IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B 55 OF 2016

BETWEEN:

IAN MAURICE FERGUSON
Plaintiff

and

MARCUS WILLIAM AYRES, STEPHEN JAMES PARBERY AND MICHAEL ANDREW OWEN IN THEIR CAPACITIES AS LIQUIDATORS OF QUEENSLAND NICKEL PTY LTD (IN LIQ) ACN 009 842 068
Defendants

PLAINTIFF'S REPLY

PART I: PUBLICATION ON THE INTERNET

1. These submissions are in a form suitable for publication on the internet.

PART II: REPLY

2. The Attorneys-General for the Commonwealth and South Australia filed written submissions concurrently in proceedings no. B52 and B55 of 2016. The Attorney-General for Victoria has adopted its submissions in no. B52 of 2016. The Attorney-General for Queensland has adopted the submissions of the Attorney-General for the Commonwealth in no. B52 of 2016.

3. The plaintiff refers to his written submissions (**PWS**), those filed by the defendants (**DWS**), the written submission of the Attorneys-General of the Commonwealth (**CWS**) and South Australia (**SAWS**) filed in no. B52 and B55 of 2016 and the written submissions of the Attorney-General for Victoria (**VWS**) filed in no. B52 of 2016.

4. The plaintiff adopts the submissions in reply of the plaintiff in no. B52 of 2016.

5. The plaintiff contends for two propositions:

   a. Proposition 1 - a function, whether said to be incidental to the exercise of a core judicial function or otherwise analogous to a function exercised by the judiciary pre-federation, cannot be conferred on a Chapter III Court where it would jeopardise the institutional integrity of the Court.

   b. Proposition 2 – the nature of the examination set in train by s.596A, the use that can be made of information obtained in that examination in existing or

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subsequent proceedings and the role played by the Court in that information being obtained, in circumstances where it is called upon to adjudicate in the existing or subsequent proceedings, jeopardises the institutional integrity of the Court by impairing the reality or appearance of its independence, an essential quality of its institutional integrity.[1]

6. Proposition 1 arises from the separation of powers doctrine. A negative implication arises in Chapter III with respect to the vesting in a Chapter III Court of power foreign to or incompatible with the judicial power of the Commonwealth.[2] That constitutional principle[3] is not displaced by reason of the fact that a court may have historically exercised the offending power.[4]

7. Aspects of the submissions of the defendants and intervenors challenge Proposition 2.

8. ***Re CWS [66]; SAWS [23]; VWS [42]***: The Commonwealth, South Australia and Victoria each rely upon *Dalton v New South Wales Crime Commission* (2006) 227 CLR 490, 507-508 [45], as do the defendants in proceedings no. B52 at [61], for the general proposition that Court's may exercise investigative functions. The plaintiff however does not simply rely upon characterizing the compulsory examination process as "investigative" in nature and then upon a general proposition that "investigative functions" cannot be conferred on Courts. It is the role played by the Court in the investigative function and the fact the Court may then sit in adjudication in existing or subsequent proceedings relating to the subject matter of the investigation that gives rise to the incompatibility.

9. The examination conducted pursuant to a 596A summons is investigative. It permits investigation of matters pertaining to proceedings which the liquidator (or another relevant party) "*might be able to bring, proceedings he contemplates bringing, proceedings he has decided to bring, and proceedings he has already brought.*"[5] The power conferred upon the Court gives it a central role in the investigation by requiring it

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[1] *Wainohou v New South Wales* (2011) 243 CLR 181 at [44] (French CJ and Kiefel J).
[2] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 272, 289; *Gould v Brown* (1998) 193 CLR 346 at 379-380, 384-385, 494; see also *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.
[3] It was referred to in such terms in *Wainhou v New South Wales* (2011) 243 CLR 181 at [105] (Gummow, Hayne Crennan and Bell JJ).
[4] In *Ex parte Lowenstein* (1938) 59 CLR 556 at 569, Latham CJ (with whom Rich J agreed) accepted that if a power was inconsistent with the co-existence of judicial power it might be invalid. See also Dixon and Evatt JJ at 588, where it was said that "if the inherent character of the function reposed in the courts is at variance with the conception of judicial power, then in our opinion it must fail even if the mode of proceeding has been found so convenient, speedy and satisfactory...". The Court adopted this approach notwithstanding that the power in question (s.217 of the Bankruptcy Act) had been exercised by the court for many years prior to Federation; see Respondent's argument at 561.
[5] *Hamilton v Oades* (1989) 166 CLR 486 at 497.

to issue the summons (upon an application meeting the pre-conditions), deciding what particular matters can be investigated in the examination and, investigating those matters of its own motion by asking questions of the examinee and requiring the examinee to produce documents.[6] Furthermore, the rules of evidence do not apply in the investigation. The information elicited by the Court may lead to the initiation of proceedings against an examinee or party when otherwise no proceedings would have been issued. The information elicited by the Court may be tendered as evidence against the examinee (or other party) in existing or contemplated proceedings.[7] Even where information adduced in the examination is not tendered, the Court may nonetheless have been exposed to highly prejudicial information against the examinee obtained in the investigation.

10. *Cheney v Spooner* (1929) 41 CLR 532 was referred to in the extract from *Dalton*, and was the subject of specific consideration by Victoria at **VWS [15]**. No consideration was given in *Cheney v Spooner* to notions of judicial power and the integrity of the Court. The case considered whether the examination was a "judicial proceeding" for the purposes of the *Service and Execution of Process Act 1901 – 1924* (as was the focus in *Dalton*).

11. *Dalton* at [45] refers to preliminary discovery as an example of an investigative function conferred on Courts, as do the Commonwealth at CWS [56.6] and [81] and Victoria at [42]. The fact both processes may be said to be judicially supervised and to occur prior to proceedings commencing does not answer the substance of the plaintiff's submission that in the compulsory examination process the Court controls what matters are investigated, can itself ask questions and call for the production of documents (not asked or called for by any other party), and then sits as adjudicator in existing or subsequent proceedings with the consequence it may be required to adjudicate specifically upon evidence elicited of its own motion during the examination. Even where information adduced in the examination is not tendered, the Court may nonetheless have been exposed to highly prejudicial information against the examinee, something which does not necessarily occur in an application for preliminary discovery. The role of the Court in an application for preliminary discovery does not involve the Court "*in the investigative process to anything like the extent to which*"[8] it is involved in the investigative process of an examination initiated by s.596A.

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[6] See ss 597(5B) and 597(9).
[7] See s 597(14).
[8] *Grollo v Palmer* (1995) 184 CLR 348 at 383 per McHugh J.

12. South Australia at SAWS [22] and [32], relying on McLure P in *Saraceni v Jones* [2012] WASCA 59; (2012) 42 WAR 518 at 540 [109], expresses the view that "the Court does not conduct the examinations; contrary to the submissions of the plaintiff in Ferguson, it is not later called to adjudicate upon its own executive act". However, in *Saraceni v Jones*, McLure P was contrasting the current provisions, where liquidators can ask questions, with the historical provisions, where the Court alone conducted the examination. Based on that comparison, her Honour indicated that the Court did not "conduct" the investigation. The question as to validity goes to the power which is conferred upon the Court. The power in question permits the Court to conduct the examination by asking questions and ordering the production of documents of its own motion.

13. ***Re VWS* [25]; SAWS [23]:** It is no answer to the plaintiff's submission that the Court may ensure that the examination is not made *"an instrument of oppression, injustice, or of needless injury to the individual"*[9]. It is not said for example, that the role of the Court in ensuring that the examination is not made *"an instrument of oppression, injustice, or of needless injury"* precludes the examination from being conducted for the purpose of ascertaining the existence of a cause of action, or testing the strength of allegations in an existing or potential cause of action by reference to information not subject to the rules of evidence. It is not said that the Court's power to ensure that the examination is not made *"an instrument of oppression, injustice, or of needless injury"*, precludes the Court from asking questions and requiring the production of documents of its own motion.

14. Equally, and for the same reasons as above, that the Court has power to refuse to issue a summons if it considers there is an abuse of process, does not address the matters upon which the plaintiff relies in support of its contention. In any event, an application based upon abuse of process is constrained by the fact that an application in support of a summons under s.596A does not require disclosure by the applicant of the purpose of the examination. The summons must issue if the Court is satisfied of the requisite status of the applicant and proposed examinee.

15. ***Re CWS [90]; DWS [25] – 26]:*** That a judicial officer may ask questions of a witness during a trial provides no relevant analogy to defeat the plaintiff's submission. A trial is a judicial process bounded by pleadings and subject to the rules of evidence. The Court may ask questions equally of both camps with the objective of ascertaining the facts upon which it is required to adjudicate. Further, the impartiality of a judicial officer at a trial is

[9] *Rees v Kratzmann* (1965), 114 C.L.R 63 at 66 per Barwick CJ.

maintained by the rules of bias. A trial does not involve the court in a potentially wide-ranging, extraneous investigation to ascertain whether a cause of action exists against a party or to test the strength of an existing or potential claim by reference to information which may be elicited by the Court itself and which is not subject to the rules of evidence.

16. ***Re DWS [13] – [19]:*** The plaintiff's submissions do not rest upon an assumption that the same Court, or the same judicial officer, will preside over both the compulsory examination and the subsequent hearing. Where a member of the judiciary participates in a process of pre-trial investigation in the manner canvassed by the plaintiff, a Court adjudicating upon existing or subsequent proceedings, whether or not presided over by the same judicial officer, may lack independence because it may be required to adjudicate upon information obtained in the investigation and tendered as evidence, stamped as it will be seen to be, with the imprimatur of the judicial branch. At the very least, the Court as an institution, having played such a role, may be perceived "*by a fair minded observer*"[10] unaided by "*the understanding that a lawyer would have of the capacity of [a judge] to make an independent decision*"[11], to lack impartiality.

Dated: 7 November 2016

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[10] *Wilson v Minister For Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 23, Gaudron J.
[11] *Wilson v Minister For Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 23, Gaudron J.