IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B 55 OF 2016

BETWEEN:

IAN MAURICE FERGUSON
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 2(a) made on 12 October 2016, the Court 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, supplementing the fifth argument of the plaintiff in the Palmer proceedings, in circumstances where there is a real risk that the Court may not be, or be seen to be, independent and impartial in the exercise of any judicial function in subsequent proceedings, the function conferred by s 596A of the *Corporations Act 2001 (Cth)* (**Corporations Act**) is incompatible with, or falls outside, the judicial power of the Commonwealth, when exercised in a voluntary winding up.

   b. Secondly, the compulsory examination framework provided by s 596A of the Corporations Act, which enables the Court to exercise the administrative or executive function of asking questions of the examinee about the examinable affairs of the corporation whilst at the same time determining whether its own questions fall within or outside the scope of the legislation, erodes the boundaries within which government power must be exercised, contrary to the *Boilermakers* principle.

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

4. Notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) was given on 12 October 2016. The plaintiff considers that no further notice is necessary.

PART IV: AUTHORIZED REPORT OR REASONS FOR JUDGMENT OF PRIMARY AND INTERMEDIATE APPELLATE COURT

5. No applicable.

PART V: RELEVANT FACTS

6. The plaintiff adopts the facts as set out by the plaintiff in the Palmer proceedings with respect to the resolution to voluntarily wind up Queensland Nickel Pty Ltd (the
10 **Company**) and the appointment of the defendants as special purposes liquidators of the Company.

7. The plaintiff held the position of director of the Company from 30 January 2013 to 24 December 2013 and from 8 July 2015 to 23 July 2015.[1]

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.[2] Pursuant to the summons, the plaintiff attended before the Federal Court and was examined on 7 and 8 September 2016.[3] On 12 September 2016, the plaintiff caused documents relating to the summons to be delivered to the solicitors for the defendants.[4]

9. On 19 September 2016, the defendants indicated to the Federal Court that they intended
20 undertaking further examinations of the plaintiff pursuant to the summons in the week commencing 31 October 2016.[5] The plaintiff has subsequently been advised that the defendants do not plan to examine the plaintiff pursuant to the summons until these proceedings have been determined.[6]

PART VI: PLAINTIFF'S ARGUMENT

Introduction

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1 Affidavit of Ian Maurice Ferguson sworn 17.10.16 at [4].
2 Affidavit of Ian Maurice Ferguson sworn 17.10.16 at [11].
3 Affidavit of Ian Maurice Ferguson sworn 17.10.16 at [6].
4 Affidavit of Ian Maurice Ferguson sworn 17.10.16 at [7].
5 Affidavit of Ian Maurice Ferguson sworn 17.10.16 at [10].
6 Affidavit of Ian Maurice Ferguson sworn 17.10.16 at [12].

10. The plaintiff adopts the arguments set out by the plaintiff in the Palmer proceedings and seeks to supplement, in particular, the fifth argument put by the plaintiff in the Palmer proceedings, that being, that the function conferred by s 596A is incompatible with, or falls outside, the judicial power of the Commonwealth.

11. The function conferred by s 596A relevantly has the following features:

    a. It is framed so as to compel the Court to issue the summons for examination about a corporations' "examinable affairs" (defined in s 9) if an eligible applicant applies for it and the person sought to be examined is or was an officer (or provisional liquidator) of the corporation.

    b. It sets in motion a process of examination which, by the operation of ss 596D, 596F and 597, is 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)). Moreover, the answers given in the examination are available to be used in evidence in later proceedings, including in proceedings against the examinee (except as provided for by s 597(12A)-(14)).

12. In addition to the matters raised by the plaintiff in the Palmer proceedings, this compulsory examination framework gives rise to 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 for at least the following reasons:

    a. First, a Court, and potentially even the Court that conducted the compulsory examination, will be the adjudicator in the subsequent proceedings. In circumstances where the Court has played an active role in the investigation which gives rise to the institution of the subsequent proceedings at least the perception of a lack of independence and impartiality arises.

    b. Secondly, in circumstances where the Court has overseen the compulsory examination and has given directions in respect of the conduct of the compulsory examination, the matters to be inquired into and the procedure to be followed, and has allowed questions to be put to the examinee the answers to which may be used in evidence in the subsequent proceedings, there is a real risk that the Court when it adjudicates upon the subsequent proceedings will not be independent or impartial in the exercise of its judicial function. At the very least there is a real risk that the Court will be perceived to lack independence and impartiality in adjudicating upon the subsequent proceedings.

c. Thirdly, in circumstances where the Court has actively participated in the compulsory examination by asking questions of the examinee, there must be a risk that the Court, when it adjudicates upon the subsequent proceedings, will not be independent or impartial in the exercise of its judicial function in the subsequent proceedings and it is almost inevitable that the Court will be perceived to lack independence and impartiality.

13. In relation to the second and third reasons, a lack of independence and impartiality or perceived independence and impartiality arises because the Court in the subsequent proceedings is being invited to judicially examine and adjudicate upon evidence elicited by reason of its own prior executive act. [7]

14. In the third example there would be an actual lack of independence for the additional reason that the Court could be seen to be acting both as prosecutor and adjudicator. Dixon and Evatt JJ in their dissenting judgment in *Ex parte Lowenstein* considered that the taking of evidence by means of examining witnesses and procuring documents and then adjudicating upon that evidence was an unconstitutional infringement upon the independence of the Court[8].

15. In *Grollo v Palmer*[9] Brennan CJ, Deane, Dawson and Toohey JJ, accepted that:

"If the issuing of interception warrants could be regarded as judicial participation in criminal investigation, it would be a function which could not be conferred on a judge

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7 *A-G (Cth) v R* (1957) 95 CLR 529 at 541.

8 *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556. Barwick, as he then was, for the applicant argued, inter alia, that section 217 of the Bankruptcy Act conferred on the Bankruptcy Court the role of prosecutor and judge in the particular matter. Dixon and Evatt JJ accepted that contention (see in particular at 579, 587-589). At 579 their Honours construed s.217(3) of the Act as meaning that the Court could, in adjudicating upon the summary trial of the bankrupt, examine witnesses and procure the production of documents. Their Honours determined that the validity of a provision authorising or requiring a Court to assume the double role of prosecutor and judge was denied. Latham CJ, with whom Rich J agreed, and Starke J, determined the matter against the applicant on grounds which were arguably influenced by reasoning with respect to the separation of powers which was overtaken by the decision in *Boilermakers*. Moreover, Latham CJ, disagreed that s.217 directed the Court to act as a prosecutor and found that the Act made provision for that role to be undertaken by the Attorney General (at 568). McTiernan J, accepted that if the court was participating in the proceedings other than as a judge, this would be unconstitutional (at 590). However, in contrast to Dixon and Evatt JJ, his Honour construed section 217(3) of the Act as meaning no more than that the court was to receive further evidence if the Crown tendered it (at 591). The majority in *Boilermakers* at 294 held that, if *Ex parte Lowenstein* had stood for the proposition that non-judicial powers could be attached to a federal court (i.e. if, properly considered, the legislation operated in the manner suggested by Dixon and Evatt JJ), the Court would have not declined to allow the decision to be re-opened in *Sachter v Attorney General for the Commonwealth* (1954) 94 CLR 86.

9 (1995) 184 CLR 348.

without compromising the judiciary's essential separation from the executive government."[10]

A lack of independence and impartiality will invalidate the exercise of any function undertaken by a federal court or by a state court exercising federal jurisdiction

16. It is essential to the character of a Court and to the nature of judicial power that a Court be and be seen to be independent from the legislative and executive arms of government and that it not be required to proceed in a manner that compromises its independence and impartiality and the appearance of independence and impartiality.

17. This requirement extends to non-judicial functions that may be incidental to the exercise of a commonwealth judicial function. A negative implication arises in Chapter III with respect to the vesting in a Chapter III Court of power foreign to or incompatible with the judicial power of the Commonwealth.[11] The decisions of this Court in relation to the extent of Commonwealth legislative power to confer non-judicial functions on federal judges require compatibility between those non-judicial functions and the functions of the Courts of which the judges are members.[12]

18. The universal nature of the requirement that a judge and judiciary act and be seen to act with independence and impartiality is borne out by the analysis that follows. The same requirement underpins the incompatibility doctrine as it applies as an exception to the *persona designata* doctrine. That is, while a person who exercises federal judicial power may validly be appointed to perform non-judicial functions in his or her personal capacity, no such function can be conferred that is incompatible either with the judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power[13].

19. The incompatibility doctrine was extended in *Kable v Director of Public Prosecutions (NSW)*[14], though the source of the *Kable* doctrine was not the separation of powers as was the case in the decisions which articulated the exception to the *persona designata* doctrine, to State Courts whose functions include the exercise of Commonwealth judicial power. Such a Court may not be conferred a function, even by the State legislature, that is incompatible with the exercise of its Commonwealth judicial power.

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[10] At 366-367.
[11] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 272, 289; *Gould v Brown* (1998) 193 CLR 346 at 379-380, 384-385, 494; see also *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.
[12] *Wainohu v New South Wales* (2011) 243 CLR 181 at 202 (French CJ and Kiefel J).
[13] *Grollo v Palmer* (1995) 184 CLR 348 at 365 (Brennan CJ, Deane, Dawson and Toohey JJ).
[14] (1996) 189 CLR 51.

20. The principle of incompatibility is now accepted to be a principle that protects the integrity of the integrated Court and legal system. [15] It must follow from this, to the extent there is any doubt, that a function that is incidental to the exercise of Commonwealth judicial power, would also be invalid if it gave rise to a lack of independence and impartiality.

A Court must not be required to proceed in a manner that gives rise to a lack of independence and impartiality or the appearance of independence and impartiality

21. It is implied in Chapter III that Courts exercising federal jurisdiction are required to exhibit the essential attributes of a Court and to observe the essential requirements of the curial process, including the obligation to act judicially[16]. The legislative power of the Commonwealth does not extend to authorizing Courts to exercise judicial power in a manner which is inconsistent with the nature of judicial power[17].

22. As Justice Gaudron said in *Nicholas v The Queen*:[18]

> "... consistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorized to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case against him or her, the independent determination of the matter in controversy by application of the law to the facts determined in accordance with the rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of the guilt or innocence by means of a fair trial according to law."

23. The incompatibility doctrine was considered by the Court in *Grollo v Palmer*[19] where it articulated the doctrine as an exception to the *persona designata* principle. Determining that no function could be conferred that was incompatible either with the judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power (which the Court defined as 'the incompatibility condition'), the Court said the condition may arise in a number of different ways:[20]

    a. It may be so permanent and complete a commitment to the performance of non-judicial functions that the performance of judicial functions becomes impracticable.

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[15] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 95-96, 101104, 110-117, 139-144; cf *Hilton v Wells* (1985) 157 CLR 57 at 67, 73-74, 81-82; *Grollo v Palmer* (1995) 184 CLR 348 at 362, 364, 376, 390, 398.

[16] *Leeth v Commonwealth* (1992) 174 CLR 455 at 486-487 (Mason CJ, Dawson and McHugh JJ).

[17] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ).

[18] (1998) 193 CLR 173 at 208-209.

[19] (1995) 184 CLR 348.

[20] *Grollo v Palmer* (1995) 184 CLR 348 at 365 (Brennan CJ, Deane, Dawson and Toohey JJ).

b. It might consist in the performance of non-judicial functions of such a nature that the capacity of the judge to perform his or her judicial functions with integrity is impaired.

c. It might consist in the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the judge to perform his or her judicial functions with integrity is diminished.

24. In the same case McHugh J, noting that the legitimacy of the Judicial Branch depends upon maintaining its reputation for impartiality observed that in "determining whether incompatibility exists, the appearance of independence and impartiality is as important as its existence"[21] and that the persona designate exception to the *Boilermakers'* principle must give way "when the exercise of non-judicial functions impairs a federal judge's ability to perform judicial functions or when it would give rise to a reasonable doubt as to the independence or impartiality of a federal judge."[22]

25. Decisions of this Court, commencing with *Kable v Director of Public Prosecution (NSW)*[23], established the principle that a State legislature cannot confer upon a State Court a function which substantially impairs its institutional integrity. In *Kable*, Justice Gaudron said that Chapter III requires that "parliaments of the States not legislate to confer powers on State Courts which are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth".[24] The integrity of the Courts depends on their acting in accordance with the judicial process and on the maintenance of public confidence in that process.[25]

26. In some but not all cases following *Kable*, the maintenance of public confidence in the judiciary has been discounted in the analysis in lieu of a focus on institutional integrity as the criterion for invalidity. In *Fardon v Attorney-General* Gummow J, with Hayne J agreeing, considered that the undermining of public confidence was a mere indicator of the impairment of institutional integrity.[26]

27. However, more recently, in *Wainohu v New South Wales*[27], the Court said that the term "institutional integrity", applied to a Court, refers to its possession of the defining or

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21 At 377.
22 At 377.
23 (1996) 189 CLR 51.
24 (1996) 189 CLR 51 at 105 (Gaudron J).
25 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 107 (Gaudron J).
26 (2004) 223 CLR 575 at 617 (Gummow J, with Hayne J agreeing).
27 (2011) 243 CLR 181.

essential characteristics of a Court, including "the reality and appearance of the Court's independence and its impartiality".[28]

28. These authorities support the proposition that, in circumstances where 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, s 596A is invalid. Adopting the approach in *Fardon*, in circumstances where the legislature has conscripted the Court, as controller of and participant in a process of pre-litigation investigation, there is a real risk that the institutional integrity of any judicial function that is exercised in subsequent proceedings will be impaired.

29. There is an aspect of the Court's reasoning in *Wainohu* with respect to the confidence reposed in judicial officers that requires further consideration. The court in *Wainohu* referred with approval to the comments of Gaudron J in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*[29], including to the following statement:[30]

> "There may be functions (for example, the issuing of warrants such as those considered in *Hilton v Wells* and in *Grollo*) which do not satisfy these criteria but which, historically, have been vested in judges in their capacity as individuals and which, on that account, can be performed without risk to public confidence. However, history cannot justify the conferral of new functions on judges in their capacity as individuals if their performance would diminish public confidence in the particular judges concerned or in the judiciary generally".

30. Insofar as it might be said against the plaintiff that the historical involvement of the Courts in the compulsory examination process militates against a finding of invalidity (notwithstanding the risk of impairment to the institutional integrity of the judicial function in subsequent proceedings), the following points are made.

31. First, it is no answer to the invalidity of s 596A in circumstances of a voluntary winding up. As the submissions of the plaintiff in the Palmer proceedings establish, compulsory examination in the context of a voluntary winding up is a more recent development and has not come before this Court for consideration previously.

32. Secondly, insofar as Bankruptcy courts were historically vested with a power of examination, the power was not vested in judges in their capacity as individuals.

33. Thirdly, there can be no reasonable factual comparison that can be drawn between a judge acting in his or her personal capacity to issue a warrant, which was the circumstance relied upon by Gaudron J when making the statement extracted above, and

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[28] (2011) 243 CLR 181 at 208 (French CJ and Kiefel J).
[29] (1996) 189 CLR 1.
[30] *Wainohu v New South Wales* (2011) 243 CLR 181 at 225-226 (Gummow, Hayne, Crennan and Bell JJ).

a judge supervising and participating in a process of pre-litigation investigation to elicit evidence that may be used in later proceedings in which the judge may appear as the adjudicator.

34. Fourthly, neither the time for which the provisions have stood without challenge nor the support of all governments in Australia can relieve the Court of deciding what it is that the Constitution permits or requires.[31]

The power under s 596A of the Corporations Act offends the separation of powers doctrine

35. For the reasons advanced by the plaintiff in the Palmer proceedings, the examination power does not involve the exercise of core judicial power or power incidental to the exercise of judicial power, as least so far as a voluntary winding up is concerned.

36. In *Saraceni*, Martin CJ (in the minority) was of the view that the Court's supervisory role in an examination was an exercise of judicial power or at least a power incidental or ancillary to judicial power. His Honour focused upon the Court's adjudication upon whether a question should be allowed.[32]

37. That function militates against a finding as to the validity of s 596A. It places the Court conducting the compulsory examination in the position where it may exercise the administrative or executive function of asking questions of the examinee about the "examinable affairs" of the corporation whilst at the same time determining whether its own questions fall within or outside the scope of the legislation. This situation is antithetical to the concept of a judicature that is independent from the executive.

38. The fundamental principal upon which federalism proceeds is the allocation of powers of government. As the Court in the *Boilermakers* case indicated:[33]

> "the position and constitution of the judicature could not be considered accidental to the institution of federalism: for upon the judicature rested the ultimate responsibility for the maintenance and enforcement of the boundaries within which government power might be exercised and upon that the whole system was constructed".

39. It was considered to be necessary for the protection of the individual liberty of the citizen that the function of the judicature be separated.[34]

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[31] *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511 at 572 (Gummow and Hayne JJ).

[32] *Saraceni v Jones (as rec and mgr of Newport Securities Pty Ltd and as agent of the Mortgagee in Possession of 3517 Road, Wilyabrup) and Ors* (2012) 287 ALR 551; [2012] WASCA 59 at [55] – [61] (Martin CJ).

[33] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 276 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

40. The compulsory examination framework, which enables the Court to exercise the administrative or executive function of asking questions of the examinee whilst at the same time determining whether its own questions fall within or outside the scope of the legislation must erode the boundaries within which government power must be exercised, in accordance with the *Boilermakers'* principle, and thereby diminish the rights and liberty of the individual.

41. If the decision in *Saraceni* can be construed as holding that the examination of persons as to the examinable affairs of a company in receivership [35] (ie the function of asking questions of the examinee) is, for historical reasons, an exercise of judicial power[36] then arguably a dilemma arises in respect of s 596A because it seeks to repose a judicial function in a body other than the Court, namely a liquidator.[37] That would also be contrary to the *Boilermakers'* principle.

42. These considerations support the contention in the Palmer submissions that the historical, pre-federation role of the court in the examination process does not provide a sound basis upon which to conclude that section 596A is valid.

Concluding remarks

43. The plaintiff adopts the submission of the plaintiff in the Palmer proceedings to the effect that 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.

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

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[34] *R v Davison* (1954) 90 CLR 353 at 381 (Kitto J).

[35] A scenario which was found in that case to be analogous to the examination of the examinable affairs of a company in a voluntary winding up: *Saraceni v Jones (as rec and mgr of Newport Securities Pty Ltd and as agent of the Mortgagee in Possession of 3517 Road, Wilyabrup) and Ors* (2012) 287 ALR 551; [2012] WASCA 59 at [212], [215], [224], [240].

[36] In *Saraceni v Jones (as rec and mgr of Newport Securities Pty Ltd and as agent of the Mortgagee in Possession of 3517 Road, Wilyabrup) and Ors* (2012) 287 ALR 551; [2012] WASCA 59, McLure P posed that question at [83] &[142] and appeared to answer it in the affirmative at [237] & [254]. In doing so, her Honour at [190] referred to with approval and went on to apply in the proceeding paragraphs the dicta of Kitto J in *R v Davison* (1954) 90 CLR 353 at 382, to the effect that, "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". (emphasis added). McLure P rejected the contention that the examination power in respect of a company in receivership could be characterized as incidental or ancillary to the exercise of judicial power at [253].

[37] The liquidator can participate in the examination and ask questions: see ss 597(5A), 597(5B) of the *Corporations Act 2001* (Cth).

PART VII: APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

45. In so far as the plaintiff has adopted the submissions of the plaintiff in the Palmer proceedings, those submissions attach the relevant provisions at Annexure A and those are the provisions on which the plaintiff relies.

PART VIII: ORDERS SOUGHT BY THE PLAINTIFF

46. 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, produced or raised 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 IX: ORAL ARGUMENT

47. The plaintiff estimates that approximately 1 hour will be required for the presentation of the plaintiff's oral argument, including submissions in reply.

Dated: 19 October 2016

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