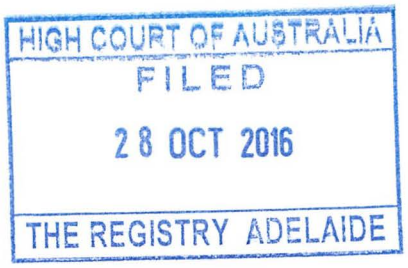
IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN:



No. B52 of 2016

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 Defendant

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

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
Defendant

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

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Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Basis for intervention

2. The Attorney-General for the State of South Australia (**South Australia**) intervenes pursuant to s78A of the *Judiciary Act 1903* (Cth) in support of the defendants.

Part III: Leave to intervene

3. Not applicable.

Part IV: Applicable legislative provisions

4. South Australia accepts the statements by the plaintiff and first defendant in *Palmer* of the applicable legislative provisions.

Part V: Submissions

5. South Australia submits that:

   i. considered in the context of Pt 5.9 Div 1 of the *Corporations Act 2001* (Cth) (**the Act**) and the Court's supervisory jurisdiction over companies in external administration, s596A confers a power and function which is not incompatible with the role of a federal court or, insofar as is necessary to decide, a state court exercising federal jurisdiction;

   ii. the Court's function under Pt 5.9 Div 1 of the Act is historically analogous to the functions performed by courts at the time of Federation in the supervision of companies in winding up, which is sufficient to support the validity of s596A; and

   iii. the test of historical analogy as a basis for identifying judicial power should be maintained.

Compatibility with federal judicial power

6. Whether the power to issue a summons under s596A is compatible with the role of a federal court does not depend on whether it is an exercise of federal judicial power. Compatibility arises on the premise that it is not. Assuming the function is properly characterised as incidental or ancillary to the judicial power of the Commonwealth,

> *Judges appointed to exercise the judicial power of the Commonwealth cannot be authorised to engage in the performance of non-judicial functions so as to prejudice the capacity either of the individual Judge or of the judiciary as an institution to discharge effectively the responsibilities of exercising judicial power of the Commonwealth.*[1]

7. Each summons in this case was issued by the Federal Court. However, the question reserved[2] appears to extend the challenge to the validity of the conferral of power on

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1 *Grollo v Palmer* [1995] HCA 26; (1995) 184 CLR 348 at 365 (Brennan CJ; Deane, Dawson and Toohey JJ).

2 Appearing in Order 4 of the orders of Kiefel ACJ made on 15 September 2016; Question Reserved Book at 23-24.

(other) courts exercising federal jurisdiction. Insofar as incompatibility is raised to this end, this invokes the *Kable* principle; South Australia addresses incompatibility under the *Kable* principle on this basis.

8. The *Kable* principle expresses an implication drawn from s77(iii) of the Constitution and the "*constitutionally mandated position*"[3] of state courts in the Australian legal system as receptacles of federal jurisdiction. Implicit in that mandated position is the notion that state courts will at all times remain fit repositories of federal judicial power. The result is that the legislatures (federal and state) are constitutionally prohibited from interfering with the functions or institution of a state court in a manner which would cause that court to cease to be a fit repository of federal judicial power.[4]

9. A court of a state will cease to be a fit repository of federal judicial power where the function or institutional modification is repugnant to or incompatible with the maintenance of the court's institutional integrity.[5]

10. The relevant question is directed to whether a law in some way distorts the processes or functions inherent to the exercise of judicial power by courts. As Gummow, Hayne and Crennan JJ said in *Forge v Australian Securities and Investments Commission*:[6]

> *... the relevant principle is one which hinges upon maintenance of the defining characteristics of a "court", or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court. It is to those characteristics that the reference to "institutional integrity" alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies.*

11. It is not possible to make an exhaustive statement of the defining characteristics of courts.[7] Neither are the defining characteristics of courts "*attributes plucked from a universe of ideal forms*".[8] Rather, they describe limits, rooted in the text and structure of Ch III of the Constitution, on the functions which legislatures may confer on state courts and the commands they may give to them.

12. Defining characteristics have been recognised as including:[9]

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3 *Fardon v Attorney-General (Qld)* [2006] HCA 46; (2004) 223 CLR 575 at 617 [101] (Gummow J).

4 *Attorney-General (NT) v Emmerson* [2014] HCA 13; (2014) 253 CLR 393 at 424 [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Kuczborski v Queensland* [2014] HCA 46; (2014) 254 CLR 51 at 98 [139] (Crennan, Kiefel, Gageler and Keane JJ).

5 *Fardon v Attorney-General (Qld)* [2004] HCA 46; (2004) 223 CLR 575 at 614 [86] (Gummow J), cited with approval in *Pollentine v Bleijie* [2014] HCA 30; (2014) 253 CLR 629 at 648-9 [42] (French CJ, Hayne, Crennan, Kiefel, Bell, Keane JJ).

6 [2006] HCA 44; (2006) 228 CLR 45 at 76 [63] (Gummow, Hayne and Crennan JJ).

7 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [64] (Gummow J, Hayne and Crennan JJ).

8 *Condon v Pompano Pty Ltd* [2013] HCA 7; (2013) 252 CLR 38 at 72 [68] (French CJ).

9 *Condon v Pompano Pty Ltd* [2013] HCA 7; (2013) 252 CLR 38 at 71-72 [67] (French CJ); *Wainohu v New South Wales* [2011] HCA 24; (2011) 243 CLR 181 at 208-9 [44]; 213-215 [54]-[56] (French CJ and Kiefel J); *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 at 343 [3] (Gleeson CJ; McHugh, Gummow and Hayne JJ).

i. the reality and appearance of decisional independence and impartiality;

ii. the application of procedural fairness;

iii. general adherence to the open court principle; and

iv. the provision of reasons for decisions.

13. The relevant substantive difference between ss596A and 596B of the Act lies in the discretion that inheres in the Court under s596B. Much of the challenge in the present case to the power in s596A is directed at the mandatory aspect of the power, especially in distinguishing that power from the historical analogue. Whatever approach is taken to the historical analogue, the elements of that analogue that support the discretionary power in s596B, and the supervisory powers that are then available on an exercise of that power, provide robust support for the validity of those powers.[10]

14. There is, in other words, a solid foundation from which to conclude that the discretionary power of the Court to issue a summons under s596B and the associated powers of supervision under Pt 5.9 Div 1 are properly characterised as federal judicial powers by reason of their historical regard as *"peculiarly appropriate for judicial performance"*.[11] However, even if *that* historical analogue were called into question, there remains a long history of supervision by courts of the winding up process.

15. Against that history, and whatever its direct applicability as an analogue capable of supporting a conclusion that each or either of s596A and s596B confer federal judicial power, to suggest that the exercise of those same supervisory powers following the exercise of the power in s596A falls foul of the incompatibility doctrine, is untenable.

Section 596A is not an impermissible direction

16. Section 596A confers power on the Court to compel the attendance of an officer or provisional liquidator of a corporation so that they may be examined by an eligible applicant.[12] Section 596A requires that the Court issue a summons "*for examination about a corporation's examinable affairs*" as defined in s9 if:

i. an "*eligible applicant*" applies for the summons. Such an applicant is ASIC, a liquidator or provisional liquidator of a company, an administrator of the company, an administrator of a deed of company arrangement executed by the corporation, or a person authorised by ASIC;[13]

and when satisfied:

ii. that the person being summonsed is or was an officer[14] or provisional liquidator[15] of the company, or was such an officer or provisional liquidator during the two year period ending on any of the dates referred to in 596A(b)(i)-(iv).

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10 See para [20]ff below.
11 *R v Davison* [1954] HCA 46; (1954) 90 CLR 252 at 382 (Kitto J).
12 *Corporations Act 2001* (Cth) s597(5A).
13 *Corporations Act 2001* (Cth) s9.
14 *Corporations Act 2001* (Cth) s9.
15 Being a liquidator appointed pursuant to the *Corporations Act 2001* (Cth) s472(2).

17. Pt 5.9 Div 1, in the context of Ch 5, confers on the Court a familiar judicial function and process. That process commences with an order under s596A if the Court is satisfied of the relevant preconditions. Requiring the Court to order the attendance of an examinee when those preconditions are satisfied does not impermissibly constrain or direct the Court.

18. A law requiring a court to exercise a power when preconditions are met does not, of itself, direct the court's exercise of that power impermissibly.[16] In *Attorney-General (NT) v Emmerson*[17] the impugned provisions required the court to order declaratory relief on application by the Director of Public Prosecutions when a number of
10 cumulative legislative criteria were satisfied. Those criteria were determined in the course of an ordinary judicial process and therefore validly conferred on the Court.[18]

19. A significant factor in invalidating the legislation considered in each of *International Finance Trust Company v NSW Crime Commission*[19] and *South Australia v Totani*[20] was the conscription of the Court and compromise of its independence. When a liquidator makes an application under s596A, the mandatory exercise of the power depends on satisfaction of preconditions. Any remaining question of conscription can only be considered in the context in which that power is exercised. Here, that context cannot be restricted to the bare fact of issuing the summons: it demands consideration of the Court's associated supervisory role.

20 <u>Pt 5.9 Div 1: The supervisory role of the examination process</u>

20. Once a summons is issued under either s596A or s596B, aspects of Pt 5.9 Div 1 dictate that the Court retains substantive control and oversight of the examination process:[21]

    i. section 596F provides that the Court may give directions as to the matters to be inquired into at the examination,[22] the examination procedure,[23] who can be present at a private examination or excluded from a public examination,[24] access to records,[25] the publication and communication of information concerning the examination,[26] and document destruction;[27]

    ii. section 597 confers power on the Court to determine the conduct of an

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16 See e.g. *Fardon v Attorney-General (Qld)* [2004] HCA 46; (2004) 223 CLR 575 at 597 [34] (McHugh J).
17 [2014] HCA 13; (2014) 253 CLR 393.
18 *Attorney-General (NT) v Emmerson* [2014] HCA 13; (2014) 253 CLR 393 at 431 [58] (French CJ; Hayne, Crennan, Kiefel, Bell and Keane JJ); *Leeth v The Commonwealth* [1992] HCA 29; (1992) 174 CLR 455 at 469-470 (Mason CJ; Dawson and McHugh JJ); *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 at 360 at [77] (Gummow and Bell JJ).
19 [2009] HCA 49; (2009) 240 CLR 319 at 354 [55] (French CJ); 363 [87] (Gummow and Bell JJ).
20 [2010] HCA 39; (2010) 242 CLR 1 at 20 [1], 43 [62] (French CJ); at 97 [249] (Heydon J).
21 *Saraceni v Jones* [2012] WASCA 59; (2012) 42 WAR 518 at 540 [107] (McLure P).
22 *Corporations Act 2001* (Cth) s596F(1)(a).
23 *Corporations Act 2001* (Cth) s596F(1)(b).
24 *Corporations Act 2001* (Cth) s596F(1)(c)-(d).
25 *Corporations Act 2001* (Cth) s596F(1)(e).
26 *Corporations Act 2001* (Cth) s596F(1)(f).
27 *Corporations Act 2001* (Cth) s596F(1)(g).

examination;

iii. the Court ensures the proper application of s597(12A) so that a witness concerned that an answer to a question may incriminate them or make them liable to penalty has the opportunity to claim the relevant privilege so as to avail themselves of the protections contained in ss597(12A)(c)-(d); and

iv. section 597B provides that where the Court is satisfied that a person was summonsed under s597A without "*reasonable cause*" it may require the applicant, or any other person who took part in the examination, to pay the respondent's costs.

21. The Court exercises its supervisory role in the context of disparate purposes and interests which emerge in an examination process. Such interests arise due to the multiple legitimate purposes of Pt 5.9 Div 1 examinations which include:[28]

i. enabling the applicant to gather information to assist in the administration of the corporation;

ii. enabling an external administrator of a corporation to identify both the corporation's tangible and intangible assets and liabilities;

iii. the protection of creditors' interests through investigations into the corporation's assets so that those assets may ultimately be realised for the benefit of creditors;

iv. the gathering of evidence and information to determine whether to bring, and to formulate, proceedings against examinable officers or other persons as a result of information obtained through the examination; and

v. assisting in the regulation of companies by providing a public forum for the examination of companies in external administration.

22. Under Pt 5.6 Div 1, the Court facilitates and supervises the investigations conducted by an eligible applicant.[29] The Court does not conduct those investigations.[30] Its role is as prescribed by ss596F and 597, being, primarily, making directions as to the conduct of the examination and determining what questions can be put to a witness. In so doing the Court ensures that the examination is not an instrument of oppression.

23. The examination process is party-driven. The Court determines the matters set out in ss596D, 596F and 597. That process assumes what Barwick CJ described in *Rees v Kratzmann* as "*the traditional judicial function of ensuring that the examination is not made an instrument of oppression, injustice or needless injury to the individual*".[31] To the extent that this involves the Court in an investigatory function, such function can be

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[28] *Evans v Wainter Pty Ltd* [2005] FCAFC 114; (2005) 145 FCR 176 at 216 -217 [252] (Lander J; Ryan and Crennan JJ agreeing).

[29] See *Corporations Act 2001* (Cth) s597(5A).

[30] Plaintiff's Written Submissions in *Palmer* at [67]; see *Saraceni v Jones* [2012] WASCA 59; (2012) 42 WAR 518 at 540 [109] (McLure P).

[31] [1965] HCA 49; (1965) 114 CLR 63 at 66 (Barwick CJ).

conferred validly.[32]

24. Thus a summons may be set aside or stayed as an abuse of process where issued in order to examine the addressee to obtain evidence for use in civil proceedings where such proceedings are not for the benefit of creditors, contributories or the company more generally.[33]

25. The private interests of creditors of the company in external administration take on particular significance and the examination process may reveal information to enable assets to be realised and distributed to creditors as the liquidator discharges its public functions under Ch 5.[34] Pt 5.9 Div 1 achieves a broader public interest by exposing examinable officers to public scrutiny[35] and may also facilitate civil or criminal proceedings as to officers' conduct.[36] The tension which may arise between the competing interests was identified by Kitto J in *Mortimer v Brown*:[37]

> *... cases are bound to arise in which immense harm may be done, on the one hand to the person being examined, on the other hand to other individuals or to the community, by the allowing or disallowing of questions.*

26. The Court's supervisory powers have an adjudicative function. Section 596F enables the Court to control proceedings,[38] determine who should be present at an examination, and control access to the records, information and documents relating to an examination.[39] Where a party does, for example, wish to restrict access to an examination, the Court is called to adjudicate between the competing interests of the examinee(s), the applicant and the public interest in community scrutiny of examinations.[40] This function of overseeing an open and public inquiry which observes

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[32] *Dalton v NSW Crime Commission* [2006] HCA 17; (2006) 227 CLR 490 at 507 [45] (Gleeson CJ; Gummow, Hayne, Callinan, Heydon and Crennan JJ).

[33] *Re Excel Finance Corporation Limited (Receiver and Manager Appointed); Worthley v England* (1994) 52 FCR 69 at 91E (the Court); see generally *Re Hugh J Roberts Pty Ltd (in liq)* [1970] 2 NSWR 582 at 585 (Street J); *Carter v Gartner* [2003] FCA 653; (2003) 130 FCR 99 at [27] (Branson J); *Evans v Wainter Pty Ltd* [2005] FCAFC 114; (2005) 145 FCR 176 at 200 [144]; [192]-[194]; [252] (6)-(8), (10) (Lander J); *Hill v Smithfield Service Centre* [2002] NSWSC 999; (2002) 171 FLR 154 at 163 [44]-[45]; 163-4 [48]-[51] (Austin J); *Hamilton v Oades* [1989] HCA 21; (1989) 166 CLR 486 at 498 (Mason CJ); *Kimberly Diamonds Ltd, in the matter of Kimberly Diamond Company Pty Ltd (in liq)* [2016] FCA 1016 at [39]-[41], [62] (Gleeson J).

[34] See e.g. *Grosvenor Hill (Qld) Pty Ltd v Barber* (1994) 48 FCR 301 at 306 (The Court); *Re Spedley Securities Ltd; Ex parte Potts* (1990) 8 ACLC 673 at 675 (Young J).

[35] See *Southern Cross Petroleum Sales (SA) Pty Ltd (In liq) v Hirsch* (1998) 70 SASR 527 at 534 (Lander J); *Rees v Kratzmann* [1965] HCA 49; (1965) 114 CLR 63 at 80 (Windeyer J).

[36] See *Hamilton v Oades* [1989] HCA 21; (1989) 166 CLR 486 at 496 (Mason CJ).

[37] [1970] HCA 4; (1970) 122 CLR 493 at 496, see also at 499 (Walsh J) where his Honour in considering *Kratzmann* referred to the potential effects on an individual of an examination and said that the relevant provision contained "a safeguard against these evils, because it entrusted the control of the proceedings to a judge".

[38] *Corporations Act 2001* (Cth) s596F(1)(a)-(b).

[39] *Corporations Act 2001* (Cth) s596F(1)(c)-(g); see e.g. *Re Pan Pharmaceuticals Ltd* [2003] NSWSC 1204; (2003) 176 FLR 341 (Barrett J); *Jagelman v Sheahan (as liquidator of Moage Ltd)* [2002] NSWSC 419; (2002) 41 ACSR 487 at [7]-[14] (Barrett J); and *Simionato v Macks* (1996) 19 ACSR 34 (Lander J).

[40] See e.g. *Harris Scarfe Holdings Ltd ACN 009 476 073 (Receivers and Managers Appointed) (Administrators Appointed)* [2001] SASC 283 at [19] (Lander J).

the rules of natural justice is entirely familiar to the usual tenets of federal judicial power.[41]

Chapter 5: Supervision of companies in external administration

27. The role performed by the Court under Pt 5.9 Div 1 serves the same fundamental supervisory purpose as those performed by the Court more generally under Ch 5. The Court's powers under s536 have been described as *"a broadly expressed supervisory jurisdiction over the conduct of persons in control of the affairs of a corporation, in circumstances where normal market forces and the exercise by shareholders of their rights to control are attenuated or non-existent"*.[42] Such comments apply equally to both Pt 5.9 Div 1 and Ch 5 more generally.

28. Justice Lockhart in *BP Australia Ltd v Amann Aviation Pty Ltd*[43] recognised the supervisory role of the Court over a company in external administration and that the examination process was part of that supervision. His Honour's description of that supervisory role, as adopted by Brennan CJ and Toohey J in *Gould v Brown*,[44] is instructive:[45]

> *The examination orders, summonses and proposed examination which are the subject of this challenge are in truth but part of the processes that follow from the making of the winding-up order, and which ultimately protect and adjust the rights to companies, their creditors and in some cases contributories. The Court's supervisory role in the course of a winding-up is to ensure that the winding-up laws are properly interpreted and applied to correct mistakes, and to supervise the exercise of compulsory processes in relation to the examination of persons and the obtaining of documents for the purposes of the conduct of those examinations ...*

29. The Court's supervision of the defendants in the winding up process is multifarious:

    i. both sets of defendants are "*officers*" within the meaning of s9 and act in the public interest;[46]

    ii. the Court can hear appeals from any decision made by a liquidator during the course of the winding up;[47]

    iii. the Court can inquire into a liquidator's conduct more generally under s536;

    iv. in the case of a voluntary liquidation the Court can, on application by a liquidator, contributory or creditor, determine any question arising in the winding up or exercise all or any of the powers that the Court might exercise if the company

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41 See e.g. *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* [2013] HCA 5; (2013) 251 CLR 533 at 553 [27] (French CJ and Gageler J).
42 *Hall v Poolman* [2009] NSWCA 64; (2009) 75 NSWLR 99 at 119 [53] (The Court).
43 (1996) 62 FCR 451.
44 [1998] HCA 346; (1998) 193 CLR 346 at 387-388 [33].
45 *BP Australia Ltd v Amann Aviation Pty Ltd* (1996) 62 FCR 451 at 475 (Lockhart J).
46 See *Hall v Poolman* [2009] NSWCA 64; (2009) 75 NSWLR 99 at 122 [64] (The Court).
47 *Corporations Act 2001* (Cth) s1321.

were being wound up by the Court.[48] That power is analogous to the power contained in s479(3) for court-ordered liquidations.

30. That is to say, Parliament has determined to entrust to the Court the supervision of the winding up and administration of companies. These functions have been characterised as judicial powers in circumstances of a court-ordered winding up.[49] The plaintiffs do not contend otherwise.

31. Whether the issuing of a summons pursuant to s596A is capable of being an exercise of federal judicial power absent a historical analogue or not, the Court's supervisory role broadly under Ch 5 and specifically under Pt 5.9 Div 1 is not materially altered by the fact that a winding up is commenced voluntarily. Whilst a voluntary winding up does not commence by order of the Court and may proceed without the Court being required to exercise any of its powers in Ch 5, a Court-ordered winding up (after the initial winding up order is made) may similarly proceed with no court involvement. Once such an order is made, the company is subject to the same judicial supervision as a company that entered liquidation voluntarily.[50] That being so, to contend that the same functions exercised in relation to a voluntary winding up would be *incompatible* with the role of a federal court or a court exercising federal jurisdiction, is untenable.

The Court as adjudicator in subsequent proceedings

32. The fact that the Court undertakes the supervisory role on the issuing of a summons does not give rise to any perception of lack of independence or impartiality in subsequent proceedings in which the Court is called on to adjudicate. As identified above, the Court does not conduct the examinations; contrary to the submissions of the plaintiff in *Ferguson*, it is not later called to adjudicate upon its own executive act. Examinations are party-driven; the role of the Court is supervisory and adjudicative of the competing interests. Any particular concern in subsequent proceedings as to the conduct of the Court in this role is addressed as a question of reasonable apprehension of bias on the part of the judicial officer from their supervision of an examination in the particular case.

Judicial power by analogy

33. In any event, s596A is sufficiently analogous to the examination powers historically exercised by courts at Federation. Justice Kitto's formulation of the test in *R v Davison* requires a comparison of "*similar or comparable powers*" that existed at Federation with the impugned legislation. Where such powers were *"consistently regarded as peculiarly appropriate"* for the exercise of judicial power they can be validly conferred on a federal court (or courts exercising federal judicial jurisdiction).[51] To focus on specific differences in the statutory provisions ignores the underlying symmetry

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48 *Corporations Act 2001* (Cth) s511.

49 As to the exercise of judicial power involved in making an order for winding up see *Gould v Brown* [1998] HCA 6; (1998) 193 CLR 346 at 386-387 [31] (Brennan CJ and Toohey J); 404-405 [68] (Gaudron J).

50 *Saraceni v Jones* [2012] WASCA 59; (2012) 42 WAR 518 at 531 [55] (Martin CJ).

51 *R v Davison* [1954] HCA 46; (1954) 90 CLR 353 at 382 (Kitto J).

between the historical powers and functions and Pt 5.9 Div 1.

34. The legislatures of both the United Kingdom and Australia have conferred on courts examination powers in the course of both voluntary and compulsory winding ups.[52] Such powers have been previously recognised by this Court[53] as similar to those examination processes relating to bankrupts which have existed for centuries.[54] The *Companies Act 1862* (UK) (25 & 26 Vict c 89) (**the 1862 Act**) was mirrored by substantially similar Acts in the Australian colonies. The 1862 Act contained an examination process similar to the examination process contained in the current *Corporations Act*.

Similarity of subject matter

35. First, under s117 of the 1862 Act a person could be examined concerning the "*Affairs, Dealings, Estate, or Effects of the company*".[55] The content of "*Affairs*" and "*Dealings*" in s117 closely mirrors that of "*examinable affairs*"; they similarly look to the lifecycle of the company. Whilst sub-section (c) of the s9 definition of "examinable affairs" expands the concept to include those of a "*connected entity*"[56] – reflecting the modern corporate group – that does not materially change the nature of the Court's power. The examination remains limited to those matters relevant to the corporation in external administration.

36. Second, both ss117 and 138 of the 1862 Act, and s596A of the current Act, define the circumstances in which a summons can be issued by setting out who may apply for a summons and who may be examined. A proper comparison between the sections reveals there is no material difference;[57] the exercise of power is fundamentally the same as both statutes:

    i. limit who may be summonsed to individuals who can properly give evidence as to the corporation's affairs; and

    ii. limit the entitlement to apply for a summons to those with a proper interest in the company's affairs. Whilst s138 of the 1862 Act is narrower in that it does not refer to administrators of a company, an administrator ultimately falls within the same genus as a liquidator.[58]

37. The third to fifth contentions advanced by the plaintiff in *Palmer* as to the application of

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52 For a survey of those historical provisions see *Saraceni v Jones* [2012] WASCA 59; (2012) 42 WAR 518 at 541-546 (McLure P).

53 *Gould v Brown* [1998] HCA 6; (1998) 193 CLR 346 at 387 [32] (Brennan CJ and Toohey J).

54 *Gould v Brown* [1998] HCA 6; (1998) 193 CLR 346 at 499-500 [327]-[328] (Kirby J).

55 Cf *Companies Act 1862 (UK)* (25 & 26 Vict c 89) s115 which empowered a court to summons the "Books, Papers, Deeds, Writings, or other Documents" concerning the "Trade, Dealings, Estate, or Effects of the Company", that being of narrower than "Affairs, Dealings, Estate or Effects" in s117: see *Massey v Allen* (1878) 9 Ch D 164 at 168 cited in *Grosvenor Hill (Qld) Pty Ltd v Barber* (1994) 48 FCR 301 at 308 (The Court); cf the plaintiff in *Palmer* at [44] of the Plaintiff's Written Submissions.

56 As to the definition of a "connected entity" see *Corporations Act 2001* (Cth) s9.

57 Cf Plaintiff's Written Submissions in *Palmer* at [47].

58 *Saraceni v Jones* [2012] WASCA 59; (2012) 42 WAR 518 at 531 [53]-[54] (Martin CJ).

the historical analogy[59] have at their core the suggestion that because the current corporations regime is more complicated than that which existed historically it is not possible to draw the analogy. That increase in regulatory reach should not of itself dictate validity. The concern expressed in *White v Director of Military Prosecutions*[60] (***White***) about the "*modern regulatory state*" does not mean that it is not possible to draw an appropriate analogy. The mere fact that there are now elements of the corporations regime which find no historical counterpart, for example the appointment of special purpose liquidators and regulatory regimes applying to liquidators,[61] does not alter materially the role or function of the Court.

Similarity of function

38. Chapter III looks to the function of the court rather than the law the court is applying.[62] That a summons under s596A is required to be issued once the preconditions in s596A are met does not alter the character of the underlying, historically recognised, judicial power.

39. Under the 1862 Act courts had a similar supervisory role to that provided for in Ch 5 of the Act. Section 138 empowered a court to determine any matter arising in a voluntary winding up and exercise any powers available to the court in a compulsory winding up. This included the power to require attendance for examination under s117. The section is in all material respects identical to the power conferred on a court in s511. As to the examination process itself, the Court's procedural oversight was similar to that now provided for in Pt 5.9 Div 1.[63] In supervising examinations under s117 of the 1862 Act, courts determined the limits of and questions put in an examination[64] and intervened to: restrain examinations advancing personal interests,[65] stop harassment and vexations conduct[66] and restrain proceedings where an abuse of process.[67]

Similarity of purpose

40. The factors identified above also illustrate a similarity of purpose. Both schemes compel those with knowledge of a corporation's affairs to appear and be examined as to those affairs, under the Court's supervision. In assigning this task to the judiciary, both the historical and modern legislatures have determined that the public interest in the proper administration of distressed companies warrants judicial oversight.

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59 Plaintiff's Written Submissions in *Palmer* at [44]-[46].
60 [2007] HCA 29: (2007) 231 CLR 570 at 595 [48] (Gummow, Hayne and Crennan JJ)
61 Plaintiff's Written Submissions in *Palmer* at [45]-[46].
62 *Boilermakers R v Kirby; Ex parte Boilermakers' Society of Australia* [1956] HCA 10; (1956) 94 CLR 254 at 278 (Dixon CJ; McTiernan, Fullagar and Kitto JJ); *Leeth v Commonwealth* [1992] HCA 29; (1992) 174 CLR 455 at 469-470 (Mason CJ; Dawson and McHugh JJ).
63 As to the process of issuing summons under the 1862 Act see *Re London and Lancashire Paper Mills Co* (1888) 57 LJ (CH) 776 at 768 (North J); as to the ex parte nature of issuing a summons see *Imperial Continental Water Corporation* (1886) 33 Ch D 314 at 317 (Chitty J).
64 *Re Northern Australia Territory Co* (1890) 45 Ch D 87 at 91 (Cotton LJ), 92, 95 (Bowen LJ).
65 *In re Imperial Continental Water Corporation* (1886) 33 Ch D 314 at 322 (Lopes LJ).
66 *In Re Metropolitan Bank (Herion's Case)* (1880) 15 Ch D 139 at 143 (Bramwell LJ).
67 *In Re Imperial Continental Water Corporation* (1886) 33 Ch D 314 at 321-2 (Lindley LJ).

Maintenance of the historical analogy

The conception of judicial power

41. The plaintiffs' submissions that historical analogy should no longer be applied as a test to sustain validity should be rejected. Reducing the historical treatment of a function or power to a matter of "*perhaps limited – potential relevance*"[68] ignores the role historical powers and functions have played in informing Ch III jurisprudence and what constitutes "*judicial power of the Commonwealth*". Any such reduction risks leaving judicial power to be defined by abstract reasoning expressed in general terms.[69]

42. Formulating an all-encompassing test for judicial power has proven elusive. Underpinning Kitto J's formulation in *Davison* is that the framers of the Constitution were "*giving effect to a doctrine which was not a product of abstract reasoning alone, and was not based upon precise definitions of the terms employed*".[70] Rather, in referring to the "*judicial power of the Commonwealth*", the framers were importing into the Constitution a concept of judicial power which had precedent, practice and general acceptance in the context of "*classes of powers requiring different 'skills and professional habits' in the authorities entrusted with their exercise*".[71]

Longstanding reliance on history

43. This Court has often considered the historical exercise of powers and functions in determining federal judicial power. In *Boilermakers* the majority, citing *Davison*, said that the manner in which judicial powers and functions had been traditionally treated will be decisive.[72] Subsequent authorities have confirmed the continued utility of examining historical powers and functions.[73] In *R v Hegarty; Ex Parte the Corporation of the City of Salisbury* Mason J said that "*historical or traditional classification is a significant factor to be taken into account in deciding whether there is an exercise of judicial power*".[74] In *Forge v Australian Securities and Investments Commission*[75] the historical practice in the colonies of appointing acting judges was material to the conclusion that appointing acting judges was not inconsistent with Ch III.[76]

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68 Plaintiff's Written Submissions in *Palmer* at [57].

69 See *White v Director of Military Prosecutions* [2009] HCA 29; (2009) 231 CLR 570 at 595 [49] (Gummow, Hayne and Crennan JJ).

70 *R v Davison* [1954] HCA 46; (1954) 90 CLR 353 at 380-381 (Kitto J).

71 *R v Davison* [1954] HCA 46; (1954) 90 CLR 353 at 382 (Kitto J).

72 *R v Kirby; Ex parte Boilermakers' Society of Australia* [1956] HCA 10; (1956) 94 CLR 254 at 278 (Dixon CJ; McTiernan, Fullager and Kitto JJ); cited in Thomas *v Mowbray* [2007] HCA 33; (2007) 233 CLR 307 at 326 [10] (Gleeson CJ); 356 [116]-[121] (Gummow and Crennan JJ).

73 *Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs* [1992] HCA 64; (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ); *R v Hegarty; Ex Parte the City of the Corporation of Salisbury* [1981] HCA 51; (1981) 147 CLR 617 at 627 (Mason J; Gibbs CJ, Stephen and Wilson JJ concurring); *Cominos v Cominos* [1972] HCA 54; (1972) 127 CLR 588 at 600 (Gibbs J), 605 (Stephen J), 608 (Mason J); *Gould v Brown* [1998] HCA 6; (1998) 193 CLR 346 at [328] (Kirby J).

74 *R v Hegarty; Ex Parte the Corporation of the City of Salisbury* (1980) 147 CLR 617 at 627 (Mason J, Gibbs and Stephen JJ agreeing).

75 [2006] HCA 44; (2006) 228 CLR 45.

76 *Forge v Australian Securities and Investments Commission* [2006] HCA 44; (2006) 228 CLR 45 at 63-4 [31]-[32] (Gleeson CJ), 82-5 [82]-[85], [88]-[89] (Gummow, Hayne and Crennan JJ), 149 [277]

44. Historical practice has also been used to justify the exercise of what would otherwise be core judicial power by the executive. In *White*[77] this Court was called upon to determine whether military tribunals were impermissibly exercising federal judicial power. Whilst the judgment of the plurality expressed concern[78] as to Kitto J's formulation in *Davison*, their Honours held that to attribute to Ch III a rejection of the well-recognised existence of systems of naval and military justice would be to prefer abstract reasoning to the content of *"the judicial power of the Commonwealth" which must have been universally understood in 1900*".[79]

Separation of powers not offended

45. The use of such a test of historical analogy does not deny the mandated separation of powers. It does not have the effect that any law enacted prior to Federation can be used to validate a current law.[80] Rather, where a function sits beyond core judicial power and that function is similar or comparable to a power historically "*consistently regarded as peculiarly appropriate*"[81] for judicial exercise, it may be appropriate to confer that power on a federal court or a court exercising federal jurisdiction. Further, with its narrow compass, the analogue provides its own restraint.

Part VI: Estimate of time for oral argument

46. South Australia estimates that 10 minutes will be required for the presentation of oral argument.

Dated: 28 October 2016

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(Heydon J), for a summary of the historical appointment of acting judges see 141-6 [256]-[267] (Heydon J).

77 *White v Director of Military Prosecutions* [2009] HCA 29; (2009) 231 CLR 570.

78 *White v Director of Military Prosecutions* [2009] HCA 29; (2009) 231 CLR 570 at 595 [48] but cf [58] (Gummow, Hayne and Crennan JJ).

79 *White v Director of Military Prosecutions* [2009] HCA 29; (2009) 231 CLR 570 at 595 [58] (Gummow, Hayne and Crennan JJ); see also *Re Tracey; Ex Parte Ryan* [1989] HCA 12; (1989) 166 CLR 518 at 573 (Brennan and Toohey JJ).

80 See Plaintiff's Written Submissions in *Palmer* at [54].

81 *R v Davison* [1954] HCA 46; (1954) 90 CLR 353 at 382 (Kitto J).