HIGH COURT OF AUSTRALIA

KIEFEL, GAGELER, KEANE, NETTLE AND GORDON JJ

Matter No B52/2016

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) & ORS — DEFENDANTS

Matter No B55/2016

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) — DEFENDANTS

Palmer v Ayres
Ferguson v Ayres
[2017] HCA 5
Date of Order: 10 November 2016
Date of Publication of Reasons: 8 February 2017
B52/2016 & B55/2016

ORDER

In each matter:

1. *The question reserved for the consideration of the Full Court pursuant to s 18 of the* Judiciary Act *1903 (Cth) is answered as follows:*

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

Answer: *No.*

2. *The writ of summons is dismissed.*

3. *The plaintiff pay the defendants' costs.*

Representation

D F Jackson QC with L T Livingston and L M Jackson for the plaintiff in B52/2016 (instructed by JW Smith & Associates)

P Zappia QC with N H Ferrett and T R March for the plaintiff in B55/2016 (instructed by Haseler Law)

T P Sullivan QC with C M Muir and A C Stumer for the first defendants in B52/2016 and the defendants in B55/2016 (instructed by King & Wood Mallesons)

B W Walker SC with C G C Curtis for the second defendants in B52/2016 (instructed by HWL Ebsworth Lawyers)

T M Howe QC, Acting Solicitor-General of the Commonwealth with J A Watson and R J May for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

P J Dunning QC, Solicitor-General of the State of Queensland with A D Keyes for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

R M Niall QC, Solicitor-General for the State of Victoria with B C Gauntlett for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

C D Bleby SC with W V Ambrose for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor (SA))

CATCHWORDS

Palmer v Ayres
Ferguson v Ayres

Constitutional law (Cth) – Judicial power – Mandatory examination of persons about corporation's examinable affairs – Where plaintiffs former directors of corporation in voluntary liquidation – Where liquidators applied for and obtained order for issue of summons under s 596A of *Corporations Act* 2001 (Cth) requiring plaintiffs to attend for examination about corporation's examinable affairs – Whether s 596A invalid as contrary to Ch III of Constitution – Whether s 596A gives rise to "matter" that engages judicial power of Commonwealth – Whether power conferred by s 596A incompatible with or outside judicial power of Commonwealth.

Words and phrases – "examinable affairs", "federal jurisdiction", "judicial power", "matter".

Constitution, Ch III.
Corporations Act 2001 (Cth), ss 596A, 597.

1 KIEFEL, KEANE, NETTLE AND GORDON JJ. Queensland Nickel Pty Ltd ("QN") was placed under administration pursuant to s 436A of the *Corporations Act* 2001 (Cth) ("the Corporations Act"). The creditors of QN subsequently resolved, pursuant to s 439C(c) of the Corporations Act, that QN be wound up in insolvency and QN's then administrators – John Park, Kelly-Anne Trenfield, Stefan Dopking and Quentin Olde – be appointed QN's liquidators.

2 Pursuant to ss 511 and 472(1) of the Corporations Act, by an order of the Federal Court of Australia, Marcus William Ayres, Stephen James Parbery and Michael Andrew Owen were subsequently appointed additional liquidators of QN for limited purposes and designated "Special Purpose Liquidators" of QN.

3 The Special Purpose Liquidators applied to the Federal Court for, and obtained, an order for the issue of a summons under s 596A of the Corporations Act requiring, among others, two former directors of QN – Clive Frederick Palmer and Ian Maurice Ferguson – to attend for examination about QN's examinable affairs. The Special Purpose Liquidators also applied for, and obtained, an order under ss 596D(2) and 597(9) of the Corporations Act, requiring each of Mr Palmer and Mr Ferguson to produce at their examination specified books in their possession relating to QN or to any of its examinable affairs (together "the Summons Order"). Mr Palmer and Mr Ferguson both attended the Federal Court and were each examined.

4 Mr Palmer and Mr Ferguson then each filed a writ of summons in this Court seeking, amongst other relief, a declaration that the Summons Order was invalid, a declaration that s 596A of the Corporations Act does not constitute a valid conferral of power upon the Federal Court to the extent that it is exercised in conjunction with s 511 of the Corporations Act, and an injunction permanently restraining the Special Purpose Liquidators from further pursuing proceedings pursuant to the Summons Order.

5 In each proceeding, pursuant to s 18 of the *Judiciary Act* 1903 (Cth), the following question was reserved for the consideration of a Full Court:

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

6 Mr Palmer contended that the power of a court to summon a person for examination under s 596A of the Corporations Act ("the s 596A power") was invalid as contrary to Ch III of the Constitution on six bases: the s 596A power does not fall within the "core" or "practical conception" of judicial power under s 71 of the Constitution and does not satisfy the functional test identified by

Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead*[1] or by Kitto J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*[2]; the s 596A power is not incidental or ancillary to the exercise of judicial power, at least in respect of a voluntary winding up; the s 596A power is not sufficiently analogous to pre-Federation judicially exercised powers to qualify as judicial power or, alternatively, reasoning from historical analogues should no longer be followed; the s 596A power is incompatible with, or falls outside, the judicial power of the Commonwealth; and, finally, there was no "matter" in the constitutional sense to engage the judicial power of the Commonwealth.

7 Mr Ferguson adopted Mr Palmer's submissions but expanded the contention that the s 596A power is incompatible with, or falls outside, the judicial power of the Commonwealth. In that respect, Mr Ferguson contended that the s 596A power poses a real risk to the court's actual or perceived independence and impartiality, and offends the separation of powers.

8 At the end of oral argument, this Court made orders in each proceeding that the question reserved be answered "no", the writ of summons be dismissed and the plaintiff pay the defendants' costs. These are our reasons for joining in those orders.

Statutory framework

9 Chapter 5 of the Corporations Act deals with various forms of external administration, including winding up by the court and voluntary winding up.

10 Part 5.9 of Ch 5 comprises three Divisions of miscellaneous provisions applicable to external administration. Divisions 1 and 2 apply to all forms of external administration[3]. Division 1 – with which these proceedings are concerned – deals with examining a person about the examinable affairs of a corporation and comprises ss 596A to 597B. Division 2 deals with orders against a person in relation to a corporation subject to external administration. Division 3 contains provisions applicable to specific forms of external administration.

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1 (1909) 8 CLR 330 at 357; [1909] HCA 36.

2 (1970) 123 CLR 361 at 374; [1970] HCA 8.

3 See *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501 at 528 [90]-[91], 534-535 [109]-[110].

11 Section 596A, in Div 1 and entitled "Mandatory examination", relevantly provides:

> "The Court is to summon a person for examination about a corporation's *examinable affairs* if:
>
> (a) an *eligible applicant* applies for the summons; *and*
>
> (b) the Court is satisfied that the person is an officer or provisional liquidator of the corporation or was such an officer or provisional liquidator during or after the 2 years ending [on the occurrence of a specified event]." (emphasis added)

"Court" includes the Federal Court and the Supreme Court of a State or Territory[4]. Jurisdiction with respect to civil matters arising under the Corporations Act is conferred on the Federal Court and the Supreme Court of each State and Territory by s 1337B of the Corporations Act.

12 Two criteria must be satisfied before a court is to summon a person under s 596A for examination about a corporation's examinable affairs. First, an "eligible applicant" must apply for the summons. A liquidator of the corporation, amongst others, is an "eligible applicant"[5]. Second, the court must be satisfied that the person to be summoned is either a current officer or provisional liquidator of the corporation, or a former officer or provisional liquidator during or after the two years ending on the occurrence of a specified event.

13 If those criteria are satisfied, the court is to summon that person ("the examinee") "to attend before the [c]ourt" at a specified place and time on a specified day "to be examined on oath about the corporation's examinable affairs"[6].

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4 ss 9 and 58AA(1) of the Corporations Act.

5 s 9 of the Corporations Act.

6 s 596D(1) of the Corporations Act.

Kiefel J
Keane J
Nettle J
Gordon J

14 "[E]xaminable affairs", in relation to a corporation, means[7]:

> "(a) the promotion, formation, management, administration or winding up of the corporation; or
>
> (b) any other affairs of the corporation (including anything that is included in the corporation's affairs because of section 53); or
>
> (c) the business affairs of a connected entity of the corporation, in so far as they are, or appear to be, relevant to the corporation or to anything that is included in the corporation's examinable affairs because of paragraph (a) or (b)."

As is apparent from par (c) of the definition of "examinable affairs", that term includes the business affairs of entities and persons connected with a corporation[8]. A "corporation" includes a body corporate[9], and a "body corporate" includes a body corporate that is being wound up[10]. Section 53 also provides an extended meaning of "the affairs of a body corporate" and, as a result, extends what may constitute the "examinable affairs" of a corporation.

15 A summons may also require the examinee to produce at the examination specified books in the examinee's possession that relate to the corporation or to any of its examinable affairs[11]. In certain circumstances, a court must require the examinee to file an affidavit about a corporation's examinable affairs, even if the examinee has been summoned for examination under s 596A[12].

16 The court controls the conduct of the examination[13]. The court may give directions about, among other things, the matters to be inquired into, and the

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7 s 9 of the Corporations Act.

8 See ss 9 and 64B of the Corporations Act for the meaning of "connected entity" and when entities will be connected with a corporation.

9 ss 9 and 57A(1)(b) of the Corporations Act.

10 s 9 of the Corporations Act.

11 s 596D(2) of the Corporations Act.

12 s 597A of the Corporations Act.

13 ss 596F and 597 of the Corporations Act.

procedure to be followed, at the examination[14]. The court may put questions to the examinee, or "allow" questions to be put to the examinee, "about the corporation or any of its examinable affairs as the [c]ourt thinks appropriate"[15].

17 At the examination, the examinee must not make a false or misleading statement or, without reasonable excuse, refuse or fail to answer a question that the court directs them to answer or produce documents that the summons requires them to produce[16]. The examinee is not excused from answering a question put to them at the examination because it might tend to incriminate them or make them liable to a penalty[17]. However, if, before answering a question, the examinee claims that the answer might tend to incriminate them or make them liable to a penalty, and the answer might in fact do so, that answer is not admissible in evidence against that person in a criminal proceeding or a proceeding for the imposition of a penalty, other than in the conduct of the examination or a proceeding in respect of falsity of an answer[18].

18 The court may order that a written record of the questions put to, and answers of, the examinee be produced and signed by the examinee[19], and, except for any specific answers for which the examinee has claimed privilege against self-incrimination, the signed written record of an examination may be used in evidence in any legal proceedings against the examinee[20].

19 If satisfied that a summons was obtained without reasonable cause, the court may order that some or all of the examinee's costs be paid by the applicant for the summons or by any person who took part in the examination[21].

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14 s 596F(1)(a) and (b) of the Corporations Act.

15 s 597(5B) of the Corporations Act.

16 s 597(7)(b), (c), (d) of the Corporations Act.

17 s 597(12) of the Corporations Act.

18 s 597(12A) of the Corporations Act.

19 s 597(13) of the Corporations Act.

20 s 597(14) of the Corporations Act.

21 s 597B of the Corporations Act.

Constitutional framework

20 Section 71 of the Constitution relevantly states that:

> "The *judicial power* of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with *federal jurisdiction*." (emphasis added)

21 Section 75 specifies the constitutionally conferred original jurisdiction of the High Court. Section 76(ii) provides that the Parliament may make laws conferring original jurisdiction on the High Court in any matter "arising under any laws made by the Parliament".

22 Section 77 provides that:

> "With respect to any of the *matters* mentioned in [ss 75 and 76] the Parliament may make laws:
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> (i) defining the jurisdiction of any federal court other than the High Court;
>
> (ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;
>
> (iii) investing any court of a State with federal jurisdiction." (emphasis added)

23 The Federal Court, created by the *Federal Court of Australia Act* 1976 (Cth) as a superior court of record and a court of law and equity, has such original jurisdiction as is vested in it by laws made by the Parliament[22]. As seen earlier, s 1337B of the Corporations Act provides a specific conferral of jurisdiction on the Federal Court, and the Supreme Court of each State and Territory[23].

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22 s 19(1) of the *Federal Court of Australia Act* 1976 (Cth). See also s 39B(1A)(c) of the *Judiciary Act* 1903 (Cth).

23 See *Gordon v Tolcher* (2006) 231 CLR 334 at 345 [29], 346 [32]; [2006] HCA 62.

24 Jurisdiction, or the authority to adjudicate, and judicial power are different concepts[24]. "[F]ederal jurisdiction" in s 71 of the Constitution means "authority to exercise the judicial power of the Commonwealth … within limits prescribed"[25]. Parliament, under s 77(i) of the Constitution, has the legislative power to give to a federal court created by it "jurisdiction to exercise any judicial power of the Commonwealth, which the Parliament may think fit to confer upon it"[26]. And, "[i]t is a necessary condition of federal jurisdiction, in the sense of authority to exercise the judicial power of the Commonwealth, that the matter in which the jurisdiction of the court is invoked is 'capable of judicial determination' or 'justiciable'"[27].

Matter

25 The plaintiffs contended that, although Parliament had conferred federal jurisdiction on federal and State courts, conferral in respect of s 596A was invalid because there was no "matter" in the constitutional sense to engage the judicial power of the Commonwealth. The basis of that contention was that the examination commenced under s 596A was an inquisitorial or investigative exercise that did not concern "some immediate right, duty or liability to be established by the determination of the Court"[28]. That contention should not be accepted. It proceeds from a misunderstanding of the concept of "matter" as it is to be understood in the constitutional sense.

"Matter" in the constitutional sense

26 A "matter", as a justiciable controversy, is not co-extensive with a legal proceeding, but rather means the subject matter for determination in a legal

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24 *CGU Insurance Ltd v Blakeley* (2016) 90 ALJR 272 at 279 [25]; 327 ALR 564 at 571; [2016] HCA 2.

25 *CGU Insurance* (2016) 90 ALJR 272 at 279 [24]; 327 ALR 564 at 571 quoting *Ah Yick v Lehmert* (1905) 2 CLR 593 at 603; [1905] HCA 22.

26 *CGU Insurance* (2016) 90 ALJR 272 at 279 [24]; 327 ALR 564 at 571 quoting *Ah Yick* (1905) 2 CLR 593 at 604.

27 *CGU Insurance* (2016) 90 ALJR 272 at 279 [26]; 327 ALR 564 at 571.

28 cf *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265; [1921] HCA 20; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 524 [25], 555 [118]; [1999] HCA 14; *CGU Insurance* (2016) 90 ALJR 272 at 279 [26]; 327 ALR 564 at 571.

proceeding[29] – "controversies which *might* come before a Court of Justice"[30] (emphasis added). It is identifiable independently of proceedings brought for its determination and encompasses all claims made within the scope of the controversy[31]. What comprises a "single justiciable controversy" must be capable of identification, but it is not capable of exhaustive definition. "What is and what is not part of the one controversy depends on what the parties have done, the relationships between or among them and the laws which attach rights or liabilities to their conduct and relationships"[32].

27 The requirement that, for there to be a "matter", there must be an "immediate right, duty or liability to be established by the determination of the Court"[33] reinforces that the controversy that the court is being asked to determine is genuine, and not an advisory opinion divorced from a controversy[34], and, further, that only a *claim* is necessary. A matter can exist even though a right, duty or liability has not been, and may never be, established[35].

"Matter" before the Federal Court

28 The Special Purpose Liquidators of QN applied to the Federal Court under s 596A for an order that defined persons, former directors of QN, be summoned to attend before that Court to provide information about the examinable affairs of QN.

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29 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-266.

30 *South Australia v Victoria* (1911) 12 CLR 667 at 675; [1911] HCA 17; *Abebe* (1999) 197 CLR 510 at 523-524 [24]; *Hooper v Kirella Pty Ltd* (1999) 96 FCR 1 at 14 [50].

31 *Fencott v Muller* (1983) 152 CLR 570 at 603; [1983] HCA 12.

32 *Fencott* (1983) 152 CLR 570 at 608.

33 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265; *Abebe* (1999) 197 CLR 510 at 524 [25]; see also at 555 [118]; *CGU Insurance* (2016) 90 ALJR 272 at 279 [26]; 327 ALR 564 at 571.

34 *Hooper* (1999) 96 FCR 1 at 15 [51].

35 See *Abebe* (1999) 197 CLR 510 at 528 [32]; *Hooper* (1999) 96 FCR 1 at 15 [55].

29 The application under s 596A was made by the Special Purpose Liquidators to aid the performance of their statutory functions and powers[36]: first, to establish what are the assets of the corporation, including whether there are rights and obligations that could be realised, secured or litigated for the benefit of the unsecured creditors generally; and, second, to get in all of those assets.

30 The s 596A power looks forward, using the concept of "examinable affairs" of the corporation, to the possibility that information gathered in the course of an examination under s 597 will support a claim for relief against the examinee or some other person. Section 596A looks forward to such a claim as a "matter": a controversy relating to the pecuniary rights or liabilities or wrongdoing of the corporation and the examinee or some other person. The contrary view of Gaudron J in *Gould v Brown*[37] is, with respect, not correct. The view of Brennan CJ and Toohey J[38] and Kirby J[39], which reflects a forward-looking understanding of s 596A, is to be preferred to that of Gaudron J, which looks backward to the circumstance which led to the corporation being in external administration.

31 Put another way, the s 596A power is a procedure that gives a liquidator the right to seek to examine certain persons involved in the corporation about the affairs of that corporation and thereby seek to establish, and then enforce, a potential right to relief against those with liabilities to the corporation, including alleged wrongdoers. Although the application arose out of events that had already occurred, the claim – one of potential rights, liabilities or wrongdoing –

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36 See, eg, ss 501 and 506 of the Corporations Act (voluntary winding up); *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 338-339, 352; [1990] HCA 8; *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (In liq)* (2005) 220 CLR 592 at 599 [5]; [2005] HCA 20; *Commissioner for Corporate Affairs v Harvey* [1980] VR 669; *Re Quatrovision Pty Ltd (in liq) and the Companies Act 1961* [1982] 1 NSWLR 95 at 103; *Ilhan v Cvitanovic* (2009) 73 NSWLR 644 at 648-649 [19]-[20]. See also *In re Contract Corporation* (*Gooch's Case*) (1872) LR 7 Ch App 207 at 211; Gronow, *McPherson's Law of Company Liquidation*, 5th ed (looseleaf) at 1-052 [1.130], 8-2056 [8.500]; Goode, *Principles of Corporate Insolvency Law*, 3rd ed (2005) at 120-121 [5-02].

37 See (1998) 193 CLR 346 at 403-404 [66]-[67]; [1998] HCA 6.

38 *Gould v Brown* (1998) 193 CLR 346 at 386-388 [31]-[33].

39 *Gould v Brown* (1998) 193 CLR 346 at 499-500 [327]-[328].

was a controversy where rights and liabilities could be established by a determination of the court made in due course in possible further litigation by reference to legal rules, principles or standards[40]. In that context, the Summons Order made by the Federal Court under s 596A was made in the exercise of judicial power.

32 Indeed, an order made under s 596A, and the other provisions in Div 1 of Pt 5.9, determine whether, and the extent to which, the examinee may not remain silent but rather is obliged to be examined about the examinable affairs of a corporation. Such an order also determines whether, and the extent to which, there is an intrusion on the examinee's privilege to keep confidential books and papers in their possession or control.

33 That the application under s 596A for a summons is made ex parte, and that the criteria for the making of an order may in some cases clearly be satisfied, does not deny that the court must be satisfied, by evidence, that the criteria are met. The resolution of the "matter" yields, as its immediate result, an order for examination with direct loss of privileges for the examinee the subject of the order. Rights and liabilities are determined by that judicial determination – they are not merely affected[41]. That alone, independent of the role of the liquidator as one class of "eligible applicants", suffices to create the necessary "matter".

34 But the making of a summons order by a court not only decides and declares the right of the eligible applicant (here, the Special Purpose Liquidators) to apply for and be granted the order, it determines the rights, status or obligations of the applicant and the examinee (here, each former director), who were, and remain, subject to the jurisdiction of the court. Here, a right to examine was granted to the applicant (the Special Purpose Liquidators) and, as a result, the examinee (each former director) was obliged to attend the court, to produce specified books not otherwise compellable to be produced and to answer questions without the benefit of the privilege against self-incrimination. The examinee was obliged to do those things on the basis that the evidence given by the examinee could be used in certain subsequent legal proceedings against the examinee.

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40 See *Abebe* (1999) 197 CLR 510 at 524-525 [25]; *Hooper* (1999) 96 FCR 1 at 16 [57].

41 Stellios, *The Federal Judicature: Chapter III of the Constitution*, (2010) at 110 [4.7].

35 Moreover, once a summons order is made, the power to examine the examinee (here, each former director) is and remains subject to the court's control. The court has the duty and ability to control the questions to be put to the examinee. The court can set aside a summons order if it thinks that it should not have been made on the grounds that it was an abuse of process or for other reasons[42]. In any event, the court can also order costs against either an applicant for the summons or a person who took part in the examination.

Not incompatible with judicial power of the Commonwealth

36 The s 596A power is not incompatible with, and does not fall outside, the exercise of the judicial power of the Commonwealth. The court, in exercising the s 596A power, is not involved in a fact-gathering exercise or an investigative function divorced from a controversy. The making of a summons order is a procedure designed to lead to a controversy regarding potential rights and liabilities in possible further litigation[43]. It is a procedure directed at the future exercise of judicial power, in aid of anticipated adversarial proceedings, analogous to other pre-trial procedures[44].

The s 596A power is not a new power

37 History alone does not provide a sufficient basis for defining the exercise of a power as judicial power[45]. As these reasons demonstrate, it is neither necessary nor appropriate to rely on a purely historical basis to define the s 596A power and its processes as an exercise of judicial power[46]. But it is relevant to observe that the s 596A power is not, in any sense, a new power.

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42 See *Evans v Wainter Pty Ltd* (2005) 145 FCR 176 at 200 [143]-[144], 216-217 [252].

43 See, eg, *In re North Australian Territory Company* (1890) 45 Ch D 87 at 91, 96.

44 See, eg, *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 89 ALJR 975 at 983 [47]; 325 ALR 168 at 179; [2015] HCA 36; *Hooper* (1999) 96 FCR 1 at 16-17 [58]-[59].

45 *R v Davison* (1954) 90 CLR 353 at 366-369, 382; [1954] HCA 46; *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 595 [48]; [2007] HCA 29.

46 Contra *Saraceni v Jones* (2012) 42 WAR 518 at 563 [237].

38 Long before the reforms effected by the *Supreme Court of Judicature Act* 1873 (UK), the Court of Chancery permitted the filing of a bill of discovery in which the applicant sought no relief except the provision of information by the defendant which was sought in aid of the pursuit of a possible claim in another court in which processes of discovery were not available[47]. In *Norwich Pharmacal Co v Customs and Excise Commissioners*, Lord Reid, referring to the rationale of the Chancery practice, said[48]:

> "I am particularly impressed by the views expressed by Lord Romilly MR and Lord Hatherley LC in *Upmann v Elkan* (1871) LR 12 Eq 140; 7 Ch App 130. They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers."

39 That duty and its rationale apply with equal, if not greater, force to an officer of a corporation. A corporation, a creature of statute[49], has powers and rights to act as a corporation so long as it obeys the laws under which it was incorporated. Supervision of a corporation, and its officers, was and remains reserved by the legislature to the courts. Rhetoric aside, analogies with abuses of inquisitorial powers in the seventeenth century are inapposite – there is no Star Chamber.

40 If the conditions in s 596A are satisfied, that section allows a judicially supervised intrusion upon the right of the examinee to preserve the confidentiality of books and papers in their possession or control and their right to silence. In *Hamilton v Oades*, Mason CJ said that the purpose of the statutory examination power now conferred by s 596A was "to create a system of

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47 *Finch v Finch* (1752) 2 Ves Sen 491 at 494 [28 ER 315 at 316-317]; *Cardale v Watkins* (1820) 5 Madd 18 [56 ER 801]; *Angell v Angell* (1822) 1 Sim & St 83 [57 ER 33]; *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623 at 644; *Airservices Australia v Transfield Pty Ltd* (1999) 92 FCR 200 at 203-204 [9]-[10]; *Hooper* (1999) 96 FCR 1 at 9 [24]-[25].

48 [1974] AC 133 at 175.

49 See, eg, *Companies Act* 1862 (UK) (25 & 26 Vict c 89). See also *Hale v Henkel* 201 US 43 at 74-75 (1906).

discovery"[50]. Discovery was the creature of the courts of equity themselves, and courts of equity adopted a forward-looking perspective[51] to allow an inquiry to ensure that justice was done in litigation that may have been in the offing[52]. Section 596A is a statutory measure directed at the same end. Such a measure is not beyond judicial power simply because it is framed by the legislature rather than by the courts themselves. Given the examinee's involvement in the examinable affairs of the corporation, the rationale of the statutory intrusion upon the examinee's privacy is, if anything, stronger than the rationale that long sustained the availability of pre-action discovery in Chancery.

Plaintiffs' other contentions about judicial power

41 For the reasons stated, an application under s 596A is a "matter" in the constitutional sense and its determination engages the judicial power of the Commonwealth. Section 596A does not confer non-judicial power on federal courts or on courts exercising federal jurisdiction. The plaintiffs' other contentions do not arise.

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50 (1989) 166 CLR 486 at 497; [1989] HCA 21.

51 *Mercedes Benz AG v Leiduck* [1996] AC 284 at 306.

52 See *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509.

42 GAGELER J. "The framers of a Constitution at the end of the nineteenth century may be supposed to have known that there have been in this world many forms of Government, that the various incidents and attributes of those several forms had been the subject of intelligent discussion for more than 2,000 years, and that some doctrines were generally accepted as applicable to them respectively"[53]. The framers of the Australian Constitution selected, adapted and melded elements of the substantially overlapping constitutional traditions of the United Kingdom and the United States as those traditions were understood to have developed to the end of the nineteenth century. They did so to produce a framework for the creation, at the beginning of the twentieth century, of a distinctly Australian system of national governance. That framework the Australian people, themselves acquainted with the manner in which representative and responsible government under the rule of law had come to be established and to operate in each of the colonies which were to become States, chose to approve. The objectively discernible mutual intentions of the framers and of the people would miscarry, and the system of national governance which the framers laboured to see created would be diminished, were the product of their labour sought to be "construed merely by the aid of a dictionary, as by an astral intelligence … without reference to history"[54].

43 Nowhere is an appreciation of the historical context within which the Australian Constitution was brought into existence more important than in seeking to understand the "judicial power of the Commonwealth", which s 71 vests solely in this Court, in federal courts which the Commonwealth Parliament chooses to create in accordance with s 72 and in courts which the Commonwealth Parliament chooses to invest with "federal jurisdiction" with respect to one or more of the nine categories of "matter" specified in ss 75 and 76. The difficulty and the danger of attempting to formulate some all-encompassing abstract definition of the judicial power of the Commonwealth was acknowledged from its inception[55], was repeatedly recognised in judicial pronouncements throughout the twentieth century[56] and has been reiterated in this century[57].

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53 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1106; [1907] HCA 76.

54 (1907) 4 CLR 1087 at 1109.

55 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 720; Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 321.

56 For example *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 320; [1990] HCA 4; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 532; [1991]

(Footnote continues on next page)

44 For present purposes, an understanding of the nature and scope of the judicial power of the Commonwealth is enhanced by close attention to the reasoning of the plurality of this Court in *R v Davison*[58]. Dixon CJ and McTiernan J (with whom Fullagar J agreed) there pointed out that many functions have traditionally been undertaken by courts of law and equity from which elements of various definitions of judicial power formulated for differing purposes in the early twentieth century are "entirely lacking"[59]. They added that there are also many functions which can be committed to a court which might equally be committed to an administrator[60].

45 Dixon CJ and McTiernan J continued[61]:

> "The truth is that the ascertainment of existing rights by the judicial determination of issues of fact or law falls exclusively within judicial power so that the Parliament cannot confide the function to any person or body but a court constituted under ss 71 and 72 of the Constitution and this may be true also of some duties or powers hitherto invariably discharged by courts under our system of jurisprudence but not exactly of the foregoing description. But there are many functions or duties that are not necessarily of a judicial character but may be performed judicially, whether because they are incidental to the exercise of judicial power or because they are proper subjects of its exercise."

46 Their Honours went on to explain, by reference to the analysis of Holmes J in *Prentis v Atlantic Coast Line Co*[62], that where the legislature has prescribed that a particular act or thing be done through the application of a judicial process, "the character of the proceeding or of the thing to be done

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HCA 32; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-189; [1991] HCA 58.

57 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 22 [51]; [2004] HCA 49; *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 553 [27]; [2013] HCA 5.

58 (1954) 90 CLR 353; [1954] HCA 46.

59 (1954) 90 CLR 353 at 367-368.

60 (1954) 90 CLR 353 at 369.

61 (1954) 90 CLR 353 at 369-370.

62 211 US 210 at 226-227 (1908).

becomes all important" in that "[t]he nature of the final act determines the nature of the previous inquiry"[63].

47 Within that exposition of principle lie two important conceptions. Each had been the subject of earlier judicial articulation and each came to be developed more fully in later cases. The first is of the existence of an area of judicial power within which a particular act or thing done is directed to an ultimate end that can be achieved only through the exercise of judicial power. At the centre of that exclusive area is what has subsequently been described as the "unique and essential function" of the judicial power of "the quelling of … controversies [as to legal rights] by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion"[64]. Also within that exclusive area of judicial power and more difficult to catalogue are some, but by no means all, other functions that have in the past been exercised only by courts. The second conception is of an area of judicial power, within "[t]he borderland in which judicial and administrative functions overlap"[65], and within which a particular act or thing done by a court through the application of a judicial process is directed to an ultimate end that might equally be achieved through the application of a non-judicial process[66]. Beyond those two conceptions lies the area of non-judicial power.

48 Where the Commonwealth Parliament confers a power to do a particular act or thing on a court, it must be assumed in the absence of some indication to the contrary that the Parliament intends and requires that power to be exercised by that court through the application of a judicial process[67]. If the act or thing is capable of being done through the application of a judicial process, the question whether the power to do it is within the judicial power of the Commonwealth turns on the end to which the act or thing is directed.

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63 (1954) 90 CLR 353 at 370. See earlier Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 304.

64 *Fencott v Muller* (1983) 152 CLR 570 at 608; [1983] HCA 12.

65 *Labour Relations Board of Saskatchewan v John East Iron Works Ltd* [1949] AC 134 at 148.

66 See *Pasini v United Mexican States* (2002) 209 CLR 246 at 253-254 [12]; [2002] HCA 3 and the cases there cited; *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 595 [48]; [2007] HCA 29.

67 *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 305; [1957] HCA 81; *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617 at 628; [1981] HCA 51; *Thomas v Mowbray* (2007) 233 CLR 307 at 329 [17], 341 [59]; [2007] HCA 33.

49 Where what the court is empowered to do is to make an order requiring or permitting the conduct of an inquiry or investigation, the question whether the power to make that order is within the judicial power of the Commonwealth therefore turns on the end to which the inquiry or investigation is directed. That is so notwithstanding that the mere making of the order might in a technical, but artificial, sense be said to quell a controversy about whether the order itself should be made.

50 Of the import of the endorsement in *Davison* of the analysis of Holmes J in *Prentis*, Mason J explained in *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission* that the exercise of a power to compel the provision of information is not inherently an exercise of judicial power but that[68]:

> "It may constitute an element in the exercise of judicial power when the power is part of the proceedings of the court, its object being to aid the court or the parties to obtain and present evidence in those proceedings. Then the exercise of the power by the court or the parties in proceedings in the court is for the purpose of enabling the court to hear and determine the lis and is, accordingly, incidental to, if not an element in, the exercise of judicial power."

51 The position is no different in principle where the power conferred on a court to compel the provision of information has as its object to assist an applicant for the exercise of that power in the pursuit of a claim of legal right which is the subject of a proceeding in another court or which may not yet have become the subject of a proceeding at all. A power of that kind was traditionally exercised by the Court of Chancery in issuing bills of discovery[69] and is now often enough exercised by courts making orders for preliminary discovery in accordance with modern rules of civil procedure[70]. The making of an order for preliminary discovery, as the Full Court of the Federal Court demonstrated in *Hooper v Kirella Pty Ltd*[71], fits comfortably within the paradigm case of an exercise of judicial power in that it is directed ultimately to the resolution of a claim of legal right. That is so notwithstanding that the information sought is

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68 (1982) 152 CLR 460 at 472; [1982] HCA 65.

69 See generally *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at 445-446; *Breen v Williams* (1996) 186 CLR 71 at 119-121; [1996] HCA 57.

70 For example Federal Court Rules 2011 (Cth), Pt 7, Div 7.3; Uniform Civil Procedure Rules 2005 (NSW), Pt 5; Supreme Court (General Civil Procedure) Rules 2015 (Vic), O 32.

71 (1999) 96 FCR 1.

essential to the pursuit of the claim and notwithstanding that the claim might well be shown by that information when obtained to be incapable of being established.

52 It is at this point in the analysis that there arises an important question of principle. What if the power conferred on the court to make an order compelling the provision of information is exercisable without any requirement for there to be a *lis* – in the sense of a claim or controversy as to legal right – in aid of the resolution of which the making of the order is directed? What if, to adopt language used by Gaudron J in *Gould v Brown*[72] to describe the power to order the examination of an examinable officer in relation to the examinable affairs of a corporation then conferred by ss 596A and 596B of the Corporations Law, it is "simply a power to obtain information"?

53 Questions of that kind arose in this Court in the exercise of its appellate jurisdiction in *Cheney v Spooner*[73] and again in *Rees v Kratzmann*[74].

54 In *Cheney v Spooner*, the appeal was from an order made under s 16 of the *Service and Execution of Process Act* 1901 (Cth) giving a liquidator leave to serve in Victoria a summons for examination concerning the affairs of a company in voluntary winding up which had been issued by a Master in Equity of the Supreme Court of New South Wales under s 123 of the *Companies Act* 1899 (NSW). In the course of holding the summons for examination to answer the statutory description in s 16 of a "summons … requiring any person to appear and give evidence … in any civil or criminal trial or proceeding", Isaacs and Gavan Duffy JJ referred to the winding up, which had been initiated by petition to the Supreme Court, as "a distinct judicial proceeding". They said that the summons required the giving of "evidence" in that proceeding on the basis that it provided the liquidator with "the means of obtaining information, that is evidentiary facts, enabling him to come to a conclusion as to ultimate facts" in the discharge of his "responsibility of working out the affairs of the company"[75]. No constitutional issue was raised, however, and s 16 was subsequently held not to be confined to process judicial in nature[76].

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72 (1998) 193 CLR 346 at 404 [67]; [1998] HCA 6.

73 (1929) 41 CLR 532; [1929] HCA 12.

74 (1965) 114 CLR 63; [1965] HCA 49.

75 (1929) 41 CLR 532 at 537.

76 *Ammann v Wegener* (1972) 129 CLR 415; [1972] HCA 58. See also *Dalton v NSW Crime Commission* (2006) 227 CLR 490; [2006] HCA 17.

55 In *Rees v Kratzmann*, the appeal was from a decision of the Full Court of the Supreme Court of Queensland dismissing an appeal from a direction of a single judge of that Court that the respondent, a former managing director, not be allowed to answer a certain question in the course of being publicly examined in relation to the affairs of a company pursuant to an order which had been made under s 250 of the *Companies Act* 1961 (Q). Preliminary objection was taken to the jurisdiction of this Court to hear the appeal on the ground that, the appeal arising only in the course of a public examination, there was no *lis* between the parties and that the order appealed from was for that reason not a decree, order, judgment or sentence within the meaning of s 73 of the Constitution. The objection was overruled. Without giving reasons, the Court directed that the hearing of the appeal proceed[77], thereby treating the order of the Full Court of the Supreme Court as one made in the exercise of judicial power[78].

56 One explanation for the outcome of the preliminary objection in *Rees v Kratzmann* might be that, irrespective of whether the making of the order under s 250 of the *Companies Act* had been an exercise of judicial power, the question which arose in the course of the examination as to the scope of the order involved a justiciable controversy[79]. The same explanation might be given of the basis on which an application for special leave to appeal was entertained without objection in *Mortimer v Brown*[80], and of the basis on which appellate jurisdiction was exercised without objection in *Hamilton v Oades*[81], where the issue was whether the common law privilege against self-incrimination was abrogated by the equivalent provision in s 541 of the *Companies (New South Wales) Code*.

57 The question of whether a power legislatively conferred on a court to order an examination in relation to the examinable affairs of a corporation is judicial in nature was raised squarely for the consideration of this Court for the first time in *Gould v Brown*. The issue was whether the power to make such an order, then conferred by ss 596A and 596B of the Corporations Law applying as State legislation under the *Corporations (New South Wales) Act* 1990 (NSW), was validly conferred on the Federal Court. Only three members of the Court of

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77 (1965) 114 CLR 63 at 65.

78 See *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 38 [63]; [2002] HCA 27 and the cases there cited.

79 Cf *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 513; [1997] HCA 3; *Zarro v Australian Securities Commission* (1992) 36 FCR 40 at 60-61.

80 (1970) 122 CLR 493; [1970] HCA 4.

81 (1989) 166 CLR 486; [1989] HCA 21.

six – Brennan CJ and Toohey J and (in a separate judgment) Gaudron J – found it necessary to address whether the power was judicial in nature, and all three found it necessary to do so only to the extent that the power was available to be exercised in respect of a corporation that had been the subject of a winding-up order made by the Federal Court. The view of Brennan CJ and Toohey J was that "[t]o the extent that the power to order and conduct examinations is available for exercise in the course and for the purposes of a winding up, it is an incident of the judicial power of winding up and has a judicial character"[82]. The view of Gaudron J, more sceptical and tentatively expressed, was to substantially similar effect save that her Honour took the view that the power could only be exercised by the court which had ordered the winding up[83].

58 The question was not raised in the appeal to this Court in *Spinks v Prentice*[84], in which other issues were raised as to the validity of the conferral on the Federal Court of power under the Corporations Law set out in s 82 and applying as Territory legislation under s 5 of the *Corporations Act* 1989 (Cth). Gummow and Hayne JJ[85], with whom Gleeson CJ relevantly agreed[86], expressly declined to address the issue. Gaudron J reiterated[87] the view she had expressed in *Gould v Brown*.

59 The question was raised again in this Court in *Saraceni v Jones*[88], on an application for special leave to appeal from a decision of the Court of Appeal of the Supreme Court of Western Australia[89]. The Court of Appeal had formally answered a question referred for its consideration to the effect that the exercise of power by the Supreme Court to make an order for examination under s 596A of the *Corporations Act* 2001 (Cth) and to conduct an examination under s 597 in relation to a corporation in receivership and where the property of the corporation is in the possession of a mortgagee or its agent under Pt 5.2 of the *Corporations*

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82 (1998) 193 CLR 346 at 389 [35] (footnote omitted).

83 (1998) 193 CLR 346 at 403-405 [66]-[70].

84 Reported with *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; [1999] HCA 27.

85 (1999) 198 CLR 511 at 596 [176].

86 (1999) 198 CLR 511 at 546 [25].

87 (1999) 198 CLR 511 at 546-547 [27].

88 (2012) 246 CLR 251; [2012] HCA 38.

89 *Saraceni v Jones* (2012) 42 WAR 518.

Act constitutes an exercise of the judicial power of the Commonwealth[90]. Refusing special leave to appeal, three members of this Court expressed the view that the actual orders of the Court of Appeal were not attended by doubt[91]. That expression of view is of persuasive value but it does not have precedential effect[92].

60 The question of whether the power to make an order for examination under s 596A of the *Corporations Act* is judicial in nature returned to be squarely raised in this Court in these proceedings in its original jurisdiction, which challenge orders made by the Federal Court for examinations into the examinable affairs of a corporation in voluntary liquidation. At the conclusion of the hearing before the Full Court of this Court, I joined in making orders which included an order formally answering in the negative a question reserved for the consideration of the Full Court asking in unqualified terms whether s 596A of the *Corporations Act* is invalid as an attempted conferral of non-judicial power on a federal court or on another court exercising federal jurisdiction.

61 My reasons for considering s 596A of the *Corporations Act* to be a valid conferral of judicial power embrace neither of two somewhat extreme positions advanced in the course of argument by the defendants and by some who intervened to support validity. The argument at one extreme was that it was sufficient to characterise the power as a judicial power that the examination might yield some information that might be used to pursue some claim of legal right. The argument at the other extreme was that it was sufficient to characterise the power as a judicial power that a broadly analogous power of examination can be seen to have been exercised by courts in the Australian colonies in 1900 under provisions modelled broadly on s 115 of the *Companies Act* 1862 (UK)[93]. The first pays insufficient attention to the importance of constitutional history. The second relies on a misinterpretation of what was said by Kitto J in *Davison*, which results in a conception of constitutional history that is too narrow.

62 The separate reasons for judgment of Kitto J in *Davison* contain the following statement[94]:

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90 *Saraceni v Jones* (2012) 42 WAR 518 at 566 [254].

91 *Saraceni v Jones* (2012) 246 CLR 251 at 257 [4].

92 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 117 [52], 133 [112], 134 [119]; [2015] HCA 37.

93 25 & 26 Vict c 89.

94 (1954) 90 CLR 353 at 381-382.

> "It may ... be said that when the Constitution of the Commonwealth prescribes as a safeguard of individual liberty a distribution of the functions of government amongst separate bodies, and does so by requiring 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."

63 The statement too readily misinterpreted is that which immediately follows. His Honour said[95]:

> "For this reason it seems to me that where the Parliament makes a general law which needs specified action to be taken to bring about its application in particular cases, and the question arises whether the Constitution requires that the power to take that action shall be committed to the judiciary to the exclusion of the executive, or to the executive to the exclusion of the judiciary, the answer may often be found by considering how similar or comparable powers were in fact treated in this country at the time when the Constitution was prepared. Where the action to be taken is of a kind which had come by 1900 to be so consistently regarded as peculiarly appropriate for judicial performance that it then occupied an acknowledged place in the structure of the judicial system, the conclusion, it seems to me, is inevitable that the power to take that action is within the concept of judicial power as the framers of the Constitution must be taken to have understood it."

64 The significance of the second of those statements of Kitto J lies in its connection with the first and in the weight properly to be accorded to his Honour's reference to what had come "by" 1900 "consistently" to be "regarded as peculiarly appropriate for judicial performance". His Honour was writing in the context of considering the characterisation of the power to order sequestration, which had been exercised judicially for centuries.

65 What Kitto J can be taken to have meant in *Davison* can only fully be understood by considering what he there said together with what he said subsequently in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*[96], to which it will be appropriate in due course to turn. There is no inconsistency.

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95 (1954) 90 CLR 353 at 382.

96 (1970) 123 CLR 361; [1970] HCA 8.

66 The appropriate perspective on what Kitto J said in *Davison* is that adopted by Jacobs J in *R v Quinn; Ex parte Consolidated Food Corporation*[97]. An argument advanced in that case, relying on what Kitto J had said in *Davison*, was that the particular function of removing a trademark from a register fell within the exclusive area of judicial power because it had in practice been conferred only on courts between 1875 and 1938.

67 Rejecting that argument, Jacobs J (with whom Barwick CJ, Gibbs, Stephen, Mason and Murphy JJ relevantly agreed) said[98]:

> "The historical approach to the question whether a power is exclusively a judicial power is based upon the recognition that we have inherited and were intended by our Constitution to live under a system of law and government which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the parliament and the executive. But the rights referred to in such an enunciation are the basic rights which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom."

68 His Honour continued[99]:

> "On the other hand the course of legislation in comparatively recent times does not, in itself, provide a foundation for the historical approach. If the legislation requires the exercise of a power to determine questions the determination of which will affect what are traditionally regarded as basic legal rights, the judicial nature of the power springs from the effect which the exercise of the decision-making function under the legislation will have upon the legal rights rather than from the history of similar legislation reposing the function in a judicial tribunal."

69 The perspective on the significance of history adopted by Jacobs J in *Quinn* is as important to determining whether a particular function is inherently non-judicial (so as to lie beyond that which is capable of being conferred on a court) as it is to determining whether a particular function is exclusively judicial (so as to be capable of being conferred only on a court). The primary question in each case is not as to how the function might have been exercised in practice at or around 1900. The answer to that narrow temporal question will be relevant, but it cannot be determinative. The aim is not simply to take a snap-shot of the

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97 (1977) 138 CLR 1; [1977] HCA 62.

98 (1977) 138 CLR 1 at 11.

99 (1977) 138 CLR 1 at 12.

historical position at a moment in time. The fundamental question is as to how the particular function is now to be characterised having regard to the systemic values on which the framers can be taken to have drawn in isolating the judicial power of the Commonwealth and in vesting that power only in courts. The aim is to be faithful to those values.

70 The task of assigning content to the judicial power of the Commonwealth "is one of construing the Constitution as it stands", Windeyer J explained in *Tasmanian Breweries*, yet that task of construing the Constitution as it stands is one which it is "impossible to do … on the assumption that Montesquieu had never lived … or that those who framed our Constitution did not copy s 71 from s 1 of Art III of the Constitution of the United States"[100]. Of the concept of judicial power to which s 71 refers, his Honour went on to state[101]:

> "The concept seems to me to defy, perhaps it were better to say transcend, purely abstract conceptual analysis. It inevitably attracts consideration of predominant characteristics and also invites comparison with the historic functions and processes of courts of law."

71 Windeyer J was explaining that the concept of the judicial power of the Commonwealth needs to be understood by reference to the reason for that power being separated and reposed only in courts of law. He was also explaining that the reason for the judicial power of the Commonwealth being separated and reposed only in courts of law needs to be understood against the background of the at first common and then divergent constitutional histories of the United Kingdom and the United States, and the powerful ideas which that history generated.

72 That explanation by Windeyer J in *Tasmanian Breweries* is wholly consistent with the frequently quoted statement of Kitto J in the same case that "a judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons"[102]. That description was of what I have already described as the paradigm case of an exercise of judicial power. Importantly, Kitto J added that "[i]t is right, I think, to conclude from the cases on the subject that a power which does not involve such a process and lead to such an end needs

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100 (1970) 123 CLR 361 at 392.

101 (1970) 123 CLR 361 at 394.

102 (1970) 123 CLR 361 at 374.

to possess some special compelling feature if its inclusion in the category of judicial power is to be justified"[103].

73 By framing his description of judicial power in *Tasmanian Breweries* in "general and ahistorical terms"[104], Kitto J cannot be taken to have been ignoring the importance of what he had described in *Davison* as "distinctions generally accepted at the time when the Constitution was framed". Nor can he be taken to have been ignoring or marginalising the lessons of history. With reference to his Honour's description of the paradigm case of an exercise of judicial power, and similar descriptions that are to be found in other cases, Professor Zines observed[105]:

> "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."

His Honour's requirement, outside the paradigm case, for "some special compelling feature" to justify inclusion in the category of judicial power expressly invokes a normative frame of reference.

74 Of similar effect to the observations of Windeyer J in *Tasmanian Breweries* and Jacobs J in *Quinn* is an observation of Cardozo CJ which was quoted by Mason and Deane JJ in *Hilton v Wells*[106] and (in part) by French CJ and Kiefel J in *Wainohu v New South Wales*[107] as applicable to the Australian Constitution[108]:

> "From the beginnings of our history, the principle has been enforced that there is no inherent power in Executive or Legislature to charge the judiciary with administrative functions except when reasonably incidental to the fulfilment of judicial duties. ... The exigencies of government have

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103 (1970) 123 CLR 361 at 374-375.

104 Cf *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 595 [49].

105 Zines, *The High Court and the Constitution*, 5th ed (2008) at 221. See now Stellios, *Zines's The High Court and the Constitution*, 6th ed (2015) at 223.

106 (1985) 157 CLR 57 at 82; [1985] HCA 16.

107 (2011) 243 CLR 181 at 202 [30]; [2011] HCA 24.

108 *In re Richardson* 160 NE 655 at 657 (1928).

> made it necessary to relax a merely doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible approximation, as that of the separation of powers. Elasticity has not meant that what is of the essence of the judicial function may be destroyed".

Not unimportant for present purposes is that Cardozo CJ made that observation in the context of holding invalid, as incompatible with the separation of powers under the Constitution of the State of New York, a statutory provision which allowed the Governor, in any proceeding for the removal by him of a person from public office, to direct that evidence be taken before a justice of the Supreme Court[109].

75 What then does history relevantly teach about the relationship between a power of investigation or inquiry and the essence of the judicial function?

76 Baron de Montesquieu's *The Spirit of Laws* was first published in 1748. "Of the Constitution of England", he then famously observed (according to an English translation of 1751)[110]:

> "Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor."

77 Borrowing from and providing "an essentially English interpretation of Montesquieu"[111], Sir William Blackstone wrote in the first book of his *Commentaries on the Laws of England*, published in 1765[112]:

> "In this distinct and separate existence of the judicial power ... consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were [judicial power] joined with the legislative, the life, liberty, and property, of the subject would be in the hands of arbitrary judges,

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109 Cf *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 12-13; [1996] HCA 18.

110 Montesquieu, *The Spirit of Laws*, (1751), vol 1 at 185-186.

111 Vile, *Constitutionalism and the Separation of Powers*, (1967) at 105.

112 Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, c 7 at 259-260.

> whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overballance for the legislative. For which reason, by the statute of 16 Car I c 10 which abolished the court of star chamber, effectual care is taken to remove all judicial power out of the hands of the king's privy council; who, as then was evident from recent instances, might soon be inclined to pronounce that for law, which was most agreeable to the prince or his officers. Nothing therefore is more to be avoided, in a free constitution, than uniting the provinces of a judge and a minister of state."

78 In *Huddart, Parker & Co Pty Ltd v Moorehead*[113] Isaacs J referred to that passage, amongst other passages, in Blackstone as "a key" to the meaning of the judicial power of the Commonwealth. After quoting that passage in Blackstone, together with statements concerning the separation of the judicial power of the Commonwealth in *R v Kirby; Ex parte Boilermakers' Society of Australia* made by a majority of this Court[114] and in *R v Richards; Ex parte Fitzpatrick and Browne*[115] (the first made in the context of emphasising the role of the courts in maintaining the federal system and the second emphasising the role of courts more generally in determining whether the other arms of government had acted in "excess of power"), Deane J said in *Re Tracey; Ex parte Ryan*[116]:

> "Therein lie the main point and justification of the doctrine of the separation of judicial from executive and legislative powers upon which the Constitution is structured. To ignore the significance of the doctrine or to discount the importance of safeguarding the true independence of the judicature upon which the doctrine is predicated is to run the risk of undermining, or even subverting, the Constitution's only general guarantee of due process."

79 Blackstone's linking of the separation of judicial power to the dissolution of the Court of Star Chamber by the *Habeas Corpus Act* 1640[117] is for present purposes significant. There was a time, in the seventeenth century, when the Court of Star Chamber, a judicial arm of the Privy Council, acted as "the curious

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113 (1909) 8 CLR 330 at 382-383; [1909] HCA 36.

114 (1956) 94 CLR 254 at 270; [1956] HCA 10.

115 (1955) 92 CLR 157 at 165-166; [1955] HCA 36.

116 (1989) 166 CLR 518 at 580; [1989] HCA 12.

117 16 Car I c 10.

eye of the state and king's council prying into the inconveniencies and mischiefs which abound in the Commonwealth"[118]. Its procedures notoriously included the "oath *ex officio*" which the Puritan John Lilburne, who famously refused to take it in 1637, described as "the inquisition Oath". By that procedure, without necessity for prior particularisation of the subject-matter on which he was to be examined, a defendant would be told to swear at the outset of a proceeding "[t]hat you shall make true answer to all things that are asked of you" and would be punished for contempt if he refused[119]. The *Habeas Corpus Act* 1640, after providing for the dissolution of the Court of Star Chamber[120], went on to provide that "from henceforth no Court, Council or Place of Judicature, shall be … constituted … which shall have, use or exercise the same or the like Jurisdiction"[121] as well as to declare that neither the King nor his Privy Council were to have jurisdiction, power or authority "to examine or draw into question, determine or dispose of the Lands, Tenements, Hereditaments, Goods or Chattels of any the Subjects of this Kingdom; but that the same ought to be tried and determined in the ordinary Courts of Justice, and by the ordinary Course of the Law"[122].

80 From that time forward the general rule, to which it is possible that exceptions might be found were the books to be trawled, has been that courts administering common law do not exercise common law or statutory powers to inquire into subject-matters unconnected with the determination of some claim of legal right. A "court of justice" has been conceived of as distinct from a court of investigation, such as a coroner's court[123] or a court of marine inquiry[124].

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118 Hudson, "A Treatise of the Court of Star Chamber", in Hargrave (ed), *Collectanea Juridica*, (1792), vol 2, 1 at 126, quoted in Holdsworth, "Conspiracy and Abuse of Legal Process", (1921) 37 *Law Quarterly Review* 462 at 466 and in *R v Weaver* (1931) 45 CLR 321 at 339; [1931] HCA 23.

119 See Levy, *Origins of the Fifth Amendment*, (1968) at 100-101, 106, 271-283.

120 Section III.

121 Section IV.

122 Section V.

123 *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431 at 446-447, quoted in *Ammann v Wegener* (1972) 129 CLR 415 at 436.

124 *R v Turner; Ex parte Marine Board of Hobart* (1927) 39 CLR 411 at 442, 450; [1927] HCA 15.

81 The issuing of a search warrant, for example, has never been conceived of as an exercise of judicial power[125] or as of a nature that is susceptible of becoming an exercise of judicial power even if it might be capable of being exercised judicially[126]. Even the conduct of a preliminary inquiry to determine whether a sufficient basis exists to commit a prisoner for trial – a "plainly inquisitorial" feature of criminal process undertaken by justices of the peace since the middle of the sixteenth century[127] having "the closest, if not an essential, connexion with an actual exercise of judicial power"[128] – has been seen not itself to be an exercise of judicial power but rather to be the performance of an executive or ministerial function: the inquisitor acting not as a "Court of Justice" but as "an officer deputed by the law to enter into a preliminary enquiry"[129].

82 In *Rees v Kratzmann*[130], Windeyer J explained:

> "There is in the common law a traditional objection to compulsory interrogations. ... The continuing regard for this element in the lawyer's notion of justice may be, as has been suggested, partly a consequence of a persistent memory in the common law of hatred of the Star Chamber and its works. It is linked with the cherished view of English lawyers that their methods are more just than are the inquisitional procedures of other countries."

His Honour immediately continued[131]:

> "But, strong as has been the influence of this attitude upon the administration of the common law, of the criminal law especially, it must

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125 *Hilton v Wells* (1985) 157 CLR 57 at 67.

126 *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 320-322; *Grollo v Palmer* (1995) 184 CLR 348 at 359-360, 386; [1995] HCA 26.

127 *Azzopardi v The Queen* (2001) 205 CLR 50 at 96-97 [136]; [2001] HCA 25.

128 *R v Murphy* (1985) 158 CLR 596 at 616; [1985] HCA 50.

129 *Cox v Coleridge* (1822) 1 B & C 37 at 51-52 [107 ER 15 at 20], quoted in *Ammann v Wegener* (1972) 129 CLR 415 at 435. See also *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 356-357, discussed in *R v Murphy* (1985) 158 CLR 596 at 616.

130 (1965) 114 CLR 63 at 80.

131 (1965) 114 CLR 63 at 80.

be admitted that in the Chancery Court it had less place: and in bankruptcy jurisdiction it has been largely displaced."

83 The extent to which equity, administered by the Court of Chancery, was a counterpoise to the common law in this respect should not be overstated. A bill of discovery in equity, as I have already noted, was a process directed to the pursuit of a claim of legal right. It was not available to assist the prosecution or defence of a criminal action[132]. There was, moreover, by 1736, "no rule more established in equity, than that a person shall not be obliged to discover what will subject him to a penalty, or any thing in the nature of a penalty"[133].

84 A unifying theme of the core area of equitable jurisdiction exercised exclusively by the Court of Chancery might well be said to have been supervision of administration[134]. That is a particularly apt description of the role of a court administering equity in relation to the Court of Chancery's most significant creation – suggested by Professor Frederic Maitland at the turn of the twentieth century to be "the most distinctive achievement of English lawyers"[135] – the trust. Fundamental to the law of trusts is that the court has jurisdiction to supervise, and in appropriate circumstances to intervene in, the administration of a trust. Indeed, a test of the validity of a trust is that it must be of such a nature that it can be administered by a court[136]. Appurtenant to that jurisdiction is a capacity for a court on application in appropriate circumstances

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132 *Montague v Dudman* (1751) 2 Ves Sen 396 at 398 [28 ER 253 at 254], quoted in *Naismith v McGovern* (1953) 90 CLR 336 at 340, see also at 341-342; [1953] HCA 59.

133 *Smith v Read* (1736) 1 Atk 526 at 527 [26 ER 332 at 332], quoted in *R v Associated Northern Collieries* (1910) 11 CLR 738 at 744; [1910] HCA 61. See also *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 520; [1993] HCA 74.

134 See generally Turner, "Equity and Administration", in Turner (ed), *Equity and Administration*, (2016) 1, especially at 16-20.

135 Maitland, *Equity, Also The Forms of Action at Common Law: Two Courses of Lectures*, (1909) at 23.

136 *Morice v Bishop of Durham* (1805) 10 Ves Jr 522 at 539-540 [32 ER 947 at 954]; *In re Baden's Deed Trusts* [1971] AC 424 at 439-440; *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623 at 633-637.

both to advise a trustee[137] and to compel the provision of information by a trustee[138].

85 Supervision of administration is also an apt description of the role of a court administering equity in relation to "one of the oldest remedies"[139] in the Court of Chancery – the appointment of a receiver, who as an officer of the court and subject to its direction is "to take possession of, get in, or recover, property for the benefit of the persons who are ultimately determined to be entitled to it"[140].

86 The longstanding statutory jurisdiction of the Court of Chancery to supervise the administration of insolvent estates was of the same ilk[141]. In *In re Condon; Ex parte James*[142], a trustee in bankruptcy was described as "an officer of the Court", having "inquisitorial powers", whose duty it was "to hold money in his hands upon trust for its equitable distribution among the creditors".

87 The jurisdiction with respect to companies in winding up, which the Court of Chancery came to exercise in the middle of the nineteenth century, fitted much the same pattern[143]. The winding up of a company has appropriately been described in generic terms as a process, "comparable to an administration in equity", that "consists of collecting the assets, realising and reducing them to money, dealing with proofs of creditors by admitting or rejecting them, and

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137 *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at 93-94 [71]-[74]; [2008] HCA 42.

138 *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 421-422, 444; *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at 724 [36], 730 [54].

139 *Hopkins v Worcester and Birmingham Canal Proprietors* (1868) LR 6 Eq 437 at 447.

140 Heydon, Leeming and Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 5th ed (2015) at 956.

141 Jones, "The Foundations of English Bankruptcy: Statutes and Commissions in the Early Modern Period", (1979) 69(3) *Transactions of the American Philosophical Society* 5 at 49-51.

142 (1874) LR 9 Ch App 609 at 614.

143 *Companies Act* 1862 (UK) (25 & 26 Vict c 89), s 81.

distributing the net proceeds, after providing for costs and expenses, to the persons entitled"[144].

88 The legacy of the jurisdiction so exercised by or conferred on the Court of Chancery, as Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ remarked in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia*[145], is that in modern times "courts are well accustomed to the exercise of supervisory jurisdiction upon applications by trustees, receivers, provisional liquidators and others with the responsibility for the conduct of administrations".

89 Within the context of administration, the statutory powers first reposed in the Court of Chancery in the middle of the nineteenth century to make orders for the examination of bankrupts[146] and of officers and other persons in relation to the affairs of companies in winding up[147], which came correspondingly to be conferred on the Supreme Courts of the Australian colonies by the end of the nineteenth century[148], could not be regarded as anomalous. But they were regarded as "extraordinary"[149] and could "only be described as being sui generis"[150].

90 Of the power to make an order for the examination of a bankrupt, Jessel MR said in *In re Wright; Ex parte Willey*[151]:

> "Now that is a very grave power to entrust to any Court or any man, viz, power to summon any other man whom you suspect (for mere suspicion will do) to be capable of giving information, and to get any information from him, although that information may be extremely hostile to the interests of the man himself. It is a power which, so far as I know, is found nowhere except in bankruptcy and the winding-up of companies

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144 *Re Crust 'N' Crumb Bakers (Wholesale) Pty Ltd* [1992] 2 Qd R 76 at 78.

145 (1998) 195 CLR 1 at 47 [80]; [1998] HCA 30.

146 10 & 11 Vict c 102.

147 *Companies Act* 1862 (UK) (25 & 26 Vict c 89), ss 115, 138.

148 See *Dalton v NSW Crime Commission* (2006) 227 CLR 490 at 509 [50].

149 *In re North Australian Territory Co* (1890) 45 Ch D 87 at 93.

150 *In re Rolls Razor Ltd (No 2)* [1970] Ch 576 at 592.

151 (1883) 23 Ch D 118 at 128.

(which is a kind of bankruptcy); it is a very extraordinary power indeed, and it ought to be very carefully exercised."

In *In re Greys Brewery Co*[152], Chitty J referred to s 115 of the *Companies Act* 1862 (UK) – the provision originally conferring power on the Court of Chancery to order an examination in relation to the affairs of a company in winding up – as the "'Star Chamber' clause".

91 How then, in light of that history, should this Court approach the characterisation of a power to order an examination conferred on a court by what those who support its validity argue to be a modern equivalent of that "'Star Chamber' clause"?

92 We must be careful not to slip into "Montesquieuan fundamentalism"[153]. We must bear in mind that the Constitution as a whole was framed as "an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances"[154]. We must recognise that "[t]he modern regulatory state arrived after 1900", with consequences which include that "modern federal legislation creates rights and imposes liabilities of a nature and with a scope for which there is no readily apparent analogue in the pre-federation legal systems of the colonies"[155] and that "[d]eciding whether a governmental power or function is best exercised administratively or judicially is a regular legislative exercise"[156]. We must also be sensitive to the consideration that "the exercise of powers, independently, impartially and judicially, especially when such powers affect the liberty of the individual, would ordinarily be regarded as a good thing, not something to be avoided"[157].

93 Fidelity to the values which inform the separation of the judicial power of the Commonwealth nevertheless requires that we be extremely cautious about accretion to the judicial power of a power to inquire which is unrelated or tenuously related to the core judicial function of quelling controversies about

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152 (1883) 25 Ch D 400 at 408.

153 *Wainohu v New South Wales* (2011) 243 CLR 181 at 201-202 [30].

154 *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 81; [1945] HCA 41.

155 *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 595 [48].

156 *Thomas v Mowbray* (2007) 233 CLR 307 at 327 [12].

157 *Thomas v Mowbray* (2007) 233 CLR 307 at 329 [17].

legal rights. To admit that an inquiry into a subject-matter is in the public interest is very different from admitting that the conferral of a power to conduct such an inquiry on a court accords with the constitutional structure that has been created to secure the enduring interests of the Commonwealth. Our job is to take a long-term view.

94 In *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd*[158], French J held that s 596A of the *Corporations Act* is limited on its proper construction to requiring the making, on the application of an "eligible applicant", of an order for examination of a person who is or was during a prescribed period an officer or provisional liquidator about the "examinable affairs" of a corporation that is in "external administration" within the meaning of Ch 5 of the *Corporations Act*. That holding has not been challenged.

95 External administration within the meaning of Ch 5 includes winding up by order of the court in the event of insolvency under Pt 5.4 or on other grounds under Pt 5.4A. External administration also includes voluntary winding up, by special resolution of the company, under Pt 5.5. Commencement of winding up results in each case in the appointment of one or more liquidators (which may include a "special purpose" liquidator)[159]: who is or are subject to the supervision of the court[160]; who, on cause shown, can be removed by the court[161]; and who can apply to the court for the determination of questions arising in the winding up[162].

96 Other forms of external administration within the meaning of Ch 5 are many and varied, but they have in common the temporary control over the property or affairs of a company (or other body under Pt 5.7) subject to the supervision of the court. They include administration of a company's affairs with a view to executing a deed of company arrangement under Pt 5.3A, which may be triggered by the appointment of an administrator[163] who is to have control of the business of the company[164], as well as administration conducted by an

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158 (2007) 156 FCR 501.

159 Sections 472, 495 and 511 of the *Corporations Act*.

160 Section 536 of the *Corporations Act*.

161 Sections 473 and 503 of the *Corporations Act*.

162 Sections 479 and 511 of the *Corporations Act*.

163 Section 435C of the *Corporations Act*.

164 Section 437A of the *Corporations Act*.

administrator under such deed of company arrangement as the creditors of the company might resolve that the company execute under Pt 5.3A[165]. They include such administration as might be conducted by a person appointed to administer a compromise or arrangement approved by a court between a company and its creditors or members under Pt 5.1. Finally, they include such administration as might be conducted by a "controller" of property of a corporation, being a receiver or another person having possession or control of that property for the purpose of enforcing a security interest[166]. Under Pt 5.2, a controller, like a liquidator: is subject to the supervision of the court[167]; can be removed by the court[168]; and can apply to the court for directions arising in the performance or exercise of any of the controller's functions or powers[169].

97 Eligible applicants for an order under s 596A are limited to liquidators (including provisional liquidators), administrators, and the Australian Securities and Investments Commission (and persons appointed by it to be applicants)[170]. Examinable affairs, although broadly defined, do not extend beyond the affairs of the corporation and connected entities or matters connected to those affairs[171].

98 The purpose of Pt 5.9, it has repeatedly been recognised, is to aid persons who have the responsibility of the external administration of a corporation in carrying out their duties[172], and it has been recognised that an examination could be restrained as an abuse of process were it to be conducted for an improper purpose such as a purpose of establishing guilt[173]. Moreover, as Martin CJ

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165 See *Re Sons of Gwalia Ltd; Ex parte Love* (2008) 218 FLR 49 at 67-68 [71]-[72]; *Ariff v Fong* (2010) 79 NSWLR 392 at 408 [55].

166 Section 9 of the *Corporations Act*, definition of "controller".

167 Section 423 of the *Corporations Act*.

168 Section 434A of the *Corporations Act*.

169 Section 424 of the *Corporations Act*.

170 Section 9 of the *Corporations Act*, definition of "eligible applicant".

171 Section 9 of the *Corporations Act*, definition of "examinable affairs".

172 *Evans v Wainter Pty Ltd* (2005) 145 FCR 176 at 216 [245]. See also *New Zealand Steel (Australia) Pty Ltd v Burton* (1994) 13 ACSR 610 at 613; *Meteyard v Love* (2005) 65 NSWLR 36 at 40 [7].

173 *Meteyard v Love* (2005) 65 NSWLR 36 at 40 [8], quoting *Hamilton v Oades* (1989) 166 CLR 486 at 498.

explained in *Saraceni v Jones*[174], the court making an order under s 596A has an important role in supervising under ss 596F and 597 the conduct of the examination it has ordered, being a role which coincides closely with what Barwick CJ described in *Rees v Kratzmann*[175] as "the traditional judicial function of ensuring that the examination is not made an instrument of oppression, injustice, or of needless injury to the individual".

99 Construed and confined in that way, the duty s 596A imposes on a court to order an examination does not take the court beyond the role of supervising an administration. The section meets in its entirety the description given by Lockhart J in *BP Australia Ltd v Amann Aviation Pty Ltd*[176] and adopted by Brennan CJ and Toohey J in *Gould v Brown*[177] of "part of the processes … which ultimately protect and adjust the rights of companies, their creditors and in some cases contributories" in which the overall role of the court is "supervisory". Not all of the processes of administration in question are triggered by a court order, but the supervisory role of the court in relation to each is not materially different.

100 The persons who may apply for an order for examination under s 596A, the persons who may be examined and the subject-matter of an examination resulting from such an order, all go beyond the persons and subject-matter of an examination capable of being ordered in the exercise of powers conferred on courts in the Australian colonies before 1900. They do not, however, do so in a manner or to an extent that engages any more acutely the concerns which have resulted, as a general rule, in the exclusion of a mere power to inquire from the concept of judicial power.

101 On that basis, which I understand to correspond with the substance of the reasoning of French J in *Highstoke* and to be consistent with the observations made on refusing special leave to appeal in *Saraceni v Jones*[178], I consider s 596A to confer a judicial power.

102 The concept of a "matter" was chosen by the framers for inclusion in ss 75, 76 and 77 of the Australian Constitution in preference to the expressions "cases" and "controversies" in §2 of Art III of the United States Constitution in order to ensure that federal jurisdiction would not be confined to cases in which

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174 (2012) 42 WAR 518 at 534 [66].

175 (1965) 114 CLR 63 at 66.

176 (1996) 62 FCR 451 at 475.

177 (1998) 193 CLR 346 at 387-388 [33].

178 (2012) 246 CLR 251 at 256-257 [3]-[4].

there were parties but would encompass all "such matters as can arise for judicial determination"[179]. In the paradigm case of an exercise of the judicial power of the Commonwealth that is directed to the quelling of a controversy about legal rights, the "matter" extends, if not to the entirety of the circumstances giving rise to the totality of the controversy, then to at least so much of the circumstances as give rise to so much of the controversy as is committed by the Parliament to the judicial determination of a court exercising federal jurisdiction[180]. Outside the paradigm case, the "matter" might be otherwise defined. For example, the jurisdiction that was conferred on the Family Court by s 63(1) of the *Family Law Act* 1975 (Cth)[181] "in relation to matters arising under" Pt VII of that Act in proceedings in relation to the custody, guardianship or welfare of a child is a statutory jurisdiction similar to the *parens patriae* jurisdiction traditionally exercised by the Court of Chancery. In that context, the "matter" has been treated as properly identified as "the welfare of a child"[182].

103 The "matter" to which the exercise of the judicial power of supervision under Pt 5.9 of the *Corporations Act* (of which s 596A is a part) is directed is that appropriately identified as external administration under and in accordance with the *Corporations Act*. It is a matter within s 76(ii) of the Constitution.

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179 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 31 January 1898 at 320. See Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 765.

180 *Abebe v The Commonwealth* (1999) 197 CLR 510; [1999] HCA 14.

181 See now s 69H of the *Family Law Act* 1975 (Cth).

182 *Secretary, Department of Health and Community Services v JWB and SMB* (*Marion's Case*) (1992) 175 CLR 218 at 257; [1992] HCA 15.