1 **IN THE HIGH COURT OF AUSTRALIA** **No. B52/2016**
BRISBANE REGISTRY

BETWEEN: **CLIVE FREDERICK PALMER**
Plaintiff

and

10 **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**
First Defendants

and

JOHN PARK, STEFAN DOPKING, KELLY-ANNE TRENFIELD AND QUENTIN OLDE IN THEIR CAPACITIES AS THE GENERAL PURPOSE LIQUIDATORS OF QUEENSLAND NICKEL PTY LTD (IN LIQ) ACN 009 842 068
20 Second Defendants

SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

PART I: Internet publication

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

PART II: Basis of intervention

2. The Attorney-General for the State of Queensland ('the Attorney-General') intervenes in these proceedings in support of the first defendant pursuant to s 78A of the *Judiciary Act 1903* (Cth).

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Intervener's submissions

Filed on behalf of the Attorney-General for the State of Queensland
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PART III: Reasons why leave to intervene should be granted

3. Not applicable.

PART IV: Statutory provisions

4. The Attorney-General adopts the first defendants' statement of applicable legislative provisions.[1]

PART V: Submissions

5. The plaintiff submits that s 596A of the *Corporations Act 2001* (Cth) ('Corporations Act') is invalid on the following bases:[2]

   a. The power to summon a person for examination under s 596A does not satisfy the functional of 'classical' test of judicial power;

   b. The power is not incidental or ancillary to the exercise of judicial power, at least in relation to a voluntary winding-up;

   c. The power is not supportable by historical or traditional analogy;

   d. In any event, the historical analogy test should no longer be applied;

   e. The nature of the power is incompatible with the judicial power of the Commonwealth.

   The following submissions are confined to the issues identified in paras (a), (b) and (e). Otherwise, the Attorney-General generally adopts the submissions of the first defendants and the second defendants.

Functional test

6. The plaintiffs submissions correctly take as their starting point the functional test for judicial power articulated in *Huddart, Parker & Co Pty Ltd v Moorehead*[3] and *R v Trades Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd.*[4]

7. However they overlook numerous authorities to the effect that while judicial power is capable of ready description, it eludes exclusive and exhaustive definition.[5] Specifically, they erroneously construe the *Huddart, Parker* and *Tasmanian Breweries* formulations so as to erect cumulative criteria so as to require a power to decide controversies between persons or polities, the application of law as

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1 First Defendants' submissions [9].
2 First Defendants' submissions [3].
3 (1909) 8 CLR 330.
4 (1970) 123 CLR 361.
5 See authorities referred to in First Defendants' submissions [11] fn 10.

determined to the facts found, and a binding and authoritative determination of existing rights or liabilities.

8. It is not profitable to attempt yet another paraphrase of the elusive definition. More importantly, Queensland submits that the Tasmanian Breweries formulation is best seen as an elaboration or refinement, reached with the benefit of hindsight, of the *Huddart, Parker* formulation and as such *Tasmanian Breweries* is of most assistance in this case.

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9. In *Tasmanian Breweries*,[6] certain provisions of the former *Trade Practices Act 1965* (Cth) were challenged on the basis that they conferred judicial power of the Commonwealth on the Trade Practices Tribunal which was not a ch III court. In issue were the powers of the Tribunal to determine that an examinable agreement or practice was contrary to the public interest. The consequence of such a determination was that the agreement or practice was unenforceable. Determinations were themselves enforceable by means of restraining orders or contempt proceedings.

20 10. By a majority of 5-1, this Court held that none of the relevant powers was judicial for the purposes of eh III. Justice Kitto in the majority held that:[7]

> ... for reasons depending upon general reasoning, analogy or history, some powers which may appropriately be treated as administrative when conferred on an administrative functionary may just as appropriately be seen in a judicial aspect and be validly conferred upon a federal court. The judgments in *R v Davison*[8] provide an illustration of this.

11. His Honour considered that power may be judicial though no adjudication in lis inter
30 partes is involved. His Honour continued:[9]

> ... a judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it
40 intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist. It is right, I think, to conclude from the cases on the subject that a power which does not involve such a process and lead to such an end needs to possess some special compelling feature if its inclusion in the category of judicial power is to be justified.

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6 (1970) 123 CLR 361.
7 (1970) 123 CLR 361, 373.
8 (1954) 90 CLR 353.
9 (1970) 123 CLR 361, 374.

12. It is submitted that the power of the Court under s 596A fairly fits within that description. An examination order is a decision settling for the future, as between defined persons, a question as to the existence of an obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided between those persons.

13. The inquiry concerning the law as it is will centre on the criteria of paras 596A(a) and (b). The facts will be the subject of evidence directed at the issues involved in those criteria. The Court will apply the law as determined to the facts as determined. The end to be reached is a summons which, so long as it stands, entitles the liquidator and obliges the examinee to observance of the rights and obligations that the application of law to facts has shown to exist. It is submitted that all those features point to an orthodox exercise of judicial power.

14. The fact that the impugned provision enables an examination order be made in relation to a company not subject to a compulsory winding-up is of no significance to the question of whether it is within judicial power. In any event, the first defendants were appointed as liquidators pursuant to court order[10] and, pursuant to ss 511 and 473(a) of the Act, the order prescribes the tasks that may be taken by the first defendants, including to preserve or protect the assets of the company.

15. The plaintiff seeks to derive support from *Saraceni v Jones*[11] and *Gould v Brown*[12] for the proposition that the public examination power was outside the core judicial function according to the functional test.

16. However, in *Saraceni* the parties accepted that proposition so that the Court did not have the benefit of argument on the point. In any event, the Court of Appeal decision in that case is not binding on this Court.

17. In *Gould v Brown*, the Court divided evenly in the result. Neither McHugh J nor Gummow J, who agreed with Gaudron J in the result, expressed any opinion about whether the public examination power was or was not judicial power.

18. In any event, in the passage from Gaudron J's reasons on which the plaintiff relies, her Honour is concerned with the 'power to examine witnesses conferred by Ch 5, Pt 5.9 of the Corporations Law'. The passage is not concerned with the Court's power to summon a witness to be examined. That distinction is considered further below, although it is not critical to Queensland's ultimate submission.

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10 Federal Court of Australia Proceeding No. QUD283 of 2016: Order of Dowsett J dated 18 May 2016.
11 (2012) 246 CLR 251.
12 (1998) 193 CLR 346.

Some functions can be either judicial or non-judicial

19. The fact that a function could be vested in the executive does not mean that is cannot be judicial. In *Thomas v Mowbray*,[13] Gleeson CJ observed:[14]

> A familiar example of a governmental power that is sometimes exercised legislatively, sometimes administratively, and sometimes judicially is control of land use. In New South Wales, for example, such controls are sometimes dealt with directly by an Act of Parliament or delegated legislation, sometimes administratively by a Minister or by local government authorities, and sometimes by the Land and Environment Court. We are now accustomed to dissolution of marriage by court order, but there was a time when marriages were dissolved by statute. Compensating victims of accident or crime could be done administratively or judicially. In New Zealand, claims by accident victims, of a kind that for many years have formed a large part of the work of Australian courts, are dealt with by a no-fault compensation scheme outside the court system. Many penalties are imposed administratively, although there is usually a capacity for judicial review or litigious contest. Deciding whether a governmental power or function is best exercised administratively or judicially is a regular legislative exercise. If, as in the present case. Parliament decides to confer a power on the judicial branch of government, this reflects a parliamentary intention that the power should be exercised judicially, and with the independence and impartiality which should characterise the judicial branch of government.

20. Later, his Honour said:[15]

> In *Fardon*,[16] I indicated that the exercise of powers, independently, impartially and judicially, especially when such powers affect the liberty of the individual, would ordinarily be regarded as a good thing, not something to be avoided. An argument, as a matter of policy, that legislation for anti-terrorist control orders ought to be subject to some qualification in aid of the human rights of people potentially subject to such orders is one thing. An argument that the making of such orders should be regarded as totally excluded from the judicial function is another. At all events, to return to the passage from the Boilermakers' Case cited earlier, powers relevantly similar to those given by Div 104 traditionally have been, and are, exercised by the judiciary. They are not exclusively or distinctively administrative. To decide that such powers are exclusively within the province of the executive branch of government would be contrary to our legal history, and would not constitute an advance in the protection of human rights.

21. To return to the distinction drawn above between the issuing of a summons to a person and the conduct of the consequent examination, the Parliament could have entrusted either or both of those functions to either the judiciary or the executive. The fact that it entrusted both to the judiciary is not a result to be avoided, particularly if to do so requires a departure from principle and authority such as that urged by the plaintiff here.

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13 (2007) 233 CLR 307.
14 (2007) 233 CLR 307, 326-327 [12].
15 (2007) 233 CLR 307, 326 [17].
16 (2004) 223 CLR 575, 586 [2].

Other examples of pre-action judicial orders

22. The nature of the impugned provision is not novel. On the contrary, a variety of pre-action orders, such as for non-party disclosure, Mareva orders and summary orders, are commonplace examples of judicial power and do not depend for that status on anterior or subsequent proceedings inter partes. For example:

23. *Mareva* orders: the Federal Court is empowered under s 23 of the Federal Court of Australia Act 1976 (Cth) to grant Mareva relief,[17] supplemented by power to grant freezing orders under r 7.32 of the Federal Court Rules 2011 (Cth). Such relief is designed to preserve assets to satisfy a potential judgment debt, and thus protect the efficacy of the Court's processes. It is clear that a Ch III court can exercise the power proleptically where a substantive proceeding has not commenced nor will be commenced imminently. In *Cardile v LED Builders Pty Ltd*,[18] the High Court held that the Federal Court could grant a freezing order 'against a third party against whom no present cause of action exists and against whom no present proceeding has commenced'.[19] In PT *Bayan Resources TBK v BCBC Singapore Pte Ltd*,[20] this Court recently held that a State Supreme Court exercising federal jurisdiction could grant a freezing order in anticipation of a foreign judgment, which if made might be registered as an order of the Court under the *Foreign Judgments Act 1991* (Cth).[21]

24. *Discovery orders*: Rule 7.22 of the *Federal Court Rules 2011* (Cth) authorises the Federal Court to allow discovery in order to ascertain the description of a prospective defendant sufficient to commence a proceeding. The preconditions for an order are set out in r 7.22(1) as follows:

a. there may be a right for the prospective applicant to obtain relief against a prospective respondent; and
b. the prospective applicant is unable to ascertain the description of the prospective respondent; and
c. another person (the other person):
   (i) knows or is likely to know the prospective respondent's description; or
   (ii) has, or is likely to have, or has had, or is likely to have had, control of a document that would help ascertain the prospective respondent's description.

25. The word 'may' indicates that a prima facie case need not be made out.[22] However, the claim must have 'some prospect of succeeding, meaning there must be 'a cause

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17 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 622-624 (Deane J). For the same power in respect of the Family Court, see *In Marriage of Talbot* (1994) 119 FLR 100, 102 (Lindenmayer J).

18 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380.

19 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, 405-406 [57] (Gaudron, McHugh, Gummow and Callinan JJ), cited in *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 89 ALJR 975, 983 [47] (French CJ, Kiefel, Bell, Gageler and Gordon JJ).

20 *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 89 ALJR 975.

21 *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 89 ALJR 975, 984 [50] (French CJ, Kiefel, Bell, Gageler and Gordon JJ), 986 [64], 988 [77]-[78] (Keane and Nettle JJ).

22 *Hooper v Kirella* (1999) 96 FCR 1, 11 [33] (Wilcox, Sackville and Katz JJ).

of action known to the law and a real (as opposed to fanciful) prospect that some remedy might be granted'.[23]

26. If the Court is satisfied of those preconditions, it may order a third party to attend the court for an oral examination, to produce documents relating to a possible defendant and to give discovery: r 7.22(2).

27. The precursor to r 7.22 was challenged before the Full Court of the Federal Court in Hooper v Kirella Pty Ltd.[24] The appellants contended that the equivalent of r 7.22 was invalid as it authorised the Federal Court to order preliminary discovery in the absence of a 'matter' which is essential for the conferral of federal judicial power under ss 76 and 77 of the Constitution. The Full Court held that an application for preliminary discovery may satisfy the requirements for a 'matter' even though 'a right, duty or liability has not been established and, indeed, may never be established' in subsequent substantive proceedings.[25] Such proceedings may in fact never be instituted.[26] Recently, this Court confirmed that a 'matter' can be based upon prospective contingencies.[27]

28. Similarly, r 7.23 allows the Federal Court to grant discovery from a prospective defendant.

29. Further examples are provided in ch 5 of the Corporations Act itself, as follows:[28]

- Section 411 empowers the court to order a meeting between a relevant corporate body and its member or members to approve a scheme of arrangement where a compromise or arrangement is proposed. There need not be a principal application before the court to which the order relates or an order in existence at all. Among the elements to be satisfied before the court may make the order is that the proposed compromise or arrangement includes a term that orders will be sought under s 413.[29]
- Section 423 allows the court to conduct an inquiry as to the manner in which a controller has carried out his or her duties, and broadly corresponds to s 536 which deals with inquiries into the conduct of liquidators. The section extends the court's supervisory jurisdiction to controllers of property not appointed by the court and the court's power is exercisable on the basis [merely] of "a complaint"

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23 *Allphones Retail Pty Ltd v Australian Competition and Consumer Commission* (2009) 259 ALR 354, 367 [54] (Foster J).

24 (1999) 96 FCR 1.

25 *Hooper v Kirella* (1999) 96 FCR 1, 15 [55] (Wilcox, Sackville and Katz JJ), citing *Abebe v Commonwealth* (1999) 197 CLR 510, 528 [32] (Gleeson CJ and McHugh J).

26 *Hooper v Kirella* (1999) 96 FCR 1, 16 [59] (Wilcox, Sackville and Katz JJ).

27 *PT Bayan TBK v BCBC Singapore Pte Ltd* (2015) 89 ALJR 975, 984-985 [54]-[55] (French CJ, Kiefel, Bell, Gageler and Gordon JJ).

28 Also see the first defendant's submissions [51].

29 Corporations Act s 411(1A)(b).

which establishes a prima facie case that there is something which requires inquiry.[30]

- Section 447A allows the court to make such order as it thinks appropriate about how pt 5.3A is to operate in relation to a particular company. The section confers "plenary powers" on the court "to do whatever it thinks is just in the circumstances", having regard to the rights of the various classes of persons affected by the administration of the company.[31] The power conferred by s 447A is the exercise of judicial power.[32]
- Secton 447D allows the court to give directions about a matter arising in connection with the performance or exercise of any of an administrator's functions and powers, including an administrator in a voluntary administration.

Incidental test

30. If contrary to the foregoing submissions the s 596A power is not within the functional test for judicial power, it is submitted that the provision is incidental to judicial power.

31. Section 596A is located in ch 5 (External administration), pt 5.9 (Miscellaneous), div 1 (Examining a person about a corporation). The structure of ch 5 shows that the power is incidental, not to windings up or court-ordered windings up in particular, but to the courts' general supervisory functions with respect to all forms of external administration. In cases where the judicial character of such procedures has been contested, the courts have commented favourably on the policy rationale for curial supervision of extraordinary procedures.[33]

32. The incidental nature of the provision is demonstrated by the close resemblance the power has to judicial power.

33. Some of those features arise from interpretive approaches to the provision that are not apparent on its face. For example, s 596A does not expressly require an eligible applicant to establish a reason for seeking an order to summon a person for examination.[34] However, principles of statutory construction dictate that the provision must be construed in its context and in a way that best achieves the purpose of the statute[35] as determined by the structure and text of the statute. Accordingly, it

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30 *Re S & D International Pty Ltd (in liq) (rec and mgrs. apptd)* [2009] VSC 225, [210].

31 See for example: *Cawthorn v Keira Constructions Pty Ltd* (1994) 33 NSWLR 607; *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270.

32 *Ariff v Fong* (2010) 79 NSWLR 392, [71]; *Australasian Memory Pty Ltd v Brien* (1998) 45 NSWLR 111, 150.

33 See for example *Gould v Brown* (1998) 193 CLR 346, 500 [328] (Kirby J).

34 *Evans v Wainter Pty Ltd* [2005] FCAFC 114; (2005) 145 FCR 176, [72].

35 *Acts Interpretation Act 1901* (Cth) s 15AA.

does not authorise an application or an order to be made for an improper purpose. Propriety of purpose is determined by text and context of the provision.[36]

34. Thus, the power is confined by reference to:

- the implied purpose of the provision;
- the definition of the relevant terms within the impugned provision;
- the matters which the court must be satisfied before making the order as listed in the provision;
- requirements that the proposed examinee has relevant information about the corporation's examinable affairs and that the information is not within the knowledge of the examining party;[37]
- the requirement that the power is exercisable only in respect of a company under external administration of some kind, and not in relation to companies generally.[38]

35. In *Lee v New South Wales Crime Commission*, [39] French CJ characterised compulsory examinations of the sort under consideration there as judicial in nature, apparently in part on the basis that the examination was ancillary to primary judicial proceedings.[40] There are of course significant differences between s 596A and the statutory regime under consideration there.

36. The three members High Court whom rejected the special leave application in *Saraceni v Jones*[41] would have upheld the s 596A of the Corporations Act constitutionally valid as incidental to judicial power.

37. Additionally, a coroner, at least in performing functions such as undertaking inquiries or holding an inquest, is exercising judicial power.

38. In *Attorney-General (NSW) v Mirror Newspapers*,[42] the New South Wales Court of Appeal rejected the defendant's argument that the coroner was not exercising judicial power. The nature of coronial proceedings and the powers vested in the coroner compelled a conclusion that the coroner exercises judicial power.

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36 *Project Blue Sky Inc v ABA* (1998) 194 CLR 355, 381 [69]; *Lacey v Attorney-General* (Qld) (2011) 242 CLR 573, 592 [44].

37 *Meteyard v Love* (2005) 65 NSWLR 36, [39]; 2005 NSWCA 444; see *Federal Court (Corporations) Rules 2000* (Cth) r 11.3(3)(a).

38 *Ariff v Fong* (2010) 79 NSWLR 392, 339 [89].

39 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196.

40 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 223 [40] and 228 [49]-[50].

41 (2012) 246 CLR 251 (Gummow, Hayne and Bell JJ).

42 (1980) 1 NSWLR 374, 382-384 [20]-[29] (Moffitt P, Hope and Samuels JJA).

39. In *Civil Aviation Authority v Australian Broadcasting Corporation*,[43] the New South Wales Court of Appeal, in holding that there could be contempt of a Coroner's Court, considered that a coroner's court had 'a much clearer role in the judicial system' than a royal commission and that 'a coronial inquest is treated as part of the administration of justice'.

40. In *Von Einem v Ahern*,[44] the applicant applied for judicial review for the purpose of obtaining an order in the nature of prohibition, forbidding the defendant, the State coroner, from proceeding with inquests into the deaths of certain persons. One ground for seeking prohibition was an allegation of appearance of bias on the part of the coroner.

41. In rejecting the argument of apprehension of bias, the Supreme Court of South Australia (in banco) distinguished between different functions of the coroner. King CJ held that the coroner was in a different position to a judge:

42. Like all coroners, he has duties which are partly judicial in character and partly non-judicial in character. Coroners have duties which are administrative, such as the authorisation of post-mortems. They have responsibilities which are investigative for the ascertainment, by means of investigation, of facts surrounding incidents. In the discharge of their investigative function it may be necessary for coroners to interview people outside the court and may be necessary for them to peruse the reports of those who have conducted such interviews. It may be necessary for them to seek the co-operation of the media.

43. In addition the Coroner has the function of hearing and evaluating the evidence which is given at an inquest and of making findings as to the causes and In addition the Coroner has the function of hearing and evaluating the evidence which is given at an inquest and of making findings as to the causes and circumstances of the events being inquired into upon the basis of that evidence. That function is plainly a judicial function.

Incompatibility

44. The plaintiff's fifth proposition asserts that the lack of discretion on the part of the Court in granting or withholding a summons for examination means that s 596A is incompatible with the exercise of judicial power.[45]

45. In *Kuczborski v Queensland* ('*Kuczborski*'),[46] this Court rejected an argument that provisions of the *Liquor Act 1992* (Qld) were an intrusion upon judicial power and

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43 (1995) 39 NSWLR 540, 548 (Kirby P).
44 (1988) 49 SASR 424.
45 Plaintiffs' submissions [3(e)].
46 (2014) 254 CLR 51.

therefore invalid on the basis of the principle in *Kable v Director of Public Prosecutions (NSW)* ('*Kable*').[47]

46. In so doing, a majority held that legislative prescription of an 'ingredient' of an offence did not involve a usurpation of judicial power.[48]

47. Justice Hayne, in separate concurring reasons, held that:[49]

> The legislative prescription of an element of an offence is commonplace. Provision for prescription by regulation of the content to be given to an element of an offence is equally commonplace. Legislative or regulatory prescription of what drugs may not lawfully be possessed or sold is an obvious example. The direct or indirect legislative prescription of what constitutes an element of an offence presents no threat to the institutional integrity of the courts.

48. Justice Bell held that, in a trial for those offences, a court would perform its ordinary functions in the determination of criminal guilt.[50]

49. The Chief Justice held that in 'hearing and determining a prosecution for an offence against any of the impugned provisions of the *Liquor Act*, courts are not undertaking any function incompatible with their role as repositories of federal jurisdiction'.[51]

50. Although *Kuczborski* involved principles arising from *Kable* which do not arise here, the decision is authority for the more general proposition that it is for Parliament to prescribe the legislative consequences of particular facts. That legislative prescription may not leave much for the court to decide, but that in itself does not entail any incompatibility with judicial power. If it is permissible for Parliament to determine elements of a criminal offence in this way, without usurping judicial power, it follows that it must also involve no incompatibility with judicial power for Parliament to prescribe the circumstances in which a court must issue a summons for examination under s 596A.

51. In applying s 596A, the Court must still determine whether the factual element of paragraph (a) of s 596A is satisfied, and whether the Court is satisfied as to the matters set out in paragraph (b). Section 596A therefore does not 'deny to the Court any discretion to grant or withhold a summons for examination' as the plaintiffs allege.[52] Rather, it is a legislative prescription of the elements which must be satisfied before the court's power, and obligation, to grant a summons is enlivened. By analogy with *Kuczborski*, this does not involve any incompatibility with judicial power.

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47 (1996) 189 CLR 51.
48 *Kuczborski v Queensland* (2014) 254 CLR 51, 120 [234]-[235] (Crennan, Kiefel, Gageler and Keane JJ).
49 *Kuczborski v Queensland* (2014) 254 CLR 51, 96 [131] (Hayne J).
50 *Kuczborski v Queensland* (2014) 254 CLR 51, 140 [305] (Bell J).
51 *Kuczborski v Queensland* (2014) 254 CLR 51, 76 [49] (French CJ).
52 Plaintiffs' submissions [63].

PART VI: Oral argument

52. The Attorney-General estimates that no more than twenty minutes will be required for oral argument.

Dated 28 October 2016.

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