

BETWEEN:

IAN MAURICE FERGUSON
Plaintiff

and

MARCUS WILLIAM AYRES, STEPHEN
JAMES PARBERY AND MICHAEL
OWEN IN THEIR CAPACITIES AS
LIQUIDATORS OF QUEENSLAND
NICKEL PTY LTD (IN LIQ) ACN 009 842
068
Defendants

DEFENDANTS' WRITTEN SUBMISSIONS

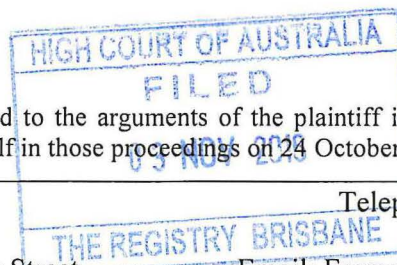
PART I: PUBLICATION ON THE INTERNET

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

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

2. The question that has been reserved for the consideration of the Full Court is whether s 596A of the *Corporations Act 2001* (Cth) is invalid as contrary to Ch III of the Constitution in that it confers non-judicial power on federal courts and courts exercising federal jurisdiction.
- 10 3. The plaintiff has adopted the arguments of the plaintiff in Proceeding No B52 of 2016 (the **Palmer Proceeding**) and made two further arguments. These submissions respond only to the two further arguments.¹
4. The two further arguments provide no basis for a finding that s 596A is invalid:
 - (a) The contention that the independence or impartiality of a court may be compromised by facilitating a public examination and then presiding in a subsequent proceeding is premised on the unfounded assumption that the

¹ The defendants have responded to the arguments of the plaintiff in the Palmer Proceeding in the submissions filed on their behalf in those proceedings on 24 October 2016.



subsequent proceeding will be conducted before the same court, and the same presiding judicial officer, as the public examination;

- (b) The contention that the power of a court to ask questions in the course of a public examination offends the separation of powers incorrectly assumes that the power to ask questions is one that should only be exercised by the executive branch of government; the power is typically exercised by liquidators or administrators who are not agents of the executive branch.

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

- 10 5. The plaintiff gave notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) on 12 October 2016. The defendants agree with the plaintiff that no further notice is necessary.

PART IV: RELEVANT FACTS

6. The plaintiff has adopted the facts set out in the submissions for the plaintiff in the Palmer Proceeding.² The defendants agree with those facts except for the matter corrected in paragraph 7 of the first defendants' submissions in the Palmer Proceeding.
7. The plaintiff relies upon some further facts.³ The defendants agree with those facts except that:
- 20 (a) The examination summons to the plaintiff did not issue on 2 August 2016. Instead:
- (i) On 2 August 2016, Registrar Belcher in the Federal Court made an order that a summons for examination be issued to the plaintiff pursuant to s 596A of the Corporations Act;⁴
- (ii) On 3 August 2016, the Federal Court issued a summons for examination to the plaintiff, in accordance with the order that had been made the previous day (the **Examination Summons**).
- (b) It was the general purpose liquidators (Mr Park, Mr Dopking, Ms Trenfield and Mr Olde), rather than the defendants, who advised the Federal Court on 19 September 2016 that they intended undertaking further examinations in

² Plaintiff's Written Submissions, para [6].

³ Plaintiff's Written Submissions, paras [7] and [8].

⁴ Question Reserved Book in Proceeding No B52 of 2016 (**QRB**), p 1.

the week commencing 31 October 2016. The defendants do not know what the general purpose liquidators have advised the plaintiff in relation to the continuation of those examinations.

8. In addition to the facts stated by the plaintiff, it is relevant that, on 29 August 2016, Justice Greenwood dismissed that part of an interlocutory application filed by the plaintiff seeking to set aside the Examination Summons.⁵ Justice Greenwood found that the plaintiff's contention that s 596A was not a valid conferral of judicial power on the court was not arguable.⁶

PART V: APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

- 10 9. The defendant relies upon the Constitutional provisions, statutes and regulations referred to in Annexure A to the plaintiff's submissions in the Palmer Proceeding and Annexure B to the first defendants' submissions in the Palmer Proceeding.

PART VI: DEFENDANTS' ARGUMENT

10. The two additional arguments advanced by the plaintiff are (a) the involvement of a court in a public examination poses a risk to the independence or impartiality of the court in a subsequent proceeding connected with the subject matter of the examination; and (b) the involvement of a court in a public examination offends the separation of powers doctrine. For the reasons set out below, both arguments are without merit.

20 No Risk to Independence or Impartiality of the Court

11. The plaintiff contends that the involvement of a court in a public examination procedure raises the real risk that the court may not be, or be seen to be, independent or impartial in the exercise of any judicial function in any subsequent proceedings connected with the matters the subject of the examination.⁷

12. This argument should not be accepted.

13. *First*, the plaintiff's argument rests on the assumption that the court which facilitates a public examination is the same court that will be involved in a subsequent proceeding. There is no basis for this assumption. There is no compulsion to commence a proceeding in connection with the examinable affairs of
30 a company in the same court where an earlier public examination occurred. In

⁵ *Palmer v Parbery* [2016] FCA 1048.

⁶ *Palmer v Parbery* [2016] FCA 1048 at [10] and [61].

⁷ Plaintiff's Written Submissions, para [12] et seq.

many cases, the court in which a proceeding is commenced will not be the same court in which a public examination occurred.

14. *Secondly*, the plaintiff's argument rests on the further assumption that the person who presides in a public examination will be the same person who presides in a subsequent hearing. Again, there is no basis for this assumption. Indeed, it is contrary to the practice in the Federal Court. In the Federal Court, an order for an examination summons is made by a registrar and a registrar presides over the examination. Civil or criminal proceedings commenced in the Federal Court in connection with the examinable affairs of a company will not be heard or determined before a registrar.
15. It cannot be contended that a judicial officer hearing a civil proceeding lacks independence or impartiality (or the appearance thereof) merely because an earlier proceeding was conducted by a different officer in the same court. The plaintiff does not cite any authority in support of that argument.
16. *Thirdly*, if a judicial officer hearing a subsequent proceeding was the same officer who presided in a public examination (contrary to the usual practice) any issue concerning a lack of independence or impartiality could be resolved by an application to that officer to stand aside in the subsequent proceeding. It cannot sensibly be contended that the public examination procedure is invalid because of a hypothetical possibility that a judicial officer who conducted a public examination might also preside in a subsequent proceeding concerning the matters that were the subject of the examination.
17. The plaintiff's written submissions rely upon the dissenting reasons of Dixon and Evatt JJ in *Ex parte Lowenstein*.⁸ In that case, it was alleged that ss 217(1)(a), (2) and (3) of the *Bankruptcy Act 1924-1933* (Cth) were invalid because they permitted the Court of Bankruptcy to act as prosecutor by charging the bankrupt with an offence, and then to act as judge by hearing and determining the trial.⁹ The majority upheld the provisions on the basis that the power to charge was not exclusively executive,¹⁰ that the provisions did not cause the Court of Bankruptcy

⁸ (1938) 59 CLR 556.

⁹ See the argument by Barwick (as he then was) at (1938) 59 CLR 556 at 558-560. See also the summary of the argument at (1938) 59 CLR 556 at 564 (Latham CJ, with whom Rich J agreed); at 575 (Starke J).

¹⁰ (1938) 59 CLR 556 at 568-569 (Latham CJ, with whom Rich J agreed); at 590 (McTiernan J).

to become a party to the proceeding,¹¹ and that the powers were incidental to the judicial functions of the Court of Bankruptcy.¹²

18. Dixon and Evatt JJ (dissenting) would have declared the provisions to be invalid on the ground that the court could not adopt “the double role of prosecutor and judge”.¹³ Their Honours found that the “promotion, prosecution and proof” of criminal charges was inconsistent with the exercise of judicial power, so that those powers could not be vested in a Federal Court.¹⁴
- 10 19. Even if the dissenting reasoning of Dixon and Evatt JJ were to be followed, that reasoning has no application to the present case. By facilitating the conduct of a public examination, a court does not place itself into the position of a prosecutor. The public examination is for the purpose of eliciting information so that people with an interest in the affairs of the insolvent company (including liquidators) can form a judgment as to whether any proceeding ought to be commenced. The court has no involvement at all in the decision to commence a proceeding following the conduct of a public examination.
- 20 20. The plaintiff also relies upon the decision of this Court in *Grollo v Palmer*.¹⁵ In that case, this Court considered the power vested in individual, consenting judges to issue a telecommunications interception warrant. The majority held that the power was not judicial¹⁶ but could be conferred on individual, consenting judges in accordance with the *persona designata* doctrine, subject to the proviso that the conferral of such power must not be incompatible either with the judge’s performance of judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power.¹⁷ That case has no direct application to the present case. The power to issue an examination summons is not conferred on individual, consenting judges but rather on the court as a whole.
21. The plaintiff evidently relies on *Grollo v Palmer* as standing for a general proposition that a non-judicial power conferred on a court should not be incompatible with the proper discharge of the court’s judicial functions. This proposition has no application in the present case.

¹¹ (1938) 59 CLR 556 at 591 (McTiernan J).

¹² (1938) 59 CLR 556 at 577 (Starke J).

¹³ (1938) 59 CLR 556 at 580.

¹⁴ (1938) 59 CLR 556 at 588-589.

¹⁵ (1995) 184 CLR 348.

¹⁶ (1995) 184 CLR 348 at 360 (Brennan CJ, Deane, Dawson and Toohey JJ).

¹⁷ (1995) 184 CLR 348 at 365 (Brennan CJ, Deane, Dawson and Toohey JJ).

22. *First*, for the reasons stated in the first defendants' submissions in the Palmer Proceeding, the power to order a public examination (including in respect of a company in voluntary liquidation) is itself a judicial power.¹⁸ Most notably, and contrary to the contention at paragraph [31] of the plaintiff's written submissions, courts had both the power and the practice of ordering examinations in the context of a voluntary winding up prior to Federation.¹⁹
23. *Secondly*, even if the power to order a public examination is merely incidental to the exercise of judicial power, the written submissions for the plaintiff do not identify any reason why that power is incompatible with the proper discharge of the court's judicial functions. In *Grollo v Palmer*, the majority suggested three ways in which the conferral of a non-judicial function might be incompatible with the performance of a court's judicial functions.²⁰ The plaintiff's written submissions refer to these instances²¹ but make no attempt to demonstrate that any of the three instances of incompatibility applies to the exercise of a power to order and facilitate a public examination.
24. None of the three instances identified by the majority in *Grollo v Palmer* is applicable. Specifically, the ordering and facilitating of public examinations does not (a) prevent the court from carrying out its other functions; (b) compromise or impair the capacity of the court to perform judicial functions with integrity; or (c) undermine public confidence in the integrity of the judiciary.

No Inconsistency with Separation of Powers

25. The plaintiff contends that for a court to ask questions of an examinee while at the same time determining whether its own questions fall within or outside the scope of the legislation "is antithetical to the concept of a judicature that is independent from the executive".²² This argument is difficult to understand. The plaintiff does not identify any authority or principle in support of the proposition that asking a question in a public examination is exclusively an administrative or executive function.

¹⁸ First Defendants' Written Submissions in the Palmer Proceeding, paras [10]-[47].

¹⁹ First Defendants' Written Submissions in the Palmer Proceeding, para [27]. See also *Re Gold Company* (1879) LR 12 Ch D 77 at 81 (Jessel MR); at 85 (Baggallay LJ); *Re Metropolitan Bank Ltd (Heiron's Case)* (1880) LR 15 Ch D 139 at 142 (Baggallay LJ); *Re Broken Hill & Argenton Smelting Co Ltd* (1893) 19 VLR 111 at 114 (Hodges J).

²⁰ (1995) 184 CLR 348 at 365 (Brennan CJ, Deane, Dawson and Toohey JJ).

²¹ Plaintiff's Written Submissions, para [23].

²² Plaintiff's Written Submissions, para [37].

26. Persons who are “eligible applicants”, and may therefore apply for a public examination under s 596A, include liquidators and administrators of the corporation.²³ Such persons are not agents of government; they act in a private capacity pursuant to the powers and duties conferred upon them by the Corporations Act. Liquidators and administrators do not exercise executive powers by applying for and subsequently conducting a public examination. Nor does a court exercise an executive function by putting a question to an examinee using the power in s 597(5B) of the Corporations Act.

PART VII: ORDERS SOUGHT BY THE DEFENDANTS

10 27. The defendants submit that the appropriate orders are as follows:

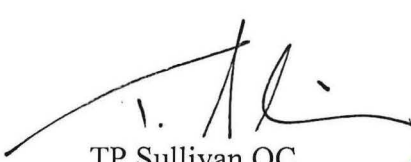
1. Answer as follows the question reserved for the consideration of the Full Court.

No.
2. Dismiss the writ of summons filed on 27 September 2016.
3. The plaintiff pay the defendants’ costs of these proceedings.


PART VIII: ORAL ARGUMENT

28. The defendants seek to supplement this outline with oral argument. However, that oral argument will not require any time in addition to that sought for oral argument in the Palmer Proceeding.

20 Dated: 3 November 2016



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²³ ASIC, and persons authorised in writing by ASIC, are also eligible applicants: Corporations Act, s 9.