

Examinations under Part 5.9 of the *Corporations Act 2001* at the Supreme Court of NSW

The following legislation and rules govern these examinations:

- Division 5.9 (section 596A -597B) Corporations Act 2001
- Supreme Court (Corporation) Rules (SCCR) Division 11
- Forms 2, 3, and 17 -Supreme Court Corporation Forms
- Form 23A of the Uniform Civil Procedure Forms.

Orders for Production

Orders for production are authorised under s. 68 of the *Civil Procedure Act 2005*. There is now a specific form that must be used for orders for production (Form 29).

Procedure to hold an examination

Is there an eligible "applicant"? Eligible applicant is defined in s. 9 of the *Corporations Act 2001*. If the applicant is not within this definition (for example, a receiver), ASIC approval is necessary to proceed.

Chamber appointments

Summonses and orders for production are issued in a chamber appointment. A chamber appointment can be arranged by telephoning the Court (9230 8111) and ask to speak to one of the deputy registrars responsible for the *Corporations Act* examinations to arrange an appointment. At this point, dates can be reserved for examination hearings and subsequently confirmed at the chamber appointment.

Before the chamber appointment, you must:

- file the initiating process or interlocutory application,
- file the affidavit in support (SCCR 11.3(3))
- notify ASIC of the application (SCCR 11.3(6)) and, if applicable,
- notify the liquidator and any other eligible applicants of the application (SCCR 11.3(5); s. 596E).

ASIC should be notified in plenty of time to allow it to check details and respond to you. A copy of your process together with a covering letter that lists your contact details, the people you wish to be examined (specify whether under s. 596A or s. 596B) and the dates that have been reserved for the examination should be included with your correspondence.

A copy of the response from ASIC should be brought to the chamber appointment.

An interlocutory process may be filed if there is an existing NSW Supreme Court file for the winding-up of the corporation (SCCF 3). The individual fee rate for an interlocutory process applies. Otherwise, an originating process should be filed to create a new file and the individual fee rate for an originating process applies. The

application can be made without notice to any person (SCCR 11.3(2)). A return date for the application is not required because the application is considered at the chamber appointment.

The supporting affidavit

The supporting affidavit must be filed in a sealed envelope and marked in accordance with CLR 11.3(4). The affidavit is not available for inspection by any person unless the Court otherwise orders (SCCR 11.3(7); s. 596C(2)). Although a Registrar has power to allow access to the affidavit (Sch E Pt 2 31A), this is very rarely used.

A recent ASIC historical search of the company should also be attached as this is useful to confirm the details of the company and its officers.

The affidavit must include:

- The reasons why the eligible applicant wants to hold a public examination into the examinable affairs of the company;
- for s. 596A examinees, an ASIC search that demonstrates that a person was an "examinable officer" during the time described in s. 596A(b),
- for s. 596B examinees, facts and other material relied on to justify why a person comes within the grounds set out in s. 596B(2). In other words, that the person has taken part in the examinable affairs of the corporation (as defined in s. 9), and has been or may have been guilty of misconduct in relation to the corporation, or may be able to give information about the examinable affairs of the corporation. Full details to support the application are required, so it is wise to annexe or exhibit relevant documents that can demonstrate a connection between the proposed examinee and the company,
- information establishing how the orders for production are justified.

Current or imminent litigation taken on behalf of the company against an intended examinee must be disclosed in the affidavit.

What should be brought to the chamber appointment

Summons for
examination Orders for
production ASIC
response

Production of documents

If production of documents is sought prior to an examination, ancillary orders for production will be needed. Sub-section 597(9) of the Act has been interpreted to allow a direction that documents be produced at the examination, but not beforehand (*Re BPTC Limited (in liq)* (1992) 8 ACSR 533). "At" the examination means a time between its commencement and conclusion (*Re South Pacific Energy Trading Pty Limited (in liq)* 1996 40 NSWLR 264).

Orders for production are authorised under the *Civil Procedure Act 2005*. They can be issued to individuals who are to be summoned to attend the examination as well as to other individuals or corporations who can provide documents etc relating to the examinable affairs of the company. It is unlikely that orders for production will be issued ex parte where production is sought from a solicitor and a claim of client legal privilege is likely to arise (*Re BPTC Limited* (in liq) (No 5) (1993) 11 ACLC 734; *Re South Pacific Energy Trading Pty Limited* (in liq) 1996 40 NSWLR 264).

The liquidator's affidavit should establish how the issue of orders for production is justified. Form 23A of the Uniform Civil Procedure Forms is to be used. Care should be taken to particularise the documents required to be produced. Orders for production are made returnable in a Return of Subpoena list, which is run every day at 9am. This listing will be made for you at the chamber appointment. Refer to the court list for the location of the list.

Where a corporation is issued with an order for production, it must be addressed to:

(Name of corporation)

by its Proper Officer

(address of corporation). (See *Re BPTC Limited* (in liq) (1992) 8 ACSR 533)

Where a partnership is issued with an order for production, the order should be addressed to the partnership, with a schedule of all the partners attached to the order. If you are certain that a particular partner has possession or control of the documents, the order can be addressed to that particular person without listing all the other partners.

Service

An examination should be personally served (subject to further direction of the Court) at least 8 days before the examination date (SCCR 11.4 and 1.9(1)(b)). There is no strict entitlement for a NSW resident to receive conduct money, but it may be prudent to offer conduct money to assist the examinee to get to Court. If the examinee lives a considerable distance from Sydney, and particularly if they are a s. 596B examinee, thought should be given to facilitating travel and accommodation requirements (*Re Kempal Pty Limited* (receiver and manager appointed) (1989) 17 NSWLR 550).

The order for production should be served at least 5 clear days before the return date. Orders for production should be personally served.

Where a summons or order for production is to be served interstate, the time for service is 14 days and the *Service and Execution of Process Act* (SEPA) Form 2 notices must be attached. We also request that you attach a covering letter to the interstate summons that invites the examinee to contact the issuing solicitor's firm to arrange for travel and accommodation.

Notice of examination

Under s. 596E of the *Corporations Act 2001*, "the person who applied for the summons" must give written notice to as many of the corporation's creditors as reasonably practical and to each "eligible" applicant. Exceptions are contained in s. 596E.

Short notice of adjournment of the examination by eligible applicant

Where the eligible applicant seeks to adjourn the examination 14 days or less before the scheduled date for the examination, they must either:

- obtain the consent of all examinees to the adjournment, or
- file and serve interlocutory process and affidavit that supports the application for the proposed adjournment.