HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

MICHAEL THOMAS WALTON
First Appellant

ANTHONY BOGAN
Second Appellant

and

ACN 004 410 833 LIMITED (FORMERLY ARRIUM LIMITED) (IN LIQUIDATION) (ACN 004 410 833)
First Respondent

KPMG
Second Respondent

COLIN GALBRAITH
Third Respondent

FIRST RESPONDENT'S SUBMISSIONS

PART I: PUBLICATION ON INTERNET

1. The First Respondent certifies that these submissions are in a form suitable for publication on the internet.

PART II: STATEMENT OF ISSUES

2. The issue in this appeal is whether it is an abuse of process to obtain an examination summons under s 596A of the *Corporations Act 2001* (Cth) (**Corporations Act**) where the applicant's purpose is to investigate and pursue a class action against directors and auditors of the company, and where the prospective action would not produce a benefit for the company, its creditors or the contributories as a whole.

PART III: SECTION 78B NOTICE

3. The First Respondent certifies that it has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* (Cth) and has concluded that no such notice is required.

PART IV: MATERIAL FACTS

4. The factual background is set out in the decision of the Court of Appeal (**CA**) at [2]-[19] (**CAB 83-7**) and briefly in the Appellants' Submissions (**AS**) at AS [5]-[15]. One additional matter should be noted.

5. Special leave was granted on the basis that the Appellants would incorporate into their grounds of appeal a number of concessions made in the course of the special leave hearing: [2021] HCA Trans 018, p 18, lines 704-705. Those concessions include the following:

10 a. the Appellants accept that their purpose in seeking to conduct an examination was to elicit information with a view to commencing a class action against some of the former directors and/or former auditor of Arrium Limited (**Arrium**) concerning a capital raising which Arrium undertook in 2014: [2021] HCATrans 018, p 7, lines 207-211; see also p 2;

b. the Appellants do not contend that the proposed action is likely to be of any benefit to the company or to its creditors: [2021] HCATrans 018, p 3, lines 4- 13;

c. the Appellants do not rely on the theoretical possibility that the
20 proposed examination will disclose material going to insolvent trading: [2021] HCATrans 018, p 3, lines 13-16.

PART V: ARGUMENT

6. The Appellants, who represent some but not all of the shareholders in Arrium (CA [128] (**CAB 128**)), sought to conduct an examination for the purpose of commencing a class action which the Court of Appeal found (CA [123]-[127] (**CAB 126-8**)), and the Appellants now accept, will not be of any benefit to the company or its creditors. The Court of Appeal's ultimate finding that, in these circumstances, the proposed examination was an abuse of process, was correct because:

30 a. as the Court of Appeal found, it is an abuse of process to obtain an examination summons under s 596A of the Corporations Act for the predominant purpose of advancing the applicant's cause in litigation against third parties and not for the

benefit of the corporation, its creditors or contributories (CA [137]-[140] (**CAB 130-1**));

b. contrary to the Appellants' submissions, the examination does not serve any broader statutory purpose. In particular, the argument that there is no abuse of process because the examination serves a legitimate purpose of enabling evidence and information to be obtained to support the bringing of proceedings against examinable officers misconstrues the purposes of Part 5.9 of the Corporations Act.

7. Before turning to these arguments, it is necessary to identify the relevant principles concerning abuse of process and the purposes underlying Pt 5.9 of the Corporations Act (in particular, ss 596A and 596B).

Abuse of process

8. The principles concerning abuse of process were summarised recently by this Court in *Victoria International Container Terminal Ltd v Lunt* [2021] HCA 11; (2021) 95 ALJR 363. Pertinent to the disposition of this appeal are the following matters.

9. ***First***, while it is not possible to define exhaustively what will constitute an abuse of process, one recognised category is where the court's processes are invoked for an illegitimate or collateral purpose: *Lunt* at [14] (Kiefel CJ, Gageler, Keane and Gordon JJ), citing *PNJ v The Queen* (2009) 83 ALJR 384; 252 ALR 612 at [3].

10. ***Secondly***, in a case involving an illegitimate or collateral purpose, the distinction between motive and purpose is of crucial importance: *Lunt* at [23] (Kiefel CJ, Gageler, Keane and Gordon JJ), [38] (Edelman J). The existence of some reprehensible motive in bringing proceedings does not give rise to an abuse of process where the immediate purpose sought to be effected by the litigant falls within the scope of the process: *Lunt* at [23] (Kiefel CJ, Gageler, Keane and Gordon JJ), [38] (Edelman J), referring to *Williams v Spautz* (1993) 174 CLR 509 at 525-527, 535; see also *Dowling v Colonial Mutual Life Assurance Society Ltd* (1915) 20 CLR 509 at 521-522 (Isaacs J).

11. In the present case, the crucial question is whether the Appellants' purpose in obtaining an examination summons is within the scope of the process for which Part 5.9 provides; or, framing the enquiry as the Court of Appeal did at CA [131] (**CAB 129**), whether the Appellants' purpose is foreign to the purpose for which the examination power is conferred. The latter formulation mirrors that of Hayne J in *Re Marvin*

Manufacturers (Aust) Pty Ltd (1994) 13 ACSR 610 at 616, and was also adopted by the Court of Appeal in *Meteyard v Love* (2005) 65 NSWLR 36 at [45] (Basten JA, Beazley JA and Santow JA agreeing).

12. The principles of abuse of process may be invoked notwithstanding that under s 596A, unlike s 596B, there is no discretion to decline to issue a summons on application by an eligible applicant. The fact that a statute requires the court to make an order on the satisfaction of certain conditions does not preclude the court from refusing to do so where it would involve an abuse of process: *Dowling* at 520 (Isaacs J). The Appellants, properly, acknowledge that a summons issued under s 596A may be set aside as an abuse of process: AS [40]. Decisions of the Federal Court expressly recognise that the principles of abuse of process apply to summonses issued under s 596A: *Carter v Gartner* (2003) 130 FCR 99 at [27] (Branson J); *Kimberley Diamonds Ltd v Arnautovic* (2017) 252 FCR 244 at [30] (FCAFC).

The purpose for which the examination power is conferred

13. The purpose for which public examination powers are conferred was addressed by Mason CJ, in the context of s 541 of the *Companies (NSW) Code*, in *Hamilton v Oades* (1989) 166 CLR 486. The Chief Justice stated at 496:

> "There are the two important public purposes examination is designed to serve. One is to enable the liquidator to gather information which will assist him in the winding up; that involves protecting the interests of creditors. The other is to enable evidence and information to support the bringing of criminal charges in connexion with the company's affairs…"

14. Section 541 was not materially different to s 596B of the Act in its present form. However, the purposes identified by Mason CJ also apply to s 596A. In *Gould v Brown* (1998) 193 CLR 346 at [33], Brennan CJ and Toohey J indicated that the purposes stated by Mason CJ in *Hamilton v Oades* applied to examinations under ss 596A and 596B. Further, in *Evans v Wainter* (2005) 145 FCR 176 at [156], [190]-[193], Lander J specifically considered and rejected a suggestion that the introduction of s 596A by the *Corporate Law Reform Act 1992* – in particular, its mandatory nature – effected any alteration to the purposes underlying the examination provisions.[1] The Appellants

[1] Prior to the *Corporate Law Reform Act 1992*, the only relevant examination provision was s 597 of the Corporations Law. Like s 541 of the *Companies (NSW) Code* considered in *Hamilton v Oades*, s 597 was substantially the same as s 596B in its present form.

cite the passage in *Hamilton v Oades* extracted above as articulating the permissible purpose of the examinations they propose to undertake: AS [53], [60].

15. Two qualifications to the purposes identified by Mason CJ should be noted.

16. ***First***, the examination provisions now appear in Chapter 5 of the Act which deals with "external administration"; and it is not only liquidators who can apply for examination orders. This suggests that the first purpose referred to by Mason CJ is not confined to assisting the liquidator in the conduct of the winding up: *Hong Kong Bank of Australia Ltd v Murphy* (1992) 28 NSWLR 512 at 521; *Marvin Manufacturers* at 616; *Gould v Brown* at [36]. The purpose must extend more generally to aiding persons who have the responsibility for the external administration of the company in carrying out their duties. That was the view taken by Gageler J in *Palmer v Ayres* (2017) 259 CLR 478 at [98]; the Full Court in *Evans v Wainter* at [245]) (Lander J, Ryan and Crennan JJ relevantly agreeing); and Santow JA in *Meteyard v Love* at [7].

17. ***Secondly***, the second purpose referred to by Mason CJ is not necessarily restricted to criminal prosecutions. The availability of civil penalties for breaches of duties by company officers (first introduced into Pt 9.4B by the *Corporate Law Reform Act 1992* (Cth)[2]), and the fact that ASIC is an "eligible applicant" for the purposes of ss 596A and 596B, suggests that the legitimate of purposes of an examination under those sections may now extend to the bringing of civil penalty proceedings by the regulator in connection with the company's affairs. Indeed, as Heydon J pointed out in *ASIC v Hellicar* (2012) 247 CLR 345 at [243], since the introduction of the civil penalty regime, there has been a transition from criminal to civil sanctions for breaches of directors' duties. Civil penalties and criminal sanctions have overlapping public purposes (*Rich v ASIC* (2004) 220 CLR 129 at [32] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); [41], [43], [47]-[50] (McHugh J)), albeit civil penalty proceedings are more confined in that they are concerned with protection of the public alone (and not rehabilitation or retribution): *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at [24], [55] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

[2] The history preceding the introduction of these provisions was traced in argument by the then Solicitor-General for the Commonwealth in *ASIC v Hellicar* (2012) 247 CLR 345 at 351-352.

The examination is not in aid of the external administration of Arrium

18. A line of decisions at an intermediate appellate level establishes that an examination summons will be stayed or discharged as an abuse of process if it is obtained for the predominant purpose of advancing the applicant's cause in litigation against third parties and not for the benefit of the corporation, its creditors or contributories.

19. The principle is consistent with the cases that acknowledge that the purpose of Pt 5.9 is to aid persons who have the responsibility of the external administration of the company in carrying out their duties: see [16] above. As Lander J (with whom Ryan and Crennan JJ relevantly agreed) stated in *Evans v Wainter* at [246], those persons who have the responsibility for the external administration owe their duties to the creditors and the contributories, and to the corporation which they are then managing.

20. Two cases in which the application of this principle was decisive of the outcome are *In Re Imperial Continental Water Corporation* (1886) 33 Ch D 314 and *Re Excel Finance Corp Ltd; Worthley v England* (1994) 52 FCR 69.

Re Imperial

21. *Re Imperial* is analogous to the present case because it involved an action by a shareholder which would benefit him and a confined number of shareholders, but not the creditors or contributories generally. A shareholder, Mr Punchard, sought to conduct an examination of directors of a company being wound up in order to obtain information to be used in an action he had brought against the company and its directors, arising from alleged agreements by which the company had mortgaged calls made on its shares and had undertaken to accept a surrender of shares held by Punchard and his nominees. The English Court of Appeal held that this was not permissible under s 115 of the *Companies Act 1862* (UK), because the information was not sought for the benefit of the creditors or contributories of the company but only for the benefit of Punchard and his nominees.

22. Cotton LJ said at 320-321:

> "Prima facie, the powers of this section are to be exercised for the purposes of the winding-up and the benefit of those who are interested in the winding-up. Now what has taken place here is this: The Appellant has brought an action against the corporation and the directors for the individual benefit of themselves and other persons whom he alleges to be entitled to have their names taken off the list of shareholders… In my opinion it would have been

> wrong to allow the Plaintiff in such an action as this to have the benefit of the powers of this section for the purposes of that action. I do not say that this would be so in all cases, for instance, when the liquidator suggests, or the contributory [shows] by affidavit, that there is reasonable ground for suspecting that the directors have put into their own pockets moneys which ought to go into the coffers of the company, it would in my opinion be no answer to an application under this section that an action is pending. *The examination would in that case be carried on for the purposes of the winding-up, for the action would be an action for the benefit of all creditors and contributors of the company.* Here the object of the action is solely to get some benefit for Mr Punchard, who is seeking to enforce his own individual rights as against the company and its directors." (emphasis added)

23. Lindley LJ said at 321:

> "One must look at the object of the action, and look at the object of the section which gives these powers, and having regard to the object of the section *it is not in my opinion to be applied to an action brought by Mr Punchard for his own individual benefit apart from that of the contributories generally*. To help such an action is not the object of this section. An action might in substance be an action by a contributory for the benefit of himself and the other contributories, having for its object getting in the assets of the company. That would be a totally different action… (emphasis added)

24. Lopes LJ said at 322:

> "The learned Judge seems to have acted upon the view, that this application under the 115th section is not made for the purposes of advancing the winding-up of the company or of obtaining information beneficial to the winding-up of the company but rather to advance the case of the contributory in the action which he is bringing against the company, and on that ground he has postponed the examination, and, I think, quite rightly."

25. *Re Imperial* was regarded as stating the permissible limits of an examination under statutory successors to s 115 in New South Wales, namely, s 253 of the *Companies Act 1936* (NSW) and s 249 of the *Companies Act 1961* (NSW): Spender and Wallace, *Company Law and Practice*, 1937, p 414; Wallace and Young, *Australian Company Law and Practice*, 1965, p 714.

26. *Re Imperial* remains relevant to a consideration of the permissible purposes of an examination under Pt 5.9 of the Corporations Act. In *Saraceni v Jones* (2012) 246 CLR 251 at [3], it was noted that the provisions of s 115 of the *Companies Act 1862* (UK) were not relevantly different to ss 596A and 596B.

27. Significantly, *Re Imperial* was cited as an illustration of an abuse of process in *Hong Kong Bank* at 519D-F, where Gleeson CJ drew on it to elucidate the distinction between an advantage to be gained by the applicant for an examination order in the

capacity of a litigant, and a benefit that might flow to creditors, or contributories, or members of the public, from the conduct of an examination. The Chief Justice emphasised that the dichotomy is not a strict one, because while an eligible person may not use an examination solely for the purpose of obtaining a forensic advantage not available from ordinary pre-trial processes, the possibility that a forensic advantage may be gained does not mean that the making of the order will not advance a purpose intended to be secured by the legislation. His Honour's treatment of the matter confirms that *Re Imperial* was correct to hold that an examination which does not advance the purpose of providing a benefit to creditors or contributories falls outside the purposes of the examination provisions.

28. While in *Hong Kong Bank* Gleeson CJ also referred to a benefit to members of the public, the reference must be understood in the unusual context of that case where, as the Chief Justice pointed out at 520A, a very large number of members of the public were owed money as a consequence of the failure of the Estate Mortgage unit trusts.[3] Those persons were not contributories of the former trustee (which was the company being wound up), nor strictly were they creditors,[4] but as unitholders they plainly stood to benefit from the litigation which the new trustee had commenced against third parties allegedly involved in breaches of trust by the former trustee. The special context of that case was emphasised in *Re Excel* at 91G-92C (see [36] below).

Re Excel

29. In *Re Excel*, a trustee for debenture holders obtained an examination summons in circumstances where it appeared to have done so for the purpose of aiding litigation which the trustee and debenture holders had commenced against the auditor of the company in question. After pointing out that success in this litigation would not necessarily free the corporation from its obligation to pay the trustee, the Full Court, comprising Gummow, Hill and Cooper JJ, stated at 93E:

> "the use of the power to obtain an examination summons for the principal purpose of furthering the cause of the applicant for the summons or, as in this case, appointer of the applicant in litigation against third parties, not for the benefit of the corporation, its contributories or creditors (other than in the

[3] At first instance, McLelland J had stated that there were 52,000 investors in the Estate Mortgage trusts, "who therefore may be taken to represent a very extensive section of the public": *Re BPTC Ltd* (1992) 7 ACSR 539 at 544.

[4] As beneficiaries under a trust the unitholders had an action for breach of trust against the former trustee, but the purpose of such an action is to restore the trust fund rather than to recover a specific sum for the benefit of any beneficiary: *Maguire v Makaronis* (1997) 188 CLR 449 at 469 and 473.

> most indirect way) is a use of the power for a purpose foreign to that power and thus an abuse of the power. Such a purpose would provide to the examiner the opportunity for pre-trial depositions which would not be available in the litigation."

The reference to pre-trial depositions must be understood in the light of 90E, where the Full Court, citing Gleeson CJ in *Hong Kong Bank* at 519, had stated that in this context the test for an abuse of process is whether the person seeking the examination order has the purpose of obtaining a forensic advantage not otherwise available.

30. The correctness of the principle stated in *Re Excel* was affirmed in *Evans v Wainter*, where Lander J stated that the case stood for the principle that it is an abuse of process to use the Pt 5.9 procedure if the purpose of the examination is not for the benefit of the corporation, its creditors or contributories: at [143], [144], [247]. Paragraphs [143] and [144] in the judgment of Lander J were in turn cited by this Court in *Palmer v Ayers* at [35] (Kiefel, Keane, Nettle and Gordon JJ), and with approval by the Full Court in *Kimberley Diamonds* at [101].

The Appellants' criticisms of Re Excel

31. The principle stated in *Re Excel* is not undermined by the criticisms the Appellants make of that case.

32. The submission that *Re Excel* has "limited application" because it was concerned with litigation against third parties, as opposed to proceedings against directors and others (AS [66]-[69]), is misconceived. *Re Excel* concerned litigation against an auditor. The present case concerns litigation against directors and auditors (CA [8] (**CAB 84-5**). All are third parties to the company.

33. The submission that *Re Excel* was not concerned with exposure of possible misconduct (AS [68]) is not correct. The affidavit in support of the summons issued in *Re Excel* suggested that the auditor may have be guilty of negligence or breach of duty in relation to the company: *Re Excel* at 75C. The claim commenced by the trustee alleged, in addition, misleading and deceptive conduct: *Re Excel* at 76F. Those claims are not materially different to the claims of negligence and misleading and deceptive conduct contemplated by the Appellants in this case and set out at CA [8] and [15] (**CAB 84-6**).

34. The Appellants submit that the approval, in *Re Excel*, of McLelland J's comments in *Re BPTC Ltd* (1992) 10 ACLC 271 at 273, confirms that examination of directors by individual shareholders to assist prosecution of proceedings against directors is within the scope of Pt 5.9 (AS [69]-[71]). That submission misunderstands both the context of the decision in *Re BPTC Ltd* and the relevant passage in *Re Excel*.

35. *Re BPTC Ltd* (1992) 10 ACLC 271 was not concerned with the examination of directors. It was an application by the new trustees of the Estate Mortgage trusts for inspection of books of the former trustee under s 387 of the *Companies (NSW) Code* (which is in substantially the same form as s 486 of the Corporations Act), to assist in the assessment of the prospects of ultimate recovery in proceedings against the former trustee. The case has no bearing on the principles applicable to the issue of an examination summons under Pt 5.9.

36. Further, the Full Court in *Re Excel* did not approve McLelland J's comments in *Re BPTC Ltd* (1992) 10 ACLC 271 at 273. Rather, it was at pains to emphasise the special context in which they were uttered. The Full Court stated at 92C:

> "Although the proposed action was by the applicant for the examination order[5] against others, it is easy to see why no abuse of process would be involved where the company under investigation was a Trustee for other persons and a new Trustee is seeking to bring action for the benefit of the beneficiaries. The context in which that case is decided is somewhat special and quite outside of the present."

The Full Court also stated at 92G that a proposition that it was not an improper purpose to examine in aid of proceedings which had been commenced or were contemplated by third parties would be too widely expressed.

37. The special context of *Re BPTC Ltd* was highlighted when the new trustees of Estate Mortgage trusts subsequently applied for examination summonses. Both McLelland J at first instance and Gleeson CJ on appeal emphasised that the new trustee was in a position analogous to that of a liquidator: *Re BPTC Ltd* (1992) 7 ACSR 539 at 544; *Hong Kong Bank* at 519G-520A. Both judges pointed out that any recovery made by the new trustees would be for the ultimate benefit of the Estate Mortgage unitholders: *Re BPTC Ltd* (1992) 7 ACSR 539 at 544; *Hong Kong Bank* at 516C. Further, as the

[5] The reference to the "applicant for the examination order" appears to be a mistake. At the time McLelland J gave judgment in *Re BPTC Ltd* (1992) 10 ACLC 271 in February 1992, the new trustees had not yet applied for an examination order. They only received authorisation to do so, and made the application, two months later, in April 1992: *Re BPTC Ltd* (1992) 7 ACSR 539 at 541.

Court of Appeal pointed out at CA [133] (**CAB 129**), any such recovery would have reduced the claims against the former trustee for breach of trust, given the recovery would be against accessories to that breach.

The role of ASIC

38. The Appellants suggest that the role of ASIC in either conducting examinations as an "eligible applicant", or authorising others to be eligible applicants, is inconsistent with any requirement that the examination have the purpose of benefiting the company, its creditors or contributories (AS [39]-[40]). That submission should be rejected.

39. ***First***, the submission rests in part on the notion that ASIC's objectives do not extend to such a purpose (AS [29]-[31]). The Appellants advert only to ss 1(2)(a) and (b) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) (AS [29]). This overlooks s 1(1)(a), which states that the objects of the Act are to provide for ASIC, which will administer such laws of the Commonwealth as confer functions and powers under those laws on ASIC; s 1(2)(d), which provides that in performing its functions and exercising its powers, ASIC must strive to administer the laws that confer functions and powers on it effectively; and s 1(2)(g), which provides that in performing its functions and exercising its powers, ASIC must strive to take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it. Having regard to those provisions, there is nothing inconsistent in ASIC conducting an examination for the purpose of benefiting a company, its creditors or contributories if (as the First Respondent submits) that is indeed a purpose for which the examination power is conferred.

40. ***Secondly,*** the Appellants suggest that the purpose benefiting a company, its creditors or contributories is not served where ASIC seeks to examine directors concerning the issue of a fraudulent prospectus to support commencing civil penalty or criminal proceedings against them (AS [32]). However, as explained at [13] to [17] above, this purpose is only one of the two purposes which examination power serves. The second such purpose – bringing of civil penalty or criminal proceedings against persons in connection with the company's affairs – plainly captures the Appellants' example.

41. ***Thirdly***, the Appellants emphasise that persons whom ASIC may authorise as "eligible applicants" may be motivated to benefit themselves and be acting in their own interests

(AS [38]-[39]). That overlooks the distinction between motive and purpose emphasised above. An applicant's motive is irrelevant if its purpose is within the scope of Pt 5.9. An example is that of a privately appointed receiver, to which the Appellants refer at AS [36]. As the Full Court explained in *Re Excel* at 93B, where a secured creditor (who typically acts via receiver) seeks an examination summons to aid recovery of the secured debt by ascertaining the existence of assets, that operates to the benefit of the company by ensuring that it pays out the secured creditors and by ensuring that there is then revealed what other assets are available for distribution to unsecured creditors. The fact that the receiver is acting in its appointor's interests is irrelevant.

42. ***Fourthly***, the Appellants suggest there is a tension between ASIC's ability to authorise a person as an eligible applicant, and a court finding that the applicant's purposes are improper because the summons is not sought for the benefit of the company, its creditors of contributories (AS [37], [41]). However, as the Full Court explained in *Re Excel* at 82E-G, the roles of ASIC and the court are distinct. The question for ASIC is whether the prospective applicant is an appropriate person for it to authorise to make an application to the court. The question for the court includes, in an appropriate case, the purpose of the applicant in seeking the examination order. There is also a conceptual difficulty in ASIC conducting an inquiry into matters that are relevant to abuse of process, where that doctrine is concerned with the use of the processes of the court, and the question of authorisation arises before any application is made to the court and without necessarily knowing the particular form that application will take when (and if) it is ultimately made.

43. The significance of the last-mentioned point is illustrated by what occurred in the present case. The material provided by the Appellants to ASIC in support of their application for authorisation as "eligible applicants" contended that they had various claims, many of which were no longer pressed at the time the application to set aside the examination summons was heard. Thus, there was a suggestion of a claim against Arrium itself; and claims on behalf of creditors of Arrium: CA [8], [10] (**CAB 84-5**). There were also assertions that "recovery would ensure that the pool of funds available to the company or other shareholders would increase": CA [8] (**CAB 85**). These contentions had been dropped by the time of the hearing: CA [26] **(CAB 89)**.

44. Additionally, the Appellants' application for authorisation stated a desire to examine specific, nominated, proposed examinees, none of whom were the subject of the examination summons which the Appellants ultimately sought and obtained: CA [9], [122] (**CAB 85, 126**).

45. In summary, the fact that ASIC has authorised a person to be an "eligible applicant" can have little bearing on whether the summons that person ultimately obtains is an abuse of process because the examination is being conducted for a purpose outside the scope of Pt 5.9.

The role of contributories

10 46. The Appellants emphasise that examination provisions have traditionally conferred standing on contributories (AS [46]ff). A number of points should be made about that.

47. ***First***, the proposition itself is not in contest. As the Court of Appeal noted in CA [59] (**CAB 102**), it has been recognised since 1879 that contributories may apply for an examination summons. The point was also made by Chitty J in *Re Imperial* at 317. However, as *Re Imperial* itself illustrates, the fact that a contributory may apply for an examination summons does not preclude the court refusing to allow the examination to proceed where it will not be conducted for a proper purpose.

48. ***Secondly***, the bulk of the provisions to which the Appellants refer – s 216 of the *Companies Act 1874* (NSW), s 162 of the *Companies Act 1899* (NSW), s 308 of the
20 *Companies Act 1936* (NSW), s 305 of the *Companies Act 1961* (NSW), and ss 367A to 367C of the *Companies Act 1961* (NSW) (as amended by the *Companies Amendment Act 1971* (NSW)) – are irrelevant. Those provisions afforded a summary procedure in lieu of an action, which enabled examination and an order for payment to a corporation to be made where it appeared misfeasance had occurred: Wallace and Young, *Australian Company Law and Practice*, 1965, p 838.[6] They are predecessors to s 598 of the Corporations Act in its present form (albeit s 598 makes no provision for examination). They do not throw light on the purposes underlying s 596A. If anything, the stipulation for payment to be made to the corporation underlines the centrality to the examination provisions of a benefit accruing to the corporation itself.

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[6] One such provision, s 162 of the *Companies Act 1899* (NSW), was considered by this Court in *Couve v J Pierre Couve Ltd* (1933) 49 CLR 486. The Court held that the section could be used by a liquidator to recover the value of goods where the recovery would only advantage a secured creditor, as there would be no surplus available to unsecured creditors.

49. ***Thirdly***, the fact that a contributory has standing to conduct an examination does not mean that a summons may be obtained in aid of a proceeding that will benefit only a particular contributory, or a group of contributories. Contrary to AS [73], the principle stated in *Re Excel* requires, relevantly, a benefit to the contributories as a whole. That is clear from the passages emphasised in *Re Imperial* at [22]-[23] above. The same point was made by the primary judge in this case and recorded by the Court of Appeal at CA [32] (**CAB 91**). Any other approach would be incoherent because, as AS [45] demonstrates, it is not difficult to conceive of cases where a benefit to one or more particular contributories results in a detriment to others.

10 50. As a practical matter, the interests of the contributories as a whole are unlikely to be relevant in an external administration where there are insufficient funds available to meet the claims of creditors. However, the theoretical possibility of a surplus explains the Court of Appeal's reference, at CA [140] (**CAB 131**), to an examination conferring a benefit on "the company or its creditors (and possibly on all of its contributories)". In light of the submissions made in the previous paragraph, the reference to "all of its contributories" must be understood as a reference to the contributories as a whole.

Demonstrable or commercial benefit

51. The Appellants criticise as a "gloss" the Court of Appeal's references to a "commercial" or "demonstrable" benefit to the company, its creditors or contributories
20 (AS [63], [73]). There is no substance to the criticism. It is plain from CA [139] (**CAB 131**) that the Court of Appeal was applying the principle in *Re Excel* and was not seeking to add any gloss to it. The references to a commercial or demonstrable benefit must be understood in a context where it was the Appellants themselves who, contending that there was a benefit to the company from the examination (CA [115] (**CAB 124**), identified the possibility of claims by the company to recover the cost of the capital raising (CA [120] (**CAB 125**)). The Court's reference at CA [123] (**CAB 126**) to a "commercial benefit" addressed this way of putting the case. The reference at CA [140] (**CAB 131**) to a "demonstrable benefit" may be seen in the same light, albeit "demonstrable" adds little to "benefit" in any event.

30 52. Further, there could be no error in focusing on a "commercial" benefit in the context of an external administration. In the passage from *Hamilton v Oades* quoted above at [13], Mason CJ explained that the purpose of enabling the liquidator to gather information which will assist in the winding up "involves protecting the interests of

creditors". At 497 in the same case, Mason CJ spoke of the duties of the liquidator to the company and its creditors in tracing assets. The principal duty of a liquidator is to preserve, realise and distribute the assets of the company amongst the creditors and contributories: *Ex parte McDonald; Re Partridge* (1961) 61 SR (NSW) 622 at 629 (FC); *Stewart v Atco Controls Pty Ltd (In Liquidation)* (2014) 252 CLR 307 at [58]-[59]; see also Corporations Act, ss 478 (Court ordered winding up), 495(1) (members' voluntary winding up), 499(1) (creditors' voluntary winding up). Commercial objectives also underlie the role of an administrator, who is appointed to maximise the chances of a company continuing in existence or, if that is not possible, produce a better return for creditors than in a winding up: Corporations Act, s 435A. Likewise, a receiver is appointed to recover and realise assets in the interests of his or her appointor (or whoever is entitled to them): *State Bank of NSW v Chia* (2000) 50 NSWLR 587 at [867]-[868], [870]; see also Corporations Act, ss 420(2), 420A. In short (save perhaps where administration would lead to the company continuing in existence) the function of any external administrator is to maximise the recovery of assets in the interests of those whom he or she identifies as entitled to those assets.

53. It follows that there is no substance in the suggestion that there is something capricious in a result that precludes shareholders examining where the benefit of the examination does not accrue to the company and its creditors (AS [64]). That result is not capricious because only an examination which might produce a benefit to the company or its creditors (and the contributories as a whole, where there may be a surplus) is consistent with the purpose of the external administration itself.

The Appellants' purposes in the present case

54. The Appellants were contributories of Arrium. However, the examination they sought to conduct was not in aid of any benefit which might accrue to the company, its contributories or contributories. The unchallenged finding is that the Appellants' prospective litigation would not bring any commercial benefit to the company, because the capital raising caused Arrium no loss: CA [123]-[127] (**CAB 126-8**). The Appellants and those they represent were not creditors of the company (CA [25] (**CAB 89**), so success in their proceedings would not improve the position of creditors by reducing the company's overall indebtedness. There was no possibility of a benefit to the contributories as a whole, since there was no prospect of a surplus in the liquidation: CA [23] (**CAB 88**).

55. Any return which the Appellants' proposed litigation generated could not enure to the benefit of the contributories as a whole, given the Appellants did not seek to represent all the contributories but only those who purchased shares after a particular date: CA [128] (**CAB 128**). Notably, some of those represented by the Appellants would not be contributories at the time the company went into administration: CA [128] (**CAB 128**). This demonstrates that the proposed claim was not one which the Appellants brought in their capacity as contributories, but one which arose from the alleged misleading or negligent conduct of the company and its auditors in respect of which they proposed to sue: *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160 at [31] (Gleeson CJ); [205]-[206] (Hayne J; Gummow, Heydon and Crennan JJ agreeing).

56. Further, any examination in aid of the Appellants' proposed claim would give the Appellants the forensic advantage of pre-trial deposition which is not ordinarily available to civil litigants in this country: *Jones v Treasury Wine Estates Ltd* (2016) 241 FCR 111 at [27].

57. The Court of Appeal was correct to find that, based on the principle stated in *Re Excel*, the examination summons should be set aside as an abuse of process.

The examination is not in aid of any broader purpose authorised by Pt 5.9

Bringing civil and criminal prosecutions

58. As noted above at [17], a purpose that examinations under ss 596A or 596B may properly serve is the bringing of civil penalty proceedings or criminal prosecutions against persons in connection with the company's affairs. The Appellants refer to this purpose at AS [75].

59. This purpose is not served by the examination the Appellants sought to conduct, because the only claim that the Appellants proposed to bring was their own claim against the directors or auditors of Arrium: CA [36], [129] (**CAB 92-3, 128**). There was no finding that the Appellants sought to use the examinations to enable any civil penalty proceeding or criminal prosecution to be brought; and, as noted at [5] above, this appeal is conducted on the premise that the Appellants accept that the end they were seeking to achieve was to elicit information with the view to commencing their proposed class action.

60. It could not be sufficient that the examination *might* serve the purpose of bringing a civil penalty proceeding or criminal prosecution, on the ground that the examination might possibly disclose information that leads a regulator or prosecutor to commence such an action. It could be said of every examination which must, by force of ss 596A and 596B, concern the examinable affairs of the corporation, that it might disclose information of potential relevance to a prosecution. On this reasoning, it is difficult to see that any examination in aid of a claim by a third party to the company would ever be an abuse of process. Such a result is inconsistent with *Re Imperial* (the correctness of which was confirmed in *Hong Kong Bank*), *Re Excel* and the decisions which have followed it. In any event, the issue does not arise where, as noted at [5] above, the Appellants disclaim any reliance on the theoretical possibility that the examinations will disclose material going to offences such as insolvent trading.[7]

The fourth purpose in Evans v Wainter

61. The Appellants also submit that the proposed examination serves a broader statutory purpose underlying Pt 5.9. Referring to the "fourth purpose" identified by Lander J in *Evans v Wainter* at [252], the Appellants say it is legitimate to obtain an examination summons for "the purpose of enabling evidence and information to be obtained to support the bringing of proceedings against examinable officers and other persons in connection with the examinable affairs of the corporation." (AS [57], [60], [62]). The passage in *Evans v Wainter* on which the Appellants rely is taken out of context.

62. The lengthy review of the authorities which Lander J had just undertaken, and the other propositions stated in *Evans v Wainter* at [252], make it plain that Lander J considered that an examination will be an abuse of process if it cannot be characterised as being for the benefit of the corporation, its contributories or creditors: see [143]-[144], [247], [252] (propositions 8-10). There is nothing in the reasons of Lander J to suggest that his Honour considered that the bringing of *any* proceedings against examinable officers, such as an action for damages by individual shareholders which involved no benefit to the company, would be within the purposes of Pt 5.9. So much is clear from [249], where his Honour, having stated that an examination summons may be obtained only where the applicant's purpose in seeking it is for the benefit of the corporation, its creditors or contributories, stated:

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[7] Further, the possibility of a civil penalty proceeding was far-fetched, given that by the time any examination occurs more than six years would have elapsed since the events in question: Corporations Act, ss 1317K, 1317GAB(2); ASIC Act, ss 12GBA(2), 12GBB(2), 12GBCC(2).

> "Otherwise, every corporation would be at risk of having its examinable affairs or its officers or other witnesses examined to the possible detriment of the corporation. For example, a person claiming damages for tort against a corporation could be authorised by ASIC as an eligible applicant and apply for an examination summons for the purpose of examining the corporation's examinable officers under s 596A or its officers under s 596B to provide evidence in support of the action in tort."

63. Lander J's reference to proceedings against examinable officers may be explicable having regard to the comments of Santow J in *Re New Cap Reinsurance Corp Holdings Ltd* [2001] NSWSC 835 at [15], quoted earlier by Lander J at [232], referring to "the wider statutory purpose of investigating and potentially prosecuting (civilly or criminally) those who have contributed to the circumstances that have led to the corporate collapse". If civil prosecution is understood as a reference to the possibility of civil penalty proceedings by the regulator against those who were involved in the company's collapse, then as submitted in [17] above that purpose is consistent with the second purpose identified by Mason CJ in *Hamilton v Oades*.

64. Further, the decision in *Evans v Wainter* did not turn on the so-called fourth purpose identified by Lander J. Rather, the Full Court in that case held there was no abuse of process because the proceedings in aid of which the creditor proposed to examine were proceedings which, if successful, would reduce the creditor's claim against the company and thereby benefit all creditors: *Evans v Wainter* at [249], [268].

Protecting members of the public

65. The Appellants suggest that the so-called fourth purpose identified in *Evans v Wainter* is consistent with Gleeson CJ's reference, in *Hong Kong Bank* at 521, to purposes which include "the protection of shareholders and creditors and of interested members of the public" (AS [54], [62]). This ignores the context of the decision in *Hong Kong Bank*.

66. As explained in [28] above, the reference in *Hong Kong Bank* to the protection of members of the public must be understood in a context where, in the unusual circumstances of that case, the large section of the public which had invested in the Estate Mortgage trusts comprised neither creditors nor shareholders of the company which was being wound up. Gleeson CJ was not intending, by his reference to members of the public, to introduce a substantively broader category of purposes underlying the examination provisions beyond those established in the authorities to

which his Honour had earlier referred (which included *Re Imperial*). This is patent from 519C, where the Chief Justice referred to Mason CJ's observation, in *Hamilton v Oades* at 496, that one of the important public purposes which an examination is designed to serve is to enable a liquidator to gather information which will assist in the winding up.

Part VI: Estimate of Time

10 67. The First Respondent anticipates being 2 hours in oral argument.

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Dated: 13 May 2021

.....(signed).....
[*Respondent or Legal Practitioner*]

The respondent is represented by Arnold Bloch Leibler.

Annexure A: List of constitutional provisions, statutes and statutory instruments referred to in the submissions

	Description	Version	Provision(s)
1.	*Australian Investment and Securities Commission Act 2001* (Cth)	Compilation in force from 6 April 2019 to 30 June 2019.	s 1(1)(a), 1(2)(a), (b), (d), (g), 12GBA(2), 12GBB(2), 12 GBCC(2)
2.	*Companies Act 1862* (UK)	As enacted.	s 115
3.	*Companies Act 1874* (NSW)	As enacted.	s 216
4.	*Companies Act 1899* (NSW)	As enacted.	s 162
5.	*Companies Act 1936* (NSW)	As enacted.	ss 253, 308
6.	*Companies Act 1961* (NSW)	As enacted.	ss 249, 305
7.	*Companies Act 1961* (NSW)	As amended by the *Companies Amendment Act 1971* (NSW).	ss 367A to 367C
8.	*Companies (NSW) Code*	As enacted pursuant to the *Companies Act 1981* (NSW).	ss 387, 541
9.	*Corporations Law*	As reprinted at 30 June 1992.	s 597
10.	*Corporate Law Reform Act 1992* (Cth)	As enacted.	s 17 (inserting Pt 9.4B to the *Corporations Law*)
11.	*Corporations Law*	As amended by the *Corporate Law Reform Act 1992* (Cth).	Pt 9.4B
12.	*Corporations Act 2001* (Cth)	Compilation in force from 6 April 2019 to 30 June 2019.	ss 420(2), 420A, 435A, 478, 486, 495(1), 499(1) Pt 5.9 (including ss 596A, 596B, 598), Pt 9.4B (including ss 1317K, 1317GAB(2))