person*”) or against an “*examinable person*”. The latter phrase is broadly defined, but in summary includes:⁶⁷
- (a) a person known or suspected to be in the possession of property of the relevant person;
 - (b) a person believed to be indebted to the relevant person;
 - (c) a person, including a person who is an associated entity or an associate of an associated entity of the relevant person, who may be able to give information about the relevant person or such person’s examinable affairs; and
 - (d) a person in possession of books, including books of an associated entity of the relevant person, that may relate to the relevant person or to such person’s examinable affairs.
69. In *Re Skase*⁶⁸ Pincus J held that there was no requirement for an examinable person to be within the jurisdiction before a summons could issue:

In the absence of any decisive authority, I propose to follow the example set in the *Seagull Manufacturing Co* case (supra), and to read the expression “*examinable person*” in s 81 of the Act literally, without any implication that the person must be present within the jurisdiction at the time of issue of the summons.

70. Similarly to the regime under the Corporations Act, examinations under the Bankruptcy Act must relate to a person’s “*examinable affairs*”. Section 5 of the act defines that expression to mean:
- (a) the person’s dealings, transactions, property and affairs; and

⁶⁶ *Re Jacka; Ex parte Jacka* (1986) 66 ALR 564.

⁶⁷ See *Australian Bankruptcy Law & Practice*, above n 3, at [81.1.20].

⁶⁸ (1991) 32 FCR 212.

- (b) the financial affairs of an associated entity of the person, in so far as they are, or appear to be, relevant to the person or to any of his or her conduct, dealings, transactions, property and affairs.

71. Sections 81(15) and (17) allow the court, registrar or magistrate to cause notes of the examination of a person to be taken down in writing, and the person being examined “shall sign the notice”. Subsection (17) provides that the signed notes may be “used in evidence in any proceedings under this Act”.

72. Prior to the 2006 *Bankruptcy Legislation Amendment (Anti-avoidance) Act 2006*, the subsection only applied where the person who gave the examination was made a party to the proceeding. The amending act altered the subsection so that it now applies “whether or not the person is a party to the proceeding”. The explanatory memorandum to the amendment act provides:

It is proposed to further amend sections 77C and 81(17) to allow notes and transcripts to be admissible in subsequent proceedings to claw back assets, irrespective of whether or not the bankrupt is a party to those proceedings. This proposed change is consistent with a general philosophy that relevant evidence should be able to be used in an efficient manner. The transferee will still be able to call the bankrupt as a witness and to cross-examine the bankrupt on their prior statements, as appropriate.

(Emphasis added).

73. Relevantly, section 255 of the act provides:

- (1) A transcript or electronic or magnetic recording that purports to be a record of proceedings under section 77C or 81, or of proceedings before a court, is to be taken to be a record of that kind, unless the contrary is proved.
- (2) The transcript or recording is admissible as evidence of the matters described by a person whose words are recorded in the transcript or recording, unless the Court, or a court in which the transcript is sought to be introduced, makes an order to the contrary.
- (3) The cost of preparing a transcript or recording is an expense of administration of the estate of the bankrupt or debtor to which the matters recorded relate.

74. Beaumont J summarised the principles regarding the admissibility of evidence of a transcript (considering the section as it existed prior to 2006) in *Re Morris; Ex parte Donnelly v Colonial Mutual Life Insurance Society Ltd* as follows:⁶⁹

⁶⁹ (1997) 77 FCR 303 at 304.

In my view, the purpose of s 81(17)(a) and its language, when taken literally, both serve to indicate that this provision is intended to ensure that there should be no bar or prohibition placed upon the legitimate use of a transcript in other proceedings. The policy underlying the provision is first, to eliminate any uncertainty that may be thought to arise, by reason of the circumstance that the examination was inquisitorial in nature and conducted compulsorily, which considerations might be thought to lead to possible limitations on the use to which such material could be put; and secondly, by the omission of the words which previously limited the use of the transcript against the person examined, to enable a more flexible and less rigid application of the evidence contained in the transcript, where that is appropriate.

75. His Honour went on to hold, however, that the admissibility of the transcript as evidence was subject to the discretion in s 135 of the *Evidence Act 1995* (Cth) to exclude evidence if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial, misleading, or cause or result in undue waste of time.

V. *Abuse of process*

Corporations Act

76. As discussed above, the public examination machinery requires courts to strike a balance between the obvious commercial benefits in allowing liquidators to pry into the affairs of the companies for which they are responsible, and protecting proposed examinees against undue inconvenience or expense. Protections for potential examinees under the statutory regime are largely to be found in the facts that:⁷⁰

- (a) a public examination cannot take place without an order of the court;
- (b) the order of the court may be confined to a specific matter;⁷¹ and
- (c) the court is tasked with ensuring that the examination is not made “*an instrument of oppression, injustice, or of needless injury to the individual*”.⁷²

77. Generally, liquidators are accorded a wide latitude in applying for and conducting public examinations. Partly, this is due to the fact that the liquidator is often at an informational disadvantage in relation to making the informed decisions necessary to

⁷⁰ *McPhersons*, above n 2, at [15.710].

⁷¹ *Rees v Kratzmann* (1965) 114 CLR 63 at 78 per Menzies J.

⁷² *Rees v Kratzmann* (1965) 114 CLR 63 at 66 per Barwick CJ.

carry out a winding up in the absence of information provided by the former officers of the company.⁷³

78. In *Evans v Wainter Pty Ltd*⁷⁴ Lander J (with whom Ryan and Crennan JJ agreed) identified the following “*legitimate purposes*” of public examinations:⁷⁵

First, an examination is designed to serve the purpose of enabling an eligible applicant to gather information to assist the eligible applicant in the administration of the corporation.

Second, it assists the corporation’s administrators to identify the corporation’s assets, both tangible and intangible. It also allows the corporation’s liabilities to be identified.

Third, the purpose is to protect the interests of the corporation’s creditors.

Fourth, it serves the purpose of enabling evidence and information to be obtained to support the bringing of proceedings against examinable officers and other persons in connection with the examinable affairs of the corporation.

Fifth, it assists in the regulation of corporations by providing a public forum for the examination of examinable officers of corporations.

79. However if the dominant purpose of the obtaining of a summons for an examination is improper (such as to harass, oppress or pressure an examinee), a court may set it aside. The court has an inherent jurisdiction to regulate its own procedure in staying an application considered to be an abuse of process.⁷⁶

80. In *Evans v Wainter Pty Ltd* Lander J provided several examples of circumstances which would likely result in an application for a summons being considered improper, and liable to be set aside:⁷⁷

- (a) an application for an order for the examination of a person for a purpose unconnected with the purposes authorised by legislation;
- (b) an application designed to allow a party to obtain a forensic advantage;
- (c) an application designed to be used a “*dress rehearsal*” for the cross-examination of a person in a pending or subsequent action (however this does not prevent a

⁷³ See *Grosvenor Hill (Qld) Pty Ltd v Barber* (1994) 48 FCR 301 at 306.

⁷⁴ (2005) 145 FCR 176.

⁷⁵ at [252].

⁷⁶ See *Carter v Gartner; Re Gartner Wines Pty Ltd* (2003) 130 FCR 99 at [27].

⁷⁷ (2005) 145 FCR 176 at [252].

court from summoning a person whilst litigation is pending against that person);
and

- (d) an application will be for an improper purpose if the application cannot be characterised as being for the benefit of the corporation, its contributories or creditors.

81. The question whether in any particular case the applicant has used the procedure abusively will depend upon the applicant's purpose in seeking the order and all of the surrounding circumstances.⁷⁸ His Honour went on to state that:⁷⁹

- (a) an application will not be an abuse of process unless the improper purpose is the dominant purpose; and
- (b) a creditor may use the public examination procedure if authorised to do so by ASIC, however, a creditor may not use the procedure for the purpose of obtaining a forensic advantage which would not have been available to the creditor if the corporation had not gone into administration.

82. In *Re Southern Equities Corp Ltd (in liq)* the Full Court of the Supreme Court of South Australia confirmed that the mere fact proceedings were on foot against a potential examinee did not prevent a summons from issuing:⁸⁰

It is clear enough from the authorities that the mere fact that proceedings are pending against the proposed examinee does not make the application for an examination an abuse of process. Nor will it be so even if the proposed examination touches upon or explores the subject matter of those existing proceedings. Still it will not be an abuse if the examination will give rise to a forensic advantage, for example by way of securing admissions or obtaining material or evidence not otherwise available to the liquidator.

83. In determining the liquidator's "*dominant*" or "*predominant*" purpose, "*great weight*" is given to the views of the liquidator.⁸¹ These views will necessarily be expressed in the supporting affidavit required by s 596C. The court will show some caution in accepting the liquidator's sworn purpose, however, in cases where there are pending proceedings against a proposed examinee.⁸²

⁷⁸ (2005) 145 FCR 176 at [252].

⁷⁹ (2005) 145 FCR 176 at [252].

⁸⁰ (1997) 25 ACSR 394.

⁸¹ *McPhersons*, above n 2, at [15.720]; citing *Hamilton v Oades* (1989) 166 CLR 486 at 497 per Mason CJ.

⁸² *Spedley Securities Ltd (in liq) v Bank of New Zealand* (1990) 3 ACSR 366.

84. The principles concerning whether a public examination is an abuse of process were considered by the Queensland Court of Appeal in *Re Qintex Group Management Services Pty Ltd (in liq)*.⁸³

Examinations under the statute are capable of being or becoming oppressive if their real purpose is simply to exert pressure by inflicting costs, or causing undue inconvenience or embarrassment to the defendant. There may also be other ways in which they can operate harshly. Conducting a dress-rehearsal of cross-examination may conceivably be another instance, although in practice it probably serves mainly to alert a witness to the questions he may expect to be asked at trial and so enable him to anticipate them. Interrogatories tend to have that effect, which is one reason why they seldom achieve their object. The fact that an application to examine is made long after the relevant events took place may be a matter for consideration; but it is a regrettable feature of many windings up that, like litigation, they often take an inordinately long time to complete. There is nothing to suggest that the liquidators here deliberately deferred the application to examine the appellants in order to catch them off their guard. Mr Adler has not sworn to any prejudice by reason of delay, and the bare fact that time has passed is not enough to supply that omission.

Bankruptcy Act

85. Similarly to the position under the Corporations Act, courts must ensure that public examinations do not proceed for an improper purpose or in a manner which unfairly impacts upon the bankrupt.
86. The issue of a summons may be set aside as an abuse of process if:
- (a) the summons sought for a purpose unconnected with the bankruptcy;⁸⁴
 - (b) the summons is sought for reasons which are vexatious or oppressive;⁸⁵ or
 - (c) the summons used in order to obtain an improper advantage for the trustee.⁸⁶
87. An examination will generally not be allowed unless it is for the benefit of the general body of creditors.⁸⁷ As set out in *Australian Bankruptcy Law & Practice*:⁸⁸

The power conferred by [s 81] is of an inquisitorial kind and should not be exercised if unnecessary mischief is going to be done or hardship inflicted on the person called upon to appear and give information ... An assurance by examining counsel that the questions asked are for the benefit of creditors

⁸³ [1996] QCA 464 per McPherson and Pincus JJA and Derrington J.

⁸⁴ *Re Alafaci; Registrar in Bankruptcy v Hardwick* (1976) 9 ALR 262 at 269-71.

⁸⁵ *Karounos v Official Trustee* (1988) 19 FCR 330 at 335.

⁸⁶ *Re Kwok; Ex parte Rummel* (1981) 61 FLR 336.

⁸⁷ *Re Hodder; Ex parte Cogle* (1965) 7 FLR 436 at 437. See also *Australian Bankruptcy Law & Practice*, above n 3, at [81.0.35], citing *Re Easton; Ex parte Davies* (1891) 8 Mor 168 at 171.

⁸⁸ Above n 3, at [81.0.35].

generally ought not to be disregarded: *Re Price (No 3)* (1948) 14 ABC 137 at 140.

88. A fishing inquiry designed to build up a case as to which there is no information that the proposed examinee is implicated is also impermissible.⁸⁹ In practice, however, it is often difficult to establish that a line of questioning is inappropriate, or not for the benefit of creditors as a whole. A recent consideration of the principles relating to setting aside an application for a summons was set out by Foster J in *Equititrust Limited (In Liq) (Receiver Appointed) (Receivers and Managers Appointed) v Equititrust Limited (In Liq) (Receiver Appointed) (Receivers and Managers Appointed)*.⁹⁰

VI. *Privilege in public examinations*

Corporations Act

89. Section 597(12) provides that an examinee is not excused from answering a question on the grounds that the answer might tend to incriminate him or her or make the examinee liable to a penalty. In *Hamilton v Oades*⁹¹ the High Court held that the predecessor to s 597(12) had abrogated the common law privilege against self-incrimination. The abrogation, however, is subject to the terms of s 597(12A) which provides that where:

- (a) before answering a question put to a person (other than a body corporate) at an examination, the person claims that the answer might tend to incriminate the person or make the person liable to a penalty; and
- (b) the answer might in fact tend to incriminate the person or make the person so liable;

the answer is not admissible in evidence against the person in:

- (c) a criminal proceeding; or
- (d) a proceeding for the imposition of a penalty;

other than a proceeding under this section, or any other proceeding in respect of the falsity of the answer.

90. As stated in *McPhersons*, the combination of these provisions often leads to the “almost farcical” situation where examinees claim privilege before every answer.⁹²

⁸⁹ *Australian Bankruptcy Law & Practice*, above n 3, at [81.0.35], citing *Re Price (No 3)* (1948) 14 ABC 137.

⁹⁰ [2014] FCA 692 at [56]–[63].

⁹¹ (1989) 166 CLR 486.

⁹² *McPhersons*, above n 2, at [15.830].

91. Although s 597 abrogates the privilege against self-incrimination, it does not expressly abrogate legal professional privilege. In *Re Compass Airlines Pty Ltd*⁹³ Beaumont and Gummow JJ stated:⁹⁴

We agree with Lockhart J that the test for the exclusion of common law rights by “necessary implication” has not been satisfied here. [...] As Lockhart J has pointed out, the circumstance that legal professional privilege does not protect communications made in furtherance of a criminal or fraudulent purpose suggests that the privilege was not intended to be excluded by implication by s 597. The width of the crime or fraud exception is illustrated by the circumstances of three decisions of the High Court in which the exception was considered.

[...]

Given these background considerations, we agree with Lockhart J that it is one thing to construe a provision of the type found in s 597 as taking away, by implication, the right of silence; yet it is a different thing to read into such a provision an intention to eliminate the very different privilege inherent in a proper legal professional relationship.

92. In relation to without prejudice privilege, however, a number of cases have reached the opposite result. In *Re BPTC Ltd (in liq)* McLelland J stated:

In my opinion, the claim that a particular communication was made “without prejudice” is not a sufficient ground to resist a requirement for the contents of that communication to be provided (whether orally or by the production of a document) in an examination under s 597. The origin and purpose of that particular privilege is quite remote from those of the privilege against self incrimination and legal professional privilege and I see no reason in principle for excluding from any such requirement under s 597 the contents of the “without prejudice” communications, bearing in mind that there is no issue for determination in any such examination and the rationale for the privilege is simply not applicable.

93. The right to object to the admissibility of without prejudice evidence in another proceeding, however, is not necessarily lost under the rules of evidence applicable to those proceedings.⁹⁵

Bankruptcy Act

94. Section 81(11AA) expressly provides that the “*relevant person*” is not excused from answering a question merely because to do so might tend to incriminate that person.

⁹³ (1992) 35 FCR 447.

⁹⁴ (1992) 35 FCR 447 at 459.

⁹⁵ *McPhersons*, above n 2, at [15.830].

The Full Federal Court has held that this provision is wide enough to abrogate the common law privilege of self-incrimination.⁹⁶

As to answering questions at the s 81 examination, the appellant says that “s 81(11AA) is directed only to questions which might *tend* to incriminate, not questions which *would* incriminate him”. I reject this submission. Set in its history as deriving from s 70 of the 1924 Act and in the light of the clear general law abrogation of any aspect of the privilege in respect of the bankrupt answering questions at an examination I am in no doubt that the wider use of the phrase is such as to ensure that the abrogation was of a width conformable with the existing law — in that the bankrupt could not refuse to answer merely by reason of the privilege. As I have said earlier, the privilege was often expressed in the terms of “tending” to ensure its width and utility. That width was intended to be abrogated, in my view.

95. As set out in *Australian Bankruptcy Law & Practice*:⁹⁷

A relevant person, therefore, is not entitled to refuse to answer questions at his examination on the ground that by so doing he may incriminate himself (*re Paget; Ex parte Official Receiver* [1927] 2 Ch 85) but the evidence so given may be excluded at a criminal trial of the examinee: *R v Owen* [1951] VLR 393; (1951) 15 ABC 132. The court has compelled a debtor to disclose the source from which he obtained articles in infringement of a patent, although the question may have been put merely with the object of initiating civil proceedings: *Re Jawett* [1929] 1 Ch 108. The scope of an examination of a relevant person and the discretions of the court to excuse an examinee from answering questions were again considered in *Clyne v Deputy Commissioner of Taxation (NSW)* (1985) 8 FCR 130...

96. Consistent with the inquisitorial nature of the public examination procedure, s 264C of the Bankruptcy Act provides penalties for a person who:

- (a) refuses or fails to be sworn or to make an affirmation;
- (b) refuses or fails to answer any question which he or she is required to answer by the Court, Registrar or magistrate; or
- (c) refuses or fails to produce any books that he or she is required by the Court, the Registrar or the magistrate, as the case may be, to produce.

97. The penalty specified is \$1,000 or imprisonment for 6 months, or both. The section does not detract from the court’s jurisdiction to punish an examinee for contempt if the examinee persists in refusing to cooperate.

⁹⁶ *Griffin v Pantzer* (2004) 137 FCR 209 at [187] per Allsop J (with whom Heerey and Ryan JJ agreed).
⁹⁷ Above n 3, at [81.11AA.05].

VII. Practical tips

98. Through the examination process the liquidator or trustee (**insolvency practitioner**) in substance obtains:
- (a) information;
 - (b) books or records;
 - (c) a transcript of the questions and answers given at the examination.
99. Issues of credit are not determined in an examination.
100. The benefit or worth of the examination process will depend upon many factors, but those will include the consideration given to objectives to be achieved from the examination process, the preparation by the insolvency practitioner, lawyers and counsel.
101. In approaching an application for examination the following factors ought to be kept in mind:
- (a) what does the insolvency practitioner want to achieve from the examination;
 - (b) how do you achieve that objective at the minimum cost;
 - (c) who are the persons that need to be examined. Will conduct money be required to be given to an examinee;
 - (d) what books or records or other documents are required to be produced and by whom;
 - (e) estimate the time that will be needed for each examinee;
 - (f) how long will the examination take;
 - (g) what funds are required to complete the examination. This will include any court fees and conduct money;
 - (h) in which court will the application be made, such as Supreme Court of Queensland or Federal Court. For bankruptcy matters the application will be made before either the Federal Court or Federal Circuit Court as those courts relevantly have concurrent jurisdiction.

102. A request for documents in a summons must include an appropriate description of any documents sought to be produced by the examinee. Take a measured approach when requesting documents. The description of documents must:
 - (a) clearly and precisely identify the documents sought;
 - (b) be unambiguous; and
 - (c) not relate to an oppressively long time frame.
103. If the request is unambiguous or too wide an application may be made to set aside the summons on the ground that it is oppressive.
104. Make sure that the request for documents is within the terms provided under the Corporations Act and the Bankruptcy. It is recommended that the summons refer to the term "*in the possession of*" with a reference to that term relevantly being defined in s 9 and s 86 of the Corporations Act or s 5(1) of the Bankruptcy Act.
105. Dates for the examination will need determined before the summons is issued as the summons includes the date the examinee is to attend court.
106. The principal matter in the conduct of the examination is preparation. Such preparation includes:
 - (a) preparing topic headings in line with the objectives sought to be achieved from the examination;
 - (b) identify for each examinee the topics which are relevant to them and there prepare the questioning around those headings;
 - (c) identify the documents that will be relevant to each examinee.
107. Have core questions built around documents. This will minimise likelihood of receiving a response from the examinee of can't recall or alternatively, without seeing the document I do not know.
108. Take to the examination some key authorities on the ambit or scope of examination so that if you encounter any objections to questions they can be responded to.

109. If a large number of documents are to be produced to the court by one or more examinees then the summons may be returnable on one first day of the examination with the examination of the particular examinee being adjourned to another day. That will enable a review of the documents before the examination of the examinees occurs.
110. If the examinee has lawyers representing them an arrangement may be made for the lawyers to produce the documents to the court with the person's examination being adjourned to another day.
111. A schedule of the times and days the examinees will be required ought to be prepared prior to the commencement of the examination to manage the examination process and to assist examinees knowing when they will be required to attend. For a lengthy examination this schedule may need to be updated.
112. It is helpful to provide a list of the examinees to the court officer to enable them to perform their function.
113. Upon the request of the insolvency practitioner's lawyers or counsel the court makes orders for release of the documents for inspection and photocopying.
114. In the Federal Court and Federal Circuit Court a registrar at the commencement of a person's examination provides the witness a script about the claiming self-incrimination privilege. The registrar also explains to the examinee the process.
115. It is important that a legal representative be respectful to the court and to the examinee.
116. Ask questions in a clear and precise way. If necessary re-phrase the question for the examinee.
117. Do not ask multiple questions at once. The examinee is unlikely to understand the question. The transcript may not identify which question is being answered and the utility of the transcript in subsequent proceedings will more than likely be diminished.
118. If a during the examination process a document is identified by an examinee, tender the document. It will be then formally be marked as an exhibit and become part of the formal record of the examination.
119. If is an examinee is unable to identify a document then have it marked for identification.

120. The transcript will then clearly identify the documents that were before an examinee and what the examinee's response to questioning with respect to those documents.
121. At the end of the examination, or alternatively in the order for the issue of the summons, the court will require the examinee to read the transcript of their examination, make any changes where there are typographical errors and sign the transcript. That will be returned to the lawyers for the insolvency practitioner.

VIII. Conclusion

122. Public examinations provide a broad, flexible power to those acting for liquidators or other insolvency professionals attempting to understand the operation of companies in external administrators, or the affairs of a bankrupt. The Australian approach to public examinations accords large discretion to liquidators, in particular, in their examination of persons connected with the affairs of an insolvent corporation.
123. As identified above, public examinations fulfil a range of purposes and assist with ensuring high governance standards across Australia's corporate landscape. Adopting the tips and practices suggested in this paper will hopefully assist practitioners to obtain the most out of the public examination machinery provided in the insolvency legislation in order to best protect and advance the interests of their clients.

Paul McQuade QC

James Green

21 June 2016

Annexure A*Corporations Act provisions***596A Mandatory examination**

The Court is to summon a person for examination about a corporation's examinable affairs if:

- (a) an eligible applicant applies for the summons; and
- (b) the Court is satisfied that the person is an officer or provisional liquidator of the corporation or was such an officer or provisional liquidator during or after the 2 years ending:
 - (i) if the corporation is under administration—on the section 513C day in relation to the administration; or
 - (ii) if the corporation has executed a deed of company arrangement that has not yet terminated—on the section 513C day in relation to the administration that ended when the deed was executed; or
 - (iii) if the corporation is being, or has been, wound up— when the winding up began; or
 - (iv) otherwise—when the application is made.

596B Discretionary examination

- (1) The Court may summon a person for examination about a corporation's examinable affairs if:
 - (a) an eligible applicant applies for the summons; and
 - (b) the Court is satisfied that the person:
 - (i) has taken part or been concerned in examinable affairs of the corporation and has been, or may have been, guilty of misconduct in relation to the corporation; or
 - (ii) may be able to give information about examinable affairs of the corporation.
- (2) This section has effect subject to section 596A.

*Bankruptcy Act provisions***Discovery of bankrupt's property etc.**

- (1) Where a person (in this section called the *relevant person*) becomes a bankrupt, the Court or a Registrar may at any time (whether before or after the end of the bankruptcy), on the application of:
- (a) a person (in this section called a *creditor*) who has or had a debt provable in the bankruptcy;
 - (b) the trustee of the relevant person's estate; or
 - (c) the Official Receiver;
- summon the relevant person, or an examinable person in relation to the relevant person, for examination in relation to the bankruptcy.
- (1A) A summons to a person by the Court or the Registrar under subsection (1) shall require the person to attend:
- (a) at a specified place and at a specified time on a specified day, being a place, time and day that are reasonable in the circumstances; and
 - (b) before the Court or the Registrar or, if the Court or the Registrar thinks fit, a magistrate;
- to be examined on oath under this section about the relevant person and the relevant person's examinable affairs.
- (1B) A summons to a person under subsection (1) may require the person to produce at the examination books (including books of an associated entity of the relevant person) that:
- (a) are in the possession of the first-mentioned person; and
 - (b) relate to the relevant person or to any of the relevant person's examinable affairs.
- (1C) Before summoning a person on an application under subsection (1) by a creditor, the Court or the Registrar, as the case requires, may impose on the applicant such terms as to costs as it, or he or she, thinks fit.
- (2) An examination under this section shall be held in public.
- (3) The Court, the Registrar or a magistrate may at any time adjourn the examination of a person under this section either to a fixed date or generally, or conclude the examination.
- (4) The Registrar or a magistrate may at any time adjourn the examination of a person under this section for further hearing before the Court.
- (5) Where the examination is adjourned by the Registrar or a magistrate for further hearing before the Court, the Registrar or the magistrate, as the

case may be, may submit to the Court such report with respect to the examination as he or she thinks fit.

- (6) Where the examination is adjourned for further hearing before the Court, the Court may:
 - (a) continue the examination;
 - (b) at any time direct that the examination be continued before the Registrar or a magistrate; or
 - (c) make such other order as it thinks proper in the circumstances.
- (7) A person summoned to attend before the Court, the Registrar or a magistrate for examination under this section is entitled to be represented, on his or her examination, by counsel or a solicitor, who may re-examine him or her after his or her examination.
- (8) Where a person is summoned for examination under this section, a creditor, the trustee or the Official Receiver may take part in the examination and, for that purpose, may be represented by counsel or a solicitor or by an agent authorized in writing for the purpose.
- (9) Without limiting the generality of subsection (8), where the Official Trustee is the trustee, the Official Trustee may, for the purpose of taking part in the examination, be represented by the Official Receiver.
- (10) The Court, the Registrar or the magistrate may put, or allow to be put, to a person being examined under this section such questions about the relevant person or any of the relevant person's examinable affairs as the Court, the Registrar or the magistrate, as the case may be, thinks appropriate.
- (10A) Notwithstanding subsection (10), where a person is being examined under this section after the end of the bankruptcy, a question about a matter or thing arising or occurring after the end of the bankruptcy shall not be put, or allowed to be put, at the examination unless the question is about a matter or thing connected with the administration of the relevant person's estate.
- (11) A person being examined under this section shall answer all questions that the Court, the Registrar or the magistrate puts or allows to be put to him or her.
- (11AA) Subject to any contrary direction by the Court, the Registrar or the magistrate, the relevant person is not excused from answering a question merely because to do so might tend to incriminate the relevant person.
- (11A) The Court, the Registrar or the magistrate may direct a person who is being examined under this section to produce at the examination specified books, or specified classes of books, that are in the possession of the person and are relevant to matters about which the person is being, or is to be, examined.

- (11B) Without limiting the generality of subsection (11A), a direction under that subsection may relate to books of an associated entity of the relevant person.
- (12) Where a person admits on examination under this section that he or she is indebted to the relevant person, then, the Court, the Registrar or the magistrate, as the case may be, may, on the application of the trustee or a creditor, order the person to pay to the trustee, at or by such time and in such manner as the Court, the Registrar or the magistrate, as the case may be, thinks fit, the whole or a part of the amount in which the person admits he or she is indebted to the relevant person.
- (13) Where a person admits on examination under this section that there is in the possession of the person property of the relevant person that is divisible among creditors, the Court, the Registrar or the magistrate, as the case requires, may, on the application of the trustee or a creditor, order the first-mentioned person to deliver the property to the trustee within a specified period, in a specified manner and on specified terms.
- (14) The Court, the Registrar or the magistrate, as the case may be, may direct that the costs of a person, other than the relevant person, examined under this section shall be paid out of the estate of the relevant person.
- (15) The Court, the Registrar or the magistrate, as the case may be, may cause such notes of the examination of a person under this section to be taken down in writing as the Court, the Registrar or the magistrate, as the case may be, thinks proper, and the person examined shall sign the notes.
- (17) Notes taken down and signed by a person in pursuance of subsection (15), and the transcript of the evidence given at the examination of a person under this section:
- (a) may be used in evidence in any proceedings under this Act whether or not the person is a party to the proceeding; and
 - (b) shall be open to inspection by the person, the relevant person, the trustee or a person who states in writing that he or she is a creditor without fee and by any other person on payment of the fee prescribed by the regulations.