

This article forms part of our litigation funding series and discusses a key decision that has the potential to significantly support the due diligence efforts of litigation funders in external administration contexts.

On 16 February, the High Court of Australia handed down its decision in a long-running dispute concerning former ASX listed Arrium Limited (Arrium). The judgment provides clarity on the purposes for which an Australian Securities and Investments Commission (ASIC) authorised eligible applicant may conduct public examinations into the affairs of a corporation in external administration. It also provides legal certainty to shareholders, and importantly litigation funders, who may be seeking to conduct investigations into potential claims against a company in external administration, counterparties to that entity, its former or current advisors or its directors and officers.

## Section 596A

Under section 596A of the Corporations Act 2001 (Cth) (Act), the court will issue an examination summons, on application by an eligible applicant, to summons an officer or provisional liquidator of a corporation in external administration for examination on the affairs of that corporation. An eligible applicant includes a person authorised in writing by ASIC to make an application under part 5.9 of the Act.

## Summary of Claim

The appellants in the High Court were former shareholders of Arrium. The shareholders were authorised by ASIC to make an application under part 5.9 of the Act as eligible applicants. They subsequently applied to the Supreme Court of New South Wales for an order pursuant to section 596A of the Act that a summons be issued to a former director of Arrium. The appellants' purpose in conducting the examination was to investigate and pursue potential claims against the former directors and auditors of Arrium, arising out of a capital raising in 2014. Any future proceedings were intended to be confined to a limited class of Arrium shareholders, being those who suffered a loss as a result of the 2014 capital raising.

A Supreme Court Registrar granted orders issuing the examination summons and associated orders requiring the former auditors and bank who advised on the 2014 capital raising to produce certain documents.



## Supreme Court Application

Arrium, acting by its external administrators, subsequently applied for the examination summons and orders for production to be stayed or set aside as an abuse of process. The former auditors and director who were the subject of the examination summons also took part in those proceedings and sought similar orders. His Honour, Justice Black in the Supreme Court, refused to stay or set aside the summons and held that although the examination was being conducted for arguably private purposes with no real nexus to the interests of stakeholders in Arrium's external administration, it did not amount to an abuse of process.

## Court of Appeal

Arrium appealed the primary judge's decision to the Court of Appeal, which allowed the appeal and dismissed the examination summons, on the basis the primary purpose of the examination was to pursue private litigation and, importantly, that it did not confer a demonstrable or commercial benefit on Arrium or its creditors, and was, therefore, an abuse of process.

## High Court Determination

In determining the appeal, the High Court had to consider whether section 596A of the Act is confined to examinations that conferred a demonstrable or commercial benefit on the corporation or its creditors. The court held that:

- Section 596A of the Act is not confined to the interests of the corporation, its creditors, contributories, or to bringing of criminal or regulatory proceedings only
- Examining an officer of a corporation for the purpose of pursuing a claim against a corporation in external administration, or one of its officers or advisors for the enforcement of the law, can be a legitimate use of the power, irrespective of whether it is in the interests of the corporation, or whether the claim relates to all or only some of the corporation's creditors or contributories

The majority, therefore, allowed the appeal and the issuance of the examination summons was held not to be an abuse of process.

## Key Implications

The High Court's decision is favourable to, and would be welcomed by, individuals, particularly shareholders, who are able to obtain ASIC authorised eligible applicant status, and to their litigation funders.

The decision clears the path for individuals who have suffered a loss in corporate contexts to seek approval for conducting public examinations as a means of gathering information and documents and completing claims due diligence processes prior to commencing final relief proceedings. In circumstances where they may be limited publicly available information, examinations (and orders for production) are a critical tool to be utilised prior to the commencement of proceedings against corporations in external administration or persons connected with those entities. Public examinations allow potential plaintiffs, and their litigation funders, to properly identify possible claims, their merits and litigation risks before incurring the costs (and liabilities) of substantive proceedings. Absent information that may be gathered during public examinations, litigation to pursue otherwise meritorious claims may never be commenced against corporations or third parties. As such, there would be very limited consequences for directors and officers or third-party advisors for misconduct or wrongful actions, particularly in bankruptcy contexts where shareholders such as the appellants in Arrium almost never benefit from dividends.



While eligible applicants and their funders would be pleased with the decision, it is likely that external administrators would not welcome the news. The external administrators in Arrium argued that they represented and acted in the best interests of creditors and contributories as a whole, and further that the appellants' interests (limited to their previously held shares) had been extinguished and that their conduct of the examination would derive no benefit to the overall pool of actual creditors. The High Court did not accept that position. It confirmed that the power conferred by section 596A operated irrespective of whether a claim might relate to all or only some stakeholders.

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<sup>1</sup> *Walton & Anor v ACN 004 410 833 Limited (Formerly Arrium Limited) (In Liquidation)* [2022] HCA 3