IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No B52 of 2016

BETWEEN:

CLIVE FREDERICK PALMER

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

First defendants

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

Second defendants

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

PART I: CERTIFICATION

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

PARTS II & III: INTERVENTION

2. The Attorney-General for the State of Victoria intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth), in support of the defendants in this proceeding.

Date of document: 28 October 2016
Filed on behalf of: Attorney-General for the State of Victoria

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PART IV: APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

3. The applicable constitutional and statutory provisions are set out in Annexure A to the plaintiff's written submissions dated 6 October 2016 (**Plaintiff Submissions**).

PART V: ARGUMENT

A. Introduction

4. These submissions address the issues stated at paragraph 3(c), (d) and (e) of the Plaintiff Submissions:[1]

5. In summary, Victoria submits that the power in s 596A of the *Corporations Act 2001* (Cth) (**Corporations Act**) constitutes as a valid conferral of the judicial power of the Commonwealth, on the bases that:

(1) It is part of a class or type of powers that has traditionally been exercised by courts concerned with the supervision of the winding up of companies.

(2) It is sufficiently analogous to a class or type of power that existed in a bankruptcy and insolvency context prior to Federation. There are also types of power that existed historically, such as pre-action discovery and court supervision of investigations, which are consistent with the operation of s 596A of the Corporations Act.

(3) The reference to historical analogy to determine whether a function involves the exercise of judicial power is conceptually appropriate and, in any event, has been relied upon for a significant period of time.

(4) The power conferred by s 596A of the Corporations Act is not incompatible with, and does not fall outside, the judicial power of the Commonwealth; it contains suitable safeguards and is of sufficient similarity to other forms of federal judicial power.

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[1] For arguments relating to the incidental aspects of the judicial power of the Commonwealth, Victoria adopts the position of the defendants at [48]-[53] of the first defendants' written submissions dated 24 October 2016.

6. To advance these submissions, it is necessary to consider the role of the examination power under s 596A of the Corporations Act, the history of examinations in winding up processes in Australia and the role of courts in those processes.

B. Section 596A and the history of examinations in winding up

7. Before issuing a summons for examination under s 596A of the Corporations Act, a Court[2] must first determine that:

   (1) the person applying for the summons is an "eligible applicant";[3]

   (2) the summons is in relation to a corporation's "examinable affairs";[4] and

   (3) the person being summoned is an officer or provisional liquidator of the corporation (or was at relevant times).

8. The summons will have directions associated with it and the relevant court has wide powers to control the process.[5] The relevant court may also protect against abuses of process by: setting aside examination summonses issued for an improper purpose;[6] making available the affidavit material relied upon to obtain the summons;[7] ensuring the questions asked relate to the corporation's examinable affairs;[8] and ensuring that summonses are not oppressive, unfair or an abuse of process[9] (requiring consideration of whether, relevantly, a forensic advantage is being sought which is not otherwise available[10]).

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2 Which includes the Federal Court of Australia, the Supreme Court of a State or Territory and the Family Court of Australia: Corporations Act, s 58AA(1).

3 Corporations Act, s 9.

4 Corporations Act, s 53. Cf *Meteyard and Others v Love and Others as Receivers and Managers of Southland Coal Pty Ltd* (2005) 65 NSWLR 36 at [6]-[11] (Santow JA), for a discussion of what constitutes examinable affairs.

5 Corporations Act, ss 596D and 597.

6 *Hamilton v Oades* (1989) 166 CLR 486 at 498 (Mason CJ).

7 *Simionato & Farragia v Macks & Macks* (1996) 19 ACSR 34 at 63.

8 *Rees v Kratzmann* (1965) 114 CLR 63 at 79.

9 *Sent v Andrews* (2002) 6 VR 317 at [11] (Buchanan J); *Kimberley Diamonds Ltd, in the matter of Kimberley Diamond Company Pty Ltd (in liq)* [2016] FCA 1016 at [62]-[74] (Gleeson J).

10 *Re Excel Finance Corp Ltd; Worthley v England* (1994) 52 FCR 69 at 90-1.

9. Therefore, although s 596A of the Corporations Act is expressed in mandatory terms, defences and discretions are available.

History of the examination power

10. The supervision of the external administration of corporations has long been an established branch of judicial activity. That has been so, not merely because such a supervisory role was suited to the "skills and professional habits" [11] of the courts but because public confidence in the system of corporate entities, including their winding up, relied on judicial supervision. The relationship was both immediate, in the sense that a company may be wound up by court order, and more attenuated in the case of voluntary winding up. But in all cases, the courts were integral. The powers of the courts are directed to assisting the liquidator in discovering the truth, with as little expense as possible, to enable a true picture of the company to be obtained.

11. The examination process, judicial in method, (public, mandatory, and armed with information gathering powers) has been critical to external administration regardless of the basis – voluntary or compulsory – by which the external party was appointed to manage the affairs of the company.

12. The history of the examination power is long and has been traced in a number of cases.[12] The power allowed for the voluntary windings up of companies by the company or the creditors with the consequential appointment of a liquidator (subject to the relevant court overruling the choice). Examination summons were available for court-ordered winding up and where it was "just and beneficial" to do so.[13] These types of powers were, in substance, mirrored in subsequent company legislation in the Australian colonies.[14]

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11 *R v Davison* (1954) 90 CLR 353 (***Davison***) at 382 (Kitto J).

12 *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501 at [46]-[78]; *Re Excel Finance Corporation Ltd; Worthley v England* (1994) 52 FCR 69 at 79-81; *Re Compass Airlines Pty Ltd* (1992) 35 FCR 447 at 452-453.

13 *Companies Act 1862* (Imp), ss 115, 129, 130, 133 and 141.

14 Eg, *Companies Act 1890* (Vic), s 109 and 124; *Companies Act 1893* (WA), ss 157 and 159; *Companies Act 1899* (NSW), s 137.

13. For present purposes, the following features of the class or type of power being exercised are:

(1) the court was given extensive powers of discretion, supervision and control regardless of how the external administration came about; and [15]

(2) the relevant court concluded examination in connection with both court-ordered windings up and voluntary windings up.[16]

14. Thus, although the examination power can in one sense be characterised as essentially investigative and not determinative of parties' rights,[17] it is, and has historically been, an aspect of the courts' general supervisory role in the external administration of companies.[18]

15. *Cheney v Spooner*[19] was an appeal against a decision to grant leave for an examination summons to be served interstate under the *Service and Execution of Process Act 1901-1924* (Cth). The question for the High Court was whether the examination summons, inter alia, required a person to give evidence in "a proceeding" (so as to enliven the interstate provision in Commonwealth Act). The appellant contended that the relevant examination provisions of the of the *Companies Act 1899* (NSW) did not give rise to a "proceeding" in any legal sense, but merely contemplated the gathering of information which may or may not result in the subsequent initiation of some proceeding. The Court held that examinations under the *Companies Act 1899* (NSW), even in the context of voluntary winding up, occurred in a judicial proceeding.[20]

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15 *Saraceni v Jones* (2012) 42 WAR 518 at [55] (Martin CJ), [227]-[228] (McLure P); *Handberg v MIG Property Services Pty Ltd* (2010) 39 ACSR 373 at 377-380 (Warren CJ); *Fardon v State of Queensland* (2004) 223 CLR 575 at [34] per McHugh J; *Patrick Stevedores Operations (No 2) v Maritime Union of Australia* (1998) 195 CLR 1 at [80]; *Mortimer v Brown* (1970) 122 CLR 493 at 495 (Barwick CJ), 496 (Kitto J), 499, 502 (Walsh J).

16 *Handberg v MIG Property Services Pty Ltd* (2010) 79 ACSR 373 at 377-380; *Saraceni v Jones* (2012) 42 WAR 518 at [227]-[228] (McLure P, outlining the supervision function).

17 *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501 at [106].

18 *Ariff v Fong* (2010) 79 NSWLR 392 at [39]-[41] and [55]-[59]; *Re Sons of Gwalia; Ex parte Love* (2008) 218 FLR 49 at [68]-[73] (Le Miere J).

19 (1929) 41 CLR 532.

20 (1929) 41 CLR 532 at 536-7 (Isaacs and Gavan Duffy JJ), 538-9 (Starke J).

16. Similarly, in *Gould v Brown*[21] Gaudron J, observed that courts have long exercised jurisdiction with respect to bankruptcy and insolvency and said "[i]t may be that those powers need not be conferred on courts, but, being so conferred, they are readily characterised as judicial in character".[22]

Purpose of examinations in winding up

17. At its most basic level, the examination power in s 596A of the Corporations Act protects the interests of a company's creditors.[23] The power also assists with the regulation of corporations by providing a forum for the consideration of the examinable affairs of corporations.[24]

18. The importance of the examination function in the protection of creditors' interests (and therefore the interest of investors in the use of limited liability corporations as a driver of commerce) was acknowledged by Paine J in *Re Anderson; Ex parte Official Receiver*,[25] where his Honour emphasised that the system of external administration would founder if a trustee in bankruptcy were compelled to rely upon such information as the bankrupt may be able or willing to give, and such facts as he can ascertain from persons ready to assist him voluntarily.[26]

19. Moreover, in many cases, properly safeguarding the interests of creditors requires liquidators to obtain information that is peculiarly within the knowledge of the proposed examinee. Indeed, this feature of the examinations regime has been acknowledged by this Court as a basis for finding the privilege against self-incrimination to be abrogated in such contexts.[27] In *Mortimer v Brown* (considering an analogous Queensland provision), Kitto J noted that, without the abrogation of the

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21 (1998) 193 CLR 346.

22 *Gould v Brown* (1998) 193 CLR 346 at 404 [68].

23 *Hamilton v Oades* (1989) 166 CLR 486 at 496 (Mason J).

24 *Evans v Wainter Pty Ltd* (2005) 145 FCR 176 at [252] (Lander J).

25 (1937) 10 ABC 284.

26 (1937) 10 ABC 284 at 288.

27 *Hamilton v Oades* (1989) 166 CLR 486 at 496; *Mortimer v Brown* (1970) 122 CLR 493 at 496 and 499.

privilege as part of the armoury of examination, the provision would be relatively valueless in the very cases which call most loudly for investigation.[28]

20. Notwithstanding the abrogation of the privilege against self-incrimination, Kitto J observed in *Mortimer v Brown*, "cases are bound to arise in which immense harm may be done ... to the person being examined and ... to other individuals or to the community, by the allowing or disallowing of questions".[29]

21. Of this risk, Jessel MR opined in *Ex parte Willey; In re Wright*:[30]

> Now that is a very grave power to entrust to any Court or any man, viz., power to summon any other man whom you suspect (for mere suspicion will do) to be capable of giving information, and to get any information from him, although that information may be extremely hostile to the interests of the man himself. It is a power which, so far as I know, is found nowhere except in bankruptcy and the winding-up of companies (which is a kind of bankruptcy); it is a very extraordinary power indeed, and it ought to be very carefully exercised.

C. Judicial power of the Commonwealth

22. The strict separation of powers under the Constitution, by which the judicial power of the Commonwealth cannot be bestowed otherwise than in accordance with Ch III of the Constitution, means that there must be some principled basis to define the parameters of judicial power of the Commonwealth.[31] That basis cannot start and end with the classical description of judicial power given by Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead* that:[32]

> the words "judicial power" as used in s 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property.

23. It must accommodate both its incidental and historical aspects. This means that the judicial power of the Commonwealth includes functions that are incidental to the

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28 (1970) 122 CLR 493 at 496.

29 (1970) 122 CLR 493 at 496.

30 (1883) 23 Ch D 118 at 128.

31 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Gould v Brown* (1998) 193 CLR 346 at [15] (Brennan CJ and Toohey J).

32 (1909) 8 CLR 330 at 357.

exercise of judicial power[33] and those that are the proper subject of its exercise because of historical practice.[34] That conclusion cannot be a product of abstract reasoning alone but must reflect the historical functions performed by courts at Federation that did not involve the determination of rights and liabilities by suit.

24. As a matter of history, judicial power was exercised beyond the traditional adjudication of existing rights and obligations between parties (the "core" of judicial power).[35]

D. Examination power falls within recognised class of judicial powers

25. The plaintiff contends that the extraordinary nature of the power in s 596A takes it outside the realm of judicial power. To say that the power is extraordinary, however, says little of its constitutional character. Contrary to the Plaintiff Submissions, the risks identified above tell in favour of the power being apt for judicial exercise. Indeed, managing the risks attending compulsory evidentiary processes is a function familiar to courts. Thus, considering the provision at issue in *Mortimer v Brown*, Barwick CJ observed in *Rees v Kratzmann* that the provision conferred on courts "the traditional judicial function of ensuring that the examination is not made an instrument of oppression, injustice, or of needless injury to the individual".[36]

26. The power in s 596A, although characteristically inquisitorial in certain respects, is apt for exercise by the courts and of a clear judicial character when reposed in courts. In this respect, courts' historical supervision of the external administration of companies renders the power distinctly judicial, irrespective of whether it is exercised in the context of court-ordered or voluntary winding up.

27. The recognition that, at Federation, there were functions "apt for exercise by a court" that extended beyond the determination of rights and liabilities in a properly constituted suit provides an important component of federal judicial power. Four points may be made in this respect.

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33 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at [122] (Gummow and Hayne JJ).

34 *Saraceni v Jones* (2012) 246 CLR 251 at [2] (Gummow, Hayne and Bell JJ).

35 *Saraceni* (2012) 42 WAR 518 at [14] (Martin CJ).

36 *Rees v Kratzman* (1965) 114 CLR 63 at 66.

(1) First, the principle attaches to types of functions and extends to those functions that properly fall within the class or type. No rigid taxonomy is called for. The particular function should not be ossified by reference to peripheral matters of form. The extension of the principle to classes or types of functions avoids the situation, which the plaintiff's submissions demand, of splitting matters that are conceptually and functionally related into those that can and those that cannot be undertaken in federal jurisdiction. In the context of this proceeding, such a separation leads to a lack of coherence in the supervision of corporations. Indeed, if a power of examination is not available in the case of *voluntary* winding up, the capacity of liquidators to protect the interests of creditors would be severely undermined. Such a position might also encourage recourse to the voluntary winding up regime as a means of avoiding disclosure of the true position of a company through court-ordered winding up (and associated examinations). On this basis, acceptance of the Plaintiff Submissions would produce a grave distortion of the operation of the winding up regime provided for in the Corporations Act.

(2) Second, and conversely, it does not provide a licence to extend the areas covered by the principle merely because it would be convenient or expedient to do so. It is not enough that a particular field would be well suited to the judicial skill set.

(3) Third, the language used by Kitto J of a function "peculiarly appropriate for judicial performance"[37] should not be taken to describe a function that can only be performed by a court. Such an approach would ignore the significant category of legislation where a power or function takes its character as judicial or administrative from the nature of the repository of the power.[38]

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37 *Davison* (1954) 90 CLR 353 at 382.

38 *White v Director of Military Prosecutions* (2007) 231 CLR 570 (***White***) at 595 [48] (Gummow, Hayne and Crennan JJ).

(4) Fourth, it is enough that the relevant activity falls within an established branch of judicial activity.

E. Examination power analogous to powers historically exercised by courts

28. The plaintiff approaches this case principally by way of discounting historical analogy. It contends that the power in s 596A is not sufficiently analogous to a power historically exercised by courts at Federation. In support of that submission, the plaintiff points to a number of features of the s 596A power as distinguishing it from potential historical analogues. For the reasons above, it is not necessary to resort to analogy in order to characterise the power as judicial. The actual judicial powers that existed historically still exist. In any event, the power is sufficiently close to the class or type of powers historically exercised by courts at and prior to Federation.[39]

29. In part, what the plaintiff seeks to do is to refer to minor differences between approaches that may have existed pre-Federation to distinguish the relevant historical analogy.[40] In *White*, Gummow, Hayne and Crennan JJ stated, in applying *Davison*:[41]

> The modern regulatory state arrived after 1900 and did so with several pertinent consequences. First, modern federal legislation creates rights and imposes liabilities of a nature and with a scope for which there is no readily apparent analogue in the pre-federation legal systems of the colonies. Secondly, any treatment today of Ch III must allow for what has become a significant category of legislation where a power or function takes its character as judicial or administrative from the nature of the body in which the Parliament has located it.

30. This reference to historical analogy exists because, in part, the framers of the Constitution are taken to have had a particular conception of judicial power at the time of Federation.[42]

31. However, the analogical exercise need not involve like-for-like and can take into consideration modern developments.[43] The concept of a representative jury for the

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39 *Saraceni v Jones & Ors* (2012) 246 CLR 251.

40 Plaintiff Submissions, [30]-[54].

41 (2007) 231 CLR 570 at [48].

42 *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 661 [193] (Heydon, Crennan and Kiefel JJ).

purposes of s 80 of the Constitution provides an example of the interaction of contemporary standards and perceptions affecting the operation of Ch III.[44] What is being construed and applied is a constitution, not a mere statute, and thus the constitutional text is to be construed "with all the generality which the words used admit".[45]

32. More recently, in *Thomas v Mowbray*,[46] where the making of control orders was analogised to traditional powers exercised by certain courts to prevent breach of the peace,[47] Gummow and Crennan JJ referred to the earlier analysis in the joint judgment in *White* with regard to:[48]

> ...the importance which has been attached in the decisions respecting Ch III to the presence or absence of an understanding at the time of the adoption of the Constitution of the treatment of a particular class or type of function as apt for exercise by a court.

33. In this context, none of the distinguishing features relied on by the plaintiff, either alone or in combination, carry the impugned power beyond the rubric accepted by authority as falling within the judicial power of the Commonwealth.

(1) **Mandatory vs discretionary.**[49] In this instance, the class or type of function is an investigative power supervised by the relevant court with the party required to answer the summons to explain a company's examinable affairs. A court may still consider if the summons is oppressive or whether there has been an abuse of process.[50] Changes to whether an examination is mandatory or discretionary are insufficient to distinguish the power being

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43 *Dalton v NSW Crime Commission* (2006) 227 CLR 490 at [45]; *Cheney v Spooner* (1929) 41 CLR 532; *White* (2007) 231 CLR 570 at 596 [51].

44 *Cheatle v The Queen* (1993) 177 CLR 541 at 560.

45 See *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at [16], and generally [16]-[27].

46 (2007) 233 CLR 307.

47 *Thomas v Mowbray* (2007) 233 CLR 307 at 327-329 (Gleeson CJ), 356-357 (Gummow and Crennan JJ, with Heydon and Callinan JJ agreeing).

48 *Thomas v Mowbray* (2007) 233 CLR 307 at [66].

49 Plaintiff Submissions, [38]-[40].

50 E.g. *Equititrust Limited (In Liq) (Receiver Appointed) (Receivers and Managers Appointed) v Equititrust Limited (In Liq) (Receiver Appointed) (Receivers and Managers Appointed)* (2014) 13 ABC(NS) 191.

exercised from the historical concept of the judicial power of the Commonwealth.[51] A court still oversees the process and can protect its processes.

(2) **Just and beneficial.**[52] In terms of there being a lack of discretion under s 596A of the Corporations Act and the pre-Federation references to "just and beneficial" as a criterion for granting an examination, Victoria notes that the purpose of the "just and beneficial" criterion was to enable a voluntary winding up to have access to a statutory regime available upon a compulsory winding up.[53] The removal or modification of the criterion does not have an effect upon the type of power being exercised.

(3) **Examinable affairs.**[54] Although the definition of "examinable affairs" in the Corporations Act is broad, it is not without limitation.[55] The reference to "the trade, dealings, estate, or effects of the company" used historically before Federation is also broad.[56] To attempt to refer to a distinction between the two approaches is not reflective of how historical analogies are assessed for the purposes of establishing what is the judicial power of the Commonwealth.

(4) **Special purposes liquidators.**[57] The circumstances relating to the appointment of the special purpose liquidator are outlined in the decision of Greenwood J in *Palmer, in the matter of Queensland Nickel Pty Ltd (In Liq) v Parbery, in his capacity as Liquidator of Queensland Nickel Pty Ltd (In*

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51 *Palmer, in the matter of Queensland Nickel Pty Ltd (In Liq) v Parbery, in his capacity as Liquidator of Queensland Nickel Pty Ltd (In Liq)* [2016] FCA 1094 at [30] (Perram J).

52 Plaintiff Submissions, [42].

53 *Handberg v MIG Property Services Pty Ltd* (2010) 79 ACSR 373 at 378-380.

54 Plaintiff Submissions, [44].

55 Corporations Act, s 53. Cf *Meteyard and Others v Love and Others as Receivers and Managers of Southland Coal Pty Ltd* (2005) 65 NSWLR 36 at [6]-[11] (Santow JA), for a discussion of what constitutes examinable affairs.

56 See Plaintiff Submissions, [44] and *London and Lancashire Paper Mills Co* (1888) 57 LJ (CH) 766 at 769 (North J).

57 Plaintiff Submissions, [45].

Liq).[58] Put simply, for the purposes of characterising the judicial power of the Commonwealth, the position of a special purpose liquidator is indistinguishable from a general liquidator;[59] both owe general duties to creditors.

(5) **Statutory licensing and people to be examined.**[60] In terms of the wider range of people able to be examined since Federation, the Corporations Act distinguishes between officers and provisional liquidators (for the purposes of s 596A) and people concerned with the examinable affairs of the company who have (or may have) been guilty of misconduct in relation to the corporation or may be able to give information about the examinable affairs of the corporation (for the purposes of s 596B). This does not change the type of power exercised pre-Federation. Similarly, the differences in licensing of insolvency practitioners merely reflect a modification of societal values and do not produce a different type of power.

Overruling Davison

34. To the extent that the plaintiff contends that the test of historical analogy should no longer be applied as a test sufficient to sustain validity, the plaintiff seeks leave to re-open the decision in *Davison*. Victoria takes no position on whether leave should be granted but rejects that the decision in *Davison* should be overruled.

35. In this respect, the plaintiff asserts that:

(1) The test of historical analogy suggested to apply in *Davison* is insufficient to sustain validity, as the Constitution adopted a division of judicial, legislative and executive functions which were necessarily inconsistent with aspects of the earlier system. This meant the issue of historical analogy is inapt when considering the exercise of judicial power under Ch III of the Constitution.[61]

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58 [2016] FCA 1048 at [20]-[27]. Referring to *Onefone Australia Pty Ltd v One.Tel Ltd (in liq)* (2003) 48 ACSR 562 (Windeyer J); *Re Obie Pty Ltd (No. 2)* (1984) 2 Qd R 155 (Thomas J).

59 See further the first defendants' written submissions dated 24 October 2016 at [39].

60 Plaintiff Submissions, [46].

61 Plaintiff Submissions, [51]-[56].

(2) The factors relevant to the overruling of an early decision of the Court support such an approach, as the dictum was not the result of a line of cases and has not, until the reasons given for the refusal of special leave in *Saraceni v Jones & Ors*,[62] been treated as a rule of direct application. The implications of overruling the decision would be limited, as many relevant categories of activity would be regarded as falling within the judicial power of the Commonwealth.[63]

36. The plaintiff's contentions as to the relevance of the test in *Davison* should be rejected. *Davison* is one of a number of cases to recognise the historical concept of the judicial power of the Commonwealth.[64] Furthermore, judgments of the Court have specifically acknowledged the issues with relying upon Ch III of the Constitution in the circumstances and dismissed the approach.[65]

37. At a conceptual level, the criticism of Kitto J in *Davison* is unwarranted. Before *Davison*, reliance upon historical analogy to establish the ambit of the judicial power of the Commonwealth had occurred in Australia.[66] In addition, Dixon CJ and McTiernan J in *Davison* noted a number of United States cases, where the doctrine of separation of powers is recognised, and the historical position of the law was considered.[67]

38. To ignore the historical conception of judicial power is to forget that the Constitution was not drafted in a vacuum and was drafted against a background of United

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62 *Saraceni v Jones & Ors* (2012) 246 CLR 251.

63 Plaintiff Submissions, [58]-[61].

64 *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617 at 627 (Mason J, with whom Gibbs CJ, Stephen and Wilson JJ agreed); *Cominos v Cominos* (1972) 127 CLR 588 at 607 (Mason J); *R v Quinn; Ex Parte Consolidated Foods Corp* (1977) 138 CLR 1 at 13 (Jacobs J); *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 574 [105] (Hayne, Crennan, Kiefel and Bell JJ). See further: DF Jackson "The Australian Judicial System: Judicial Power of the Commonwealth" (2001) 24(3) *UNSW Law Journal* 737 at 743 stating: "Where the line is drawn often depends not only upon legal analysis, but also upon historical practice and social considerations".

65 *White* (2007) 231 CLR 570 at [48].

66 *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 referred to approvingly in *Chu Keng Lim v Minister for Immigration* (1992) 176 CLR 1 at 67 (McHugh J).

67 *Davison* (1954) 90 CLR 353 at 369, referring to: *Wayman v Southard* 23 US 1 (1825); *Bank of United States v Halstead* 23 US 51 (1825); *United States v Union Pacific Railroad Co.* (1878) 98 US 569; *Ex parte City Bank* 44 US 292 (1845); *Livingston v Story* 34 US 632 (1835); *Fidelity & Deposit Co. of Maryland v United States* (1902) 187 US 315.

Kingdom law.[68] The submission that the United States Constitution provides for a separation of powers and the Australian Constitution is modelled on the United States Constitution does not support overruling *Davison*. As this Court has acknowledged they are different constitutional systems.[69] The United States Supreme Court is a Federal appellate court and each State retains its own common law. By contrast, in Australia the High Court of Australia is a final appellate court for State and federal laws and there is one common law throughout the Commonwealth.[70]

39. If the historical concept of judicial power was not recognised, the judicial power of the Commonwealth would be limited by just the incidental and functional definitions. The incidental and functional definitions of judicial power were both discussed by McLure P in *Saraceni*.[71]

(1) For the purposes of the functional definition, it is necessary to have a controversy between parties about existing rights and liabilities, resulting in a final, biding and authoritative determination.[72]

(2) The incidental definition encompasses powers and functions that, although not otherwise judicial, can validly be conferred on a court because of its relationship to other powers or functions of the relevant court.[73] Historical practice or an analogy to historical practice can be an important indicator that a function or power is ancillary to the exercise of judicial power.[74] The plaintiff's submissions are silent on what to do regarding the relationship between incidental function and historical analogy.

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68 Quick & Garran, *Annotated Constitution of the Australian Commonwealth* (1901) (LexisNexis Butterworths, Revised Edition 2015) at [788].

69 *Monis v The Queen* (2013) 249 CLR 92 at 116 [28] (French CJ), 207 [325]-[326] (Crennan, Kiefel and Bell JJ).

70 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 463.

71 (2012) 42 WAR 518 at [83].

72 *Saraceni* (2012) 42 WAR 518 at [85].

73 *Gould v Brown* (1998) 193 CLR 346 at 388-389 [33]-[35] (Brennan CJ and Toohey J), 500 [328] (Kirby J).

74 *Davison* (1954) 90 CLR 353 at 368-370 (Dixon CJ and McTiernan J).

40. If the plaintiff's submissions in this respect were accepted, issues as to the enforcement of arbitral awards would arise,[75] as well as questions over courts' supervisory jurisdiction where the determination of rights does not take place. These functions would not be incidental to the exercise of judicial power. Contrary to the plaintiff's submissions,[76] this would have a significant impact on curial activities.

F. Compatibility with the judicial power of the Commonwealth

41. The general assertions of the plaintiff as to the contended inconsistency of s 596A of the Corporations Act with the judicial power of the Commonwealth are misplaced.

42. In *Dalton v NSW Crime Commission*, albeit in a different context to a winding up, the joint judgment refused to accede to a challenge of the investigative functions of courts.[77] The judgment gave as examples: the examination of judgment debtors, bankrupts, and officers of failed corporations; the equity jurisdiction of the Supreme Courts with respect to bills of discovery (or preliminary discovery); and the courts of marine inquiry established in the Australian colonies. Likewise the next of kin inquiry in an administration suit, conducted in New South Wales by the Master in Equity.

43. That judgment highlights that some of the powers referred to by the plaintiff are within the bounds and metes of the judicial power of the Commonwealth. In addition, as noted by McLure P in *Saraceni*, the discretions contended not to exist by the plaintiff actually do exist.[78]

44. The plaintiff has sought to classify the examination power as a novel and uninhibited power that is foreign to Australian law. The history of the examination power is inconsistent with that submission.[79] As Mason CJ noted in *Hamilton v Oades*,[80] a purpose of the examination power was "to create a system of discovery".[81]

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75 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 574 [105] (Hayne, Crennan, Kiefel and Bell JJ).

76 Plaintiff's Submissions, [60]-[61].

77 *Dalton v NSW Crime Commission* (2006) 227 CLR 490 at 507-508 [45].

78 *Saraceni* (2012) 42 WAR 518 at [227]-[228] (McLure P). See further *Rees v Kratzmann* (1965) 114 CLR 63 at 66 (Barwick CJ).

79 *Re Rolls Razor Ltd* [1968] 3 All ER 698 at 700 (Buckley J).

45. Moreover, the plaintiff's submissions fail to acknowledge that some conduct *can* be classified as falling within the judicial power of the Commonwealth, when it is exercised by a court (as a result of the "chameleon doctrine").[82]

46. In terms of judicial oversight, as noted by McLure P in *Saraceni*,[83] it was held in *Hall v Poolman*, considering the court's ability to control liquidators under s 536 of the Corporations Act, that:[84]

> The court must bear in mind the place of s 536 in the regulatory system established under Australia's corporations legislation when construing the section. It must be recognised that this section, together with the virtually identical provision applicable to controllers of the property of a corporation in s 423, is a broadly expressed supervisory jurisdiction over the conduct of persons in control of the affairs of a corporation, in circumstances where normal market forces and the exercise by shareholders of their rights to control are attenuated or non-existent. These powers are one part of a range of a regulatory powers conferred on the court and/or ASIC to ensure the lawful, orderly and efficient conduct of the affairs of corporations during such a period. The detailed regulatory scheme found in the *Corporations Act* (Cth) manifests in this, as in so many other respects, the central significance of corporate conduct for the economic and social life of the nation.

47. Given the operation of s 536 of the Corporations Act and associated provisions (such as s 1321 of the Corporations Act), the submission of the plaintiff is untenable. A court retains a residual discretion over a liquidator who is a fiduciary and officer of the company.[85] These residual discretions protect a creditor from a liquidator abusing their powers.[86] They also mean that the wide definition of "eligible applicant" does not make s 596A of the Corporations Act incompatible with the exercise of the judicial power of the Commonwealth.

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80 (1989) 166 CLR 486.

81 (1989) 166 CLR 486 at 497-498.

82 *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 175-179 (Isaacs J); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 373 (Kitto J); *Cominos v Cominos* (1972) 127 CLR 588 at 606.

83 *Saraceni* (2012) 42 WAR 518 at [158].

84 (2009) 75 NSWLR 99 at [53].

85 Corporations Act, s 9.

86 See recently: *Kimberley Diamonds Ltd, in the matter of Kimberley Diamond Company Pty Ltd (in liq)* [2016] FCA 1016.

48. As a final matter, Victoria notes that reference to cases such as *South Australia v Totani*[87] does not assist the plaintiff's position.[88] First, in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia*,[89] Hayne, Crennan, Kiefel and Bell JJ, referring to *Totani*, considered that historical considerations can support a conclusion that the power to take a particular action is within the judicial power of the Commonwealth, as the framers of the Constitution understood it. Second, there is no absolute obligation on the relevant court to make orders under s 596A of the Corporations Act when an eligible applicant applies for such orders.

10 PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

49. Victoria estimates that it will require approximately 15 minutes for the presentation of oral submissions.

Dated: 28 October 2016

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87 (2010) 242 CLR 1 (***Totani***).

88 In that case, it will be recalled, the Magistrates' Court of South Australia was required to assist in the making of "control orders" under s 14(1) of the *Serious and Organised Crime (Control) Act 2008* (SA) without the need to determine, by ordinary judicial processes, whether the defendant engaged in or had engaged in, serious criminal activity. See generally: (2010) 242 CLR 1 at 52 [82] (French CJ); 67 [149] (Gummow J); 88-89 [226] (Hayne J); 160 [436] (Crennan and Bell JJ); 173 [481] (Kiefel J).

89 (2013) 251 CLR 533 at 574 [105].