IN THE HIGH COURT OF AUSTRALIA **No B 52 OF 2016**
BRISBANE REGISTRY
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

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

PLAINTIFF'S REPLY

PART I: PUBLICATION ON THE INTERNET

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

PART II: REPLY

2. The plaintiff refers to his written submissions (***PWS***) and those filed by the first (***1DWS***) and second (***2DWS***) defendants and by the Attorneys-General for the Commonwealth (***CWS***), Queensland (***QWS***), Victoria (***VWS***) and South Australia (***SAWS***).

The exercise of the power under s 596A does not give rise to a "matter" under Ch III

3. The submissions of the defendants and the interveners have not engaged with the starting point of the plaintiff's argument, identified at PWS [9], namely the requirement to identify the "matter" said to arise under any laws made by the Parliament, within the meaning of s 76(ii) of the Constitution.

4. The function conferred by s 596A of the *Corporations Act 2001* (Cth) does not answer that description. There can be no "matter" within the meaning of s 76 "unless there is some immediate right, duty or liability to be established by the determination of the Court."[1] The obligation upon a court to issue a summons under s 596A, thereby commencing a process of examination in which the court is actively involved under ss 596D, 596F and 597, does not constitute a "matter". Rather, the function of the court is purely inquisitorial or investigative. Further, at least in a voluntary winding up, the exercise of the power under s 596A has no

[1] *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ); *CGU Insurance Ltd v Blakeley* (2016) 90 ALJR 272, 327 ALR 564 at [26] (French CJ, Kiefel, Bell and Keane JJ).

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relationship with any judicial determination of any right, duty or liability in any pending or anticipated proceeding.

R v Davison

5. ***Re 1DWS [17]-[19], [45]; 2DWS [7]-[13]; CWS [54]-[55]; VWS [36]-[40]; SAWS [41]-[45]:*** The submissions at PWS [49]-[58] do not deny that historical considerations *may* be relevant. Rather the plaintiff submits that the reasoning of Kitto J in *R v Davison*[2] at 382 should not be applied as a test sufficient, without more, to sustain validity.[3] That submission is not inconsistent with the later authorities in this Court gathered in fn 38 in 1DWS [45], fn 51 in CWS [54] and fn 64 in VWS [36]. The approach in those authorities is encapsulated in the passage from *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*[4] extracted at 1DWS [17]. The Court there observed that "[h]istorical considerations can support a conclusion" that the power to take a particular action is within the concept of judicial power as the framers must be taken to have understood it. That formulation emphasises that historical considerations can be relevant, but are not, on their own, decisive.

6. It does not follow that a power should be classified as judicial for constitutional purposes simply because a similar power had been given to courts at a time when there was no need to distinguish between judicial and non-judicial power. *R v Quinn; Ex parte Consolidated Food Corporation*[5] illustrates the point. The Court held that the function of ordering the removal of a trade mark, conferred upon an administrative decision-maker, was not judicial despite a long history of legislation – including pre-Federation legislation in England and in the Australian colonies – reposing such a function upon a judicial tribunal.[6]

7. The error of principle in *R v Davison* at 382 lies in elevating the existence of a pre-Federation historical analogue to a sole or exclusive test, so that where such an analogue is identified it is said to be "inevitable" that the power to take the particular action is judicial. The refusal of special leave in *Saraceni*[7] appears to have been the first occasion upon which this Court identified and applied the passage in *R v Davison* at 382 as the *sole* reason for concluding that a particular function was judicial.

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2 (1954) 90 CLR 353.

3 Kitto J. himself in *The Queen v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374-5 indicated that some "special compelling feature" was necessary to include in federal jurisdiction cases not in the category referred to by Griffith C.J. in *Huddart Parker Co Pty Ltd v. Moorehead* (1908) 8 CLR 330 at 357. There was an obvious such reason in *R v Davison*. The sequestration order affected status and altered the rights of the bankrupt and the bankrupt's creditors.

4 (2013) 251 CLR 533 at [105] (Hayne, Crennan, Kiefel and Bell JJ).

5 (1977) 138 CLR 1.

6 (1977) 138 CLR 1 at 11-12 (Jacobs J, with whom Barwick CJ, Gibbs J, Stephen J, Mason J and Murphy J agreed).

7 (2012) 246 CLR 251.

8. ***Re CWS [48]-[53]:*** The Commonwealth overstates the significance of historical considerations in the various judgments in *R v Davison*. History was but one consideration. In *Cominos v Cominos*, Mason J (the successful counsel in *R v Davison*) described the reasoning in *R v Davison* as follows:[8]

> "There the conclusion that the making of a sequestration order by the registrar on a debtor's petition was an exercise of judicial power was supported by a history according to which sequestration orders had been made in the course of a curial process, a close analogy with the making of a sequestration order by the Court on a creditor's petition (an admitted exercise of judicial power) and a consideration of the purpose for which the power was granted to the registrar."

9. ***Re 2DWS [12]-[13]; CWS [56]-[57], QWS [22]-[29]:*** Acceptance of the plaintiff's argument would not imperil the validity of any of the judicial functions identified in CWS [56], QWS [22]-[29] or those referred to by Dixon CJ and McTiernan J in *R v Davison* at 368. As Brennan J later observed in *Mellifont v Attorney-General (Qld)*,[9] by reference to the functions instanced by Dixon CJ and McTiernan J, in every case the exercise of such functions "affects the rights (including powers, privileges and immunities), status or obligations (including duties, disabilities and liabilities) of persons, whether natural or artificial, who are subject to the jurisdiction of the courts". None of those functions was or is purely inquisitorial or investigative. None of them was or is unconnected with any determination affecting a right, status or obligation. The same may be said of the other functions itemised in *Dalton v New South Wales Crime Commission*.[10]

No sufficient historical analogy

10. ***Re 1DWS [20]-[43]; 2DWS [14]-[19]; CWS [38]-[45]; VWS [28]-[33]; SAWS [33]-[40]:*** Contrary to 1DWS [33], the plaintiff does not submit that, in order to satisfy any applicable test of historical analogy, the legislation must be "in the exact same terms" as the pre-Federation legislation. The degree of analogy which is sufficient is informed by the scope and purpose of Ch III.

11. The grounds of distinction between s 596A and the pre-Federation provisions identified in PWS [38]-[46] indicate that the suggested analogy here is insufficiently close. The absence of any discretion under s 596A, and the removal of the pre-Federation criterion that the exercise of the power of examination in a voluntary winding up be "just and beneficial",[11] are of particular significance. A duty upon the Court to issue an examination summons, without

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[8] (1972) 127 CLR 588 at 607.
[9] (1991) 173 CLR 289 at 315.
[10] (2006) 227 CLR 490 at [45].
[11] See s 138 of the *Companies Act 1862* (UK) (25 & 26 Vict c 89).

any discretion to refuse it, is not analogous to a discretionary power conditioned upon satisfaction of a legal criterion that the exercise of power be "just and beneficial".

12. ***Re 1DWS [36]:*** The discretion to set aside a summons obtained under s 596A for an improper purpose is materially different in scope and content from the discretion under the pre-Federation legislation to determine whether to issue a summons at all. The English courts in the nineteenth century regarded the careful exercise of that discretion as fundamental to the just administration of the winding up: see PWS [38], [41] and [71].

Section 596A does not satisfy the "functional" test of judicial power

13. ***Re CWS [29]-[37]; QWS [6]-[29]:*** The function conferred by s 596A does not fit within the classical description of judicial power by Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead*[12] or by Kitto J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd.*[13] It is not a power to decide controversies between persons or polities, by the application of the law as determined to the facts as found, so as to produce a binding and authoritative determination of existing rights or liabilities.

14. Rather, s 596A mandates judicial involvement in what is, in essence, a private discovery procedure conducted by a moving party and prospective litigant but otherwise unconnected with any final or binding determination of any justiciable controversy.

15. Contrary to CWS [29], the observations of Brennan CJ and Toohey J in *Gould v Brown*[14] were directed to whether an examination was incidental to the exercise of judicial power, not whether it satisfied the "functional" test of judicial power.

16. It is wrong to characterise a summons for examination under s 596A as defining any question as to the "existence of an obligation." (QWS [12]) or as enlivening the court's supervisory jurisdiction akin to the examples given at QWS [29]. At least in a voluntary winding up, an examination summons under s 596A has no relationship with any subsisting or future judicial proceeding. Such a summons may readily be contrasted with *Mareva* orders or orders for preliminary discovery (see QWS [23]-[24]; 2DWS [13]).

Section 596A is not incidental to the exercise of judicial power

17. ***Re 1DWS [48]-[53]; CWS [29]-[37]; QWS [30]-[43]***: An incidental jurisdiction may only be implied where it is strictly necessary to fulfil an express grant of power.[15] The exercise of the power under s 596A is not incidental to any exercise of any of the Court's general powers of supervision over a voluntary winding up of the kind identified in 1DWS [51], either

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[12] (1909) 8 CLR 330 at 357.
[13] (1970) 123 CLR 361 at 374.
[14] (1998) 193 CLR 346 at [35].
[15] *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1 at 27; *Grassby v R* (1989) 168 CLR 1 at 16-17.

generally or in the particular circumstances of the present case. The power to summon for examination is not "necessary or proper to render … effective"[16] the exercise of any of those general powers.

18. There is no suggestion that there has been, or will be, any occasion for the exercise of any of those general powers of supervision in the present case to which the summons for examination issued to the plaintiff could be said to be ancillary.

Section 596A is incompatible with, or falls outside, the judicial power of the Commonwealth

19. ***Re 1DWS [54]-[68]; 2DWS [20]-[27]; CWS [68]-[89]; QWS [44]-[51]; VWS [41]-[48]; SAWS [6]-[32]:*** The emphasis, particularly by the interveners, upon *Kable v Director of Public Prosecutions (NSW)*[17] should not divert attention from the requirements of Ch III as they apply to *Commonwealth* legislation conferring a function upon a Ch III court. Those requirements are more stringent than the requirements of *Kable*.[18] It would be necessary to consider the concept of incompatibility, as addressed in PWS [63]-[72], only if the Court were to conclude that the validity of s 596A otherwise would be supported by historical analogy.

20. Neither the power to set aside a summons obtained for an improper purpose, nor the supervisory powers of the court in the conduct of the examination, is an answer to PWS [63]-[72]. The court remains compelled, upon application, to exercise the extraordinary power to summon for examination without consideration of whether it is just or beneficial to do so; to become a participant in a process of pre-litigation investigation; and to compromise the appearance or reality of the court's independence or impartiality in determining any subsequent proceeding relating to the subject-matter of the examination.

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[16] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 278 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

[17] (1996) 189 CLR 51.

[18] *Baker v R* (2004) 223 CLR 513 at [51] (McHugh, Gummow, Hayne and Heydon JJ); *Wainohu v New South Wales* (2011) 243 CLR 181 at [43] (French CJ and Kiefel J).