

C A T C H W O R D S

CORPORATIONS - examination pursuant to s. 597 of the Corporations Law - delegation to Registrar of certain powers of the Court in relation to examinations - whether delegation valid.

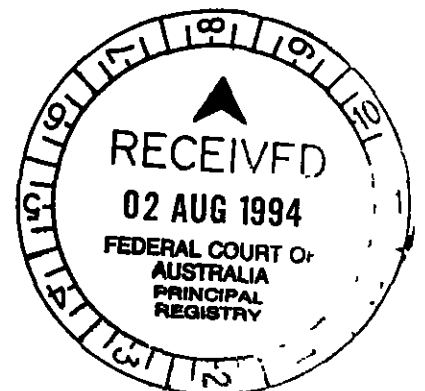
Corporations Law, ss. 596A-597
Corporations Act 1989, s. 60
Corporate Law Reform Act 1992, ss. 116, 117
Federal Court of Australia Act 1976, ss. 19, 35A
Federal Court Rules, O. 71 r. 7, rr. 81-82

Acton Engineering Pty Ltd v Campbell (1991) 31 F.C.R. 1
Mercantile Mutual Life Insurance Co. Ltd v Australian Securities Commission (1993) 40 F.C.R. 409
Harris v Caladine (1991) 172 C.L.R. 84

IN THE MATTER OF THE SOCKET SCREW & FASTENER DISTRIBUTORS (N.S.W.) PTY LIMITED (IN PROVISIONAL LIQUIDATION)
ACN 054 654 787
WILLIAM JAMES HAMILTON in his capacity as provisional liquidator of The Socket Screw & Fastener Distributors (N.S.W.) Pty Limited - Applicant
No. NG3016 of 1994.

IN THE MATTER OF FRANBRIDGE PTY LIMITED (RECEIVER AND MANAGER APPOINTED) (IN PROVISIONAL LIQUIDATION)
ACN 001 963 435
WILLIAM JAMES HAMILTON in his capacity as provisional liquidator of Franbridge Pty Limited - Applicant
No. NG3017 of 1994.

BEFORE: DAVIES, SHEPPARD, GUMMOW JJ.
PLACE: SYDNEY.
DATE: 29 JULY 1994.



IN THE FEDERAL COURT OF AUSTRALIA)
NEW SOUTH WALES DISTRICT REGISTRY) No. NG3016 of 1994
GENERAL DIVISION)

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DATE: 29 JULY 1994.

MINUTE OF ORDERS

In proceeding NG3016 of 1994

THE COURT ORDERS THAT:

(A) The questions in the Case Stated be answered as follows:

(1) Is Part 5.9 of the Corporations Law effective to confer jurisdiction upon the Court in respect of the conduct of examinations of company officers?

Answer: Yes.

(2) Does the Court have power to conduct such examinations?

Answer: Yes.

(3) Were the examination summonses issued by Registrar Jurd valid?

Answer: Yes.

(4) Was the examination invalid by reason of lack of delegated authority to Registrar Quilter?

Answer: No.

(5) Are the persons examined in the proceedings obliged to sign the transcript of the proceedings, having been ordered to do so by Registrar Quilter?

Answer: Yes.

3.

(6) Will the persons examined in the proceedings be bound to sign the transcript of the examinations if ordered to do so by a Judge of the Court?

Answer: Yes.

(B) The applicants pay the costs of the provisional liquidator of the Case Stated.

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Note: Settlement and entry of orders is dealt with by Order 36 of the Federal Court Rules.

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DATE: 29 JULY 1994.

REASONS FOR JUDGMENT

THE COURT:

Before the Court are two cases stated by a Judge of the Court pursuant to s. 26 of the Federal Court of Australia Act 1976 ("the Federal Court Act"). The proceedings were heard together. Six questions are stated as issues for decision, but it became apparent in the course of argument that there was no contest that the first three must be answered in the affirmative. Question 4 asks whether certain examinations conducted before Registrar Quilter on 13 and 14 April 1994 were "invalid by reason of lack of delegated authority to Registrar Quilter". It was accepted in argument that questions 5 and 6 should be answered "yes", if question 4 is answered "no". Question 4 is of central importance.

On 18 February 1994 upon the application of Mr W.J. Hamilton, the provisional liquidator of Franbridge Pty Limited and The Socket & Screw Fastener Distributors (N.S.W.) Pty Limited, another Registrar of the Court had made orders requiring various persons to attend for examination. In respect of the affairs of each corporation the examinations were to be held concurrently with those in the other. No question arises as to the validity or effectiveness of the orders made 18 February 1994.

On 13 and 14 April 1994, before Registrar Quilter, examinations were conducted of a number of the persons the

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subject of the orders made 18 February 1994. Before the completion of the examinations, in each matter an application was made to a Judge of the Court by certain examinees ("the applicants") seeking, in particular, a declaration that the conduct of the examinations before Registrar Quilter was "without power". The issue was then brought before the Full Court in the manner we have described.

The applicants seek an answer to question 4 that the examinations were invalid. Counsel for the provisional liquidator appeared in opposition and submitted that there was no invalidity.

Registrar Quilter acted pursuant to an instrument dated 16 August 1993 ("the Instrument") and signed by the Chief Justice. The Instrument states that the Chief Justice directs that each of the Registrars, who are listed:

". . . may exercise the following powers in any proceeding under the Corporations Law (as defined in section 14 of the Corporations Act 1989), being the powers of the Court specified in columns 2 and 3 of the following item of Part 1 of the Third Schedule to the Federal Court Rules:

Column 1 Item No.	Column 2 Provision of the Corporations Law	Column 3 Number of rule in Order 71	Column 4 Description (For Information only)
90	Section 597	81A to 82 inclusive	Powers of Court in relation to examinations."

The instrument is headed

"FEDERAL COURT OF AUSTRALIA ACT 1976
[Direction pursuant to s 35A(1) - June 1993]
CORPORATIONS LAW"

The powers of the Court identified in the instrument were those in s. 597 of the Corporations Law and Rules "81A to 82" of O. 71 of the Federal Court Rules ("the Rules"). Rule 81A was inserted with effect from 23 June 1993 and appears immediately before r. 82. Rule 81A deals with certain matters arising under sub-ss. (4), (13) and (14) of s. 597. Rule 82 deals with the consequences of certain refusals or failures to attend examinations, to be sworn or affirmed or to answer questions, to produce books or to sign the written record of the examination.

Section 597 of the Corporations Law (which appears in Part 5.9) was amended by s. 117 of the Corporate Law Reform Act 1992 ("the 1992 Act"), with effect from 23 June 1993, that is to say before the date of the Instrument. Sub-sections (1), (2), (3), (5), (8), (11) and (18) of s. 597 were omitted. New sections were inserted. Section 596A deals with mandatory examination about the examinable affairs of a corporation, s. 596B with what is described as "discretionary examination", s. 596C with the provision of an affidavit in support of an application under s. 596B, s. 596D with the content of a summons issued under ss. 596A or 596B, and s. 596E with the giving of notice to creditors and other persons with an interest in the corporation, including liquidators and administrators. Another provision introduced by the 1992 Act is s. 596F. This states:

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- "596F (1) Subject to section 597, the Court may at any time give one or more of the following:
- (a) a direction about the matters to be inquired into at an examination;
 - (b) a direction about the procedure to be followed at an examination;
 - (c) a direction about who may be present at an examination while it is being held in private;
 - (d) a direction that a person be excluded from an examination, even while it is being held in public;
 - (e) a direction about access to records of the examination;
 - (f) a direction prohibiting publication or communication of information about the examination (including questions asked, and answers given, at the examination);
 - (g) a direction that a document that relates to the examination and was created at the examination be destroyed.
- (2) The Court may give a direction under paragraph (1) (e), (f) or (g) in relation to all or part of an examination even if the examination, or that part, was held in public.
- (3) A person must not contravene a direction under subsection (1)."

Section 1311 is a general penalty provision which would appear to apply in respect of contraventions of s. 596F. It was not disputed before us that the powers of the Court under ss. 596A - 596F were not included in those delegated to Registrar Quilter by the instrument dated 16 August 1993. Reliance for

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the conduct of the examinations thus was placed upon s. 597 supplemented by O. 71 rr. 81A and 82. But was there a valid delegation in respect of those examinations?

So far as is immediately relevant, s. 597 as it stood at the date of the Instrument, provided:

"597 (4) 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.

(5A) Any of the following may take part in an examination:

(a) the Commission;

(b) any other eligible applicant in relation to the corporation;

and for that purpose may be represented by a lawyer or by an agent authorised in writing for the purpose.

(5B) The Court may put, or allow to be put, to a person being examined such questions about the corporation or any of its examinable affairs as the Court thinks appropriate.

(6) A person who is summoned under section 596A or 596B to attend before the Court shall not, without reasonable excuse:

(a) fail to attend as required by the summons; or

(b) fail to attend from day to day until the conclusion of the examination.

(7) A person who attends before the Court for examination must not:

(a) without reasonable excuse, refuse or fail to take an oath or make an affirmation; or

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- (b) without reasonable excuse, refuse or fail to answer a question that the Court directs him or her to answer; or
 - (c) make a statement that is false or misleading in a material particular; or
 - (d) without reasonable excuse, refuse or fail to produce books that the summons requires him or her to produce.
- (9) The Court may direct a person to produce, at an examination of that or any other person, books that are in the first-mentioned person's possession and are relevant to matters to which the examination relates or will relate.

. . .

- (13) The Court may order the questions put to a person and the answers given by him or her at an examination to be recorded in writing and may require him or her to sign that written record.

. . .

- (17) The Court or another court before which an examination under this Division takes place may, if it thinks fit, adjourn the examination from time to time."

Before it was omitted by the 1992 Act, sub-s. 597 (5) had provided:

"597 (5) The Court, on making an order for an examination, or at any later time, on the application of any person concerned, may give such directions as to the matters to be inquired into, and, subject to subsection (4), as to the procedure to be followed (including, in the case of an examination in private, directions as to the persons who may be present), as it thinks fit."

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As counsel for the examinees pointed out, the new s. 596F covers, in finer detail, much of the same ground. But, as we have indicated, s. 596F includes a specific provision for sanctions for contravention. Further, the new section is expressed as being subject to s. 597. In our view, and contrary to the submissions of counsel for the examinees, it does not follow that s. 596F operates to the exclusion of anything in s. 597 and as an exhaustive statement of the procedural directions for an examination which may be made under the more general provisions of s. 597.

Counsel for the applicants first submitted that the amendments which had been made to Part 5.9 of the Corporations Law by the 1992 Act brought about the result that the Court lacked jurisdiction to conduct an examination under the Corporations Law.

Counsel submitted, in particular, that elements that had been contained in sub-ss. 597 (1), (2) and (3) as they had previously read were not replicated in the new provisions. On examination, however, it appears that ss. 596A, 596B and 596D contain the elements that previously were to be found in these sub-sections. Counsel conceded this point during his submissions and conceded that the first three questions should be answered "Yes".

We add that the examination of officers of companies has long been regarded as a judicial function and the proper

subject of judicial power. In The Queen v Davison (1954) 90 C.L.R. 353 at 367-368, Dixon C.J. and McTiernan J. pointed out that the usual subject of judicial power, the existence of a controversy between subjects or between the Crown and a subject, is entirely lacking in various proceedings properly falling within the jurisdiction of various courts of justice. Their Honours pointed out that there may be proceedings in courts which involve no adjudication of rights. We are satisfied that the examination for which Part 5.9 provides is a civil matter arising under the Corporations Law and that jurisdiction is conferred on the Court in respect thereof by the various Corporations Acts. The operation of the legislative scheme for national corporations law, with particular reference to the jurisdiction of this Court, was discussed by the Full Court in Acton Engineering Pty Ltd v Campbell (1991) 31 F.C.R. 1. What has been said above and what follows should be understood in the light of that analysis.

The question of the validity of the delegation remains.

The identification in the instrument of delegation of sub-s. 35A (1) of the Federal Court Act is not determinative of the source of authority for the making of that instrument. As a matter of construction, if some other or additional or cumulative source of authority exists outside sub-s. 35A (1) reliance upon it is not excluded by the express reference to s. 35A. The Instrument may, in this sense, represent an

amalgam. The relevant principles, with reference to the High Court authorities (including R v Bevan; Ex parte Elias and Gordon (1942) 66 C.L.R. 452 at 487, Lockwood v The Commonwealth (1954) 90 C.L.R. 177 at 184, and Brown v West (1990) 169 C.L.R. 195 at 203-204), are discussed in Mercantile Mutual Life Insurance Co. Ltd v Australian Securities Commission (1993) 40 F.C.R. 409 at 412-413, 435-437.

Section 60 of the Corporations Act 1989 ("the Corporations Act"), which is federal legislation, extends the rule making powers conferred upon this Court by s. 59 of the Federal Court Act. These powers now extend to the making of Rules of Court with respect to proceedings, and the practice and procedure of this Court, under the Corporations Law, and with respect to any matter or thing necessary or convenient to be prescribed thereby for carrying out or giving effect to that law. Those Rules of Court also are to be applied where this Court exercises jurisdiction with respect to matters arising under the corporations law of a State. Sub-section 60 (2) so provides.

A provision such as s. 60 ordinarily would not be taken to authorise delegation to a registrar or master of the exercise of the jurisdiction of a superior court, an express conferral of authority by statute being necessary; see Professor Enid Campbell, "Rules of Court", 1985, p. 70. This particularly is so when the court exercises the judicial power of the Commonwealth. Harris v Caladine (1991) 172 C.L.R. 84,

emphasises the need for specific provision and the close scrutiny to be given to it in assessing constitutional validity.

Order 71 r. 7 (1) of the Rules, as it stood on 16 August 1993, provided:

- "7 (1) A Registrar may, if the Court or a Judge so directs, exercise a power of the Court:
 - (a) under a provision of the Corporations Law specified in column 2 or 3 of an item in Part 1 of the Third Schedule; and
 - (b) . . ."

Item 90 of Part 1 of the Third Schedule to the Rules identified the powers of the Court in relation to examinations, under ss. 596A, 596B and 597, and O. 71 rr. 81 - 82 inclusive.

One of the submissions for the provisional liquidator, in support of the validity of the Instrument, was that it was to be supported as a direction by the Chief Justice under O. 71 r. 7 (1), which in turn was based upon s. 60. However, as we have indicated, of itself s. 60 is not to be read as a sufficiently specific statutory warrant for delegation of the nature dealt with in O. 71 r. 7.

However, that is not the end of the matter. It will be observed that O. 71 r. 7 (1) conditions the exercise of power

by a Registrar upon the existence of a direction by the Court or a Judge. The phrase "if the Court or a Judge so directs" also appears in sub-s. 35A (1) of the Federal Court Act. That provision, as immediately relevant, is as follows:

"35A (1) Subject to subsection (2), the following powers of the Court may, if the Court or a Judge so directs, be exercised by a Registrar:

(a) . . .

. . .

(h) a power of the Court prescribed by Rules of Court."

Nothing turns upon sub-s. (2). The submission by counsel for the examinees was that the relevant powers of the Court for the conduct of the examinations were found in s. 597, if at all, and whilst they were reflected or implemented by various provisions in O. 71, the powers of the Court were not, within the meaning of s. 35A, "prescribed" by O. 71.

One ordinary meaning of "prescribe" is to lay down or impose authoritatively a rule or direction. There is a number of cases in which the term has been considered in a particular statutory or other context. What is in issue here is the particular context in which s. 35A is placed.

Section 35A appears in the statute by which this Court is established and provision is made for its operation. Section 19 of the Federal Court Act in providing that the Court has

such original jurisdiction as is vested in it by laws made by the Parliament confirms what has become the obvious truth that the Court has received jurisdiction from numerous statutory sources. The result is that the powers in aid of the exercise of that jurisdiction may be derived from varied sources. Thus it is to be expected, as s. 60 of the Corporations Act illustrates, that Rules of Court will be made under various enabling laws to deal with a heterodox collection of subjects. The phrase "prescribed by Rules of Court" as it appears in s. 35A is to be understood in this context.

In particular, a power may be prescribed, within the meaning of s. 35A, even though it is not prescribed solely or exclusively by the operation of any one Rule of Court. In our opinion, the prescription may still answer the description in s. 35A although it results also from the operation of an enabling statute and from the satisfaction of conditions attached within the Rules of Court themselves; cf Joint Coal Board v Cameron (1989) 90 A.L.R. 208 at 210-211, 216-217.

Order 71 r. 7 (1) implements, in the sense described above, the general powers in s. 60 of the Corporations Act and its effect is, by the phrase "if the Court or a Judge so directs", conditioned upon the existence and operation of such a direction. The power to give the direction, and so bring about satisfaction of the condition, is conferred by statute, namely para. 35A (1) (h) of the Federal Court Act. The relevant power of the Court is "prescribed" by O. 71 r. 7 in

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the sense that whilst it is created by s. 597, it is identified and singled out in Part I of the Third Schedule to the Rules. Further, its exercise is, by the Rule itself, conditioned upon the existence of a statutory direction of the Court or a Judge.

Accordingly, in our view in the cases stated for the Full Court, question 4 should be answered "No". Questions 1, 2, 3, 5 and 6 should be answered "Yes".

The costs of the provisional liquidator of the cases stated should be paid by the applicants.

I certify that this and the preceding thirteen (13) pages are a true copy of the Reasons for Judgment of the Court.

Associate:

Carman Moore

Date:

29 July 1994.

Counsel and solicitors
for the applicants:

Mr R.K. Eassie instructed
by Palombi Hazan.

Counsel and solicitors for
the provisional liquidator:

Mr Peter Garling instructed
by Price Brent.

Date of Hearing:

21 July 1994.

Date of Judgment:

29 July 1994.