Equity Division
Supreme Court
New South Wales

Case Name:	TW McConnell Pty Ltd as trustee for the McConnell Superannuation Fund v SurfStitch Group Ltd (administrators appointed) (No 2)
Medium Neutral Citation:	[2018] NSWSC 1149
Hearing Date(s):	5 July 2018
Date of Decision:	26 July 2018
Jurisdiction:	Equity - Commercial List
Before:	Stevenson J
Decision:	Plaintiff entitled to access to documents produced on subpoena
Catchwords:	EVIDENCE – privilege – privilege against self-incrimination – statutory abrogation of privilege - where transcripts of examinations under s 19 of the Australian Securities and Investments Commission Act 2001 (Cth) produced to court by ASIC in response to a subpoena – where objection was taken during examinations under s 68(2) of the ASIC Act – whether inspection should be permitted
Legislation Cited:	Australian Crime Commission Act 2002 (Cth) Australian Securities and Investments Commission Act 2001 (Cth) Canada Act 1982 (UK) c 11, sch B pt 1 ('Charter of Rights and Freedoms') Civil Procedure Act 2005 (NSW) Corporations Act 2001 (Cth) United States Constitution
Cases Cited:	A v Boulton [2004] FCAFC 101; (2004) 136 FCR 420 Gemmell v Le Roi Homestyle Cookies Pty Ltd (in liq) [2014] VSCA 182; (2014) 46 VR 583 Hamilton v Oades [1989] HCA 21; (1989) 166 CLR 486 HKSAR v Lee Ming Tee [2001] 1 HKLRD 599 Johns v Australian Securities Commission [1993] HCA 56; (1993) 178 CLR 408

	La Macchia v Minister for Primary Industries and Energy (1992) 110 ALR 201 Maronis Holdings Ltd v Nippon Credit Australia Ltd [2000] NSWSC 138; (2000) 18 ACLC 609 Mercedes Holdings Pty Ltd v Waters (No 7) [2013] FCA 138 Re Australian Property Custodian Holdings Ltd (No 3) [2013] VSC 154; (2013) 275 FLR 327 Reid v Howard [1995] HCA 40; (1995) 184 CLR 1 Shaw v Yarranova Pty Ltd [2006] VSC 45 Shipley v Masu Financial Management Pty Ltd [2008] NSWSC 1187 Smith v R [2007] WASCA 163; (2007) 63 ACSR 445 Sorby v The Commonwealth [1983] HCA 10; (1983) 152 CLR 281 Watson v AWB Ltd (No 3) [2009] FCA 1174; (2009) 181 FCR 96 X7 v Australian Crime Commission [2013] HCA 29; (2013) 248 CLR 92
Texts Cited:	Australian Securities and Investments Commission, Regulatory Guide 103: Confidentiality and release of information (1995) R P Austin and A J Black, Austin & Black's Annotations to the Corporations Act (looseleaf, LexisNexis Butterworths)
Category:	Procedural and other rulings
Parties:	TW McConnell Pty Ltd as trustee for the McConnell Superannuation Fund (Plaintiff) SurfStitch Group Ltd (in administration) (First Defendant) Justin Peter Cameron (Second Defendant)
Representation:	Counsel: T Chalke (Plaintiff) M Izzo (First Defendant) N M Bender (Second Defendant) Solicitors: Gadens (Plaintiff) King Wood & Mallesons (First Defendant) Arnold Bloch Leibler (Second Defendant)
File Number(s):	SC 2017/193375

JUDGMENT

1 TW McConnell Pty Ltd seeks access to transcripts of two examinations of the second defendant, Mr Justin Cameron, made by officers of the Australian Securities and Investments Commission under s 19 of the *Australian Securities and Investments Commission Act 2001* (Cth) and now produced to the Court by ASIC in answer to a subpoena issued at McConnell's request.

2 Mr Cameron resists access on the basis of the privilege against self-incrimination.

3 McConnell contends that:

(1) the Act has modified Mr Cameron's privilege against self-incrimination so that:

(a) Mr Cameron could not refuse to answer questions put to him during the s 19 examinations on the basis that the answers might tend to incriminate him: s 68(1);

(b) as Mr Cameron claimed the existence of the privilege before answering the questions and as the answers might in fact have tended to incriminate him, the answers given by Mr Cameron are not admissible against him in criminal proceedings or proceedings for the imposition of a penalty: ss 68(2) and (3);

(c) the privilege is otherwise "abrogated"; and

(2) accordingly, now that ASIC has produced the transcript of the s 19 examinations to the Court in response to a subpoena, Mr Cameron cannot invoke the privilege to resist access to it by McConnell.

4 In *Watson v AWB Ltd (No 3)* [2009] FCA 1174; (2009) 181 FCR 96 at [31]-[32] Foster J concluded, in circumstances indistinguishable from those here, that the privilege was so modified. The s 19 transcript in that case could be

inspected by the party that caused the subpoena to be issued. In *Re Australian Property Custodian Holdings Ltd (No 3)* [2013] VSC 154; (2013) 275 FLR 327 Robson J followed that decision at [148].

5 I am invited to come to a different conclusion and to hold that those decisions are plainly wrong: see for example *La Macchia v Minister for Primary Industries and Energy* (1992) 110 ALR 201 at 204 (Burchett J); explained and applied in *Shaw v Yarranova Pty Ltd* [2006] VSC 45 at [66] – [69] (Bell J).

6 I am not persuaded to come to that conclusion.

7 Accordingly, I propose to permit McConnell's legal advisers to have access to the transcript. If those advisers consider that wider access should later be sought, I will hear an application for such access in due course.

Relevant provisions of the Act

8 Section 19 of the Act provides that where ASIC, on reasonable grounds, suspects that a person can give information relevant to a matter it is investigating, it can require the person "to appear before a specified member or staff member for examination on oath to answer questions": s 19(2)(b).

9 The examination must take place in private: s 22(1). ASIC may (and must if the examinee requests) cause a record to be made of statements made in the examination: s 24(1). If such a record is made, ASIC may require the examinee to read it and sign it: s 24(2)(a). If requested by the examinee, ASIC must provide to the examinee a copy of the written record of the examination: s 24(2)(b). ASIC may impose conditions on the provision of the written record: ss 24(2)(b) and 26. One such condition could be that the written record not be disclosed by the examinee to anyone other than the examinee's legal representative.

10 The effect of ss 65(1)(a) and 65(1A) of the Act is that the person required to attend a s 19 examination must answer questions unless that person has a "reasonable excuse" to not do so.

11 Section 68(1) provides that it is not a "reasonable excuse" for a person to refuse or fail to answer questions at a s 19 examination because the information "might tend to incriminate the person or make the person liable to a penalty".

12 Subsections 68(2) and (3) provide:

> "(2) Subsection (3) applies where:
>
> (a) before:
>
> (i) making an oral statement giving information; or
>
> (ii) signing a record;
>
> pursuant to a requirement made under this Part, Division 3 of Part 10 or Division 2 of Part 11, a person (other than a body corporate) claims that the statement, or signing the record, as the case may be, might tend to incriminate the person or make the person liable to a penalty; and
>
> (b) the statement, or signing the record, as the case may be, might in fact tend to incriminate the person or make the person so liable.
>
> (3) The statement, or the fact that the person has signed the record, as the case may be, is not admissible in evidence against the person in:
>
> (a) a criminal proceeding; or
>
> (b) a proceeding for the imposition of a penalty;
>
> other than a proceeding in respect of:
>
> (c) in the case of the making of a statement—the falsity of the statement; or
>
> (d) in the case of the signing of a record—the falsity of any statement contained in the record."

Background

13 McConnell is a shareholder of the first defendant, SurfStitch Group Ltd (administrators appointed). McConnell brings these proceedings as the representative plaintiff of other shareholders of SurfStitch pursuant to Pt 10 of the *Civil Procedure Act 2005* (NSW).

14 The proceedings are brought against SurfStitch itself and its former chief executive officer and director, Mr Cameron.

15 McConnell alleges that Mr Cameron was involved in SurfStitch's alleged contravention of various provisions of the *Corporations Act 2001* (Cth).

16 On 6 October 2016 and 2 June 2017 Mr Cameron was examined by an officer of ASIC under s 19 of the Act.

17 Sometime prior to March 2018 McConnell made a request to ASIC under s 25 of the Act for a copy of the transcript of Mr Cameron's s 19 examinations.

18 Section 25 of the Act provides:

> **s 25 Giving to other persons copies of record**
>
> "(1) ASIC may give a copy of a written record of the examination, or such a copy together with a copy of any related book, to a person's lawyer if the lawyer satisfies ASIC that the person is carrying on, or is contemplating in good faith, a proceeding in respect of a matter to which the examination related.
>
> (2) If ASIC gives a copy to a person under subsection (1), the person, or any other person who has possession, custody or control of the copy or a copy of it, must not, except in connection with preparing, beginning or carrying on, or in the course of, a proceeding:
>
> (a) use the copy or a copy of it; or
>
> (b) publish, or communicate to a person, the copy, a copy of it, or any part of the copy's contents.
>
> Penalty: 10 penalty units or imprisonment for 3 months, or both.
>
> (2A) Subsection (2) is an offence of strict liability.
>
> Note: For strict liability, see section 6.1 of the Criminal Code.
>
> (3) ASIC may, subject to such conditions (if any) as it imposes, give to a person a copy of a written record of the examination, or such a copy together with a copy of any related book."

19 ASIC refused that request.

20 On 9 March 2018 McConnell caused a subpoena to be issued to ASIC requiring production of the transcripts of Mr Cameron's s 19 examinations. ASIC produced the transcripts on 29 March 2018.

21 Mr Cameron opposes McConnell having access to the transcripts on the basis that it reveals material that might tend to incriminate him, or might provide a basis for further investigations that could be used in criminal or civil proceedings against him; and is accordingly privileged.

The nature of the privilege

22 In *Smith v R* [2007] WASCA 163; (2007) 63 ACSR 445, the Western Australian Court of Appeal (Buss JA, with whom Pullin and Miller JJA relevantly agreed) described the privilege this way (at [46]):

> "At common law, the privilege against self-incrimination entitles a natural person to refuse to answer any question and to refuse to produce any document if the answer or the document would expose, or would have a tendency to expose, him or her, either directly or indirectly, to the risk of criminal conviction." (Citations omitted.)

23 The privilege against self-incrimination is a basic substantive common law right: *Reid v Howard* [1995] HCA 40; (1995) 184 CLR 1 at 11 (Toohey, Gaudron, McHugh and Gummow JJ); see *X7 v Australian Crime Commission* [2013] HCA 29; (2013) 248 CLR 92 at [104].

24 The privilege extends not only to the risk of incrimination by direct evidence "but also from making a disclosure which may lead to incrimination or to the discovery of real evidence of an incriminating character": *Sorby v The Commonwealth* [1983] HCA 10; (1983) 152 CLR 281 at 310 (Mason, Wilson and Dawson JJ).

25 In some countries, the privilege against self-incrimination is entrenched as a constitutional right. See for example ss 11(c) and 13 of the *Canada Act 1982* (UK) c 11, sch B pt 1 ('*Charter of Rights and Freedoms*'), and the Fifth Amendment and the Fourteenth Amendment of the *United States Constitution*.

26 However, in Australia, the privilege can be abrogated or modified by statute: *Reid v Howard* at 12 and *Sorby* at 308. In recent times, "this has occurred with increasing frequency in enactments of the Commonwealth Parliament": *Smith* at [51].

27 The privilege may only be abrogated by statute in cases of clear words or necessary implication. Necessary implication "imports a high degree of certainty as to legislative intention": *Hamilton v Oades* [1989] HCA 21; (1989) 166 CLR 486 at 495.

28 So far as concerns s 68, Buss JA said in *Smith* at [57]:

> "Section 68(1) expresses, with clarity, Parliament's intention that the common law privilege against self-incrimination has been abrogated for the purposes of, relevantly, investigations and information-gathering by ASIC under Pt 3 of the ASIC Act."

29 Buss JA continued at [60] and [61]:

> "In *A v Boulton* (2004) 136 FCR 420, Kenny J (with whom Beaumont and Dowsett JJ agreed) cited, [at [31]], the following passage from the judgment in *HKSAR v Lee Ming Tee* [2001] 1 HKLRD 599, in relation to the effect of a statutory abrogation of the privilege against self-incrimination and its replacement with a compensatory provision:
>
> > 'Where, as in the present case, the words of the statute clearly abrogate the privilege and substitute for it a limited direct use prohibition, the privilege is abrogated *in its entirety* and the scope of the substituted protections, if any, becomes a matter of statutory construction.'
>
> Accordingly, s 68(1) of the ASIC Act having abrogated the privilege against self-incrimination, the scope of the 'direct use' immunity conferred by s 68(3) is to be determined upon the proper construction of s 68 (in particular, s 68(2) and (3)) in the context of the ASIC Act as a whole." (Emphasis added.)

30 In *Boulton* the Court was dealing with provisions in the *Australian Crime Commission Act 2002* (Cth) which are analogous to those in s 68 of the Act. The passage cited from *HKSAR v Lee Ming Tee* concerned Hong Kong legislation that is also analogous to s 68.

31 I do not see Buss JA's citation of the Hong Kong decision as bespeaking his Honour's conclusion that the effect of s 68(1) is to abrogate the privilege "in its entirety" in the sense of otherwise than for the purposes of Pt 3 of the ASIC Act. The passage I have cited at [28] makes clear that his Honour's conclusion as to abrogation was so confined: cf Dr Austin and the Hon Justice Black in *Austin & Black's Annotations to the Corporations Act* (looseleaf, LexisNexis Butterworths) at [ASICA.68].

32 I see that conclusion as being consistent with that of the Victorian Court of Appeal in *Gemmell v Le Roi Homestyle Cookies Pty Ltd (in liq)* [2014] VSCA 182; (2014) 46 VR 583.

33 In that case, the Court was concerned with ss 597(12) and 597(12A) of the *Corporations Act* which deal with liquidators examinations and which are analogous to ss 68(1) - 68(3) of the ASIC Act. The issue was whether an examinee, later sued by the liquidators for insolvent trading under s 588M of the *Corporations Act*, could rely on the privilege against self-incrimination to avoid filing a responsive defence or giving discovery.

34 Ashley JA, with whom Almond AJA agreed, held at [65] that s 597(12) of the *Corporations Act* abrogated the privilege against self-incrimination for the purposes of the relevant Division of that Act, but only to the extent of the answers given to questions put during the examination.

35 Neave JA came to the same conclusion at [116]. Her Honour said:

> "(a) In an examination under Div 1 of Pt 9 of the Corporations Act 2001…s 597(12) prevents a person from refusing to answer questions on the ground that the answers may tend to incriminate them or make them liable to a penalty. To that extent the Act abridges common law privileges.
>
> (b) Except to the extent described in (a), s 597(12) does not abrogate the common law privileges relating to self-incrimination and exposure to a penalty…".

36 In *Gemmell*, the examinee had not asserted the privilege under the equivalent of s 68(2) so questions of waiver, not relevant here, arose. The Court's

conclusion, on the facts, was that the examinee's privilege was not abrogated for the purposes of pleading and discovery in relation to matters not contained in answers given at the examination, except to the extent that a pleading or discovery would "expose them to increased jeopardy": Ashley JA at [114].

37 The questions raised in *Gemmell* may arise later in these proceedings, for example in relation to discovery, or perhaps in cross-examination: see Neave JA's observations at [117].

38 But I see nothing that fell from their Honours in *Gemmell* to cast doubt on the correctness of the conclusions to which Foster J and Robson J came in *Watson* and *Australian Property Custodians.*

39 In those cases, their Honours were considering whether the privilege against self-incrimination had been abrogated in relation to the answers that *were* given at a s 19 examination, so as to deny a third party access to the transcript containing those answers.

40 The above authorities make clear that the privilege was so abrogated.

41 In *Watson*, Foster J said:

> "[31] In terms of principle, the ASIC Act has modified the privilege against self-incrimination to some extent. As envisaged by the relevant statements of principle in *Reid v Howard*…, the scope of the privilege has, to some extent, been modified by statute and that modification of the privilege is effective. However, the answers to the questions asked during the course of the relevant examinations which are recorded in the transcripts cannot be used in criminal proceedings other than as permitted by s 68(3) of the ASIC Act.
>
> [32] This is not a case of a court in a civil proceeding seeking to override the privilege before the privilege can be invoked. The simple fact is that, to the extent permitted by law, the privilege in its modified form has already been invoked."

42 His Honour's observations were made in the context where, as here, access was sought to a s 19 transcript produced by ASIC on subpoena and, in that context, were correct (if I may respectfully say so).

43 It is clear from his Honour's reasons that his Honour appreciated that different questions might arise if use was later sought to be made of the answers given during the examination in civil proceedings: see [22] and [21].

44 On behalf of Mr Cameron it was submitted:

> "The proposition that [McConnell] should be granted access to the examination transcripts therefore requires the conclusion that s 68 [of the ASIC Act] abrogated the privilege against self-incrimination in its entirety save for the ability of an examinee to object to the answers given at an examination being admitted into evidence in any criminal proceedings or proceedings for the imposition of a civil penalty. That was the basis for the decisions in…*Watson* and [*Australian Property Custodian*]."

45 I do not agree. Giving McConnell or its legal representatives access to the transcripts reflects that Mr Cameron's privilege has been abrogated for the purposes of giving those answers during the s 19 examinations. It reflects no more than that.

46 What use McConnell may make of the answers in these proceedings remains to be seen.

47 On behalf of Mr Cameron it was submitted that, were McConnell permitted to inspect the s 19 transcripts, there is an appreciable risk that McConnell would use the material in the transcripts in a manner that might tend to expose Mr Cameron to criminal and civil penalties. It was submitted that "one would reasonably expect a diligent and motivated plaintiff to exhaust all avenues of inquiry arising from the transcripts and, given the direct overlap between the issues in the proceedings and those about which ASIC examined Mr Cameron, there was a real risk that such inquiries would yield fresh evidence that could be used against him".

48 That might be right. But that is a consequence of the abrogation of privilege effected by s 68(1). As I have said, it remains to be seen what further use McConnell can make, in these proceedings, of those answers.

The subpoena

49 Section 25 of the Act makes particular provision as to the persons to whom ASIC may give copies of a s 19 transcript: see [18] above.

50 That power is not at large. ASIC's discretion under s 25 must be exercised having regard to its obligations under s 127: *Johns v Australian Securities Commission* [1993] HCA 56; (1993) 178 CLR 408 at 423 and 425 (Brennan J), 436 (Dawson J), 452 (Toohey J) and 468 (McHugh J).

51 Section 127 obliges ASIC to "take all reasonable measures to protect from unauthorised use or disclosure" information given to it in confidence.

52 Section 127 makes detailed provision for the circumstances in which ASIC can disclose such information; for example with the consent of the person who provided the information (s 127(3A)) or where ASIC's Chairperson is satisfied that precisely enumerated agencies and regulatory bodies would be assisted to receive the information (s 127(4)).

53 In ASIC's *Regulatory Guide 103: Confidentiality and release of information* (1995), ASIC identifies factors to which it will have regard when exercising its discretion to release information under s 25. Those guidelines state that ASIC will have a general discretion to release information taking into account factors such as:

(a) its functions and powers;

(b) the objects of the *Corporations Act* and the ASIC Act;

(c) the observations of the High Court in *Johns v Australian Securities Commission*; and

(d) the public interest generally.

54 The guidelines also state that:

> "While ASIC will take all these factors into account, in the absence of compelling reasons to the contrary ASIC will generally assist litigants by disclosing transcripts as contemplated by s 25(1)".

55 Answers compulsorily given by an examinee at a s 19 examination no doubt comprise information given to ASIC "in confidence" for the purposes of s 127 of the Act. In those circumstances, and notwithstanding the generality of the statements made by ASIC in its Regulatory Guide, it is hard to see how ASIC could, consistently with its duty under s 127, exercise its power under s 25 to give to a third party a transcript containing answers to which the examinee has taken objection under s 68(2).

56 That may well be why ASIC did not accede to McConnell's request in this case.

57 None of these matters gainsays this Court's power to issue a subpoena or ASIC's obligation to comply with a subpoena.

58 As Bryson J said in *Maronis Holdings Ltd v Nippon Credit Australia Ltd* [2000] NSWSC 138; (2000) 18 ACLC 609 the procedure under s 25 of the Act "does not qualify and has no implications for the existence or availability of the Court's powers to allow and control access and inspection" of documents produced on subpoena. On behalf of Mr Cameron it was submitted, albeit without enthusiasm and without elaboration, that Bryson J's decision was "plainly wrong". I do not agree. It has been followed on a number of occasions including in *Shipley v Masu Financial Management Pty Ltd* [2008] NSWSC 1187 at [16] and [20] (White J); see also *Mercedes Holdings Pty Ltd v Waters (No 7)* [2013] FCA 138 at [3] (Perram J).

59 It may seem strange that a party can "side step" the procedure contemplated by s 25 of the Act by issuing a subpoena to ASIC. But it follows from the matters at [57] and [58] that this can be done.

60 In any event, this begs the question of whether, now that the transcript has been produced, it may be inspected.

Conclusion

61 For those reasons, my conclusion is that McConnell should have access to the s 19 transcripts.

62 The answers were given in private and under compulsion. They are obviously confidential. I do not see that as a reason to deny, as a matter of discretion, giving McConnell access to the transcripts. However, in the first instance I will confine access to McConnell's legal representatives.

63 If those legal representatives consider that wider access should be given, I will entertain an appropriate application.

64 I invite the parties to confer and agree on the orders necessary to give effect to these reasons, including as to costs.

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