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 OWEN IN THEIR CAPACITIES AS LIQUIDATORS OF QUEENSLAND NICKEL PTY LTD (IN LIQ) ACN 009 842 068
First Defendants

and

JOHN RICHARD PARK, STEFAN DOPKING, KELLY-ANNE LAVINA TRENFIELD & QUENTIN JAMES OLDE IN THEIR CAPACITIES AS LIQUIDATORS OF QUEENSLAND NICKEL PTY LTD (IN LIQ) ACN 009 842 068
Second Defendants

FIRST DEFENDANTS' WRITTEN SUBMISSIONS

PART I: PUBLICATION ON THE INTERNET

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

PART II: CONCISE STATEMENT OF THE ISSUES PRESENTED BY THE PROCEEDINGS

2. The question that has been reserved for the consideration of the Full Court is whether s 596A of the *Corporations Act 2001* (Cth) is invalid as contrary to Ch III of the Constitution in that it confers non-judicial power on federal courts and courts exercising federal jurisdiction.

10 3. The first defendants submit that the power to summon a person for examination may validly be conferred on federal courts and courts exercising federal jurisdiction because:

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(a) There is no exhaustive or exclusive test of judicial power that can be stated in the abstract. The characterisation of a power requires regard to the powers that were exercised by courts at the time of Federation.

(b) At the time of Federation, there was a long-established power in the courts to order an examination of a person concerned in the affairs of a company in liquidation. That power extended to circumstances where the company had been placed into voluntary liquidation. The power to order examination under s 596A is closely aligned to the power to order examination that existed at the time of Federation. The power in s 596A is therefore a judicial power.

(c) In the alternative, the power to order an examination is incidental to the general supervisory jurisdiction of the court over the winding up of a company, including a company that is in voluntary liquidation.

(d) Contrary to the submissions of the plaintiff, the conferral of power under s 596A to order an examination does not undermine the institutional integrity of the courts. On the contrary, the power to order and supervise an examination is properly conferred on courts because courts are thereby in a position to ensure that the examination process is not abused.

4. The above arguments are explained in more detail in Part VI below.

PART III: NOTICES UNDER S 78B OF THE JUDICIARY ACT 1903

5. The plaintiff gave notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) on 15 September 2015. The first defendants agree with the plaintiff that no further notice is necessary.

PART IV: RELEVANT FACTS

6. The first defendants agree with the statement of relevant facts set out in the plaintiff's written submissions at paragraphs 5 to 7.[1]

7. However, contrary to paragraph 8 of the plaintiff's written submissions, the summons for examination was not issued on 2 August 2016. More precisely:

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[1] Annexure "A" to these submissions comprises a copy of the orders of Dowsett J dated 18 May 2016 appointing the first defendants as the special purpose liquidators of Queensland Nickel Pty Ltd (referred to in the Plaintiff's Written Submissions, para [7]).

(a) On 2 August 2016, Registrar Belcher in the Federal Court made an order that a summons for examination be issued to the plaintiff pursuant to s 596A of the *Corporations Act*.[2]

(b) On 3 August 2016, the Federal Court issued a summons for examination to the plaintiff, in accordance with the order that had been made the previous day (the ***Examination Summons***).[3]

8. The first defendants also rely upon the following relevant facts:

(a) On 29 August 2016, Justice Greenwood dismissed that part of an interlocutory application filed by the plaintiff seeking to set aside the Examination Summons.[4] Justice Greenwood found that the plaintiff's contention that s 596A was not a valid conferral of judicial power on the court was not arguable.[5]

(b) On 2 September 2016, Justice Perram heard and dismissed applications filed by the plaintiff seeking leave to appeal the decision of Justice Greenwood and for a stay of the Examination Summons pending the hearing of his appeal by the Full Court of the Federal Court.[6] Justice Perram found that the argument concerning the constitutional validity of s 596A did not have any prospect of success.[7]

(c) On 14 October 2016, the plaintiff, first defendants and second defendants consented to an order of this Court restraining the first defendants and second defendants from enforcing the Examination Summons against the plaintiff, pending the determination of this matter, or until further order.

PART V: APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

9. In addition to the Constitutional provisions, statutes and regulations referred to in Annexure A to the plaintiff's written submissions, the first defendants refer to the provisions listed in Annexure B to these submissions.

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2 Question Reserved Book (**QRB**), p 1.
3 QRB, p 8.
4 *Palmer v Parbery* [2016] FCA 1048.
5 *Palmer v Parbery* [2016] FCA 1048 at [10] and [61].
6 *Palmer v Parbery* [2016] FCA 1094.
7 *Palmer v Parbery* [2016] FCA 1094 at [33].

PART VI: FIRST DEFENDANTS' ARGUMENT

No Exclusive and Exhaustive Test of Judicial Power

10. The plaintiff submits that the power of a court to summon a person for examination under s 596A of the *Corporations Act* does not fall within the "core" of judicial power as used in s 71 of the Constitution because that power does not satisfy the functional test identified by Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead*[8] or by Kitto J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd.*[9]

11. However, this Court has frequently affirmed that it is not possible to frame a definition of judicial power that is at once "exclusive and exhaustive".[10]

12. As Hayne J stated in *Attorney-General (Commonwealth) v Alinta Ltd*,[11] it:

> ...has been recognized since the very earliest decisions of this court about Ch III...[that] no single combination of necessary or sufficient factors identifies what is judicial power.

13. Similarly, in *The Queen v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd*,[12] Windeyer J stated:

> The concept [of judicial power] seems to me to defy, perhaps it were better to say transcend, purely abstract conceptual analysis. It inevitably attracts consideration of predominant characteristics and also invites comparison with the historic functions and processes of courts of law.

14. Hence, the power to order an examination may be judicial even though it is not a power to decide controversies between parties within the meaning of the general tests for judicial power propounded in cases such as *Huddart Parker*.

15. For the reasons set out below, the power to order an examination under s 596A of the *Corporations Act* may validly be conferred on a court because:

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8 (1909) 8 CLR 330 at 357.
9 (1970) 123 CLR 361 at 374.
10 *R v Davison* (1954) 90 CLR 353 at 366 (Dixon CJ and McTiernan J); *The Queen v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1971) 123 CLR 361 at 394 (Windeyer J); *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-189 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245 at 257 (Mason CJ, Brennan and Toohey JJ).
11 (2008) 233 CLR 542 at [93] (Hayne J).
12 (1971) 123 CLR 361 at 394.

(a) the power is one that had historically been exercised by the courts at the time of Federation and is therefore properly characterised as a judicial power;

(b) further, or in the alternative, that power is incidental to the judicial power to exercise supervision over companies in liquidation, or to appoint a liquidator to a company.

The Historical Approach

16. In *R v Davison*, Kitto J stated:[13]

> Where the action to be taken is of a kind which had come by 1900 to be so consistently regarded as peculiarly appropriate for judicial performance that it then occupied an acknowledged place in the structure of the judicial system, the conclusion, it seems to me, is inevitable that the power to take that action is within the concept of judicial power as the framers of the Constitution must be taken to have understood it.

17. In *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*, a majority of this Court affirmed the principle expounded in that passage stating:[14]

> Historical considerations can support a conclusion "that the power to take [a particular] action is within the concept of judicial power as the framers of the Constitution must be taken to have understood it."

18. In that case, the majority referred to the centuries old practice of courts enforcing arbitral awards in the course of upholding the power to enforce an award under the *International Arbitration Act 1974* (Cth).[15]

19. Applying the same historical approach, the Court of Appeal of Western Australia in *Saraceni v Jones* held that the power to order an examination in respect of a company in receivership or in respect of which there was a mortgagee in possession was a judicial power, since it was closely analogous to the historically exercised power to order an examination in respect of a company in voluntary liquidation.[16]

20. Up to the time of Federation, the historical antecedents of the power in s 596A of the *Corporations Act* to order an examination in the case of a company in voluntary liquidation were as follows.

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13 (1954) 90 CLR 353 at 382.
14 (2013) 251 CLR 533 at 574 [105] (Hayne, Crennan, Kiefel and Bell JJ).
15 (2013) 251 CLR 533 at 568 [82] et seq (Hayne, Crennan, Kiefel and Bell JJ).
16 (2012) 42 WAR 518 esp at 559 [212] and 563 [237] (McLure P, with whom Newnes JA agreed).

Historical Antecedents

21. Companies incorporated under the *Joint Stock Companies Registration and Regulation Act 1844* (UK) (7&8 Vict c 110) could be wound up under the *Joint Stock Companies Winding Up Act 1844* (UK) (7&8 Vict c 111). Under s 15 of the latter act, the court had the power to summon and examine on oath any person capable of giving information concerning the commercial dealings or trading or any acts of bankruptcy of the company.

22. The *Joint Stock Companies Act 1856* (UK) (19&20 Vict c 47) introduced the office of an "official liquidator" in a court ordered winding up (s 88) and a "liquidator" for a voluntary winding up (s 104). Sections 77 and 78 of that Act empowered the court to summon before it any person known or suspected to have in his or her possession any of the property of the company, or supposed to be indebted to the company, or any person whom the court deemed capable of giving information about the affairs of the company.

23. English corporate law was consolidated in the *Companies Act 1862* (UK) (25&26 Vict c 89) (the **1862 Act**). Under the 1862 Act, the court had power to order an examination in respect of the affairs of a company that was in voluntary liquidation.

24. Specifically, section 115 and 117 provided:

> 115. The Court may, after it has made an Order for winding up the Company, summon before it any Officer of the Company or Person known or suspected to have in his Possession any of the Estate or Effects of the Company, or supposed to be indebted to the Company, or any Person whom the Court may deem capable of giving Information concerning the Trade, Dealings, Estate, or Effects of the Company; and the Court may require any such Officer or Person to produce any Books, Papers, Deeds, Writings, or other Documents in his Custody or Power relating to the Company ...
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> 117. The Court may examine upon Oath, either by Word of Mouth or upon written Interrogatories, any Person appearing or brought before them in manner aforesaid concerning the Affairs, Dealings, Estate, or Effects of the Company, and may reduce into Writing the Answers of every such Person, and require him to subscribe the same.

25. Section 138 of the 1862 Act provided that if a company was being wound up voluntarily, the Court had a power to exercise, upon application by a liquidator or contributory, all or any of the powers which were exercisable in a court ordered winding up, including the power of compulsory examination.

26. Section 138 of the 1862 Act stated:

> Where a Company is being wound up voluntarily the Liquidators or any Contributory of the Company may apply to the Court ... to determine any Question arising in the Matter of such Winding up, or to exercise, as respects the enforcing of Calls, or in respect of any other Matter, all or any of the Powers which the Court might exercise if the Company were being wound up by the Court; and the Court ... if satisfied that the Determination of such Question, or the required Exercise of Power, will be just and beneficial, may accede, wholly or partially, to such Application, on such Terms and subject to such Conditions as the Court thinks fit.

10 27. Hence, by 1862 in the UK, there was an established basis for a court to order an examination in respect of a company in voluntary liquidation. Cognate legislation was introduced by various Australian parliaments between 1863 and 1899.[17] Further, prior to Federation, both English and Australian courts had recognized the jurisdiction to order examination in respect of companies in voluntary liquidation, in reliance on ss 115 and 138 of the 1862 Act[18] or an Australian equivalent.[19]

28. Accordingly, by the time of Federation, courts in Australia had an established jurisdiction to order an examination in respect of the affairs of a company in voluntary liquidation.

The Modern Provisions

20 29. There is a very close correlation between the power of examination conferred by ss 115 and 138 of the 1862 Act and the power to order examination under s 596A of the Corporations Act, when exercised (to the extent necessary) in conjunction with s 511 of the Corporations Act.

30. Specifically:

(a) Section 511 appears in Part 5.5 of the Corporations Act which deals with voluntary winding up. Section 511(1)(b) states relevantly:

> (1) The liquidator, or any contributory or creditor, may apply to the Court:

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17 See *Companies Act 1863* (Qld) (27 Vic No 4), ss 112, 113, 128; *Companies Act 1864* (SA) (27&28 Vic No 13), ss 151; *Companies Act 1864* (Vic) (27 Vic No 190) ss 106, 107, 121; *Companies Act 1869* (Tas) (33 Vic No 23), ss 147, 148, 165; *Companies Act 1874* (NSW) (37 Vic No 19) ss 133, 173, 174 and 189; *Companies Act 1890* (Vic) (54 Vict No 1074), ss 109, 110 and 124; *Companies Act 1892* (SA) (55&56 Vic No 557), ss 154, 156; *Companies Act 1893* (WA) (56 Vic No 8), ss 157, 159; *Companies Act 1899* (NSW) (56 Vict No 40), ss 123, 124 and 137.

18 See *Re Gold Company; Re Metropolitan Bank Ltd (Heiron's Case)* (1880) LR 15 Ch D 139 esp at 142 (Baggallay LJ).

19 *Re Broken Hill & Argenton Smelting Co Ltd* (1893) 19 VLR 111 at 114 (Hodges J).

> (b) to exercise all or any of the powers that the Court might exercise if the company were being wound up by the Court.

(b) That provision is closely modelled on s 138 of the 1862 Act which provided (relevantly):

> Where a Company is being wound up voluntarily the Liquidators or any Contributory of the Company may apply to the Court...to exercise...all or any of the Powers which the Court might exercise if the Company were being wound up by the Court...

(c) Section 596A provides (relevantly):

> The Court is to summon a person for examination about a corporation's examinable affairs if:
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> (a) an eligible applicant applies for the summons; and
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> (b) the Court is satisfied that the person is an officer or provisional liquidator of the corporation or was such an officer or provisional liquidator...

(d) The provision is analogous but not identical to s 115 of the 1862 Act. As discussed below, the differences between s 596A and s 115 are not material for the purpose of characterising the power in s 596A.

31. In *Saraceni v Jones*, McLure P (with whom Newnes JA agreed) stated that "the court examination powers in relation to the *voluntary* winding up of a company have been exercised by English and Australian courts since well before federation" (emphasis in original).[20] Her Honour went on to find that the jurisdiction to order an examination in respect of a company in receivership, or subject to a mortgagee in possession, was analogous to the power to order an examination in a voluntary winding up and was therefore judicial power.[21]

32. In dismissing an application for special leave to appeal from that decision, Gummow, Hayne and Bell JJ observed:[22]

> [2]...The *Companies Act 1862* (UK) (the 1862 Act), which was the model for the companies legislation of the Australian colonies, provided in s 138 that where a company was being wound up voluntarily the liquidator or any contributory might apply to the court

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20 (2012) 42 WAR 518 at 559 [212].

21 (2012) 42 WAR 518 at 563 [237]; 564 [240].

22 *Saraceni v Jones* (2012) 246 CLR 251 at 256-257 [2]-[3] (Gummow, Hayne and Bell JJ). That passage is not a binding precedent because the occasion for the passage was an application for special leave. However, the reasoning is compelling.

> having jurisdiction to wind up the company to exercise all or any of the powers which the court might exercise if the company were being wound up by the court.
>
> [3] One of those powers, conferred by s 115 of the 1862 Act, was to order the compulsory examination of an officer or other person whom the court deemed capable of giving information about the affairs of the company. **The provisions of the Corporations Act [ss 596A and 596B] which it is sought to impugn are not to any relevantly different effect.**
>
> (emphasis added)

33. The plaintiff seeks to distinguish the power to order an examination that existed in 1900 from the power in s 596A because the earlier powers had some different features to s 596A.[23] However, applying the historical approach, a power may be judicial even if the legislation which confers the power differs in some ways from the historical legislation that conferred a similar power. The historical approach to characterisation of a power as judicial includes circumstances where there is a relevant *analogy* with an historical power. If it were otherwise, the historical approach would permit the characterisation of a power as judicial only if the legislation under review were framed in the exact same terms as pre-Federation legislation.

34. The plaintiff identifies six alleged grounds of distinction between the pre-Federation examination provisions and the provisions of the *Corporations Act*. However, none of those grounds is a relevant ground of distinction for the purpose of characterising the power in s 596A.

35. *First*, the plaintiff observes that s 115 of the 1862 Act conferred a discretion as to whether to make an order for examination, and also observes that s 138 of the 1862 Act required the court to exercise its powers in a voluntary liquidation only if to do so would be "just and beneficial".[24] By contrast, s 596A provides that the court "is to summon" a person for examination if the criteria in s 596A(a) and (b) are satisfied.

36. The distinction between mandatory power and discretionary power is not relevant to the characterisation of the power as judicial or non-judicial. The plaintiff cites no authority in support of the proposition that judicial powers must be discretionary. In any case, while s 596A is expressed in mandatory terms, the court retains the discretion to set aside a summons for examination if it has been obtained

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23 Plaintiff's Written Submissions, paras [37]-[48].
24 Plaintiff's Written Submissions, paras [38]-[41].

for an improper purpose.[25] There is accordingly no relevant difference between the pre-Federation power and the power under s 596A.

37. *Second*, the plaintiff observes that s 596A calls for examination before a court, while some pre-Federation statutes provided for examination by or before either a court or an independent officer such as the Chief Commissioner of Insolvent Estates.[26] However, the 1862 Act and the cognate Australian provisions authorised a person to be summoned before the court. Hence, by the time of Federation, the jurisdiction to summon persons for examination before the court was well-established.

10 38. *Third,* the plaintiff observes that the 1862 Act did not adopt the concept of "examinable affairs" which is used in s 596A and that the examination extended only to "the trade, dealings, estate or effects of the company".[27] However, the scope of the affairs that may be examined is not rationally connected to whether the power is properly characterised as judicial. In any case, the scope of matters which could be examined pursuant to the 1862 Act was broad and was to be interpreted having regard to the purpose of the provision in assisting in the orderly winding up of the company.[28] The term "examinable affairs" is interpreted having regard to the same purpose.[29]

39. *Fourth*, the plaintiff submits that nothing in the 1862 Act or other pre-Federation
20 legislation authorised the appointment of a "special purpose" liquidator.[30] However, this is not correct. The power to assign different and discrete tasks to several liquidators was recognised as early as 1887 in the decision in *Re Midland Land & Investment Corporation*.[31] The power to appoint an additional liquidator to a company is presently to be found in s 472(1) and the power to assign tasks between liquidators is contained in s 473(8) of the Corporations Act.[32] These powers may be exercised by the court in respect of a company in voluntary

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25 *Re Southland Coal Pty Ltd* (2005) 189 FLR 297 at 300 [15] (Young CJ in Eq); *Re Excel Finance Corp Ltd; Worthley v England* (1994) 52 FCR 69 at 89 and 93 (Gummow, Hill and Cooper JJ); *Re New Tel Ltd (in liq); Evans v Wainter Pty Ltd* (2005) 145 FCR 176 at 199 [144] (Lander J, with whom Ryan and Crennan JJ agreed).

26 Plaintiff's Written Submissions, para [43].

27 Plaintiff's Written Submissions, para [44].

28 *Re Greys Brewery Co* (1883) 25 Ch D 400 at 403 (Chitty J).

29 *Re Hugh J Roberts Pty Ltd (in liq)* (1970) 91 WN (NSW) 537 at 540 (Street J); *Grosvenor Hill (Qld) Pty Ltd v Barber* (1994) 48 FCR 301 at 308-310 (per curiam).

30 Plaintiff's Written Submissions, para [45].

31 (1887) WN 58.

32 See *Re Obie Pty Ltd (No 4)* (1984) 8 ACLR 967 at 971 (Thomas J) (interpreting analogous provisions in ss 372(1) and 373(8) of the *Companies (Qld) Code*); *Re Spedley Securities Ltd* (1991) 4 ACSR 555 at 556; *Nairn v Westpoint Management Ltd* (2009) 72 ACSR 426 at 429.

liquidation by virtue of s 511.[33] Provisions analogous to ss 472(1), 473(8) and 511 of the Corporations Act could be found in ss 92 and 138 of the 1862 Act.

40. *Fifth*, the plaintiff submits that under the 1862 Act and other pre-Federation legislation, liquidators were appointed from the list of official liquidators maintained by the court and there was no equivalent of the modern system of statutory licensing and regulation of insolvency practitioners.[34] The plaintiff's submissions do not explain how this distinction is relevant to the characterisation of the power in s 596A.

41. *Sixth*, the plaintiff submits that the classes of persons who could be examined under s 115 of the 1862 Act was more narrowly confined than under s 596A.[35] The opposite is the case. An order for examination under s 596A may be made only against a person who is or was "an officer or provisional liquidator of the corporation". By contrast, under s 115 of the 1862 Act, the persons who could be summoned for examination were:

> ...any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company...

42. The scope of persons who can be summoned under s 596B of the Corporations Act is arguably broader than the scope of potential examinees under s 115 of the 1862 Act. There is no challenge to the validity of s 596B.

43. The grounds identified by the plaintiff as distinguishing s 596A of the Corporations Act from the pre-Federation provisions governing examination are not relevant to the characterisation of the power in s 596A. Applying the historical approach to the characterisation of judicial power, the power to order an examination under s 596A of the Corporations Act is a judicial power.

Historical Approach should continue to be applied

44. The plaintiff submits that the "historical approach" as exemplified by the statement of Kitto J in *R v Davison*[36] is wrong in principle and ought not to be followed.[37]

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33 *Lo v Nielsen & Moller (Autoglass) (NSW) Pty Ltd* [2008] NSWSC 407 at [29] (Barrett J).
34 Plaintiff's Written Submissions, para [46].
35 Plaintiff's Written Submissions, para [47].
36 (1954) 90 CLR 353 at 382.
37 Plaintiff's Written Submissions, paras [49]-[61].

45. However, regard to the historical approach is well-established in the jurisprudence of this Court.[38] The application of the historical approach has recently been affirmed by this Court, as appears from the passage quoted at paragraph 17 above from the decision in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*.[39]

46. The historical approach does not make historical considerations the sole relevant factor. Rather, it recognises that abstract reasoning alone cannot produce an exhaustive definition of judicial power, and the characterisation of a power must therefore be influenced to a significant degree by the historical exercise of power in the courts.

47. The plaintiff submits that the historical approach pays insufficient regard to the purpose of the separation of judicial power under Chapter III of the Constitution.[40] However, the Constitution does not expressly define judicial power. The constitutional entrenchment of the separation of powers does not necessitate the development of a comprehensive abstract theory of judicial power. At the time the Constitution was drafted, there was a pre-existing understanding of the types of powers that were exercised by courts and were therefore properly understood as judicial powers. The historical approach gives effect to the purposes of the Constitution by assisting to identify those powers which were generally regarded as judicial and ensuring that these powers are typically vested in courts.

Incidental to Judicial Power

48. Parliament may validly confer on a court a power that is incidental to a judicial power.[41]

49. If (contrary to the above) the power to order an examination in respect of a company in liquidation is not a judicial power, that power may nonetheless be conferred on a court because it is incidental to judicial power.

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38 *Cominos v Cominos* (1972) 127 CLR 588 at 600, 605, 608; *R v Hegarty; ex parte City of Salisbury* (1981) 147 CLR 617 at 627; *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1 at 11-12 (Jacobs J); *Attorney-General (Commonwealth) v Alinta Ltd* (2008) 233 CLR 542 at 559 [35] (Kirby J); *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 594-595 [45]-[49] (Gummow, Hayne and Crennan JJ); *Thomas v Mowbray* (2007) 233 CLR 307 at 328-329 [16]-[17] (Gleeson CJ); at 357 [120]-[121] (Gummow and Crennan JJ).

39 (2013) 251 CLR 533 at 574 [105] (Hayne, Crennan, Kiefel and Bell JJ).

40 Plaintiff's Written Submissions, para [56].

41 *R v Federal Court of Bankruptcy; ex parte Lowenstein* (1938) 59 CLR 556 at 587 (Dixon and Evatt JJ) (applied in *Gould v Brown* (1998) 193 CLR 346 at 358 (Kirby J); *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151.

50. In *Gould v Brown*,[42] a majority of this Court held that power to order an examination could be validly conferred on a court because that power was incidental to the judicial power to order that a company be wound up.

51. In the present case, there was no court-ordered winding up of Queensland Nickel Pty Ltd. However, even in the case of a voluntary liquidation, the court retains a significant supervisory role over the liquidation of the company. Specifically:

(a) As discussed above, s 511(1)(b) of the Corporations Act enables the court to make any order in a voluntary winding up that it has the power to make in a liquidation ordered by the court.

(b) Under s 511(1)(a), the court may "determine any question arising in the winding up of a company" in voluntary liquidation.

(c) Under s 493A(3)-(6), the court may authorise the transfer of shares in a company subject to voluntary liquidation and may set aside conditions imposed by a liquidator on the transfer of shares.

(d) Under s 500(3), the court may require persons to deliver to the liquidator any property to which a company in voluntary liquidation is entitled.

(e) Under s 502, the court may appoint a liquidator to a company in voluntary liquidation if there is no liquidator acting, and under s 503, the court may remove a liquidator and appoint another liquidator.

(f) Under s 507(9) the court may give directions necessary for the initiation and conduct of an arbitration in respect of a company in voluntary liquidation;

(g) Under s 509(6), on an application by the liquidator, the court may order that ASIC deregister a company in voluntary liquidation.

(h) Under s 536, a court may inquire into whether a liquidator is fulfilling his or her duties and may take such action as the court thinks fit.

(i) Under s 1321, a person aggrieved by an act, omission or decision of a liquidator may apply to the court which may then confirm, reverse or modify the act or decision.

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42 (1998) 193 CLR 346 at 387 [33] (Brennan CJ and Toohey J); 405 [70] (Gaudron J) 500 [328] (Kirby J).

52. The power to order an examination is an incident of the more general supervisory jurisdiction that the court has over a liquidator (including a non-court appointed liquidator).[43]

53. Moreover, in the present case, the first defendants who obtained the order for examination of the plaintiff were court appointed liquidators. They were appointed as liquidators on 18 May 2016 under an order of Dowsett J.[44] That order expressly contemplated that the functions of the first defendants would include the conduct of examinations.

No Infringement of Integrity of Court

10 54. The plaintiff submits that three features of s 596A cause that provision to be incompatible with the judicial power of Commonwealth and impair the institutional integrity of the court.[45]

55. *First*, the plaintiff submits that s 596A has this effect because the court is compelled to issue the summons and is reduced to implementing the anterior decision made by the eligible applicant.[46]

56. However, as French CJ stated in *International Finance Trust Company v NSW Crime Commission*:[47]

> The separation of legislative, executive and judicial powers reflected in the structure of Chs I, II and III of the Constitution does not prevent the Commonwealth Parliament from
20 passing a law which has the effect of requiring a court exercising federal jurisdiction to make certain specified orders if certain conditions are met.

57. Section 596A creates a substantive rule of law making a person subject to examination if the criteria in s 596A(a) and (b) are satisfied. A court will not make an order unless satisfied that the criteria are satisfied. By giving effect to the substantive rule of law in s 596A, the court does not become a rubber stamp for the decision of the eligible applicant. Moreover, as discussed above, the court is not

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43 The power to order examinations in respect of a company subject to administration or a deed of company arrangement has been upheld on the basis that the power is incidental to the supervisory jurisdiction of the court under s 447A of the Corporations Act: *Re Sons of Gwalia Ltd* (2008) 66 ACSR 253 at 271 [71]-[72] (Le Miere J); *Ariff v Fong* (2010) 79 NSWLR 392 at 408 [55] (Barrett J). Similarly, Martin CJ in *Saraceni v Jones* (2012) 42 WAR 518 at 534 [67] held that the powers to conduct an examination in respect of a company in receivership "involve the exercise of judicial power, or at least powers which are incidental or ancillary to judicial power". Cf at 566 [253] (McLure P, with whom Newnes JA agreed).

44 See Annexure B.

45 Plaintiff's Written Submissions, paras [62]-[74].

46 Plaintiff's Written Submissions, para [63].

47 (2009) 240 CLR 319 at 352 [49].

deprived of all discretion with respect to the summons. The summons may be set aside if the court is satisfied that it was not sought for a proper purpose.[48]

58. Further, where a liquidator applies for an examination summons under s 596A, there is no sense in which the court is co-opted to undertake the work of the executive so that its independence from the executive will be undermined. This was a critical feature in cases relied upon by the plaintiff such as *International Finance Trust Company v NSW Crime Commission*[49] and *South Australia v Totani*[50] which led to the conclusion that the legislation considered in those cases was invalid.[51]

10 59. *Second*, the plaintiff submits that the examination regime involves the court in an inquisitorial or investigative process that is not consistent with the exercise of judicial power.[52]

60. However, the court in an examination under s 596A does not become involved an investigative process; it merely facilitates and supervises the investigative process.

61. This Court has, in any case, recognised that courts may exercise investigative functions. In *Dalton v NSW Crime Commission*, the majority stated:[53]

> The proposition denying the investigative functions of courts should not be accepted. From a time well before federation, the courts of the Australian colonies, like those in England and elsewhere in the Empire, exercised a range of administrative and investigative
20 functions. Provisions for the examination of judgment debtors, bankrupts and officers of failed corporations are in point. In *Cheney v Spooner* [(1929) 41 CLR 532], this Court upheld the application of the 1901 Act to an order by the Supreme Court of New South Wales under ss 123 and 124 of the *Companies Act 1899* (NSW) which gave leave to the liquidator of a company in voluntary liquidation to summons a number of persons to attend for examination by the Master in Equity. The equity jurisdiction of the Supreme Courts with respect to bills of discovery (or preliminary discovery in more recent parlance) provides another instance of an investigative procedure. So also 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.

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48 See fn 32 above.

49 (2009) 240 CLR 319 at 354 [55] (French CJ); 363 [87] (Gummow and Bell JJ).

50 (2010) 242 CLR 1 at 20 [1], 43 [62] (French CJ); at 97 [249] (Heydon J).

51 See *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 574 [105] (Hayne, Crennan, Kiefel and Bell JJ): "The problem with the legislation considered in each of *Kable* and *Totani* was that the relevant state courts were enlisted or co-opted by the executive to perform a task which did not engage the courts' independent judicial power to quell controversies."

52 Plaintiff's Written Submissions, paras [66]-[70].

53 (2006) 227 CLR 490 at [45] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

62. As that passage makes clear, there is a long history of courts engaging in investigative processes. There is no inconsistency between those processes and the institutional integrity of the courts.

63. *Third*, the plaintiff submits that the power under s 596A is "extraordinary" and that the public interest in the investigation of the affairs of a company in liquidation should be advanced by statutory regulators or by liquidators without the involvement of the court.[54]

64. The public interest in the investigation of the affairs of a company in liquidation is an extremely important one. A liquidator assumes his or her role with very little knowledge or idea of the affairs of the company. The records of the company may be chaotic, and officers and employees despite statutory requirements to do so, may be reluctant to provide information in a timely way. The power to examine under oath, about the affairs of the company, redresses this issue to some extent and assists in the effective execution of a liquidator's duties. This concept was recognised in *Re Qintex Group Management Services Pty Ltd* (in liq) where the Queensland Court of Appeal stated:[55]

> In the nature of things, liquidators when they are appointed labour under the particular disability of not knowing as much about the affairs of the company as former directors and others, and that they often cannot obtain reliable information about suspicious transactions. Generally, the only source available to them is the records of the company such as books and documents, if still available, and the information they contain is always vulnerable to contrived explanations and even to distortion by persons not anxious to disclose what they really know about events that took place when they were in charge of the company's affairs. A plaintiff in civil proceedings is bound to prove his case and generally must do so by oral evidence. Directors and senior officers of the company in liquidation, even if they have not absconded, are often unwilling and unco-operative witnesses especially in matters in which they are the target of proceedings brought by the liquidator. Few other litigants suffer to that disadvantage, or to the same extent, as liquidators.

65. Moreover, the gravity of the public examination process and the potential impact of the process on an examinee supports the conferral of the power to order an examination (and to supervise it) upon the courts.

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54 Plaintiff's Written Submissions, paras [71] and [73].

55 [1997] 2 Qd R 91 at 94-95 (McPherson and Pincus JJA, Derrington J).

66. As Barwick CJ stated in *Rees v Kratzmann*:[56]

> [T]he legislature has reposed in the judge presiding at the interrogation, the traditional judicial function of ensuring that the examination is not made an instrument of oppression, injustice or of needless injury to the individual.

67. Similarly, in *Saraceni v Jones*, Martin CJ stated:[57]

> [I]n *Thomas v Mowbray*, Gleeson CJ referred to the view he had expressed in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 to the effect that powers which had the capacity to affect the liberty of an individual and erode human rights might be better reposed in the judicial branch of government so that they would be exercised independently, impartially and judicially...By analogy, it might well be thought that the judicial branch of government is best placed to supervise the examination of a person with respect to the affairs of a corporation under external examination so as to ensure that the examination did not become an instrument of oppression or abuse, or was not used for an improper purpose, such as the gaining of an unfair forensic advantage, or any purpose extraneous to the purpose for which the power is conferred...

68. The characteristics of a court help to ensure that the examination process is not abused. The conferral of the examination power on the court is not inconsistent with the institutional integrity of the court.

PART VII: ORDERS SOUGHT BY THE FIRST DEFENDANTS

69. The first defendants submit that the appropriate orders are as follows:

1. Answer as follows the question reserved for the consideration of the Full Court.

   No.

2. Dismiss the writ of summons filed on 12 September 2016.

3. The plaintiff pay the first defendants' costs of these proceedings.

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56 (1965) 114 CLR 63 at 66.
57 (2012) 42 WAR 518 at 525 [18].

PART VIII: ORAL ARGUMENT

70. The first defendants seek to supplement this outline with oral argument and estimate that 1 hour will be required.

Dated: 24 October 2016

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