IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B 52 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
Defendants

PLAINTIFF'S 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. By order 4 made on 15 September 2016, Kiefel ACJ reserved the following question for the consideration of a Full Court pursuant to s 18 of the *Judiciary Act 1903* (Cth):

> "Is s 596A of the *Corporations Act 2001* (Cth) invalid as contrary to Ch III of the Constitution in that it confers non-judicial power on federal courts and on courts exercising federal jurisdiction?"

3. In Part V below, the plaintiff develops the following submissions:

   a. First, the power to summon a person for examination under s 596A of the *Corporations Act 2001* (Cth) ("**Corporations Act**") does not satisfy the functional or "classical" test of judicial power and thus does not fall within the "core" of the judicial power of the Commonwealth under s 71 of the Constitution.

   b. Secondly, the power under s 596A of the Corporations Act is not incidental or ancillary to the exercise of judicial power, at least in the case of a voluntary winding up.

   c. Thirdly, the power under s 596A of the Corporations Act is not sufficiently analogous to a power historically exercised by the courts at the time of Federation so as to constitute, on that ground, an exercise of the judicial power of the Commonwealth under s 71 of the Constitution.

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d. Fourthly, in the alternative to the third argument above, the test of historical analogy should no longer be applied as a test sufficient to sustain validity.

e. Fifthly, the lack of discretion on the part of the Court, the enlistment of the Court in a process of pre-litigation investigation and the extraordinary nature of the power combine to produce the conclusion that the function conferred by s 596A of the Corporations Act is incompatible with, or falls outside, the judicial power of the Commonwealth, irrespective of the existence or otherwise of any relevant pre-Federation historical analogue.

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

10 4. Notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) was given on 15 September 2016. The plaintiff considers that no further notice is necessary.

PART IV: RELEVANT FACTS

5. The plaintiff held the position of director of Queensland Nickel Pty Ltd ("**Queensland Nickel**") in periods which included from 17 April 2013 to 5 April 2014 and from 22 January 2015 to 16 February 2015.[1] On 18 January 2016, Queensland Nickel entered into voluntary administration pursuant to s 436A of the Corporations Act.[2]

6. On 22 April 2016, the creditors of Queensland Nickel resolved pursuant to s 439C(c) of the Corporations Act that the company be voluntarily wound up. The administrators were appointed as liquidators of the company.[3]

20 7. On 18 May 2016, on the application of the Commonwealth and the Commissioner of Taxation in their capacities as creditors of Queensland Nickel, the Federal Court (Dowsett J) made an order pursuant to ss 511 and 472(1) of the Corporations Act appointing the defendants as additional liquidators of Queensland Nickel, for the limited purposes specified in paragraphs 4(b) to 4(d) of the order. The order designated the defendants as "Special Purpose Liquidators" of Queensland Nickel.[4]

8. On 2 August 2016, on the application of the defendants, the Federal Court (Registrar Belcher) summoned the plaintiff for examination under s 596A of the Corporations Act. The summons required the plaintiff to attend before the Court to be examined on oath about the examinable affairs of Queensland Nickel; and to produce at the examination

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[1] Affidavit of Clive Frederick Palmer affirmed 14.9.16 at [4].
[2] Affidavit of Clive Frederick Palmer affirmed 19.9.16 at [23].
[3] Affidavit of Clive Frederick Palmer affirmed 19.9.16 at [24].
[4] Exhibit CP-01 to the affidavit of Clive Frederick Palmer affirmed 19.9.16, pp 15-18.

under ss 596D(2) and 597(9) specified books in the plaintiff's possession, custody or control relating to Queensland Nickel or its examinable affairs.[5] Pursuant to the summons, the plaintiff attended before the Federal Court and was examined on multiple days in September 2016.[6] The Federal Court has fixed further dates for examination of the plaintiff commencing on 31 October 2016.[7]

PART V: PLAINTIFF'S ARGUMENT

Introduction

9. The "judicial power of the Commonwealth" is referred to in s 71 of the Constitution, which provides for the vesting or investment, as the case may be, of that power in this Court, other federal courts and other courts invested with federal jurisdiction. The federal jurisdiction which may be conferred on federal courts is defined by s 77(i) and on any court of a State by s 77(iii). The ambit of the jurisdiction which has been so conferred is explained in the opening words of s 77, that is "[w]ith respect to any of the matters mentioned in" ss 75 or 76. The central phrase, for present purposes, is contained in s 76(ii), which identifies a matter arising under any laws made by the Parliament.

10. In *Saraceni v Jones*,[8] the Western Australian Court of Appeal rejected a challenge to the validity, under Ch III of the Constitution, of s 596A of the Corporations Act. Three Justices of this Court refused special leave to appeal from that decision.[9] Their Honours did so on the ground that the validity of s 596A was supported by the application of the dictum stated by Kitto J in *R v Davison* as follows:[10]

> "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."

11. However, the reasons given for the refusal of special leave in *Saraceni* created no precedent and were not binding on any court.[11]

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[5] Affidavit of Clive Frederick Palmer affirmed 19.9.16 at [36] and Exhibit CP-01 (pp 39-44).
[6] Affidavit of Clive Frederick Palmer affirmed 19.9.16 at [56]-[58], [71]-[77].
[7] Affidavit of Clive Frederick Palmer affirmed 19.9.16 at [76], [95]; Affidavit of Clive Frederick Palmer affirmed 27.9.16 at [14].
[8] (2012) 287 ALR 551.
[9] *Saraceni v Jones* (2012) 246 CLR 251 (Gummow, Hayne and Bell JJ).
[10] (1954) 90 CLR 353 at 382.
[11] *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [52] (French CJ, Nettle and Gordon JJ), [112] (Kiefel and Keane JJ), [119] (Bell and Gageler JJ).

12. In any event, *Saraceni* did not determine the question that arises in the present case. The question determined in *Saraceni* was whether ss 596A and 597 of the Corporations Act conferred on the Court a non-judicial power where the power was exercised on the application of a privately appointed receiver and manager and a privately appointed agent of a mortgagee in possession.[12]

The relevant provisions in Div 1 of Pt 5.9 of the Corporations Act

13. Chapter 5 (ss 410 to 600H) of the Corporations Act is entitled "External Administration". Part 5.4 (ss 459A to 464) deals with "Winding up in insolvency"; Pt 5.4A (ss 461 to 464) with "Winding up by the Court on other grounds"; and Pt 5.4B (ss 465 to 489E) with "Winding up in insolvency or by the Court". The provisions governing a voluntary winding up are contained in Pt 5.5 (ss 459F to 512). Part 5.9 (ss 596A to 600H) is entitled "Miscellaneous". This includes, in Div 1 (ss 596A to 597B), provisions for the examination of persons about a corporation.

14. Section 596A provides:

> "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 during or after the 2 years ending:
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> (i) if the corporation is under administration – on the section 513C day in relation to the administration; or
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> (ii) if the corporation has executed a deed of company arrangement that has not yet terminated – on the section 513C day in relation to the administration that ended when the deed was executed; or
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> (iii) if the corporation is being, or has been, wound up – when the winding up began; or
>
> (iv) otherwise – when the application is made."

15. An "eligible applicant" includes ASIC and a liquidator, provisional liquidator or administrator of the corporation: s 9. The "examinable affairs" of a corporation are widely defined in s 9 to include the promotion, formation, management, administration or winding up of the corporation; any other affairs of the corporation (including by reason of the extended definition of that concept in s 53); or the business affairs of a "connected

[12] (2012) 287 ALR 551 at [71] (McLure P).

entity"[13] of the corporation, in so far as they are, or appear to be, relevant to the corporation or to anything included in the corporation's examinable affairs.

16. Section 596B confers a distinct power of examination. By that section, the Court is empowered, but not required, to summon a person for examination about a corporation's examinable affairs if an eligible applicant applies for the summons and the Court is satisfied that the person (i) has taken part or been concerned in examinable affairs of the corporation and has been, or may have been, guilty of misconduct in relation to the corporation, or (ii) may be able to give information about its examinable affairs. An application for a summons under s 596B (but not under s 596A) must be supported by affidavit: s 596C.

17. Section 596D deals with the content of a summons issued under ss 596A or 596B. Notice of the examination is required to be given under s 596E. The Court may give directions about the matters to be inquired into at an examination, the procedure to be followed, who may be present or who may be excluded, and access to, or the publication, communication or destruction of, records of the examination: s 596F.

18. An examination is to be held in public except to such extent (if any) as the Court considers that, by reason of special circumstances, it is desirable to hold the examination in private: s 597(4). The Court may put, or allow to be put, to a person being examined such questions about the corporation or any of its examinable affairs as the Court thinks appropriate: s 597(5B).

19. A person who is summoned under ss 596A or 596B must not, without reasonable excuse, fail to attend the examination, refuse or fail to take an oath or make an affirmation, refuse or fail to answer a question that the Court directs him or her to answer, or refuse or fail to produce books that the summons requires, or that the Court directs, be produced: s 597(6)-(10A). A person is not excused from answering a question put to the person at an examination on the ground that the answer might tend to incriminate the person or make the person liable to a penalty: s 597(12). Where, before answering a question, the person claims that the answer might have that tendency, and the answer might in fact do so, the answer is not admissible in evidence against the person in a criminal proceeding or a proceeding for the imposition of a penalty, other than a proceeding under s 597 or in respect of the falsity of the answer: s 597(12A). Subject to that protection, any written

[13] The term "connected entity", in relation to a corporation, is defined by s 9 to mean a body corporate that is, or has been, related to the corporation; or an entity that is, or has been, connected (as defined by s 64B) with the corporation.

record of an examination signed by the person, or any authenticated transcript, may be used in evidence in any legal proceedings against the person: s 597(14).

20. The examinee may, at his or her own expense, engage legal representation who may put to the examinee such questions as the Court considers just for the purpose of enabling the examinee to explain or qualify any answers or evidence given by the examinee: s 597(16).

21. Sections 596A and 596B apply, of their own force and by reason of the definition of "eligible applicant", to both a court-ordered winding up and a voluntary winding up.

The power under s 596A of the Corporations Act does not satisfy the functional test of judicial power

22. The power of the Court to summon a person for examination under s 596A of the Corporations Act does not fall within what is sometimes described as the "core" of judicial power as used in s 71 of the Constitution. It does not satisfy the functional test identified by Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead*[14] or by Kitto J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd.*[15] The power under s 596A is not a power to decide controversies between persons or polities, by the application of the law as determined to the facts as found, so as to produce a binding and authoritative determination of existing rights or liabilities.

23. McLure P correctly accepted that this was so in *Saraceni*.[16] So too did Gaudron J in *Gould v Brown*, where her Honour said:[17]

> "The power to examine witnesses conferred by Ch 5, Pt 5.9 of the Corporations Law is not a power to be exercised in the discharge of judicial duties. It is a power divorced from the determination of any justiciable controversy. It is not directed to the determination of existing rights or liabilities. Nor is it directed to the determination of guilt or innocence or the imposition of punishment for breach of the law. It is unrelated to the making of any binding decision as to existing powers, duties or status. And it is not associated with the conferral or adjustment of rights or interests in accordance with legal standards. It is simply a power to obtain information. As such, it is not judicial power."

24. Taken alone, the examination power is not a judicial power, even when conferred on a court.[18] As French J observed in *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd*:[19]

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[14] (1909) 8 CLR 330 at 357.
[15] (1970) 123 CLR 361 at 374.
[16] (2012) 287 ALR 551 at [84]-[86] (Martin CJ and Newnes JA agreeing).
[17] (1998) 193 CLR 346 at [67].
[18] *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501 at [96], [106]-[107] (French J); *Re Sons of Gwalia Ltd; Ex parte Love* (2010) 218 FLR 49 at [61]-[64] (Le Miere J).
[19] (2007) 156 FCR 501 at [106]-[107].

> "Divorced from association with a judicial proceeding nothing about the examination power under the *Corporations Act* marks it as judicial in character. It lacks the core elements of the judicial process such as the finding of facts, the making of value judgments and binding determinations as to legal rights and obligations. ...
>
> The examination power taken alone, in the sense used above, is not an exercise of judicial power nor, taken alone, is it judicial when exercised by a court. It can only be accommodated within the exercise of judicial power if incidental to it or justified by historical usage."

The power under s 596A of the Corporations Act is not incidental or ancillary to the exercise of judicial power

25. Whether a power is incidental to a judicial power involves ascertaining whether it has sufficient relation to the principal judicial function or purpose.[20]

26. In *Saraceni*, McLure P concluded that, if the examination power in relation to the examinable affairs of a company the subject of an appointment of a receiver or agent of a mortgagee in possession is not for historical reasons judicial, it is not incidental to the exercise of judicial power.[21] That conclusion applies equally to an exercise of the examination power in relation to a company in voluntary liquidation.

27. At its highest, an examination power in a winding-up can be described as incidental or ancillary to the exercise of judicial power only where the winding-up itself occurred pursuant to an order of the Court. In *Highstoke*, French J said:[22]

> "An examination ordered in aid of the implementation of a winding-up order made by a court can be seen as incidental to the exercise of judicial power and has long been accepted as such, at least implicitly if not explicitly, on that basis. On the other hand an examination which is "free standing" in the sense that it is exercised without reference to any pending proceeding does not fall within the scope of the judicial power unless it can be characterised as judicial on the basis that it is a function which courts have long carried out."

28. The judgments in *Gould v Brown* indicate that an examination is judicial in character where it is auxiliary or incidental to a winding up ordered by the Court.[23] Here, Queensland Nickel is the subject of a *voluntary* winding-up. The winding up was not initiated by the Court. Thus the power conferred by s 596A of the Corporations Act was not exercised as an incident to an exercise of power to resolve a dispute between parties. It follows that the position is as set out by Gaudron J in *Gould v Brown*:[24]

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[20] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 278; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at [122] (Gummow and Hayne JJ).
[21] (2012) 287 ALR 551 at [253] (Newnes JA agreeing).
[22] (2007) 156 FCR 501 at [107].
[23] (1998) 193 CLR 346 at [31]-[33] (Brennan CJ and Toohey J), [66]-[70] (Gaudron J), [327]-[330] (Kirby J).
[24] (1998) 193 CLR 346 at [70].

> "It is convenient to proceed on the assumption that the power to examine witnesses in relation to the examinable affairs of a corporation may validly be conferred on a federal court if it has ordered that that corporation be wound up or if proceedings have been instituted in that court for its winding up. Even on that assumption, however, it must be concluded that, to the extent that the power conferred by Ch 5, Pt 5.9 is not confined to examination by a court which has exercised or is exercising jurisdiction to make an order for the winding up of the corporation, it is not properly characterised as judicial power. And to that extent, Ch III precludes the conferral of that power on the Federal Court, whether by the States or by the Commonwealth."

10 29. An order by the Court that a corporation be wound up in insolvency, or on any other ground, finally determines the justiciable controversy as to the insolvency of the corporation or the satisfaction of the relevant ground for the winding up.[25] The winding-up order directly affects, in a binding manner, the rights and liabilities of the corporation, its directors and members and its creditors. By contrast, the order made on 2 August 2016 appointing the defendants as additional, or special purpose, liquidators to a company already the subject of a voluntary winding up had none of the qualities necessary to constitute a judicial act. That appointment itself was an administrative act, and not an exercise of judicial power.[26]

30. Accordingly, even if the examination summons issued to the plaintiff under s 596A of the
20 Corporations Act were to be characterised as incidental or ancillary to the order for the appointment of the defendants as special purpose liquidators, it would not be incidental or ancillary to the exercise of judicial power.

The power under s 596A of the Corporations Act is not sufficiently analogous to a power historically exercised by the courts at the time of Federation

31. The only possible basis upon which the power under s 596A of the Corporations Act might be characterised as judicial is by application of the reasoning of Kitto J in *R v Davison* at 382, quoted in paragraph 10 above, namely that the action was of a kind that by 1900 had become "so consistently regarded as peculiarly appropriate for judicial performance." Dixon CJ and McTiernan J spoke, to similar effect, of "duties or powers
30 hitherto invariably discharged by courts under our system of jurisprudence".[27] However, for the reasons given below, the function conferred by s 596A of the Corporations Act does not satisfy this test.

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[25] See, eg, *Gould v Brown* (1998) 193 CLR 346 at [68].
[26] *Brian Cassidy Electrical Industries Pty Ltd v Attalex Pty Ltd (No 2)* [1984] 3 NSWLR 52 at 82 (McHugh JA).
[27] (1954) 90 CLR 353 at 369.

Need for caution in applying a test of historical analogy

32. In *White v Director of Military Prosecutions*,[28] Gummow, Hayne and Crennan JJ identified, as one difficulty in the path of any unconditional acceptance of the approach expounded by Kitto J in *R v Davison* at 382, that the modern regulatory state arrived after 1900 and, as a consequence, 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.

33. The relevant function and the relevant historical analogue or antecedent must each be identified with precision. Care is required in identifying and evaluating the differences and any similarities between them. In *Highstoke*,[29] French J said:

> "[T]o say that the courts have historically exercised investigative functions does not mean that all investigative functions conferred on a court, absent relevant historical antecedents or analogues, are to be regarded as judicial if not otherwise incidental to the exercise of judicial power. Without some limitation of that kind investigative obligations may be imposed by statute upon courts exercising federal jurisdiction on any subject within the legislative competence of the Commonwealth Parliament."

34. The strength of the language in which the "test" of historical analogy is expressed – "invariably discharged", "so consistently regarded as peculiarly appropriate for judicial performance", "acknowledged place in the structure of the judicial system" – points to the extraordinary nature of the test, the high threshold which it imposes and the careful historical analysis which it requires.

No sufficient historical analogy

35. The earliest provision in the United Kingdom for the examination of persons in connection with the liquidation of a company was s 15 of the *Joint Stock Companies Winding Up Act 1844* (UK) (7 & 8 Vict c 111).[30] Somewhat similar provisions had been made in New South Wales from 1841.[31] This was followed in the United Kingdom by s 115 of the *Companies Act 1862* (UK) (25 & 26 Vict c 89) ("**1862 Act**") including, by force of s 138 of that Act, a discretionary power of examination in a voluntary winding up. Like provisions, some of which were modelled on the 1862 Act, were enacted in Western Australia from 1858,[32] in New South Wales from 1874,[33] in Victoria from

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[28] (2007) 231 CLR 570 at [48].
[29] (2007) 156 FCR 501 at [108].
[30] *Highstoke* (2007) 156 FCR 501 at [46] (French J).
[31] *Insolvency Act 1841* (NSW) (4 Vic No 6), ss 17, 67 and 70; *Companies Winding Up Act 1847* (NSW) (11 Vic No 19), s 13.
[32] *Joint Stock Companies Ordinance 1858* (WA) (22 Vict No 6), ss 79, 80, 97; *Companies Act 1893* (WA) (56 Vict No 8), ss 157, 159.

1864,[34] in Queensland from 1863,[35] in South Australia from 1864[36] and in Tasmania from 1869.[37] *Public* examinations were introduced into the law relating to the winding up of companies in England by s 8 of the *Companies (Winding Up) Act 1890* (Eng).[38] The text of the relevant provisions is set out in **Annexure A.**

36. If the Court concludes that it is appropriate to apply the reasoning of Kitto J in *R v Davison*,[39] it should not be held that s 596A, as it applies to a voluntary winding up or a special purpose liquidator, is of the same kind as, or is sufficiently analogous to, the power of compulsory examination in a winding-up under ss 115 and 138 of the 1862 Act, or any of the pre-Federation legislation in England or in the Australian colonies, so as to fall within the concept of the judicial power of the Commonwealth.

37. The principal differences between s 596A of the Corporations Act and the pre-Federation legislation may be summarised as follows.

38. *First*, the grant of an examination summons under s 115 of the 1862 Act, and the equivalent provisions in the Australian pre-Federation statutes, was not mandatory. Instead, it was dependent upon the Court being persuaded by the materials put before it that the Court should exercise its discretion to issue the summons.[40] In *Re North Australian Territory Co,* Cotton LJ emphasised:[41]

> "The Court may, if it has made an order for winding-up, summon before it any officer or any other person; but then that is in the discretion of the Court, ... it is not at all the right of the applicant; it is the Court which may, if it thinks it right, order the person to attend and be examined and give any information he can with reference to the interests of the company being wound up."

39. The exercise of that discretion involved the balancing of the requirements of the liquidator or administrator to obtain information on the one hand against the possible

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[33] *Companies Act 1874* (NSW) (37 Vic No 19), ss 173, 174 and 189; *Companies Act 1899* (NSW) (56 Vict No 8), ss 123, 124 and 137(2).

[34] *The Companies Statute 1864* (Vic) (27 Vic No 190), ss 106, 107, 121; *Companies Act 1890* (Vic), ss 109, 110 and 124.

[35] *Companies Act 1863* (Qld) (27 Vic No 4), ss 112 and 113.

[36] *Companies Act 1864* (SA) (27 & 28 Vic No 13), s 151; *Companies Act 1892* (SA) (55 & 56 Vict No 557), ss 154, 156.

[37] *Companies Act 1869* (Tas) (33 Vic No 22), ss 147, 148, 165.

[38] See *Re Compass Airlines Pty Ltd* (1992) 109 ALR 119 at 124 (Lockhart J, with whom Beaumont and Gummow JJ agreed).

[39] (1954) 90 CLR 353 at 382.

[40] See, eg, *London and Lancashire Paper Mills Co.* (1888) 57 LJ (CH) 766 at 768-769 (North J); *Re North Australian Territory Co* (1890) 45 Ch D 87 at 91-92 (Cotton LJ), 92-93 (Bowen LJ).

[41] (1890) 45 Ch D 87 at 91-92.

oppression to the person sought to be examined on the other.[42]

40. By contrast, once an eligible applicant applies under s 596A, and the other preconditions to that section's operation have been enlivened, the summons must be issued. The discretionary nature of the power to issue an examination summons under the pre-Federation legislation was rightly perceived by the courts as being of the essence of the power.[43] A provision expressed in mandatory terms, such as now reflected in s 596A, had no analogue prior to Federation. Such a provision was not enacted in any Australian jurisdiction until 1992.[44]

41. Further, under s 138 of the 1862 Act, the importation of the examination power to a *voluntary* winding up required first that the Court assume jurisdiction with respect to the winding up by determining that exercise of the power would be "just and beneficial".[45] The same was true of the other pre-Federation provisions in England and in the Australian colonies. In *In re Metropolitan Bank (Heiron's Case)*,[46] the Court of Appeal for England and Wales emphasised that a voluntary liquidator who applied to the Court under s 138 of the 1862 Act for an order under s 115 for the examination of a person was not entitled to the order as of right, but must first satisfy the Court that the order would be just and beneficial for the purposes of the winding-up. James LJ said:[47]

> "the powers conferred on voluntary liquidators by virtue of the 115th and 138th sections of the Companies Act, 1862, are very inquisitorial, and the more inquisitorial they are, the more the Court is bound to take care that they are not used for the purpose of vexation and oppression. . . . ."

42. The position under s 596A is quite different. There is no discretion, whether expressed by reference to a criterion of "just and beneficial" or otherwise, to determine whether a summons for examination should issue in the case of a voluntary winding up. The Court must summon the person for examination if the pre-conditions in sub-ss (a) and (b) are satisfied. There is no requirement for the applicant for the summons to persuade the Court that it is just and beneficial to order the examination.

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[42] See, eg, *Re Castle New Homes Ltd* [1979] 2 All ER 775, [1979] 1 WLR 1075; *Cloverbay Ltd (Joint Administrators) v Bank of Credit and Commerce International* [1991] Ch 90 at 99.

[43] See, eg, *Re North Australian Territory Co* (1890) 45 Ch D 87 at 92-93 (Bowen LJ).

[44] *Corporate Law Reform Act 1992* (Cth), which introduced a new Div 1 in Pt 5.9 of the Corporations Law applicable in each of the States and Territories. See *Saraceni* (2012) 287 ALR 551 at [138]-[139]; *Highstoke* (2007) 156 FCR 501 at [63]-[67].

[45] See, eg, *In re Gold Co* (1879) 12 Ch D 77 at 79-80; *In re Broken Hill and Argenton Smelting Co Ltd* (1893) 19 VLR 111 at 114-115; *Sir John Moore Mining Co* (1878) 37 LT 242 at 243 (Bacon VC).

[46] (1880) 15 Ch D 139.

[47] (1880) 15 Ch D 139 at 141-142.

43. *Secondly*, some of the pre-Federation statutes provided for examination by or before either the Court or an independent officer, such as the Chief Commissioner of Insolvent Estates.[48] Further, prior to the nineteenth century, it was common for any examination of a bankrupt to be conducted by or before commissioners appointed to administer the bankruptcy process and not by or before the courts.[49] Viewed from the perspective of the framers of the Constitution in 1900, it could not be said that the legislation of the preceding decades, or the preceding centuries, had uniformly or consistently regarded the function of examination of a person in the winding up of a company or in bankruptcy as being peculiarly appropriate for judicial, rather than executive, performance.

10 44. *Thirdly*, neither the 1862 Act nor the other pre-Federation legislation adopted any concept of "examinable affairs" of the breadth now seen in the definitions in ss 9 and 53.[50] The pre-Federation power of examination extended only to "the trade, dealings, estate, or effects of the company".[51]

45. *Fourthly*, nothing in the 1862 Act or the other pre-Federation legislation authorised the appointment of "special purpose" liquidators, of the kind presently in issue, to conduct examinations on behalf of the interests of a particular creditor or an identified sub-class of creditors, rather than in the interests of creditors as a whole.

46. *Fifthly*, under the 1862 Act and the other pre-Federation legislation, liquidators were appointed exclusively from the list of official liquidators maintained by the Court itself,
20 and subject to the Court's control, under ss 92 and 93 of the 1862 Act. There was no equivalent of the modern system of statutory licensing and regulation of insolvency practitioners. Lord Walker said in *In re Pantmaenog Timber Co Ltd*, referring to ss 115 and 117 of the 1862 Act:[52]

> "In those days there was no insolvency service ("official liquidator" simply meant a liquidator appointed in a compulsory liquidation) and no body of licensed insolvency practitioners. The court seems to have been ready to take a hands-on approach. But it was (in an age which may have set a higher value on privacy) conscious that its powers under sections 115 and 117 ought not to be used oppressively."

47. *Sixthly*, the class of persons who could be examined under s 115 of the 1862 Act and the

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[48] See, eg, *Companies Act 1874* (NSW) (37 Vic no 19), s 133; *Companies Winding Up Act 1847* (NSW) (11 Vic No 19), s 13; *Insolvency Act 1841* (NSW) (4 Vic No 6), ss 3, 4, 13, 67.

[49] *Osborn and Bradshaw against Churchman* (1606) Cro Jac 120 (Lord Hardwicke); *An Act Touching Orders for Bankrupts 1571* (13 Eliz I c 7) (*Statute of Elizabeth*), s 2; Gleeson *et al* (eds), *Historical Foundations of Australian Law, Vol II* (2013) at 423-428.

[50] See, eg, *Grosvenor Hill (Qld) Pty Ltd v Barber* (1994) 48 FCR 301 at 308-309.

[51] See, eg, *London and Lancashire Paper Mills Co.* (1888) 57 LJ (CH) 766 at 769 (North J).

[52] [2004] 1 AC 158 at [83].

other pre-Federation legislation was more narrowly confined than in s 596A.

48. The constitutional validity of the examination power in s 596A, in its operation upon a voluntary winding up or an examination sought by a special purpose liquidator, is not justified on the ground that the power is relevantly the same as, or sufficiently analogous to, the pre-Federation power. The action to be taken by the Court under s 596A is not "of a kind" which had come by 1900 to be consistently regarded as peculiarly appropriate for judicial performance.[53]

Alternatively, the test of historical analogy should no longer be applied as a test sufficient to sustain validity

10 49. On a fair reading of the reasons in *R v Davison*, it is apparent that the majority did not apply a test of judicial power as turning solely upon whether there existed a pre-Federation statutory antecedent of the impugned function.

50. It is correct that Dixon CJ and McTiernan J referred to an article by Dean Pound which postulated an historical criterion as a chief guide in doubtful cases.[54] Also Kitto J founded his analysis upon the view that, when the Constitution prescribes a distribution of the functions of government by distinguishing between powers described as legislative, executive and judicial, it is using terms which refer, not to fundamental functional differences between powers, but to distinctions generally accepted at the time when the Constitution was framed.[55] The provenance of the "test" proposed by Kitto J in
20 *R v Davison* at 382, and its appropriateness in advancing the constitutional purposes of the separation of judicial power required by the text and structure of the Constitution, is otherwise unexplained in *R v Davison*.

51. If the passage of Kitto J in *R v Davison* at 382 is read as formulating a test of historical analogy intended, without more, to be sufficient to sustain validity, then it is wrong in principle and should no longer be followed.

52. To reason that the pre-Federation conferral, by statute, of a function of a particular kind upon courts in the United Kingdom or in the Australian colonies is, without more, sufficient to bring the function within the meaning of the phrase "the judicial power of the Commonwealth" in s 71 of the Constitution, does not sufficiently recognise that, by
30 its terms and structure, the Constitution adopted a division of judicial, legislative and executive functions which was necessarily inconsistent with aspects of the earlier system.

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[53] *Cf R v Davison* (1954) 90 CLR 353 at 382 (Kitto J).
[54] (1954) 90 CLR 353 at 369, referring to Dean Pound, *The Rule Making Power*, 12 American Bar Ass 599.
[55] (1954) 90 CLR 353 at 381-382.

53. To treat a function as falling within the "judicial power of the Commonwealth" simply because the function was exercised – even "consistently" or "invariably" – by courts in England or in the colonies prior to 1900 is a course which should not be adopted. It involves testing the validity of a law against a doctrine of judicial independence under Ch III of the Constitution by reference to functions exercised in a system where no such doctrine applied. The use of English historical antecedents in this connection is particularly inapposite. The historical existence of a curial function in a system without a written or rigid constitution, without an institutionally separate judicial branch of government, and in which the Parliament was sovereign, is an unsafe indicator of validity in an Australian constitutional setting which has the opposite attributes.

54. So understood, the "test" of historical analogy is capable of producing absurd results. Any law enacted in the nineteenth century in England or in the Australian colonies (or at earlier times in England) which conferred a particular function on the courts, necessarily at a time when the legislators were not bound by any principle of the separation of judicial power or any such principle in the form and to the extent now entrenched in Ch III of the Constitution, could be resorted to so as to support the validity of an analogous law enacted in the 21st century. A function conferred upon the courts not because it was peculiarly appropriate for judicial performance, but rather because it was regarded as being in the public interest and was conferred at a time before the emergence of modern statutory regulators equipped with extensive powers of investigation, is apt to be misunderstood as judicial rather than administrative in character.

55. *R v Davison* was decided at a time when the Court regarded it as impermissible to consider the Constitutional Convention Debates.[56] The Convention Debates support the conclusion that the framers of the Constitution made a deliberate choice to adopt a separation of judicial, legislative and executive power and to protect the independence of the federal judiciary; that they did so, in part, by adapting the model provided in the *United States Constitution*; and that they intended that the federal judicature would be the guardian of a federal constitution and not merely, as in England, an interpreter of laws made by a sovereign Parliament.[57] Those choices are reflected in the emphasis given by Quick and Garran, in their work published in 1901, to the United States' jurisprudence

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[56] See *Cole v Whitfield* (1988) 165 CLR 360 at 385.

[57] *Constitutional Convention Debates*, 10 March 1891 (Sydney), p 198; 19 April 1897 (Adelaide), pp 936-937; 20 April 1897 (Adelaide), pp 950-953, 955, 962; 28 January 1898 (Melbourne), pp 268, 271, 274-275, 278-279; 31 January 1898 (Melbourne), pp 319-321; 4 March 1898 (Melbourne), pp 1875-1884; 17 March 1898 (Melbourne), p 2477.

and commentary.[58] It is a consequence of those choices that not every function historically exercised by the English courts was or would be necessarily or presumptively compatible with the new system of government established by the Constitution.

56. A "test" of historical analogy pays insufficient regard to the constitutional purposes of the separation of the judicial power of the Commonwealth under Ch III. The preservation of the appearance and reality of judicial independence and impartiality, the maintenance of the rule of law and the protection of judicial process and institutional integrity from unjustified interference are undermined by a test of validity which turns upon the mere existence of an historical analogue.

10 57. That is not to deny that, in an appropriate case, the historical treatment of a function or power may be a relevant consideration in determining whether or not the power is judicial.[59] However, the existence of a pre-Federation historical analogue or antecedent should not be treated as having more than some – perhaps limited – potential relevance as a consideration, in a doubtful or borderline case, in characterising whether a particular function is capable of exercise within the judicial power of the Commonwealth under s 71 of the Constitution. In cases where the function would not otherwise satisfy that description, however, the historical analogy should not save it from invalidity. Further, in cases where the function is incompatible with the exercise of judicial power under Ch III of the Constitution, the "test" of historical analogy can have no role at all.

20 58. The factors relevant to the overruling of an earlier decision in this Court[60] support the conclusion that the dictum of Kitto J in *R v Davison* at 382, if understood as proposing a test sufficient to sustain validity, should not be followed or should be overruled:

a. The dictum was not the result of a line of cases carefully working out the meaning and effect of s 71 of the Constitution. Indeed, it put a gloss on s 71 that was either not articulated before or had not been treated as having decisive effect in identifying the ambit of the judicial power of the Commonwealth.

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[58] Quick & Garran, *Annotated Constitution of the Australian Commonwealth* (1901) at [286] (pp 719-723).

[59] *Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ), 67 (McHugh J); *R v Hegarty; Ex Parte Salisbury City Corp* (1981) 147 CLR 617 at 627 (Mason J; with whom Gibbs CJ, Stephen and Wilson JJ concurred); *Cominos v Cominos* (1972) 127 CLR 588 at 605 (Stephen J), 608 (Mason J); *Boilermakers* (1956) 94 CLR 254 at 278 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *White v Director of Military Prosecutions* (2007) 231 CLR 570 at [51] (Gummow, Hayne and Crennan JJ).

[60] *Queensland v Commonwealth* (1977) 139 CLR 585 at 620-631; *Commonwealth v The Hospital Contribution Fund of Australia* (1982) 150 CLR 49 at 55-58; *John v Commissioner of Taxation of Commonwealth* (1989) 166 CLR 417 at 438-440; *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 350-353 [65]-[71].

b. Although the dictum has been referred to in subsequent cases, it has not – until the reasons given for the refusal of special leave in *Saraceni* – been treated as a rule capable of direct application, isolated from any other consideration, so as to have dispositive significance in determining the validity of the impugned law. In that sense, the dictum is not part of a definite stream of authorities. It can be overruled, not followed or appropriately qualified without affecting an established line of cases.

c. The dictum is an isolated application of the "test" in the sense just described. Although it can be confined to the particular circumstances of the legislative provision challenged in *R v Davison*, the dictum potentially affects the operation of s 71 of the Constitution generally.

d. The particular reasoning of Kitto J at 382 deals with an issue of constitutional importance with potentially far-reaching implications. The reasoning, if understood as postulating a sole or decisive test of validity, cannot be supported. The Court in this case should indicate that it will not follow that particular reasoning. (The plaintiff does not impugn the correctness of the actual result in *R v Davison*.)

59. To the extent that leave is necessary to make the above submission, it should be granted.

60. Acceptance of the plaintiff's argument would not involve any denial of the judicial character of the power exercised in the various categories of curial activity (past or present) identified by Dixon CJ and McTiernan J in *R v Davison*.[61] Their Honours referred to the administration of assets or trusts, the maintenance and guardianship of infants, the exercise of a power of sale, the administration of enemy property, the winding up of companies and the grant of probate. Each of these involves the application of the law in a binding determination or affectation of an existing right or liability, even if there be no contradictor. None of them is a purely investigative or inquisitorial function such as that conferred by s 596A of the Corporations Act.

61. Nor would acceptance of the plaintiff's argument prevent the Commonwealth from conferring power upon a Ch III court to issue a summons for an examination which is incidental to a judicial process; or prevent the States from conferring upon their courts an appropriately framed discretion to permit examination in a range of non-judicial forms of external administration, subject only to the limitation sourced from *Kable v Director of Public Prosecutions (NSW)*.[62]

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[61] (1954) 90 CLR 353 at 368.
[62] (1996) 189 CLR 51.

The function conferred by s 596A is incompatible with, or falls outside, the judicial power of the Commonwealth

62. Three features of the function conferred by s 596A require particular analysis.

63. *First*, s 596A is framed so as to deny to the Court any discretion to grant or withhold a summons for examination. In its practical operation, s 596A confers the relevant decision-making function upon the eligible applicant, rather than upon the Court. It compels the Court to issue the summons if an eligible applicant applies for it and the Court is satisfied that the person sought to be examined is or was an officer (or provisional liquidator) of the corporation as described in sub-s (b). The role of the Court is reduced to implementing an anterior decision made by the eligible applicant. So much appears to have been the intention at the time of the enactment of s 596A: the Explanatory Memorandum said of the operation of that section that "[i]t is envisaged that the issue of a summons in such circumstances will be a formality ...".[63]

64. The contrast with s 596B is apparent. That provision confers a discretion upon the Court to determine whether or not to summon a person for examination. The Court may do so if, relevantly, satisfied that the person (i) has taken part in examinable affairs of the corporation and has been, or may have been, guilty of misconduct in relation to the corporation; or (ii) may be able to give information about examinable affairs of the corporation. Even if so satisfied, the Court retains the discretion as to whether or not to issue the summons.

65. The absence of discretion, the limitation upon the scope of the function conferred upon the Court, the direction given by s 596A to the Court as to the manner and outcome of its exercise of jurisdiction and the dependence upon an anterior determination by a party other than the Court, are indicative of a function which is incompatible with the Court's institutional integrity.[64]

66. *Secondly*, the exercise of the function conferred by s 596A sets in motion a process of examination which, by the operation of ss 596D, 596F and 597, is supervised and controlled by the Court and in which the Court is actively involved. The Court may put questions and allow questions to be put (s 597(5B)). The examinee is compelled, upon

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[63] Explanatory Memorandum for the Corporate Law Reform Bill 1992 (Cth) at [1155], extracted in *Highstoke* (2007) 156 FCR 501 at [66].

[64] See *International Finance Trust Company v NSW Crime Commission* (2009) 240 CLR 319 at [47]-[56] (French CJ), [97]-[98] (Gummow and Bell JJ), [159] (Heydon J); *South Australia v Totani* (2010) 242 CLR 1 at [75]-[82] (French CJ), [140]-[149] (Gummow J), [225]-[236] (Hayne J), [436] (Crennan and Bell JJ), [481] (Kiefel J).

pain of penalty, to attend the examination, to answer the questions put or permitted to be put by the Court and to produce the documents required by the Court (s 597(6)-(12)). The answers given in the examination are available to be used in evidence in later proceedings, including in proceedings against the examinee except, in respect of answers the subject of a valid claim of privilege, criminal proceedings or proceedings for the imposition of a penalty (s 597(12A)-(14)).

67. The Court is thus enlisted as a participant in a process of investigation with the purpose and likely effect of assembling facts to be used in subsequent civil, or possibly criminal, proceedings against the examinee, related parties or other persons or entities.

10 68. The purpose of that process of investigation is not to enable the Court to make any final or binding adjudication upon the existing rights or liabilities of any parties to a dispute, or to resolve any justiciable controversy. Nor is the purpose to give effect to any earlier judicial determination, such as occurs when the Court supervises an examination of a judgment debtor as an aid to the enforcement of a judgment of the Court. Rather, the process under Div 1 of Pt 5.9 of the Corporations Act is no more than a fact-gathering exercise for the benefit of the eligible applicant and the creditors of the corporation or (as in this case) the particular creditors in the interests of whom the eligible applicant acts.

69. The legislature has conscripted the Court, as controller of and participant in a process of pre-litigation investigation, for no purpose connected to the exercise of the judicial power
20 of the Commonwealth. Instead, the Parliament has attempted "to cloak ... in the neutral colors of judicial action"[65] a process of inquisition or investigation, by using the legitimacy and institutional standing of the Court as a forum and imprimatur for the making, in public, of untested allegations unconfined by the rules of evidence or by the adversarial process of a trial. There is a real risk that the Court may not be, or be seen to be, independent or impartial in the exercise of any judicial function in subsequent proceedings commenced by the eligible applicant or the corporation against the examinee or any related party concerning the subject-matter of the examination.

70. A commission of inquiry and report, which affects no rights and imposes no liabilities, is not a judicial function.[66] Nor is the interrogation of a witness itself an exercise of judicial

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[65] *Kuczborski v Queensland* (2014) 254 CLR 51 at [228] (Crennan, Kiefel, Gageler and Keane JJ), referring to *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 133 (Gummow J), citing *Mistretta v United States* (1989) 488 US 361 at 407.

[66] *Victoria v Australian Building Construction Employees' and Building Labourers Federation* (1982) 152 CLR 26 at 152 (Brennan J); *Wainohu v New South Wales* (2011) 243 CLR 181 at [23] (fn 83) (French CJ and Kiefel J).

power.[67] The inappropriateness of a member of the federal judiciary, as such, exercising such powers lies behind the *persona designata* doctrine.[68]

71. *Thirdly*, the power under s 596A to compel the examination – on oath and in public – of a person, like its statutory predecessors, is extraordinary. The nature of such a power has frequently been the subject of judicial observation. It has been rightly regarded as "very inquisitorial";[69] "very extraordinary", "very stringent" and "extensive";[70] "large and extensive";[71] and "very grave".[72] Like s 115 of the 1862 Act, s 596A confers "very extraordinary powers, and which [put] persons very often to considerable inconvenience".[73] In *Re North Australian Territory Co*, Bowen LJ said of s 115 of the 1862 Act:[74]

> "It is an extraordinary power; it is a power of an inquisitorial kind which enables the Court to direct to be examined - not merely before itself, but before the examiner appointed by the Court - some third person who is no party to a litigation. That is an inquisitorial power, which may work with great severity against third persons, and it seems to me to be obvious that such a section ought to be used with the greatest care, so as not unnecessarily to put in motion the machinery of justice when it is not wanted, or to put it in motion at a stage when it is not clear that it is wanted, and certainly not to put it in motion if unnecessary mischief is going to be done or hardship inflicted upon the third person who is called upon to appear and give information."

72. Those observations apply *a fortiori* to s 596A given the absence of the discretion reposed in the Court which was rightly regarded by the English courts in the nineteenth century as essential to the avoidance of injustice in the application of s 115 of the 1862 Act.

73. The public interest in the investigation of the affairs of a company in liquidation can be, and should be, advanced by processes of investigation undertaken by statutory regulators or by liquidators without the involvement of the Court. The function is not one which is peculiarly appropriate for judicial performance.

74. The lack of discretion on the part of the Court, the enlistment of the Court in a process of pre-litigation investigation and the extraordinary nature of the power combine to produce the conclusion that the function conferred by s 596A is incompatible with, or falls

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[67] *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357-358 (Griffith CJ).
[68] *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).
[69] *In re Metropolitan Bank (Heiron's Case)* (1880) 15 Ch D 139 at 141-142 (James LJ).
[70] *In re Imperial Continental Water Corporation* (1886) 33 Ch D 314 at 316 (Chitty J).
[71] *In re Imperial Continental Water Corporation* (1886) 33 Ch D 314 at 322 (Lopes LJ).
[72] *Ex parte Willey; In re Wright* (1883) 23 Ch D 118 at 128 (Jessel MR).
[73] *In re Imperial Continental Water Corporation* (1886) 33 Ch D 314 at 316 (Chitty J).
[74] (1890) 45 Ch D 87 at 92-93.

outside, the judicial power of the Commonwealth. That is so irrespective of the existence or otherwise of any relevant pre-Federation historical analogue.

PART VI: APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

75. See Annexure A.

PART VII: ORDERS SOUGHT BY THE PLAINTIFF

76. The plaintiff respectfully submits that the appropriate orders are as follows:

1. Answer as follows the question reserved for the consideration of the Full Court: "Yes.".
2. Declare that s 596A of the *Corporations Act 2001* (Cth) is invalid or, alternatively, is invalid to the extent of its operation with respect to a corporation which is the subject of a voluntary winding up.
3. Declare that the summons addressed to the plaintiff and purportedly granted by the Federal Court in proceedings QUD580 of 2016 on 2 August 2016 under s 596A of the *Corporations Act 2001* (Cth) is invalid; and that no information or document obtained pursuant to the summons, or produced during the examination, may be used in evidence in any legal proceedings.
4. Order that the defendants (a) deliver up to the plaintiff all records of the examination conducted pursuant to the summons granted by the Federal Court on 2 August 2016 and all documents produced in answer to the summons or at or during the examination; and (b) are restrained from using, for any purpose, the information or documents obtained pursuant to the summons granted by the Federal Court on 2 August 2016.
5. Order that the defendants be permanently restrained from seeking any further summons addressed to the plaintiff pursuant to s 596A of the *Corporations Act 2001* (Cth) or conducting any further examination of the plaintiff pursuant to any summons purportedly granted under that section.
6. The defendants pay the plaintiff's costs of these proceedings.

PART VIII: ORAL ARGUMENT

77. The plaintiff estimates that approximately 1.5 to 2 hours will be required for the presentation of the plaintiff's oral argument, including submissions in reply.

Dated: 6 October 2016

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