IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **NO B52 OF 2016**

BETWEEN: **CLIVE FREDERICK PALMER**
Plaintiff

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

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

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **NO B55 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

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Filed on behalf of the Attorney-General of the Commonwealth (Intervening) by:

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PART I FORM OF SUBMISSIONS

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

PART II BASIS OF INTERVENTION

2. Pursuant to s 18 of the *Judiciary Act 1903* (Cth) (**Judiciary Act**), and by order dated 15 September 2015, her Honour Acting Chief Justice Kiefel reserved the following question for consideration of a Full Court:

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

3. The Attorney-General of the Commonwealth intervenes pursuant to s 78A of the Judiciary Act in support of the defendants, and contends that the question should be answered, 'No.'

PART IV APPLICABLE CONSTITUTIONAL PROVISIONS, STATUES AND REGULATIONS

4. The Constitution, Chapter III, ss 71, 75, 76 and 77.

5. The Commonwealth relies on the extracts of statutory provisions annexed to the Plaintiff's Submissions.[1] A combined table of statutes and other relevant statutory provisions is annexed to these Submissions at Annexure A.

PART V ISSUES PRESENTED BY THE QUESTION RESERVED

6. The Commonwealth Attorney-General contends:

   6.1. **Proposition 1.** In answering the question reserved, s 596A must be placed in its full statutory context. In particular, the Court should consider: the nature and incidents of the s 596A power; the character of the functions given to courts in the execution of a s 596A summons, including the provisions made in ss 596C - 596F and 597; and the main purpose of Pt 5.9 of the *Corporations Act 2001* (Cth) (**Corporations Act**), being judicial supervision of companies under external administration and, in particular, in insolvency.

   6.2. **Proposition 2**. Once regard is had to that full context, and in conformity with established principles concerning judicial power, the s 596A power is properly characterised as judicial, either centrally or in an ancillary fashion (if that is required). It is sufficiently connected to, and facilitative of, the determination of controversies regarding rights, duties and liabilities arising in the course of an external administration to be within judicial power. This is so irrespective of the 'historical' test.

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1 Plaintiff's Written Submissions 6 October 2016 in B52/2016 (**Plaintiff's Submissions**). See also Plaintiff's Written Submissions 18 October 2016 (**Ferguson Submissions**) in B55/2016.

6.3. **Proposition 3**. However, additionally, or alternatively, when regard is had to history, it is apparent that s 596A confers a power that is consistent with, and closely analogous to, powers that have been exercised by Courts for a very long time, thus confirming its status as core judicial power (or if not, ancillary to judicial power).

6.4. **Proposition 4**. It remains correct to have regard to the functions historically exercised by courts when ascertaining the scope of the judicial power of the Commonwealth. Specifically, the propositions expressed by Kitto J in *R v Davison* (1954) 90 CLR 353 (***Davison***) and adopted in subsequent cases represent binding ratio. Leave should not be given to re-open *Davison*, and it should not be departed from in any event.

6.5. **Proposition 5**. The matters in the Plaintiff's fifth argument,[2] either separately or together, are insufficient to render the power pursuant to s 596A non-judicial or otherwise repugnant to the exercise of federal judicial power. The matters raised by the Plaintiff in *Ferguson v Ayers* (B55/2016) seeking to supplement that fifth argument do not take the matter further.

Proposition 1. Statutory context: the courts' role in connection with examination summonses

Corporations Act 2001 (Cth), Chapter 5

7. The nature of the task given to the Court under s 596A is best understood when situated in the larger context of the Corporations Act, specifically Chapter 5 (External administration) and the mechanisms of 'voluntary' administration and liquidation.[3]

8. **Companies**. In the first place, incorporation of a company is a process and status granted by law, permitting business activities to be conducted with the benefit of separate legal personality and capacity.[4] The Corporations Act places the management of a company in the hands of its directors, who have significant duties to perform.[5] Contributories and creditors also have significant interests in ensuring that the company is properly managed. These interests become acute in circumstances preceding, and involving, insolvency.[6]

9. **Insolvent trading**. A director has a duty to prevent insolvent trading, and may

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2 See Plaintiff's Submissions, [3(e)], [62]-[74].

3 Cf *Saraceni v Jones* (2012) 42 WAR 518, 527-530 ([24]-[50]) per Martin CJ.

4 See *NSW v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, 90-97 ([96]-[120]) per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ. See also *Corporations Act 2001* (Cth) (**Corporations Act**), s 57A (Meaning of 'corporation'), s 112 (Types of companies), s 124 (Capacity and powers).

5 *Corporations Act*, s 120 (Members, directors and company secretary of a company), s 201 (Consent to be a director), s 198A (Business managed by directors), Ch 2D, Pt 2D.1, ss 180-198F (Directors' duties and powers).

6 See eg *Bishopsgate Investment Management Ltd (In provisional liquidation) v Maxwell* [1993] Ch 1, 24 per Dillon LJ.

be liable for continuing to trade where he or she has 'reasonable grounds for suspecting that the company is insolvent, or would become insolvent': s 588G, s 588M. Accordingly, Chapter 5 of the Corporations Act generally makes provision for 'external administration' including in anticipation of, or because of, insolvency – including, as happened in this case, for appointment of an administrator by the directors.

10. **External administration**. Chapter 5 of the Corporations Act is divided into a series of parts dealing with, in effect, a vesting of control of a company or its property in persons other than its directors. The general regime was correctly explained by Martin CJ in *Saraceni v Jones* (2012) 42 WAR 518 (***Saraceni***),[7] although that case concerned a receiver and manager, and mortgagee in possession. The present case differs from *Saraceni* in that it concerns a company in liquidation pursuant to a voluntary winding up. The following summary of the statutory scheme addresses the present context.

11. **Resolution on insolvency (Voluntary administration)**. On about 18 January 2016 the directors of Queensland Nickel Pty Ltd (**Queensland Nickel**) resolved to appoint an administrator pursuant to s 436A of the Corporations Act.[8] Section 436A is contained in Pt 5.3A ('Administration of a company's affairs with a view to executing a deed of company arrangement').[9] Section 436A provides that a company may appoint an administrator if the board resolves that:

> ...in the opinion of the directors voting for the resolution, the company is insolvent, or is likely to become insolvent at some future time.

12. **Administration.** If a resolution is made under s 436A of the Corporations Act, a period of administration begins: s 435C(1). The administrator takes control of the company's business and affairs, and may perform any function and exercise any power that the company or its officers could otherwise exercise: s 437A. The directors (and other officers) are prohibited from exercising their ordinary functions and powers: s 437C. The administrator then, 'as soon as practicable', investigates the 'company's business, property, affairs and financial circumstances' and forms an opinion on certain options available under the Corporations Act to creditors: s 438A. The directors are required to assist the administrator: s 438B. The administrator is also a person who can apply for a summons to examine the directors: s 596A; s 9 (Definitions) ('Eligible applicant'). The administrator reports to creditors, and convenes a creditors' meeting: s 439A. At that meeting, the creditors may resolve to wind the company up: s 439C.[10]

13. **Creditor's decision to wind up**. On 22 April 2016 and pursuant to s 439C(c),

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7 *Saraceni v Jones* (2012) 42 WAR 518, 527-530 ([24]-[50]).

8 *Palmer, in the matter of Queensland Nickel Pty Ltd (In Liq) v Parbery, in his capacity as Liquidator of Queensland Nickel Pty Ltd (In Liq)* [2016] FCA 1048 at [15] per Greenwood J. See also *Palmer, in the matter of Queensland Nickel Pty Ltd (In Liq) v Parbery, in his capacity as Liquidator of Queensland Nickel Pty Ltd (in Liq)* [2016] FCA 1094 per Perram J.

9 The objects of Pt 5.3A are set out in s 435A of the Corporations Act.

10 An administration can also end if, for example, a Court is satisfied that the company is not insolvent and makes orders under s 447A: s 435C(3).

the creditors resolved that Queensland Nickel be wound up.[11] That triggered s 446A, deeming the company to have passed a special resolution under s 491, such that the company is to be 'wound up voluntarily'.

14. **Liquidators**. After a creditors' decision to wind the company up, liquidation commences: s 499(2A). If no liquidator is available, the Court is to appoint one: s 502. Liquidators appointed in a voluntary winding up may exercise all the powers conferred by the Corporations Act on a liquidator in a winding up in insolvency or by the Court: s 506. The Corporations Act then proceeds to Pt 5.6 (Winding Up Generally), and in particular Div 3 (Liquidators). The directors of the company are obliged to co-operate: s 530A. The liquidator must report to ASIC any apparent misconduct in relation to the company: s 533(1); and the liquidator is subject to direction by the Court, in stipulated circumstances (referable to apprehended unlawful conduct), as to the lodgement of such a report: s 533(3). The liquidator can apply to the Court to have questions determined or powers exercised: s 511.

15. **Supervision of liquidators**. A liquidator appointed in the course of a court ordered winding up has long been regarded as an officer of the Court;[12] and whether strictly described as an officer or not, a liquidator appointed by a court in a 'voluntary' liquidation must (a) adhere to the terms of his or her appointment (the Court orders); and (b) is subject to relevantly similar Court supervision.[13] Howsoever the liquidation comes about, the Court is vested with power 'on cause shown, to remove a liquidator or appoint another liquidator': s 503. Further, the Court is vested with a power to supervise liquidators pursuant to s 536.[14] In this regard (and among other things), s 536(3) provides:

> The Court *may at any time require a liquidator to answer any inquiry in relation to the winding up and may examine the liquidator* or any other person on oath concerning the winding up and may direct an investigation to be made of the books of the liquidator. (emphasis added)

16. Accordingly, whether the liquidator is appointed by the Court or not, the liquidator is under the control of the Court and discharging a function of importance to creditors and the public.

17. **Special purpose liquidators**. A special purpose liquidator is the description commonly given to additional liquidators appointed to a company, but with or for limited purposes. The concept is not new.[15] The defendants in this case

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11 *Palmer, in the matter of Queensland Nickel Pty Ltd (in liq) v Parbery, in his capacity as Liquidator of Queensland Nickel Pty Ltd (In Liq)* [2016] FCA 1048, [16] per Greenwood J.

12 *Owen & Gutch v Homan* [1853] EngR 883; (1853) 4 HLC 997, 1032; 10 ER 752, 766 (Concerning Court appointed receivers); *Re Henry Pound, Son, & Hutchins* (1889) 42 ChD 402, 420 (Liquidator); *Commissioner for Corporate Affairs v Harvey* [1980] VR 669, 695-696 (as contemplated by Court Rules).

13 *Singtel Optus Pty Ltd v Weston* [2012] NSWSC 674; 90 ACSR 225, 268-269 ([149]-[151]) per Bergin CJ in Eq.

14 Cf s 472(2) (Provisional Liquidators); s 511 (Application to Court to have questions determined or powers exercised).

15 *Lo v Nielsen and Moller Autoglass (NSW) Pty Ltd* [2008] NSWSC 497 (26 ACLC 407), [23]-[32] per Barrett J (and the cases there cited).

were appointed as such pursuant to orders of the Court.[16] To make that order the Court had to be satisfied that the appointment was just and beneficial; and the appointment was on such terms and conditions as the Court thought fit.[17] Those orders made appointed the defendants as additional liquidators for the limited and specified purposes set out by Dowsett J in paragraphs [4(a)] to [4(d)], which included conducting examinations of the matters set out in the schedule (the 'Special Purpose Liquidators' Tasks'), pursuant to s 596A of the Corporations Act. The defendants are, of course, obliged to comply with the authority vested in them by those orders.[18]

18. **Purpose of liquidation.**[19] In liquidation, as in bankruptcy, the subject matter of insolvency law involves a compromise between the insolvent's lawful obligations to pay debts and liabilities; the creditors' interests in recovering property or money owed to them; the contributories' interests in respect of contributed equity; and the public interest in the enforcement of the duties and standards expected of those managing companies.[20] Thus, the essential tasks in liquidation are to ascertain the assets of the company; to get in the assets of the company (including where appropriate by pursuit of claims and legal proceedings against persons who may be liable to the company for wrongful preferential payments, debts or damages);[21] to ascertain the legitimate claims by creditors or contributories on the assets so available; and to divide the available assets among the persons entitled.[22]

19. **Purpose of examination powers**. The overall purpose of examination powers, including pursuant to s 596A and s 596B, is and remains that stated by Windeyer J in *Rees v Kratzmann* (1965) 114 CLR 63, ([80]) (in the context of examinations and the validity of provisions removing the immunity against self-incrimination):

> ...the purpose of the bankruptcy statute being to secure a full and complete examination and disclosure of the facts relating to the bankruptcy in the interests of the public. The provisions of *The Companies Act* reflect, it seems to me, the same idea. The honest conduct of the affairs of companies is a matter of great public concern to-day.[23]

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16 Above fn 14. Orders (Dowsett J), 18 May 2016 (QUD283/2016).

17 Corporations Act, s 511(2).

18 See above, paragraph [15].

19 See generally *Sydlow Pty Ltd (In liq) v TG Kotselas Pty Ltd* (1996) 65 FCR 234, 238 ([23]-[24]) per Tamberlin J.

20 See again, *Bishopsgate Investment Management Ltd (In provisional liquidation) v Maxwell* [1993] Ch 1, 24 per Dillon LJ. See also *BP Australia Ltd v Amann Aviation Pty Ltd* (1996) 62 FCR 451, 475 per Lockhart J (Supervision of compulsory processes); *Gould v Brown* (1998) 193 CLR 387-388 ([33]) per Brennan and Toohey JJ.

21 See s 565 (Undue preferences); s 567 (Liquidator's right to recover); Pt 5.7B, (Recovering property or compensation for the benefit of creditors of insolvent company), esp Div 2 (Voidable transactions); s 588G*ff* (Insolvent trading).

22 See s 530B (Right to books of company); s 543 (Surplus); s 553 (Debts and claims to be proved); s 554 (Computation of debts and claims); s 553E (Default reference to *Bankruptcy Act 1966* (Cth)); s 554E (Secured creditors); s 555 (Priorities).

23 In respect of 'purpose' see also *Re Excel Finance Corporation Ltd; Worthley v England* (1994) 52 FCR 69, 93 per the Court (Gummow, Hill and Cooper JJ); *Hong Kong Bank of Australia Ltd v Murphy* (1992) 28 NSWLR 512, 521 per Gleeson CJ (Mahoney and Priestley JJA agreeing) ('These include the protection of shareholders and creditors and of interested members of the public. They are not, however, confined to the need for such protection in the case of a winding up. Winding up is only

20. Courts are given the role of supervising the examination and disclosure to which Windeyer J referred in the context of the ongoing exercise of functions by them, including during external administrations.

Section 596A

21. Coming to the provision the subject of the question referred in this case, there are several matters to note.

22. *First*, the essential difference between the statutory formulation used in s 596A of the Corporations Act, and that used in s 596B (which provides that the Court 'may summon a person for examination') is plainly explained with regard to the class of persons who are the object of the summons. In the case of s 596A, it is 'mandatory' for persons who are or were recently officers of the company to attend to be examined. By contrast, s 596B is concerned with persons who 'may be able to give information'; or who may have been involved in some misconduct in respect of the company.

23. *Secondly*, at the stage of the Court determining whether to issue a summons pursuant to s 596A, the Court must be satisfied of various matters of fact and law, as set out in s 596A. The Court is then to fashion an order which complies with s 596A.

24. *Thirdly*, the Court has broad express powers to control the examination of a person summoned. Those powers are laid out in ss 596C – 596F, and 597, noting, in particular, the Court may give a direction about the matters to be inquired into at an examination (s 596F(1)(a)); and may allow or disallow questions as it thinks appropriate (s 597(5B)).

25. *Fourthly*, the Courts' powers under Pt 5.9 are subject to inherent and implied powers to ensure that their processes are not abused, including the power to prevent the institution or maintenance of proceedings for an improper purpose.[24] That is because a power conferred on a Court: (a) is presumptively intended to attract the usual incidents of that court's jurisdiction;[25] (b) is presumptively intended to 'be exercised in accordance with standards characterising ordinary judicial processes';[26] and (c) is presumptively not intended to abrogate the court's inherent jurisdiction.[27]

26. *Fifthly*, and relatedly, an examination summons can, upon challenge or upon

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one form of external administration.'); *New Zealand Steel (Australia) Pty Ltd v Burton* (1995) 13 ACSR 610, 616 per Hayne J.

24 See *Walton v Gardiner* (1993) 177 CLR 378, 393 per Mason CJ, Deane and Gaudron JJ; *Williams v Spautz* (1992) 174 CLR 509, 521 per Mason CJ, Dawson, Toohey, McHugh JJ). In the particular context of examination summonses, see *Carter v Gartner* (2003) 130 FCR 99, 108 [27] per Branson J.

25 *Electric Light and Power Supply Corporation Ltd v Electricity Commission of New South Wales* (1956) 94 CLR 554, 559 per the Court (Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ).

26 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 431 [58] per French CJ, Hayne, Crennan, Keifel, Bell and Keane JJ.

27 *Assistant Commissioner Condon v Pompano* (2013) 252 CLR 38, 60-62 [41]-[44] per French CJ.

the Court's own motion, be discharged or stayed, including upon the ground that it is an abuse of process.[28] The power is, in this respect, no different from other powers which may be exercised ex parte.[29]

27. *Sixthly*, the Courts' powers referred to in the preceding 5 points are to be exercised judicially,[30] and in accordance with the Constitution.[31]

28. All of the above invoke the following observations of French CJ in *Assistant Commissioner Condon v Pompano* (2013) 252 CLR 38, 63 ([45]), in support of characterising s 596A as a conferral of judicial power:

> The subsistence of the inherent and rules-based powers is relevant to the question of whether the impugned provisions .... impair the defining and essential characteristics of the ... Court. That question must be answered by considering those provisions in the common law and statutory context in which they operate.

Proposition 2: s 596A confers judicial power and the 'functional' test

29. Section 596A satisfies what the Plaintiff describes as the 'functional' test of judicial power. It gives a power that is to be exercised for, and in connection with, the purpose described in paragraph [18] above. It is an integral part of the process of judicial supervision of companies under external administration. This was the point made by Brennan CJ and Toohey J in *Gould v Brown* (1998) 193 CLR 346, 389 ([35]):

> To the extent that the power to order and conduct examinations is available for exercise in the course of and for the purposes of a winding up, it is an incident of the judicial power of winding up and has a judicial character.

30. The Commonwealth advances the following further submissions in this respect.

31. *First*, as was said in *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (***Boilermaker's Case***):

> The judicial power of which s 71 speaks is not to be defined or limited in any narrow or pedantic manner.[32]

32. *Secondly*, in determining whether a power is judicial, 'the focus in the authorities is upon the manner in which and subject matter upon which the body purportedly exercising judicial power operates and the purposes and consequences of any decisions it makes.'[33]

33. *Thirdly*, of these characteristics, the *purpose* for which a power is to be

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28 In the case of the Federal Court, this is facilitated by r 11.5 of the *Federal Court (Corporations) Rules 2000* (Cth).

29 The power to proceed ex parte is also a traditional judicial power: see *South Australia v Totani* (2010) 242 CLR 1, 101-102 ([258]) (Heydon J) (and the cases there cited).

30 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 431 [58] (and the cases there cited).

31 *Wainohu v New South Wales* (2011) 243 CLR 181, 230-231 ([112]-[113]) per Heydon J; *Wotton* v Queensland (2012) 246 CLR 1, 3 [9].

32 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 278 per Dixon CJ, McTiernan, Fullager and Kitto JJ.

33 *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350, 363 ([35]) per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ.

exercised is particularly significant where (as here) the power in issue includes one of inquiry.[34] One factor militating in favour of the characterisation of a power as judicial is if its main purpose is, as here, 'the better administration of justice'.[35]

34. *Fourthly*, the circumstance that an exercise of the examination summons power may, on occasion, anticipate or be directed to the subsequent invocation of Commonwealth judicial power (eg to enforce provisions of the Corporations Act) does not prevent its exercise by a Chapter III Court.[36] Indeed, this is a factor which supports characterisation of the summons power as judicial.

35. *Fifthly*, in the context of the present case, these conclusions reflect the fact that Chapter III Courts clearly have a constitutionally-permissible supervisory function in relation to external administration.[37]

36. *Sixthly*, the fact that an external administration is not commenced by the Court does not deprive the Court of its supervisory functions in relation to administration and liquidations. The Court's jurisdiction with respect to matters arising on a winding up does not depend on that Court having made the winding up order.[38] This is particularly the case where, as here, special purpose liquidators *appointed by the Court* have exercised statutory power by obtaining a *Court order* for examination proceedings, to be conducted *before the Court*, subject to *express and inherent powers exercisable by the Court, judicially,* as ordinary incidents of its judicial power.[39] To ignore or marginalise these features of s 596A by reference to an external administration not having commenced by Court order is erroneous.

37. In short, there is an abundance of principled reasons in favour of s 596A satisfying the functional test.

Proposition 3: Consistency with historical judicial power

38. Further, or alternatively, the power given by s 596A is judicial because it is sufficiently analogous to powers historically exercised by Courts.

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34 *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656, 666 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ; *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352, 380 - 381([64]) per Gageler J.

35 *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289, 305 per Mason CJ, Deane, Dawson, Gordon, McHugh JJ.

36 *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 89 ALJR 975, 984 ([50]) per French CJ, Kiefel, Bell, Gageler and Gordon JJ.

37 See *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1, 47 ([80]) per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ; *Highstoke Pty Ltd v Hayness Knight GTO Pty Ltd* (2007) 156 FCR 501, 527 [86] per French J.

38 *Acton Engineering Pty Ltd v Campbell* (1991) 31 FCR 1, 14, 16 per Lockhart J, Black CJ agreeing at 2, Davies J at 4.

39 See *R v Hegarty; Ex Parte City of Salisbury* (1981) 147 CLR 617, 628 per Mason J ('A function may take its character from that of the tribunal to which it is reposed. Thus, if a function is entrusted to a court, it may be inferred that it is to be exercised judicially...') (Also citing *R v Spricer; Ex parte Australian Builders Labourers Federation* (1957) 100 CLR 277, 205.).

39. The proposition that 'history matters' when it comes to the content of judicial power is based on *Davison* (addressed at [46]*ff* below). To accept the proposition does not mean that, before a power can be admitted as judicial based on the historical test, the power must be identical in all respects with a power historically exercised by courts.[40]

40. As with other constitutional terms, 'judicial power' identifies the essential characteristics of that concept at Federation understood at the level of connotation rather than denotation.[41] The result is that a power may, on the historical approach, be judicial even if it is not identical to a power exercised by Courts prior to Federation, so long as it bears the essential characteristics of powers historically exercised by them.[42] This reflects the broader principle stated by Dixon J in *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29, 81. It is a matter of what is essential, not a matter of particular equivalence.

41. On this basis, the Commonwealth advances the following submissions.

42. *First*, the historical development of the examination power from the time it was first used by Henry VIII in 1542-43 (34 & 35 Henry VIII, c 4); to its extension by Elizabeth I (13 Eliz, c 7), James I (1 Jac, c 15) and others; to its adaptation to Joint Stock Companies (19 & 20 Vic, c 47); to the first *Companies Act* 1862 (UK), and then adoption in the Colonies, States and the Commonwealth, has been described in a number of cases.[43] It has also been applied to cases of 'voluntary' liquidations.[44] The relevant statutory provisions are annexed to these submissions.

43. *Secondly*, the s 596A power is of an essential kind exercised by courts since well before Federation and analogously (in the case of bankruptcy) for many centuries. In this respect:

    43.1. it is trite the Commonwealth Constitution does not define 'judicial power';

    43.2. the 'judicial power' of the Commonwealth must be understood to include the power to apply equitable 'jurisdiction', and that power can only be

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40 Indeed, even the complete absence of any analogue would not determine the constitutional question: see *Assistant Commissioner Condon v Pompano* (2013) 252 CLR 38, 64 ([49]) per French CJ.

41 See by analogy *Cheatle v The Queen* (1993) 177 CLR 541.

42 See eg *Thomas v Mowbray* (2007) 233 CLR 307.

43 See in particular, *Re Transequity Ltd (In Liq)* [1991] Tas R 308, 311-312; 6 ACSR 517, 519-520, 522-523 per Zeeman J; *Re Compass Airlines Pty Ltd* (1992) 35 FCR 447, 452-453 per Lockhart J (Beamont and Gummow JJ agreeing). On its subsequent State and Commonwealth adaptation to companies, see *Highstoke v Hayes Knight* (2007) 156 FCR 501, 515-523 ([46]-[72]) per French J.

44 *In re Broken Hill and Argenton Smelting Company Ltd* (1893) 19 VLR 111; *Cheney v Spooner* (1929) 41 CLR 532; *In re Cambell Covering Ltd (No 2)* [1954] 1 Ch 255; *In re Cambell Coverings Ltd* [1953] 1 Ch D 488 (CA); *Re Brash Holdings Ltd* (1995) 15 ACSR 755; 13 ACLC 285 per Hayne J; *Dalton v New South Wales Crime Commission* (2006) 227 CLR 490 at 508 ([45]) per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ) ('... In *Cheney v Spooner*, this Court upheld the application of the 1901 Act to an order by the Supreme Court of New South Wales under ss 123 and 124 of the *Companies Act 1899* (NSW) which gave leave to the liquidator of a company in voluntary liquidation to summons a number of persons to attend for examination by the Master in Equity.) See also *Saraceni v Jones* (2012) 42 WAR 518, 540 ([108]) per McLure P.

described by historical reference;[45]

43.3. State courts (preceding Federation) exercised equitable jurisdiction; and exercised that jurisdiction in respect of examinations in bankruptcy and company law.[46]

44. *Thirdly*, as explained in Zines's *The High Court and the Constitution*:

> ... Indeed, in a sense, the concept of judicial power referred to above *is itself derived from historical examination, that is, of what courts have done*. From this has been distilled those features that are pre-eminently or exclusively judicial, which have been arrived at by having regard to social values and the reasons for preserving the separateness of judicial power (*emphasis* added).[47]

45. *Fourthly*, the reference to the historical jurisdiction exercised by courts of common law and equity in England, as informing the meaning of judicial power, is not a clinging attachment to UK legal or constitutional history. Rather, those matters became the subject of the jurisdictions of the Supreme Courts of the Colonies.[48] It is not only a matter of what was considered to fall within judicial power at the time of Federation; it is also a matter of what judicial power those Colonies inherited and exercised.

Proposition 4: *R v Davison* should not be the subject of leave (or overruled)

46. To the extent that the Plaintiff challenges *Davison*: he challenges ratio of this Court and needs leave; leave should not be given; and, if leave be given or is otherwise considered unnecessary, *Davison* should be followed and not overturned.

47. The particular dispute in *Davison* was whether the making of a sequestration order was an exercise of judicial power. The argument rejected in *Davison* strongly resembles that put by the Plaintiff in this case: namely, the power was non-judicial because there was no controversy or *lis* between the parties: *Davison*, 358-360.

48. As a minimum, *Davison* stands for the proposition that a power may be judicial if it is a power that was, before Federation, exercised by courts in the United Kingdom and Australia. That was relied on by Dixon CJ and McTiernan J (with whom Fullagar J relevantly agreed); and by Kitto J in answering the questions

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45 See eg Heydon, Leeming, Turner, *Meagher, Gummow & Lehane, Equity: Doctrine & Remedies*, (5th ed, LexisNexis, 2015), 5 ('It is the body of law developed by the Court of Chancery in England before 1873.'); FW Maitland, *Equity & The Forms of Action at Common Law*, Chaytor & Whittaker, eds (CUP, Cambridge, 1929), Lecture I, 1.

46 See eg s 22 of the *Supreme Court Constitution Amendment Act 1861* (Qld) (pursuant to which the Court possessed equitable jurisdiction to 'exercise and perform all acts matters and things necessary for the due execution of such equitable jurisdiction as is possessed by the Lord High Chancellor or other Equity Judges of England in the exercise of similar jurisdiction within the realm of England').

47 Stellios, James, *Zines's the High Court and the Constitution* (Federation Press, 6th ed, 2015), 223. See also *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 392 per Windeyer J on Montesquieu, history and content of judicial power.

48 Above, fn 46. See also *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CKR 38, 59-62 ([39]-[45] per French CJ (State Constitutions, Inherent powers).

stated in the special case.

49. **Dixon CJ and McTiernan J**. Dixon CJ and McTiernan J commenced by quoting Griffith CJ's conception of judicial power in *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 (***Huddart Parker***) 366-367.[49] However, if that were accepted as an exhaustive statement of judicial power, then that would have supported the characterisation of the power at issue in *Davison* as non-judicial. Their Honours observed that the English courts had historically exercised many powers which did not fall within Sir Samuel's paradigm definition: 368.[50] That observation led their Honours to adopt a nascent version of the chameleon doctrine (at 369) and, ultimately, to form the view that, because of the nature and incidents of the sequestration power, it was judicial: 370-371.

50. **Fullagar J**. Fullagar J agreed generally with Dixon CJ and McTiernan J: 375. He also made additional observations by reference to matters of history: 376-377.

51. **Kitto J**. Kitto J held the answer to a question of characterisation 'may often be found' in matters of history: 382. He then referred to the long and established involvement of courts in the sequestration process (382-384) before saying that 'th[o]se considerations le[d] him to conclude' that the power was judicial: 384.

52. The reasons *why* Kitto J's analysis has so regularly been cited, quoted, applied, and approved is not merely due to precedent, but because the reasons are principled, logical, and persuasive. As his Honour observed, the expression 'bankruptcy and insolvency' in s 51(xvii) of the Constitution was:

> ... an expression 'describing in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the condition in which the law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation: *L'Union St Jaques de Montreal v Belise* (1874) LR 6 PC 31, 36; *Royal Bank of Canada v Larue* [1928] AC 187, 197.

53. As to 'judicial power' within the meaning of the Constitution, his Honour explained that when the Constitution requires (381-382):

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[49] *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 per Griffith CJ ('...the words 'judicial power' as used in sec 71 of the Constitution means the power which every sovereign authority must of necessity have to decide controversies between its subject, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has the power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.') The formulation was approved in the Privy Council in *Shell Co of Australia Ltd v Federal Commissioner of Taxation* [1931] AC 275. See also Lord Simonds LC in *Labour Relations Board of Saskatchewan v John East Iron Works Ltd* [1949] AC 134, 149 ('Without attempting to give a comprehensive definition of judicial power they [their Lordships] accept the view that its broad features are accurately stated in that part of the judgment of Griffiths CJ in *Huddart Parker...*'); *R v Davison* (1954) 90 CLR 353, 366 per Dixon CJ, McTiernan J. See also *Precision Data Ltd v Wills* (1991) 173 CLR 167, 188-189 per the Court ('The acknowledged difficulty, if not impossibility, of framing a definition of judicial power that is at once exclusive and exhaustive arises from the circumstances that many positive features which are essential to the exercise of the power are not by themselves conclusive of it.'); *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542, 577 [93] per Hayne J.

[50] Ie Set out above, fn 49.

> ... a distinction to be maintained between powers described as legislative, executive and judicial, it is using terms which refer, not to fundamental functional differences between powers, but to distinctions generally accepted at the time when the Constitution was framed between classes of powers requiring different 'skills and professional habits' in the authorities entrusted with their exercise.

54. **Subsequent acceptance**. That *ratio*, or if not *ratio* in a technical sense, the proper informing analysis set out in *Davison*, has been referred to and relied upon in very many cases ever since.[51] By way of example, the *Davison* principle was applied by a majority of this Court in *Baker v R* (2004) 223 CLR 513. McHugh, Gummow, Hayne and Heydon JJ observed that the making of recommendations in sentencing did not readily fit within ahistorical descriptions of judicial power (534 [48]). However, their Honours further observed (citing *Davison*) that there was a long history, predating the Constitution, of judges making sentencing recommendations in that context: 533-534 [47]-[48]. Thus, there was nothing repugnant to the judicial power in the statute at issue: 534 [49]. See also *Assistant Commissioner v Pompano Pty Ltd* (2013) 242 CLR 39 and the crisp analysis of the relations of common law, history, statute and the Constitution summarised by French CJ.[52]

55. Even in the ordinary case, this Court does not lightly review and depart from its previous decisions.[53] Here, the *Davison* principle is one which has been carefully worked out in an unbroken line of cases in this Court that have stood for many years. There is no material difference between the reasons of the majority justices in *Davison* or in subsequent judgments that have endorsed the approach. The decision has not caused any inconvenience. Overruling the decision (and the principle for which it and subsequent cases relevantly stand) would very substantially disrupt 60 years of constitutional analysis; and accepted constitutional theory and behaviour.

56. **Significant impact on legislative and judicial activities**. The Plaintiff's argument, if accepted, is apt to cause substantial disruption to well settled practices in a number of areas. If the content of the judicial power of the Commonwealth is to be identified by 'abstract reasoning alone'[54], then there is a long list of legislation and presently accepted judicial activities which would

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51 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 278 per Dixon CJ, McTiernan, Fullagar and Kitto JJ; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 373 per Kitto J; *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289, 315 per Brennan J; *Secretary, Department of Health & Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218, 287 per Brennan J; *Baker v The Queen* (2004) 223 CLR 513, 534 ([46]-[48]) per McHugh, Gummow, Hayne and Heydon JJ; *Momcilovic v The Queen* (2011) 245 CLR 1, [81] per French CJ; *TCL Air Conditioner (Zhongshan) Co Ltd v Federal Court* (2013) 251 CLR 533, 574 [105] per Hayne, Crennan, Kiefel and Bell JJ; *CGU Insurance Limited v Blakeley* (2016) 90 ALJR 272, 280 [29] per French CJ, Kiefel, Bell and Keane JJ.

52 *Commissioner v Pompano Pty Ltd* (2013) 252 CLR 39, 47 ([2]) ('The common law informs the interpretation of the Constitution and statutes made under it. It carries with it the history of the evolution of independent courts as the third branch of government and, with that history, the idea of a court, what is essential to that idea, and what is not.'). See also at 47, ([5]).

53 See eg (including as to the principles): *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438-439 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ.

54 *White v Director of Military Prosecutions* (2007) 231 CLR 570, 598 [58] citing *R v Davison* at 380-381.

appear vulnerable to challenge.[55] That includes in relation to:

56.1. military discipline;[56]

56.2. the welfare jurisdiction of the Family Court of Australia;[57]

56.3. bankruptcy;[58]

56.4. Corporations Act insolvency;[59]

56.5. judicial advice[60] (and advice to other statutory officers);[61]

56.6. preliminary discovery, Mareva-type orders and Anton Piller orders.[62]

57. In addition, significant functions which are at least conferred by State law would also be suspect if the historical analysis was disavowed, either when picked up in federal jurisdiction, or on a *Kable* analysis and would, in any event, raise questions about the exercise of the High Court's appellate jurisdiction under

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55 See Dixon CJ and McTiernan J's list in *R v Davison* (1954) 90 CLR 353, 368 ("It may be said of each of these various elements that it is entirely lacking from many proceedings falling within the jurisdiction of various courts of justice in English law. *In the administration of assets or of trusts the Court of Chancery made many orders involving no lis inter partes, no adjudication of rights* and *sometimes self-executing.* Orders relating to *the maintenance and guardianship of infants*, the exercise of a power of sale by way of family arrangement and the consent to the marriage of a ward of court are all conceived as forming part of the exercise of judicial power as understood in the tradition of English law. Recently courts have been called upon to administer enemy property. In England declarations of legitimacy may be made. *To wind up companies may involve many orders that have none of the elements upon which these definitions insist.* Yet all these things have long fallen to the courts of justice. To grant probate of a will or letters of administration is a judicial function and could not be excluded from the judicial power of a country governed by English law. Again the enforcement of a judgment or judicial decree by the court itself cannot be a necessary attribute of a court exercising judicial power.").

56 See eg *White v Director of Military Prosecutions* (2007) 231 CLR 570, 583 [9] per Gleeson CJ ('That history forms part of the context relevant to the construction of the Constitution and, in particular, to an understanding of the relationship between s 51(vi) and Ch III'), 595-598 ([50]-[58]) per Gummow, Hayne and Crennan JJ.

57 Section 67ZC (Orders relating to welfare of children), s 68B (Injunctions) *Family Law Act* 1975 (Cth), See the 'supervisory' jurisdiction over the welfare of a child of a marriage: *Secretary, Department of Health and Community Services v JWB and SMB (Re Marion)* (1992) 175 CLR 218, 41-42 per Mason CJ, Dawson, Toohey, Gaudron JJ.

58 Section 81 of the *Bankruptcy Act 1966* (Cth).

59 Division 1 of Pt 5.9 of the *Corporations Act 2001* (Cth).

60 Judicial advice: *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocesan of Australia and New Zealand* (2008) 237 CLR 66, 93-94 [71]-[74] per Gummow A-CJ, Kirby, Hayne and Heydon JJ.

61 Judicial advice in analogous contexts (such as to liquidators): *Reid Murray Holdings Ltd (In Liq)* [1969] VR 315, 317 per Adam J. See also *Re G B Nathan & Co Pty Ltd (In Liq)* (1991) 24 NSWLR 674, 677-679 per McLelland J for a history of s 479(3) of the *Corporations Act 2001* (Cth), which provides that a liquidator may apply to the Court for directions in relation to any particular matter arising under the winding up.

62 The bill of discovery (before action); and modern preliminary discovery: *Hooper v Kirella Pty Ltd* (1999) 96 FCR 1, 9-10 [24]-[29] per the Court (Preliminary discovery in equity); *Corrs Pavey Whiting & Byrne v Collector of Customs* (1987) 14 FCR 434, 445-446 per Gummow J; *Commonwealth v Miller* (1910) 10 CLR 742, 754-755 per Isaacs J. *Dalton v New South Wales Crime Commission* (2006) 227 CLR 490, per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ.

s 73 of the Constitution in respect of such functions.[63]

58. For at least these reasons, leave to reopen *Davison* and subsequent cases that have relied upon it, should be refused.[64] And even if leave is granted, this Court should not depart from *Davison*, for the following reasons.

59. ***Davison* is consistent with general principle.** The proposition for which *Davison* stands cannot be said to be wrong in any significant respect. Rather, it is an application of the principle unanimously accepted by this Court in *Cheatle v R* (1993) 177 CLR 541, 552 that the Constitution is 'to be read in the light of the common law's history.'[65] The 'common law' in light of which the Constitution is to be read encompasses the doctrines of equity, as Sir Owen Dixon pointed out, writing extra-judicially, in 1957: 'constitutional questions should be considered and resolved in the context of the whole law, of which the common law, including in that expression the doctrines of equity, forms not the least essential part.'[66] Similarly, the proposition in *Davison* may also be perceived as an application of the principle stated in *Cole v Whitfield* (1988) 165 CLR 360: matters of history known to the framers may be used 'for the purpose of identifying the contemporary meaning of language used [and] the subject to which that language was directed'. It is also consistent with this Court's approach to other Chapter III concepts, such as the meaning of the 'Supreme Court of a State';[67] of 'court';[68] and of 'trial by jury.'[69]

60. **Kitto J's analysis applied in *Saraceni*.** The question of the constitutional validity of s 596A was most recently (and comprehensively) addressed in the WA Court of Appeal in *Saraceni*. Apart from the fact that *Sarceni* concerned a receiver, and not directors appointing an administrator upon risk of insolvency, the case is indistinguishable from the Plaintiff's.

61. The Plaintiff does not grapple with *Saraceni*. Rather, the Plaintiff seeks to disarm it by distinguishing it on the grounds that *Saraceni* concerned an

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63 See again Dixon CJ's list in *R v Davison* (1954) 90 CLR 353, 368 at fn 55 (above). For specific examples, cf eg *Morice v Bishop of Durham* (1805) 10 Ves 522, 539 (32 ER 974, 954) per Lord Eldon (In the context of charitable trusts) ('As it is a maxim, that the execution of a trust shall be under the control of the court, it must be of such a nature, that it can be under that control; so that an administration of it can be reviewed by the Court; or, if the trustee dies, the Court itself can execute the trust;..."). See also, eg the beneficiary's right to inspect trust accounts and trust document: *Re Cowin* (1886) 33 ChD 179, 186; *Re Londonderry's Settlement* [1965] Ch 918, 937.

64 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438-439 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ.

65 See also *Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 152 per Knox CJ, Isaacs, Rich and Starke JJ.

66 Dixon, Owen, 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240, 245.

67 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 580-581 ([97]-[98]) per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

68 *South Australia v Totani* (2010) 242 CLR 1, 41-42 ([59]-[60]), 43 ([63]), 49 ([72]) per French CJ; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 68 ([42]) per Gleeson CJ, 82-85 ([82]-[85], [89]) per Gummow, Hayne and Crennan J; 123-124 [195] per Kirby J, 136 ([238]) per Callinan J, 141-143 ([256]) per Heydon J; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 47-48 ([5]-[6]), 72 [68] per French CJ.

69 *R v Snow* (1915) 20 CLR 315, 323 per Griffith CJ; *Cheatle v The Queen* (1993) 177 CLR 541, 549 per the Full Court.

examination sought by a receiver and manager; whereas this case concerns a 'voluntary administration'. However, that forensic technique can only be meaningful if the Plaintiff's *only* case is that a director of a company in voluntary administration is in a (constitutionally significant) different position to every other insolvency.

62. In *Saraceni*, Martin CJ concluded that the examination power in s 596A was within the concept of judicial power (whether core or incidental), and it was unnecessary to address historical analogy to determine the issue.[70] McLure P (with whom Newnes J agreed, [255]) considered it was within core judicial power, relying on the historical precedents to inform the conclusion.[71] In both cases, the orders upheld the validity of the examination summons against the contention it was invalid because it did not engage judicial power.[72]

63. ***Saraceni* special leave.** The plaintiffs in *Saraceni* sought special leave to appeal: *Saraceni v Jones* (2012) 246 CLR 251. Special leave was refused, with Gummow, Hayne and Bell JJ sufficiently firm as to also give particular reasons:

> The making on application of a receiver of a mandatory examination order is an action 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.

64. Although reasons on special leave do not create a precedent and 'bind no one',[73] it does not follow that they are disregarded for all purposes.[74] With respect, the observations reflect the certainty that, having regard to the historical functions of courts, and in matters of insolvency, examinations are within judicial power.

65. **The plaintiff's argument assumes that there is only one conception of the separation of powers.** Further again, the Plaintiff's challenge to *Davison* is that historical conceptions of the functions of courts, and particularly UK and colonial conceptions, cannot be fully assimilated to the Australian Constitution because of the constitutional guarantee of the separation of powers. The false premise in this argument is that there is one exclusive, ahistorical test for

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70 *Saraceni v Jones* (2012) 42 WAR 518, 522-523 ([4]) per Martin CJ.

71 *Saraceni v Jones* (2012) 42 WAR 518, 541-546 ([114]-[141]) (Historical development); 563 ([235]), 594 ([241]) per McLure P (See also at 566 ([253]) in relation to incidental judicial power).

72 In respect of Martin CJ's reasons, See: 523-527 ([5]-[23]) (Characterising the judicial power); 527-523 ([24]-[57]) (Corporations Act); 532-534 ([58]-[65]) (Purpose and scope of examination power); at 534 ([66]) (Role of the Court pursuant to s 596A). In respect of the reasons of McLure P, see 541-546 ([114]-[141]) (Historical analogues); 553-560 [184]-[214] (Judicial power of the Commonwealth); 566 ([254]) (Conclusion). Newnes J agreed with McLure P at 566 ([255]).

73 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 per French CJ, Nettle and Gordon JJ, 117 ([52]); per Kiefel and Keane JJ 133 ([112]); per Bell and Gageler JJ, 134 [119]. However note the corollary, the Court is there acting judicially, but *before* any proceedings inter parties are before the Court: *Collins (alias Hass) v The Queen* (1975) 133 CLR 120, 122 per Barwick CJ, Stephen, Mason and Jacobs JJ.

74 Cf *Mihaljevic v Longyear (Australia) Pty Ltd* (1985) 3 NSWLR 1, Editor's Note on Special Leave, 25 per Gibbs J, ('... but we have said often enough that the refusal of special leave to appeal is not to be taken as an affirmation of the correctness of what was said in the court below, unless, of course, the Court goes out of its way to say this it does agree with what was said in the court below.')

determining the content of judicial (and separated) power. In truth, as this Court has repeatedly affirmed, there is no one such test,[75] and matters of history are one (sometimes determinative) factor among others. Further, the constitutional separation of powers is an implication deriving from the text and structure of the Constitution, as is apparent from this Court's reasoning in the *Boilermakers' Case*. It is wholly consistent with the reasoning in the *Boilermakers' Case* to accept that the text of the Constitution, including relevantly the content of Commonwealth 'judicial power', is to be read in light of historical practices. Indeed, not only was the majority in the *Boilermakers' Case* the same majority who adopted the historical principle in *Davison*, but the majority in the *Boilermakers' Case* cited *Davison* with approval: at 278.

66. **Investigative functions**. Further again, there is nothing in the complaint that the examination process is or can be characterised as 'investigatory'. The equivalent complaint was addressed and dismissed in *Dalton v NSW Crime Commission* (2006) 227 CLR 490, 507-508 ([45]) by Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ:

> The proposition denying the investigative function of courts should not be accepted. From a time well before federation, the courts of the Australian colonies, like those in England and elsewhere in the Empire, exercised a range of administrative and investigative functions.[76] Provisions for the examination of judgment debtors, bankrupts and officers of failed corporations are in point. In *Cheney v Spooner* [(1929) 41 CLR 532] this Court upheld the application of the 1901 Act to an order by the Supreme Court of New South Wales under ss 123 and 124 of the *Companies Act 1899* (NSW) which gave leave to the liquidator of a company *in voluntary liquidation* to summon a number of persons to attend for examination by the master in Equity. ...[77] (*emphasis* added)

67. **The argument against 'history' because there can be new matters**. It should not be thought that an exclusive application of the *Davison* approach would confine courts to those powers exercised in 1901. As with constitutional concepts such as representative government,[78] the constitutional concept of 'judicial power' has an evolutionary aspect. The creation and imposition by Parliament of classes of rights and liabilities unknown at Federation does not reduce the significance of history;[79] it instead points to the ability of Ch III to accommodate what French CJ has described as 'durable legislative development.'[80]

Proposition 5: The examination power is not incompatible with federal judicial power (in the Submissions, the Plaintiff's 'Fifth Argument.').[81]

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75 See, eg, *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188-189 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ; *Wainohu v State of New South Wales* (2011) 243 CLR 181, 201-202 (French CJ and Kiefel J) (and cases cited therein).

76 Citing (generally) Dixon CJ and McTiernan J in *R v Davison* (1954) 90 CLR 353, 368.

77 Further examples being given at ([45]), 508.

78 See eg *Bennett v The Commonwealth* (2007) 231 CLR 91, 107 [32] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

79 Cf Plaintiff's Submissions, [32], citing without context partial reasons of Gummow, Hayne and Crennan JJ in *White v Director of Military Prosecutions* (2007) 231 CLR 570, 595 [48]. The point their Honours were advancing in *White* was that the historical test is not an *exclusive* test for the content of judicial power, as is made clear by the following paragraph, 595 [49].

80 *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 18 [19] per French CJ.

81 See Plaintiff's Submissions [3(e)], [62]-[74].

68. The Plaintiff (with the support of Mr Ferguson in the second matter) advances five reasons why the summons power is incompatible with the institutional integrity of the courts in which it is vested. Those reasons, individually and cumulatively, do not support the conclusion advanced by the Plaintiff.

69. **The Constitution permits the conferral of a power coupled with a duty on a Chapter III court**. The Plaintiff contends that the power is repugnant because it imposes a duty on the issuing court.[82] There are a number of answers to this.

10 70. *First*, this Court has held that Parliament may, if it wishes, confer on a court a power coupled with a duty.[83] In *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 373 ([12]) Hayne, Crennan and Kiefel JJ described the conferral of powers coupled with duties on court as 'commonplace in the judicial system'.

71. *Secondly*, this principle holds even if the class of persons who may apply for the order include members of the executive government: see, eg *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393;[84] *South Australia v Totani*
20 (2010) 242 CLR 1.[85]

72. *Thirdly*, consistently with these principles, this Court has had no difficulty in construing statutes expressed in permissive terms to impose a duty upon satisfaction of prescribed conditions.[86]

73. *Fourthly*, the power given by s 596A is not a power which is to be exercised by filing an application without more.

30 74. Further, as set out at [25] above, s 596A is to be read *subject to* the Courts' inherent (or implied) power to prevent an abuse of its own process.

75. *Fifthly*, a summons issued under s 596A is readily subject to review. That has been addressed at [26] above.

76. The ready, and prompt, amenability of a summons to review means that s 596A is far removed from the issues considered in *International Finance Trust Co*

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82 Plaintiff's Submissions [65].

83 See *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 434 ([68]) per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ; *South Australia v Totani* (2010) 242 CLR 1, 48-49 ([71]) per French CJ, 63 ([133]) per Gummow J, 129 ([339]) per Heydon J; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 352 ([49]) per French CJ, 360 ([77]) per Gummow and Bell JJ), 372-373 ([120]-[121]) per Hayne, Crennan and Kiefel JJ, 386 ([157]) per Heydon J.

84 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 435 ([72]-[73]) per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

85 *South Australia v Totani* (2010) 242 CLR 1, 48-49 ([71]) per French CJ (and cases there cited).

50 86 *Hogan v Hinch* (2011) 243 CLR 506, 548 ([67]-[68]) per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291, 301-303 ([26]-[30]) per Gummow and Hayne JJ; *Leach v The Queen* (2007) 230 CLR 1, 16-18 ([36]-[38]) per Gummow, Hayne, Heydon and Crennan JJ; *Mitchell v The Queen* (1996) 184 CLR 333, 338, 345-6 per Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

Ltd.[87]

77. *Sixthly*, in all of this, the Court is to act judicially.

78. **The Constitution permits Chapter III courts to supervise processes of inquiry**. The Plaintiff asserts that s 596A confers an incompatible function because it enlists the court in a process of investigation for a purpose other than making a conclusive determination of rights and liabilities. There are a number of responses to this.

10 79. *First*, there is no constitutional objection to a Court exercising a power of inquiry as such; what is critical is the purpose and the manner in which the power is to be exercised.[88]

80. *Secondly*, as submitted at [19] above, the purpose of the s 596A power, and the examination summons process, is to facilitate the exercise of judicial power involved in the supervision of the external administration (or at least, a liquidation) of an insolvent company.

20 81. *Thirdly*, there can be no 'in-principle' objection to a court lending coercive powers to a person to facilitate the bringing of actions by that person. Were it otherwise, Chapter III courts would not be able to order preliminary discovery and grant other pre-commencement forms of relief.[89]

82. *Fourthly*, the Court retains a collection of powers to supervise an examination at all times. That power is to be exercised judicially, and in accordance with the Constitution.

30 83. *Fifthly*, the longstanding role of judges in supervising examinations is relevant to the question of alleged incompatibility as much as to the question of characterisation: see *Wainohu v State of New South Wales* (2011) 243 CLR 181, 212 ([52]) per French CJ and Kiefel J.

84. **The Plaintiff's adjectival claim that the power is 'extraordinary' is of no constitutional significance**. The Plaintiff describes the power as 'extraordinary' (amongst other epithets); and implies that description is constitutionally significant. That is unsound.

40 85. *First*, the observation that a law is extraordinary is of no inherent constitutional significance. In the context of the (arguably far more extraordinary) laws at issue in *Kuczborski v The State of Queensland* (2014) 254 CLR 51, this Court observed that 'to demonstrate that a law may lead to harsh outcomes, even disproportionately harsh outcomes, is not, of itself, to demonstrate

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87 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 363-364 ([88]-[90]), 366 ([95]-[97]) per Gummow and Bell JJ, 386 ([159]-[161]) per Heydon J.

50 88 See above, at [66] See also *Re Ranger Uranium Mines Proprietary Limited; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656, 666 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ. In those cases, the purpose for which the power is to be exercised is centrally relevant: *Re Ranger,* 666.

89 cf *Hooper v Kirella Pty Ltd* (1999) 96 FCR 1. See also fn 60.

constitutional invalidity.'[90] Further, this Court has emphasised, particularly in the context of allegations of Chapter III incompatibility, that novelty is not a badge of constitutional excess.[91]

86. *Secondly*, in any event, for the reasons advanced at Proposition 3 above (and by reference to the legislation), the summons power is a power which has long been reposed in courts. Its pedigree, coupled with the repeated reaffirmation by Parliaments of its beneficial nature by enactment and re-enactment, cuts strongly against the Plaintiff's contentions.

10 87. **The matters advanced, cumulatively, do not render the power incompatible**. Nor do the 3 (or more) matters relied on by the Plaintiff cumulatively lead to a conclusion that the summons power is incompatible with the institutional integrity of the courts in which it is reposed. The Plaintiff's argument in this regard depends on separating the specific power under s 596A from the broader scheme of Pt 5.9.[92] That broader scheme involves the exercise of powers by the Court for the purpose of, and incidental to, the Court's judicial supervision of the external administration of a company.

20 88. In advancing the contrary argument, the Plaintiff puts a general contention that the *public interest* in investigating the affairs of a company in liquidation 'should be' advanced by executive inquiries: Plaintiff's Submission, [73]. The contention appears to be that the Plaintiff disagrees with the policy choice Parliament has made to repose the power in courts. The Constitution allocates those policy choices to Parliament.[93]

89. The Plaintiff also makes a general contention that the function is not one which is peculiarly appropriate for judicial performance: Plaintiff's Submissions, [73].
30 This contention appears to assume that the Chapter III judiciary may only exercise powers which are peculiarly apt for exercise by courts. That contention cannot stand with the chameleon doctrine, which recognises that there are many powers which may be conferred either on the judiciary or on the executive, and it is for Parliament to make that choice in its discretion: see, eg, *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323.[94]

90. **Section 596A offends Ch III because the Court can ask questions.** Finally, Mr Ferguson's submissions on this point are set out at [34]-[40] of the Ferguson
40 Submissions. This argument proceeds on the assumption that the submissions of the Plaintiff are correct: Ferguson Submissions, [34]. Justices may rule on matters otherwise decided for the purposes of, and at, an *ex parte* or

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90 At 116 ([217]). See also 113-114 ([208]-[209]), 119 ([228]) per Crennan, Kiefel, Gageler and Keane JJ.

91 *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 94 ([138]) per Hayne, Crennan, Kiefel and Bell JJ; *Kuczborski,* 113 ([206]-[207]) per Crennan, Kiefel, Gageler and Keane JJ, 140 ([304]) per Bell J; *Momcilovic v The Queen* (2011) 245 CLR 1, 207 ([534]) per Crennan and Kiefel JJ.

50 92 Above, [7]-[28].

93 *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542, 551 ([5]) per Gleeson CJ.

94 At 360 per Gaudron J, Mason CJ agreeing at 333, Brennan J agreeing at 341, Deane J agreeing at 342, Toohey J agreeing at 355; *Baker v The Queen* (2004) 223 CLR 513, 529-530 ([33]) per McHugh, Gummow, Hayne and Heydon JJ.

interlocutory stage. The whole argument of Mr Ferguson is falsely premised on the contention that asking questions is an exclusively 'administrative or executive function.'[95] It is not, and never has been. A judge may ask questions; and take any answers into account. That a judge is able to do so is protective of the processes of the Court; and is an ordinary incident of the conduct of judicial proceedings.

Conclusion.

91. The question referred should be answered 'No'.

PART VI ESTIMATED HOURS

It is estimated that **1 hour** will be required for the presentation of the oral argument of the intervener.

Dated: 28 October 2016

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95 Ferguson Submissions, [36], [39].