HIGH COURT OF AUSTRALIA

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### Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **Michael Thomas Walton**
First Appellant

**Anthony Bogan**
Second Appellant

and

**ACN 004 410 833 Limited (Formerly Arrium Limited) (In Liquidation)**
**ACN 004 410 833**
First Respondent

**KPMG**
Second Respondent

**Colin Galbraith**
Third Respondent

## APPELLANTS' SUBMISSIONS

### Part I: PUBLICATION

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

### Part II: ISSUES ON THE APPEAL

2. The following issues arise on the appeal with respect to s 596A of the *Corporations Act 2001* (Cth) (**Act**) and the summons issued under that section to a director of the first respondent (**Arrium**):
    a. whether the summons was an abuse of process because the appellants' predominant purpose was to investigate and pursue claims in their capacity as shareholders against Arrium's directors or auditors: **CAB 131, 132** at CA [140] and [141];
    b. whether the summons was an abuse of process because the fulfilment of the appellants' purpose would not confer a demonstrable or commercial benefit on

Arrium or its creditors and (possibly all) of its contributories: **CAB 126, 132** at CA [123] and [141]; and

c. whether the appellants' purpose served the legitimate purpose of enabling evidence and information to be obtained to support the bringing of proceedings against examinable officers and other persons in connection with the examinable affairs of Arrium.

**Part III: *JUDICIARY ACT 1903*, s 78B**

3. Notices pursuant to s 78B of the *Judiciary Act 1903* are not required.

**Part IV: REPORT OF DECISIONS BELOW**

4. The reasons of the primary judge, Black J, were delivered on 19 November 2019 and are not reported. The internet citation is [2019] NSWSC 1606 (**J**) at **CAB 5**. Orders (with further reasons) were made on 2 December 2019 with internet citation [2019] NSWSC 1708 at **CAB 43**; **57**. The reasons of the Court of Appeal comprising Bathurst CJ, Bell P and Leeming JA, are reported at [2020] NSWCA 157; 383 ALR 298 (**CA**) at **CAB 76**.

**Part V: FACTS**

5. The appellants were shareholders of Arrium which was a company listed on the Australian Stock Exchange and a significant producer of steel and iron ore. Its assets included the Southern Iron Mining operation: **CAB 83** at CA [2] and [8].

6. On 15 September 2014, Arrium announced a fully underwritten $754 million capital raising. The purpose of the capital raising was to pay down debt. Retail shareholders were offered a one for one pro rata entitlement offer and were provided with an Information Memorandum in respect of the offer with earnings guidance and a financial outlook. In addition, and shortly before the capital raising, Arrium released its results for the financial year ending 30 June 2014: **CAB 83** at CA [3-5].

7. The capital raising was completed by 14 October 2014: **CAB 83** at CA [6].

8. By January 2015, Arrium announced the suspension or close of the Southern Iron Mining operation. By February 2015, Arrium had recognised an impairment in the value of its mining operations in an amount of $1,335 million: **CAB 83-84** at CA [7].

9. Arrium went into voluntary administration on 7 April 2016 and into liquidation on 20 June 2019: **CAB 84** at CA [7].

10. On 5 April 2018, the appellants' solicitors wrote to the Australian Securities and Investments Commission (**ASIC**) seeking "eligible applicant" status to participate in examinations in circumstances where they were concerned that the information disclosed at the time of the capital raising did "not adequately or fairly" portray the "true state of Arrium's business": **CAB 84** at CA [8]. On 24 April 2018, ASIC authorised the appellants as "eligible applicants": **CAB 85** at CA [12].

11. On 6 May 2019, the appellants applied for orders under s 596A of the Act that an examination summons be issued to Mr Colin Galbraith for examination and to produce documents. Mr Galbraith was a director of Arrium until December 2015, chair of its Governance and Nominations Committee and member of its Audit and Compliance Committee: **CAB 85-86** at CA [13]. The Registrar made the examination order on 15 May 2019: **CAB 87** at CA [17].

12. The affidavit in support of the application disclosed that its purpose was to obtain further information about potential claims the appellants and shareholders may have against Arrium's officers and auditors arising out of information disclosed as part of the capital raising. Further, the deponent anticipated the examinations would reveal "important factual matters bearing on whether the Company Officers of Arrium failed to adequately inform the market as to the financial position of Arrium in FY 2014 and FY 2015": **CAB 86** at CA [15].

13. The appellants are not, and were not at the time of the issue of the summons, creditors of Arrium in circumstances where they had not lodged a proof of debt and Arrium and its related companies had entered into deeds of company arrangement and a deed of distribution which had the effect that creditors were taken to have abandoned all claims if they had not lodged a proof of debt by the specified barring date: **CAB 87-88** at CA [20].

14. Arrium's evidence, at first instance, included an affidavit of Ms Caroline Goulden deposing to the fact that the September 2014 capital raising was not the subject of detailed investigations because the liquidators considered it unlikely that its circumstances would give rise to a cause of action to benefit Arrium or its creditors because Arrium had not suffered a loss as a result of the capital raising: **CAB 88** at CA [21-22].

15. The Court of Appeal agreed with the trial judge's assessment that the appellants' predominant purpose in seeking the issue of the examinations summons was to investigate and pursue a personal claim in their capacity as shareholders against Arrium's directors or auditors: **CAB 92, 128** at CA [36], [129]. There is no dispute that the potential claim relates to Arrium's alleged failure to inform, adequately, the market as to its financial position in FY2014 and FY2015 and, specifically, representations made to the market of investors and potential investors in Arrium concerning the capital raising and its financial position at the relevant times: **CAB 86** at CA [15].

## Part VI: ARGUMENT

16. Properly construed, and contrary to the Court of Appeal's findings, s 596A does not require:
    a. the applicant for a summons to have the predominant purpose of benefitting the corporation, its creditors or contributories, in the sense that they must have the immediate purpose of benefitting the company or its creditors and all contributories (as existed at the time of the appointment of administrators);[1] or,
    b. the *fulfilment* of the applicant's purpose to confer a commercial or demonstrable benefit on the company or its creditors (and possibly on all of its contributories).[2]

17. So much arises from the plain words and context of the provision.

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[1] *cf* **CAB 131, 132** at CA [140] and [141].
[2] *cf* **CAB 126, 132** at CA [123] and [141].

**Section 596A is mandatory**

18. Section 596A mandates that the Court must issue an examinations summons to a person about a company's examinable affairs provided two conditions are met.

19. First, the applicant for the summons must be an "eligible applicant" as that term is defined in s 9.

20. Secondly, the Court must be satisfied that the person the subject of the summons is an officer or provisional liquidator of the corporation during or after the two years ending on the day the winding up began or, in the case of a company in voluntary administration or subject to a deed of company arrangement, the section 513C day, as defined.

21. The subject matter of the examination must be the corporation's "examinable affairs" which, pursuant to s 9, includes "the promotion, formation, management, administration or winding up of the corporation" and the matters set out in s 53.

22. Section 596A appears, along with s 596B, in Division 1 of Part 5.9 which is entitled "Examining a Person about a Corporation". Unlike s 596A, s 596B affords the Court the discretion whether to issue a summons on application by an eligible applicant. Section 596B is not restricted to a company's officers but is directed to any person the Court is satisfied has taken part in the examinable affairs of the company and has been, or may have been, guilty of misconduct in relation to the corporation or may be able to give information about the examinable affairs of the corporation.

23. The mandatory nature of s 596A is a departure from the examination provisions which preceded it.

24. Section 596A was enacted after the Law Reform Commission handed down its Report No. 45, 1988 (**Harmer Report**). At paragraph 584 of that Report, the Commission noted that the chief purposes of such examinations were:

> "*to facilitate the recovery of property, to discover whether conduct of the insolvent led to the insolvency and to investigate possible causes of action against third parties.*"

25. The Commission recommended that corporate insolvency examination procedures be brought into line with those in bankruptcy and without the requirement for a court order: at [585]-[586].

26. The parliament did not enact that recommendation, but instead enacted s 596A. The Explanatory Memorandum to the *Corporate Law Reform Bill 1992* acknowledged the concern expressed in the Harmer Report that the "formalities and expense involved in obtaining a court order may be a deterrent to the use of the procedure" (at [1153], p 227). In response, the Explanatory Memorandum stated:

> *"The intention is that the Court will issue the summons where it is satisfied that the person's connection with the company is such that the person is an examinable officer . . . It is envisaged that the issue of a summons in such circumstances will be a formality . . ."* (at [1155], p 228).

27. By making the provision mandatory, the clear legislative intention is to compel a company's officers to account publicly concerning the company's examinable affairs upon application by an eligible applicant. Its mandatory nature speaks to the facility with which the provision is intended to be used and speaks against a construction which imposes requirements and outcomes not mandated by its terms.

**Standing to apply is conferred on a range of applicants including ASIC**

28. The provision confers standing on an "eligible applicant". At the relevant time, "eligible applicant" was defined to mean the Australian Securities and Investments Commission (**ASIC**), a liquidator or provisional liquidator of the corporation, an administrator of the corporation, an administrator of a deed of company arrangement executed by the corporation or a person authorised by ASIC to make the application.

29. **ASIC:** ASIC's objectives are listed in s 1(2) of the *Australian Investment and Securities Commission Act 2001* (Cth) **(ASIC Act),** the first two of which are:

    a. maintaining, facilitating and improving the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs and the efficiency and development of the economy; and

b. promoting the confident and information participation of investors and consumers in the financial system.

30. None of ASIC's objectives include assisting individual companies under external administration or increasing returns to their creditors, and imposing such duties may be incompatible with ASIC's statutory objectives.[3]

31. ASIC's stated objectives are substantially in the same form as those provided for in s 1(2) of the *Australian Securities and Investments Commissions Act 1989*[4] the enactment of which predates s 596A of the Corporations Law. By naming ASIC as an eligible applicant, the parliament could not have expected ASIC to have acted other than consistently with its statutory objectives.

32. Further, the fulfilment of those objectives cannot be assumed to confer a demonstrable or commercial benefit to the company or (all) of its creditors or (possibly all) of its contributories assist the company. An example of this is where, in keeping with its statutory objectives, ASIC seeks to examine directors concerning the issue of a fraudulent prospectus to support commencing civil penalty or criminal proceedings against them. Such an examination is unlikely to confer a benefit on the company or its creditors[5] and may, in fact, be detrimental to the company's prospects if, say, the company is in voluntary administration. It cannot be said that, in those circumstances, ASIC's use of the power constitutes an abuse.

33. **ASIC authorisation of others:** ASIC itself can authorise other persons to be "eligible applicants". The weight of authority suggests that, properly construed, the source of ASIC's power to authorise a person as an eligible applicant under s 596A is s 11(4) of the ASIC Act.[6] This section authorises ASIC to do whatever is necessary for or in connection with, or reasonably incidental to the performance of its functions.

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[3] *Lock v Australian Securities and Investments Commission* (2016) 248 FCR 547 at 595-600 [219]-241] (Gleeson J).
[4] Including as amended pursuant to the *Corporations Legislation Amendment Act 1990*.
[5] For reasons including those determined by this Court in *Pilmer v Duke Group (In Liq)* (2001) 207 CLR 165.
[6] *Saraceni v Australian Securities and Investments Commission* (2012) 211 FCR 298 at 305 [34] (Jacobson J); *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501 (French J) at [79]-[80] following *Hong Kong Bank of Australia Ltd v Australian Securities Commission* (1992) 40 FCR 402 (Lockhart, Gummow and O'Connor JJ) at 408; *cf Burns Philp & Co Ltd v Murphy* (1993) 29 NSWLR 713 (Mahony, Clarke and Handley JJA).

34. There is no principled reason why ASIC could not authorise a shareholder to incur the expense of conducting the examination in the example given above at paragraph 32. The shareholder may elicit the same information to support proceedings against the company's directors for the same potential breaches, albeit for compensation instead of a penalty. The examination would touch upon matters relevant to ASIC and other shareholders and each may seek access to the transcript of examination. In those circumstances it ought not be said that the examination is being conducted for purely "private" purposes[7] notwithstanding the applicant is not benefitting the company or its creditors.

35. While ASIC may authorise a person to assist it to fulfil its "public" function, it is not constrained to authorise only those whose subjective purpose is to fulfil a public function.

36. In *Whelan v Australian Securities Commission (No 1)*,[8] Beaumont J resisted a construction of the legislation which restricted ASIC's capacity to authorise only those persons with a "public" role in the same class as a liquidator. His Honour held that the provision allowed ASIC to authorise a privately appointed receiver of a trustee of debenture holders owing duties only to the debenture holders: at 346C-E and 347F-G.

37. In *Ryan v Australian Securities and Investments Commission; In the matter of Allstate Explorations NL (Subject to Deed of Company Arrangement)*,[9] the administrators of the company sought to set aside ASIC's authorisation of two shareholders to conduct examinations on bases, including, that ASIC was required to ensure that there was a financial benefit to the corporation: 316 at [50]. Gyles J rejected that submission for reasons including that there was no mandatory consideration of that kind in the statute and that it ignored the general purposes of public examination: 316-317 at [51].

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[7] It was for this reason, amongst others, that Hayne J determined that the creditor's application was within the purposes of the legislation in *Re Marvin Manufacturers (Aust) Pty Ltd; New Zealand Steel (Australia) Pty Ltd v Burton* (1994) 12 ACLC 586 at 593 to 594 (Hayne J).
[8] (1993) 58 FCR 333.
[9] (2007) 158 FCR 59 (Gyles J).

38. In *Re Excel Finance Corporation Ltd; Worthley v England* (***Re Excel***),[10] it was noted that contributories, as well as creditors, had the appropriate connection with the corporation to warrant authorisation by ASIC under former s 597: 84A-B. The court came to that conclusion after a review of the legislative history of s 597 and the standing traditionally conferred on those parties: at 80G-81D. Nowhere is it suggested that contributories would not be an appropriate applicant for examination orders because they may be motivated to benefit themselves and not the company or its creditors.

39. It is therefore the case that the provision confers standing on the following:
    a. external administrators who act in the interests of the company and its creditors;
    b. ASIC which acts in accordance with its statutory objectives of regulating companies and entities within the financial system; and
    c. those authorised by ASIC who are not confined to those fulfilling a "public" function, but which may include those acting in their own interests, such as creditors or shareholders, or the interests of others, such as trustees or receivers.

40. This does not gainsay the ensuing summons being set aside as an abuse, notwithstanding the applicant's authorisation by ASIC. This must be so where the process of authorisation and application is a two-staged process.[11] However, it does suggest that the objectives of the provision are not served solely by those whose subjective purpose is to benefit the company and its creditors, as might be the case had the legislation conferred standing only on, say, external administrators. Nor does it support a construction that the intended outcome of the applicant must confer a benefit on the company and its creditors.

41. There is one further matter: to the extent ASIC is required to consider an applicant's purposes when granting authorisation[12] then, assuming ASIC has properly determined those purposes to be appropriate and has duly authorised the applicant, it is a curious

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[10] (1994) 52 FCR 69 at 79E-81E (Gummow, Hill and Cooper JJ).
[11] *Re Excel* at 82D-83C (Gummow, Hill and Cooper J).
[12] The reasoning in *Re Excel* suggests this is the case at least with respect to identifying any potential conflicts between the applicant's purposes and the winding up: at 88A-C.

outcome for the Court to set aside, as an abuse, the application which seeks no more than to fulfil the purposes as disclosed to ASIC.

**Section 596A applies to a range of external administrations**

42. Part 5.9 is entitled "Miscellaneous" and appears in Chapter 5 of the Act which is entitled "External Administration". Its context suggests the provision applies only to companies the subject of external administration, and it has since been read down as applying only to such companies.[13] The external administrations in Chapter 5 comprise receiverships (Pt 5.2), voluntary administrations (Pt 5.3A), court ordered winding up in insolvency (Pt 5.4), court ordered winding up on other grounds (Pt 5.4A), members' voluntary winding up (Div 2 Pt 5.5) and creditors' voluntary winding up (Div 3 Pt 5.5).

43. It is, therefore, not the case that s 596A only applies to companies under external administration and which are insolvent. Further, the fulfilment of the applicant's purposes in certain administrations will be unlikely to confer a "demonstrable" or "commercial" benefit to the company and (all) of its creditors. Two examples illustrate the point.

44. **Receivership:** A receiver acts to repay its secured creditor and has no interest in further augmenting the company's assets for the benefit of lower ranking creditors. The fulfilment of the receiver's purpose will reduce the liabilities of the company and, correspondingly, its assets. The receiver's actions are unlikely to result in a net benefit to the company. For the same reason, the fulfilment of a receiver's purpose is unlikely to provide a "demonstrable" or "commercial" benefit to the general body of unsecured creditors.

45. **Members' voluntary winding up**: A member may seek to examine a director in the context of a member's voluntary winding up. In circumstances where it must be assumed the company has sufficient funds to pay all creditors,[14] there can be no

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[13] *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501 (French J), cited favourably in *Palmer v Ayers* (2017) 259 CLR 478 at 513 [94] (Gageler J).

[14] A company may only continue by way of a members' voluntary winding up provided the liquidator does not form the view that the company is unable to pay its debts and within the times specified in the directors' solvency declaration in the manner provided for in ss 495 and 496.

additional or demonstrable benefit to any of them by fulfilment of the member's purpose. Further, where the director is also a member, any claims ultimately pursued will not result in a benefit to "possibly all" members.

**Legislative history of s 596A does not support a narrow construction of its purpose**

46. Sections 596A and 596B have an extensive legislative history which has been addressed in a number of cases.[15] It is neither necessary nor appropriate to rely on an historical analysis of repealed provisions to construe the scope and purposes of s 596A as enacted at the relevant time.[16] It is nonetheless relevant to observe that, historically, examination provisions expressly conferred standing on contributories.[17]

47. Prior to Federation, Australian colonies passed legislation based on English provisions, most notably the *Companies Act 1862* (UK) (25 & 26 Vict c 89), which contained provisions for court ordered examinations (ss 115 and 117) and, in the circumstances of a voluntary winding up, the capacity for liquidators or contributories to apply to the court to exercise its powers, such as conducting examinations (s 138).[18]

48. Examination provisions were introduced into New South Wales by the *Companies Act 1874* (NSW), including s 216 which provided for, among other things, examinations of directors in relation to misfeasance on the application of a liquidator, a creditor or a contributory with the potential for the director to be ordered to account for or repay misapplied moneys or to contribute money to the assets of the company by way of compensation. Equivalent provisions have appeared in successive legislative enactments in each state.[19] Each of those provisions expressly conferred standing on contributories, as well as creditors and liquidators, to apply for an examination summons.

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[15] *Evans v Wainter Pty Ltd* (2005) 145 FCR 176 at 185-186 [44]-[56] and 194-198 [101]-[125] (Lander J); *Re Excel* at 79E-81E; *Saraceni v Jones* (2012) 42 WAR 518 at 541-546 [114]-[141] (McLure P).
[16] *Palmer v Ayres* (2017) 259 CLR 478 at 494 [37] (Kiefel, Keane, Nettle and Gordon JJ.
[17] *Cf* **CAB 97, 98 and 100** at CA [45], [49] and [52] where the Court of Appeal suggested that the legislation had not, until the enactment of s 541 of the *Companies (NSW) Code* in 1981, specified the persons entitled to apply for an examinations order. This appears to have been based on a limited review of the examination provisions as they applied only in the context of a court ordered winding up.
[18] *Saraceni v Jones* (2012) 42 WAR 518 at 541-542 [121]-[123] (McLure P).
[19] In New South Wales, the provision was substantially replicated in s 162 of the *Companies Act 1899* (NSW), s 308 of the *Companies Act 1936* (NSW) and s 305 of the *Companies Act 1961* (NSW).

49. In New South Wales (and as replicated in other states), the *Companies Amendment Act 1971* (NSW) introduced new ss 367A to 367C to the *Companies Act 1961* (NSW). Upon that amendment, the National Securities Commission (a predecessor to ASIC) was first empowered to seek examination orders. On that bill's second reading speech, it was said to confer upon the Commission "new powers in aid of the detection of fraud and misfeasance": 9 Sept 1971. p 731. The new provisions granted standing to either the Commission or a "prescribed person". Sub-sections 367B (1A)(a) and (b) expressly defined a prescribed person as including a liquidator or provisional liquidator; or "a contributory of the company", respectively. Unlike previous enactments, creditors were not conferred standing by its terms. Standing, for a creditor, could only come through authorisation by the Commission under the new s 367B (1A)(d) which also defined a "prescribed person" as a person authorised by the Commission to make an application.[20]

50. Sections 367A to 367C, 249 and 250 of the *Companies Act 1961* (NSW) were repealed upon enactment of section 541 of the *Companies (NSW) Code*. Section 541 defined a "prescribed person" to be an official manager, liquidator or provisional liquidator or any other person authorised by the Commission without express reference to either contributories or creditors. The available extrinsic material does not disclose the reasons for the amendment.[21] The successor provision to s 541 of the *Companies Code (NSW)* was s 597 of the Corporations Law which was in substantially the same form and applied until the enactment of ss 596A and 596B pursuant to the *Corporate Law Reform Act 1992*, and as substantially replicated in the *Corporations Act 2001* (Cth).

51. The purposes of the examinations power have been considered by this Court with respect to s 250 the *Companies Act 1961* (Qld) and s 541 of the *Companies (NSW) Code*.

52. In *Rees v Kratzmann*,[22] the majority declined to construe s 250 of the *Companies Act 1961* (Qld) as restricting the scope of the examination to the matters stated in the

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[20] *cf Re Excel* at 80G to 81A which states that s 541 of the uniform *Companies (New South Wales) Code* was the first time the Commission was granted power to authorise persons to apply for an examination order without reference to s 367B of the *Companies Act 1961* (NSW), as amended.
[21] *Re Excel* at 81A-B.
[22] (1965) 114 CLR 63 (Barwick CJ, Taylor, Menzies and Windeyer JJ, Kitto J in dissent).

initiating report from the liquidator, provided that the examination did not stray beyond the promotion, formation, trade, dealings, affairs or property of the company as required by the legislation. Menzies J (with whom Barwick CJ and Taylor J agreed), noted that the section was explicable historically and did not afford a substantial ground for implying an over-all limitation: at 78. In the plurality, Windeyer J noted that such examination provisions correlated to those originally appearing in bankruptcy stating, at 80:

> *" . . . the purpose of the bankruptcy statute being to secure a full and complete examination and disclosure of the facts relating to the bankruptcy in the interests of the public. The provisions of* The Companies Act *reflect, it seems to me, the same idea. The honest conduct of the affairs of companies is a matter of great public concern today. If the legislature thinks that in this field the public interest overcomes some of the common law's traditional consideration for the individual, then effect must be given to the statute which embodies the policy."*[23]

53. In *Hamilton v Oades*,[24] the majority determined that the common law privilege against self-incrimination had been abrogated by s 541(12) of the *Companies (NSW) Code*. In coming to that conclusion, Mason CJ, cited favourably Windeyer J in *Rees v Kratzmann*, at 494, and further stated, at 496-497:

> *"There are the two important public purposes that the examination is designed to serve. One is to enable the liquidator to gather information which will assist him in the winding up, that involves protecting the interests of creditors. The other is to enable evidence and information to be obtained to support the bringing of criminal charges in connection with the company's affairs…The examination is designed to elicit, among other things, evidence and information relating to the question whether the witness 'has been, or may have been, guilty of fraud, negligence, default, breach of trust, breach of duty or other misconduct in relation to' the corporation."*

[23] Cited with approval by Walsh J (with whom Barwick CJ, Windeyer and Owen JJ agreed) in *Mortimer v Brown* (1970) 122 CLR 493, at 499.
[24] (1989) 166 CLR 486 (Mason CJ, Dawson and Toohey JJ, Deane and Gaudron JJ dissenting).

54. In *Hongkong Bank of Australia v Murphy*,[25] Gleeson CJ, with whom Priestley and Mahony JJA agreed, stated, at 521E:

> *"The statutory context of "external administration", in which s 597 has its place, throws light on the purposes for which the power to order examinations (or to authorise persons to apply for examination orders) is conferred. Those purposes include the protection of shareholders and creditors and of interested members of the public."*

55. In that case, the company in liquidation was Burns Philp, the former trustee of a failed trust in circumstances where "a very large number of members of the public" were owed money as a consequence of its financial failure: 520A-B. The incoming trustee sought to gather information and prosecute proceedings in relation to the failure of the trust for the benefit of investors: 519G-520B.[26]

56. The judgment of Lander J in *Evans v Wainter Pty Ltd* (***Evans v Wainter***)[27] is a leading authority on the purposes of s 596A. In that case, Lander J considered the two public purposes proposed by Mason CJ in *Hamilton v Oades* before noting (in comments which apply equally to s 596A):

> *"The two purposes identified by Mason CJ are not necessarily the only purposes for which s 596B has been enacted. Mason CJ was considering the purposes of the Code where the prescribed person was a liquidator. . . . Having regard to those who are now entitled to be an 'eligible applicant' under the Act, the first purpose identified by Mason CJ would not be limited to circumstances where a liquidator is gathering information to assist in the winding up and only protecting creditors."* (at [116]).

57. After indicating that the purpose of the power is to be gleaned from the legislation, Lander J identified five purposes. The first three purposes relate to the administration of the corporation, identification of assets and liabilities and protection of the interests of the corporation's creditors: 216, at [252]. The fourth purpose is pertinent to the present case:

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[25] (1992) 28 NSWLR 512.
[26] Special leave to appeal refused.
[27] (2005) 145 FCR 176 (Ryan, Lander and Crennan JJ).

*"Fourth, it serves the purpose of enabling evidence and information to be obtained to support the bringing of proceedings against examinable officers and other persons in connection with the examinable affairs of the corporation."*

58. The fifth purpose concerns regulation of corporations by providing a public forum for the examination of examinable officers. Some reserve has been expressed concerning the compatibility of this last purpose with the conferral of judicial power.[28] No such doubt attends the fourth purpose which contemplates the bringing of proceedings.

10 59. Lander J indicated that an order for examination will be set aside if it is unconnected with any of the five purposes authorised by the legislation (at proposition four). Further, the summons will be set aside if it is used to obtain a forensic advantage (proposition five) or to conduct a dress rehearsal of cross examination (proposition six). Further (at proposition eight), Lander J states:

*"it will be an offensive purpose if the application cannot be characterised as being for the benefit of the corporation, its contributories or its creditors."*

**The appellants' purpose was authorised by s 596A and was not otherwise an abuse**

60. The appellants' purpose, as set out at paragraph 15 above, serves the purposes
20 identified by the High Court, the Court of Appeal and specifically, the fourth purpose identified by Lander J.[29] The capital raising and disclosures about the company's financial circumstances are matters falling squarely within the examinable affairs of Arrium (that is, its "promotion" and "management"). The appellants seek information and evidence on these matters to support the prosecution of proceedings against Arrium's directors and auditors concerning potential breaches of their duties in those capacities.

61. The issue is whether the appellants' immediate purpose sought to be effected by the issue of the examinations summons falls outside the scope of s 596A and is, therefore,

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[28] *Highstoke Pty Ltd v Hayes Knight GTO Ptd Ltd* (2007) 156 FCR 501 at 524 [74] (French J). Also, *Palmer v Ayers* (2017) 259 CLR 478 at 491-492 [30] where Kiefel, Keane, Nettle and Gordon JJ noted that s 596A "looks forward".

[29] To the extent it is relevant, the appellants and the class of shareholders whom they represent are or were "contributories" and it has not been suggested otherwise at first instance or on appeal.

improper.[30] As was explained by this Court in *William v Spautz*[31] and, more recently, in *Victoria International Container Terminal Limited v Lunt*,[32] provided the immediate purpose or desired result falls squarely within the scope of the remedy sought, the motive or ultimate purpose does not, thereby, render the proceedings an abuse.

62. In the present case, the appellants wish to use the process for the purpose for which it was designed: to examine a director of Arrium about Arrium's examinable affairs to support proceedings against Arrium's directors and others. Even assuming[33] the appellants' ultimate purpose is to be compensated for the damage they have suffered, such a motive does not render their use of the process an abuse. That ultimate purpose is merely the entitlement or benefit which the law gives the applicant in that event. Further, such an entitlement or benefit is not offensive to the purposes of the external administration provisions generally which include protecting shareholders and interested members of the public[34] and where the appellants were conferred standing by ASIC to fulfil that purpose.

**Court of Appeal's determination**

63. The Court of Appeal's determination means that unless the application confers "a demonstrable benefit on the company or its creditors (and possibly all of its contributories)" the summons will be set aside as an abuse. In the result, the Court of Appeal has impermissibly narrowed the purposes for which s 596A may be invoked by erroneously focussing on the "commercial" or "demonstrable" benefit to the company which may arise from prospective litigation as opposed to whether the applicants' purposes serve the objects for which the examination provisions were enacted.

64. Further, shareholders will be precluded from examining a director on the director's misconduct, in that capacity, if the benefit of any intended litigation does not accrue to the company and its creditors. Whether such an examination is an abuse may turn on nothing more than a shareholder submitting a proof of debt or participating in a deed of

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[30] *William v Spautz* (1992) 174 CLR 509 at 525 (Mason CJ, Dawson, Toohey and McHugh JJ).
[31](1992) 174 CLR 509 at 526-527.
[32] *Victoria International Container Terminal Limited v Lunt* [2021] HCA 11 at 9-10 [23]-[24] (Kiefel CJ, Gageler, Keane and Gordon JJ) and 15-16 [38]-[39] (Edelman J).
[33] There has been no express finding concerning the appellants' motive or ultimate purpose.
[34] *Hongkong Bank of Australia v Murphy* (1992) 28 NSWLR 512 at 521E (Gleeson CJ) extracted at paragraph 54 above.

company arrangement before the barring date. These capricious outcomes sit uneasily with the heavy onus on those alleging improper purpose and the important public purposes said to be served by examinations by this Court in *Rees v Katzmann* and *Hamilton v Oades*.

65. Notwithstanding these matters, the Court of Appeal came to its conclusions based on its reading of *Re Excel* and *Evans v Wainter*. Each is addressed in turn.

***Re Excel***

66. *Re Excel* does not address s 596A which is mandatory and directed solely at a company's directors and officers. The case stands for a limited proposition which is that the use of the power under former s 597 to obtain an examination summons for the principal purpose of furthering the applicant in litigation against *third parties*, and not for the benefit of the corporation its contributories or creditors, is an abuse[35] (emphasis added).

67. *Re Excel* concerned an application for access to the affidavit in support of the examination summons. In that case, a receiver appointed by the trustee of debenture holders sought examinations against Mr Worthley, the company's auditor, for the purposes of prosecuting proceedings against the auditor for the auditors' misfeasance. In a joint judgment, Gummow, Hill and Cooper JJ determined that the commencement of proceedings by the trustee and debenture holders against Mr Worthley raised, without more, the possibility that the receiver had sought the examination summons against Mr Worthley for an improper purpose such that the examinee ought to be allowed access to the affidavit for the purposes of seeking to have the summons set aside.[36]

68. *Re Excel's* limited application was acknowledged by the Full Court in *Evans v Wainter*[37] and the Full Court of the Supreme Court of South Australia in *Sandhurst Trustees Ltd v Harvey*[38]. That is, *Re Excel* did not delineate the metes and bounds of the purposes for which the examinations power may be employed. It did not address

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[35] *Re Excel* at 93E; as noted at **CAB 109, 130** at CA [76] and [137], respectively.
[36] *Re Excel* at 94D.
[37] at 200 [139].
[38] (2004) 88 SASR 519 at 532 [53] (Doyle CJ (with whom Perry and Bleby JJ agreed).

circumstances where the potential examinee is a director of the company and the examination seeks to elicit information and evidence for the purposes of prosecuting proceedings against the directors and others, which is the present case. Further, as Doyle CJ noted, the Full Court in *Re Excel* was not concerned with exposure of possible misconduct.[39]

69. *Re Excel* does not support a finding that examinations of company directors sought by individual shareholders to assist prosecution of proceedings against company directors for misconduct in that capacity are for a "private" purpose and outside of the scope of the examinations power: *cf* **CAB 131-132**; CA [140] and [141]. On the contrary, the Full Court's treatment of the judgment of McLelland J *Re BPTC Ltd*[40] suggests otherwise.

70. In *Re BPTC Ltd*, McLelland J rejected an application to set aside orders for production of documents sought by the new trustee in contemplation of claims against the former trustee in circumstances where a large number of members of the public were owed money as a result of the failure of the trust. During the course of argument, McLelland J was referred to an 1887 decision of the English Court of Appeal[41] in which it was stated that the obtaining of evidence in support of actions by individual shareholders against the directors of the company in liquidation was outside the proper ambit of the equivalent provision. In response, his Honour stated, at 273:

> *"In my opinion such a limited view cannot be regarded as acceptable at the present day. Facilitation of the accountability to individual creditors or contributories, as well as to the company itself, of those who participated in the conduct of its affairs prior to the winding up should nowadays be regarded as sufficiently related to the winding up to fall within the scope of the section."*

71. The Full Court, in *Re Excel*, distinguished, but otherwise approved, the *ratio* from the decision of McLelland J.[42]

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[39] *ibid*. at at 531, [46].
[40] (1992) 10 ACLC 271.
[41] *Re North Brazilian Sugar Factories* (1887) 37 Ch D 83.
[42] *Re Excel* at 91F-92C.

***Evans v Wainter***

72. The Court of Appeal (at **CAB 131** at CA [139]) relies on the statement of principle, in *Evans v Wainter*, at 200 [143] and 216 [247], that the purpose of the application must be "for the benefit of the corporation, its contributories or creditors".

73. As a bare statement of principle, it does not support the further gloss contended for by the Court of Appeal in that it does not comprehend a "demonstrable" or "commercial" benefit accruing to the company or (all) its creditors (and possibly *all* of its contributories): CA [123], [140] and [141]. So much is apparent from Lander J's qualification that when a single creditor is pursuing an examination in respect of its own debt (and not the broader management of the company), the examination must be in interests of the corporation or its creditors "as a whole": at 217, at [252(9)]. Such a qualification would not be necessary if that were already implied. No such qualification is made with respect to shareholders.

74. As a statement of principle, divorced from context or application, it provides little guidance on the present facts. In *Evans v Wainter* the respondent sought to examine former directors of the company in liquidation, NewTel, concerning statements made to the respondent regarding foregoing its debt in the context of a share purchase and company take over. In that case, the respondent's purpose was to obtain information to assist it to commence proceedings against a third party, a law firm. NewTel was not intended to be a party to that litigation. However, the Court accepted that because the respondent had a chose in action against NewTel, the anticipated proceedings might compensate it for any loss he suffered and, accordingly, increase the pool of funds available to other creditors: 218 at [257]-[262]. It may be inferred, in those circumstances, that the applicant's purposes served the statutory purpose of protecting creditors (purpose 3). It does not follow that, in another context, if an examinations summons serves one of the other statutory purposes that it must, additionally, serve the purpose of protecting creditors.

75. This is clear from the reasoning of Lander J where he cites, with approval, Santow J's observation[43] that the legislative intention was to facilitate prosecution of civil

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[43] In *Re New Cap Reinsurance Corp Holdings Ltd* [2001] NSWSC 835 at [14]-[16], cited in *Evans v Wainter* at 213 [232].

proceedings by eligible applicants which have the *potential* either to assist the liquidation for the benefit of all creditors or to serve the wider statutory purpose of investigating and potentially prosecuting (including civilly) those who have contributed to the circumstances leading to the company's collapse. Santow J emphasised that one or other purpose sufficed. There is no relevant basis to distinguish a creditor from a shareholder fulfilling only that wider statutory purpose.

## Part VII: ORDERS

76. The appellant seeks the following orders as set out in the Notice of Appeal (**CAB 147)**:

a. Appeal allowed;

b. Set aside the Orders of the New South Wales Court of Appeal made on 30 July 2020 and in lieu thereof order:

   i. Appeal dismissed with costs;

   ii. The orders made by the Supreme Court of New South Wales on 2 December 2019 be reinstated.

c. The first respondent pay the appellants' costs of the application for special leave to appeal.

d. The first and second respondents pay the appellants' costs of the appeal.

## Part VIII: ESTIMATE OF TIME

77. The appellants anticipate being half a day in oral argument, including reply.

Dated: 15 April 2021

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## Annexure A

## List of constitutional provisions, statutes and statutory instruments referred to in the submissions

Pursuant to paragraph 3 of the Practice Direction No. 1 of 2019, the appellants list the particular statutory provisions referred to in their submissions. The relevant date is the date the summons was issued, being 15 May 2019.

| No | Description | Version | Provision(s) |
|---|---|---|---|
| 1. | *Australian Investment and Securities Commission Act 2001* (Cth) | Compilation in force from 6 April 2019 to 30 June 2019. | ss 1(2) and 11(4) |
| 2. | *Australian Securities and Investment Commissions Act 1989* (Cth) | As enacted and as amended pursuant to the *Corporations Legislation Amendment Act* 1990 (Cth). | s 1(2) |
| 3. | *Companies Act 1862* (UK) (25 & 26 Vict c 86) | As enacted. | ss 115, 117 and 138 |
| 4. | *Companies Act 1874* (NSW) | As enacted. | s 216 |
| 5. | *Companies Act 1899* (NSW) | As enacted. | s 162 |
| 6. | *Companies Act 1936* (NSW) | As enacted. | s 308 |
| 7. | *Companies Act 1961* (NSW) | As enacted. | ss 249, 250 and 305 |
| 8. | *Companies Act 1961* (NSW) | As amended by the *Companies Amendment Act 1971* (NSW). | ss 367A to 367C |
| 9. | *Companies Act 1961* (Qld) | As enacted. | s 250 |

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| 10. | *Companies (NSW) Code* | As enacted pursuant to the *Companies Act 1981* (NSW). | s 541 |
| 11. | *Corporations Act 2001* (Cth) | Compilation in force from 6 April 2019 to 30 June 2019. | ss 9 ("eligible applicant", "examinable affairs", "section 513C day"), 53, Pt 5.9 (including 596A, 596B), Div 2 of Pt 5.5 (including ss 495 and 496) |
| 12. | *Corporations Law* | As enacted pursuant to the *Corporations Act 1989* (Cth). | s 597 |
| 13. | *Corporations Law* | As amended by the *Corporate Law Reform Act 1992* (Cth). | ss 596A and 596B |