HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, EDELMAN AND STEWARD JJ

MICHAEL THOMAS WALTON & ANOR APPELLANTS

AND

ACN 004 410 833 LIMITED (FORMERLY ARRIUM LIMITED) (IN LIQUIDATION) & ORS RESPONDENTS

Walton v ACN 004 410 833 Limited (formerly Arrium Limited) (in liquidation)
[2022] HCA 3
Dates of Hearing: 6 & 7 October 2021
Date of Judgment: 16 February 2022
S20/2021

ORDER

1. *Appeal allowed.*

2. *Set aside orders 3, 4 and 5 made by the Court of Appeal of the Supreme Court of New South Wales on 30 July 2020 and, in their place, order that the appeal be dismissed with costs.*

3. *The first and second respondents pay the appellants' costs of and incidental to the appeal, including the application for special leave to appeal.*

On appeal from the Supreme Court of New South Wales

Representation

N C Hutley SC and J Shepard for the appellants (instructed by Banton Group)

M A Izzo SC with T E O'Brien for the first respondent (instructed by Arnold Bloch Leibler)

J K Kirk SC with A B Emmerson for the second respondent (instructed by Ashurst)

Submitting appearance for the third respondent

CATCHWORDS

Walton v ACN 004 410 833 Limited (formerly Arrium Limited) (in liquidation)

Companies – Winding up – Mandatory examination of persons about examinable affairs of corporation – Application to set aside summons for examination – Purposes for which an officer or provisional liquidator may be summoned for examination about corporation's examinable affairs pursuant to s 596A of *Corporations Act 2001* (Cth) – Where appellants were shareholders of corporation in liquidation – Where appellants authorised by Australian Securities and Investments Commission to make application pursuant to s 596A of *Corporations Act 2001* (Cth) – Where appellants applied for summons for purpose of investigating potential personal claims in capacity as shareholders against former directors and auditors of corporation – Where Registrar issued summons to former director to attend court for examination – Whether appellants' purpose foreign to purpose of s 596A of *Corporations Act 2001* (Cth) – Whether examination an abuse of process.

Words and phrases – "abuse of process", "benefit of the company, its creditors, or its contributories", "corporation in external administration", "eligible applicant", "enforcement of the law", "examinable affairs", "predominant purpose", "public administration and compliance", "public interest", "purpose of the examination", "scope and purpose of a statutory process", "summons for examination", "winding up".

Corporations Act 2001 (Cth), s 596A.

1 KIEFEL CJ AND KEANE J. The first respondent ("Arrium") was a producer of iron ore and steel and was listed on the Australian Stock Exchange. Between September and October 2014 it raised $754 million in capital. It provided an Information Memorandum in connection with the capital raising and shortly prior to that action it published its financial results for the year ended 30 June 2014. In its half-yearly results published in February 2015 the company acknowledged a reduction in the value of its mining operations of $1,335 million. Earlier, in January 2015, it had announced that it would be suspending or closing one of its principal mining operations. The announcement followed a decline in the export price of iron ore. The company was placed into administration in April 2016 and in June 2019 liquidators were appointed.

2 In April 2018 the solicitors of the appellants, who were shareholders of Arrium, wrote to the Australian Securities and Investments Commission ("ASIC") requesting that the appellants be given the status of an "eligible applicant", a term defined by the *Corporations Act 2001* (Cth)[1] to include a person authorised in writing by ASIC to make an application under Pt 5.9, Div 1. Section 596A, in Pt 5.9, Div 1, relevantly provides that such a person may apply to the Court for a summons to be directed to a person who is an officer of a corporation or was an officer of a corporation in a specified period relating to the administration or winding up of the corporation, to be examined about the corporation's "examinable affairs"[2]. ASIC provided that authorisation.

3 The appellants applied to the Supreme Court of New South Wales for orders that the third respondent, a former director of Arrium, appear for examination and produce documents. Orders were also sought for the second respondent (the auditor) and the bank who advised on the capital raising to produce certain documents. A Registrar in Equity made the orders. Arrium sought to have the orders stayed or set aside. The second respondent and the third respondent took part in those proceedings and sought similar orders. Black J ordered that the examination summons be stayed on condition that Arrium file an application for leave to appeal within a specific period[3]. Arrium did so. The Court of Appeal (Bathurst CJ, Bell P and Leeming JA) granted leave to appeal, allowed the appeal,

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1 s 9.

2 See *Corporations Act 2001* (Cth), s 9.

3 *In the matter of ACN 004 410 833 Ltd (formerly Arrium Ltd) (subject to a deed of company arrangement)* [2019] NSWSC 1708.

discharged the orders for examination made by the Registrar and made other orders[4].

4 In the letter to ASIC, the appellants' solicitors gave as the reason their clients should be given the status of eligible applicants their clients' concern that the results for the financial year ended 30 June 2014 and the information given in respect of the capital raising did "not adequately or fairly" portray the "true state of Arrium's business". They advised that they would seek an order for examination in order to determine whether any claims might be brought against the company, its directors or its auditor. The letter implied that a derivative action on behalf of the company was possible. In subsequent communications they said that the examinations would be made for the benefit of shareholders and creditors of the company.

5 At the hearing before Black J, the appellants abandoned any suggestion that their purpose was to investigate the possibility of a derivative action. They accepted that they were not claiming against the company as creditors, and that any recovery by them against third parties would not improve the position of the company's other creditors. What was proposed was a class action for loss and damage suffered by investors who bought securities in the company after its 2014 financial year results and the 2014 capital raising, based on allegations of misrepresentations about its financial position at the relevant times.

6 Black J considered that the information provided by the appellants to ASIC "does tend to indicate that their predominant purpose in seeking the issue of the examination summons was to investigate, and pursue, a personal claim in their capacity as shareholders against directors of Arrium or against its auditors"[5]. But his Honour was not satisfied that the application amounted to an abuse of process[6].

7 The Court of Appeal identified the critical question to be whether the purpose of the examination is foreign to the purpose for which the statutory power is conferred[7] and concluded that it was. The examination was sought for a private

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4 *ACN 004 410 833 Ltd (formerly Arrium Ltd) (In liq) v Walton* (2020) 383 ALR 298.

5 *In the matter of ACN 004 410 833 Ltd (formerly Arrium Ltd) (subject to a deed of company arrangement)* [2019] NSWSC 1606 at [49].

6 *In the matter of ACN 004 410 833 Ltd (formerly Arrium Ltd) (subject to a deed of company arrangement)* [2019] NSWSC 1606 at [50].

7 *ACN 004 410 833 Ltd (formerly Arrium Ltd) (In liq) v Walton* (2020) 383 ALR 298 at 330 [131].

purpose for the benefit of a limited group of persons who bought shares in Arrium at a particular time irrespective of whether they held their shares when administrators were appointed, not for a purpose which conferred a demonstrable benefit on the company or its creditors or all of its contributories[8].

8 On this appeal the appellants argue that the system of discovery provided by s 596A does not require a benefit to accrue to Arrium, its contributories or its creditors. They contend that the statutory purpose is broader. It is to enable evidence and information to be obtained to support the bringing of proceedings against officers of the company and others in relation to the examinable affairs of the company.

Statutory provisions

9 Section 596A appears in Pt 5.9 of Ch 5 of the *Corporations Act*. Chapter 5 is headed "External administration". The Parts which precede Pt 5.9 deal with different types of external administration of a company and certain aspects of it. For example, Pt 5.1 deals with "Arrangements and reconstructions"; Pt 5.2 with "Receivers, and other controllers, of property of corporations"; Pt 5.3A with "Administration of a company's affairs with a view to executing a deed of company arrangement"; Pt 5.4 with "Winding up in insolvency"; Pt 5.5 with "Voluntary winding up"; Pt 5.6 with "Winding up generally"; Pt 5.7B with "Recovering property or compensation for the benefit of creditors of [an] insolvent company"; and Pt 5.8 with "Offences".

10 Part 5.9 is headed "Miscellaneous". Division 1, in which s 596A and other provisions referred to below are located, is headed "Examining a person about a corporation". Section 596A provides:

> "**Mandatory examination**
>
> The Court is to summon a person for examination about a corporation's examinable affairs if:
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> (a) an eligible applicant applies for the summons; and

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8 *ACN 004 410 833 Ltd (formerly Arrium Ltd) (In liq) v Walton* (2020) 383 ALR 298 at 332 [140], [141], referring to *Re Excel Finance Corporation Ltd (Receiver and Manager Appointed); Worthley v England* (1994) 52 FCR 69 and *Evans v Wainter Pty Ltd* (2005) 145 FCR 176.

(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:

(i) if the corporation is under administration – on the section 513C day[9] in relation to the administration; or

(ii) if the corporation has executed a deed of company arrangement that has not yet terminated – on the section 513C day in relation to the administration that ended when the deed was executed; or

(iii) if the corporation is being, or has been, wound up – when the winding up began; or

(iv) otherwise – when the application is made."

11 An "eligible applicant", in relation to a corporation, is defined by s 9 to mean:

"(a) ASIC; or

(b) a liquidator or provisional liquidator of the corporation; or

(c) an administrator of the corporation; or

(d) an administrator of a deed of company arrangement executed by the corporation; or

(e) a person authorised in writing by ASIC to make:

(i) applications under the Division of Part 5.9 in which the expression occurs; or

(ii) such an application in relation to the corporation."

12 Section 9 defines "examinable affairs", in relation to a corporation, to mean:

"(a) the promotion, formation, management, administration or winding up of the corporation; or

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9 If a winding up was in progress when the administration began, the day on which the winding up is taken to have begun, or otherwise the day on which the administration began: see *Corporations Act 2001* (Cth), ss 9 and 513C.

(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)."

13 Attention is directed on this appeal to para (b) and to s 53, which provides that for the purposes of the definition of "examinable affairs" in s 9, the affairs of a body corporate relevantly include:

"(a) the promotion, formation, membership, control, business, trading, transactions and dealings (whether alone or jointly with any other person or persons and including transactions and dealings as agent, bailee or trustee), property (whether held alone or jointly with any other person or persons and including property held as agent, bailee or trustee), liabilities (including liabilities owed jointly with any other person or persons and liabilities as trustee), profits and other income, receipts, losses, outgoings and expenditure of the body; and

(b) in the case of a body corporate (not being a licensed trustee company or the Public Trustee of a State or Territory) that is a trustee (but without limiting the generality of paragraph (a)) – matters concerned with the ascertainment of the identity of the persons who are beneficiaries under the trust, their rights under the trust and any payments that they have received, or are entitled to receive, under the terms of the trust; and

(c) the internal management and proceedings of the body; and

(d) any act or thing done (including any contract made and any transaction entered into) by or on behalf of the body, or to or in relation to the body or its business or property, at a time when:

(i) a receiver, or a receiver and manager, is in possession of, or has control over, property of the body; or

(ii) the body is under administration; or

(iia) a deed of company arrangement executed by the body has not yet terminated; or

(iii) a compromise or arrangement made between the body and any other person or persons is being administered; or

(iv) the body is being wound up;

and, without limiting the generality of the foregoing, any conduct of such a receiver or such a receiver and manager, of an administrator of the body, of an administrator of such a deed of company arrangement, of a person administering such a compromise or arrangement or of a liquidator or provisional liquidator of the body".

14 Section 596B provides:

"**Discretionary examination**

(1) The Court may 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:

(i) has taken part or been concerned in examinable affairs of the corporation and has been, or may have been, guilty of misconduct in relation to the corporation; or

(ii) may be able to give information about examinable affairs of the corporation.

(2) This section has effect subject to section 596A."

15 Section 596C requires an affidavit to be filed in support of an application under s 596B.

16 Sections 596D and 596E, respectively, provide for the content of a summons under s 596A or s 596B and require the applicant to give written notice of the examination to certain persons if the Court issues a summons. The Court may give directions about the examination (s 596F), which is to be held in public (s 597(4)). ASIC and any other eligible applicant in relation to the corporation may participate in the examination (s 597(5A)).

17 A person who is examined is obliged to answer questions which the Court directs the person to answer, unless they have a reasonable excuse (s 597(7)(b)). The Court may also direct the person to produce books in their possession that are relevant to the examination (s 597(9)). A person is not excused from answering a question on the ground that it might tend to incriminate the person or make the person liable to a penalty (s 597(12)). Where a person claims that the answer might have either of those effects, s 597(12A) provides that the answer is not admissible in evidence against the person in a criminal proceeding or a proceeding for the

imposition of a penalty other than a proceeding under the section or a proceeding respecting the falsity of the answer.

18 A person may be required by the Court to sign a written record of their examination, which may, subject to s 597(12A), be used in evidence in any legal proceedings against the person (s 597(14)). The Court may order a person to file an affidavit about the examinable affairs of a corporation even if they have been summoned under s 596A or s 596B for examination about those affairs (s 597A).

Abuse of process

19 There can be no doubt that if the predominant purpose of the examination for which an application is made under s 596A, or s 596B, is collateral or foreign to the statutory purpose of such an examination, the application will amount to an abuse of process[10]. The appellants' submissions do not deny this. Two purposes must therefore be considered: first, the statutory purpose, and then the applicant's purpose in light of the statute's purpose. The central question on this appeal is: what is the statutory purpose or purposes of the examination for which s 596A provides?

20 There is no difficulty in concluding what purpose the examination is to serve for the appellants. It is to enable them to investigate and pursue a proceeding in which they and a class of shareholders will claim, against certain directors and auditors of Arrium, damages for alleged misrepresentations made concerning the financial position of the company. It is to enable them to interrogate some or all of those and other persons prior to bringing said proceeding. The appellants' claim is one made in their personal capacity. It is a claim having no connection to the winding up of the company. The appellants do not pretend that it will be of benefit to those engaged in that external administration, to the company or to its creditors as a whole.

21 Abuses of process in connection with an application for an examination summons may take many forms. An application brought by a liquidator for an examination for the purpose of rehearsing the cross-examination of a potentially hostile witness in pending litigation would likely be an abuse of process[11]. Other

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10 See, for example, *Hong Kong Bank of Australia Ltd v Murphy* (1992) 28 NSWLR 512 at 518-519 per Gleeson CJ, Mahoney and Priestley JJA agreeing; *Williams v Spautz* (1992) 174 CLR 509 at 525 per Mason CJ, Dawson, Toohey and McHugh JJ; *Re Excel Finance Corporation Ltd (Receiver and Manager Appointed); Worthley v England* (1994) 52 FCR 69 at 91.

11 *Re Auto Import Co (Australia) Ltd* (1924) 25 SR (NSW) 52 at 55-56.

examples may include the cross-examination of a person to destroy their credit[12] and to obtain de facto discovery when an order for discovery has been refused[13]. In these examples, the applicant is seeking a forensic advantage not otherwise available by ordinary pre-trial processes where the legislative purpose is not advanced[14]. They have in common that they are purposes foreign to the statutory purpose, and do not permit the exercise of the statutory power. To do so would be an abuse of that power. In those circumstances it would be an abuse of the processes of the court to seek the exercise of the power.

22 In *Hong Kong Bank of Australia Ltd v Murphy*[15], Gleeson CJ (with whom Mahoney and Priestley JJA agreed) gave as an example of an abuse of process the application made in *In re Imperial Continental Water Corporation*[16]. A shareholder, who held a mortgage on calls that might be made of other shareholders of a particular company, brought proceedings to enforce the mortgage, to have any deficiency made good by the directors and to have an agreement, by which his shares were to be cancelled and his name removed from the register and the list of contributories, enforced. He obtained an order under s 115 of the *Companies Act 1862* (UK)[17] ("the 1862 Act") for the examination of the directors.

23 Section 115 provided that after a court had made an order for winding up a company, it could summon before it any officers of the company or persons, including those suspected of having in their possession property of the company or whom the court thought capable of giving information concerning the trade dealings and property of the company, and require them to produce documents.

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12 See *Re Excel Finance Corporation Ltd (Receiver and Manager Appointed); Worthley v England* (1994) 52 FCR 69 at 91, referring to *Re Hugh J Roberts Pty Ltd (In liq)* [1970] 2 NSWR 582.

13 See *Re Excel Finance Corporation Ltd (Receiver and Manager Appointed); Worthley v England* (1994) 52 FCR 69 at 91. See, relevantly, *In re North Australian Territory Company* (1890) 45 Ch D 87.

14 *Hong Kong Bank of Australia Ltd v Murphy* (1992) 28 NSWLR 512 at 519.

15 (1992) 28 NSWLR 512 at 519.

16 (1886) 33 Ch D 314.

17 25 & 26 Vict c 89.

The examinee could be required to subscribe their name to the record of the examination[18].

24 Chitty J at first instance ordered, on a motion brought by the examinees, that the examination be postponed until after the trial of the action. The Court of Appeal of England and Wales held that decision to be correct. Each member of the Court of Appeal held that it did not accord with the proper purpose of the section to have the examination taken for the purpose of the proposed action[19]. The powers of examination are to be exercised for the purpose of the winding up, to enable the liquidator to ascertain what has been done with the assets of the company, with a view to benefiting those interested in the winding up – the creditors and contributories. Here the object of the action was solely for the benefit of the shareholder to enforce his own individual rights[20]. Cotton LJ said it would be wrong to give the shareholder the benefit of the statutory power for the purposes of this action[21]. Lindley LJ described such a course as an abuse of the power of the section, not a use of it[22].

25 It is correct to observe that decisions such as *In re Imperial Continental Water Corporation*[23] reflect the statutory context in which the power to summon a person for examination is given and the purpose for which the powers were conferred[24] and that these may change over time. The appellants contend that there has been a widening of the purpose of s 596A at or prior to the introduction of Pt 5.9. They point to s 541 of the *Companies (New South Wales) Code* of 1981 as having expanded the relevant power and to the mandatory nature of s 596A as marking a departure from the examination provisions which preceded it. Making

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18 *Companies Act 1862* (UK), s 117.

19 *In re Imperial Continental Water Corporation* (1886) 33 Ch D 314 at 320-321 per Cotton LJ, 321 per Lindley LJ, 322 per Lopes LJ.

20 *In re Imperial Continental Water Corporation* (1886) 33 Ch D 314 at 321 per Cotton LJ.

21 *In re Imperial Continental Water Corporation* (1886) 33 Ch D 314 at 320.

22 *In re Imperial Continental Water Corporation* (1886) 33 Ch D 314 at 321-322.

23 (1886) 33 Ch D 314. See also *In re North Australian Territory Company* (1890) 45 Ch D 87.

24 *New Zealand Steel (Australia) Pty Ltd v Burton* (1994) 13 ACSR 610 at 613 per Hayne J.

the provision mandatory evinces a clear statutory intention to compel a company's officers to account publicly concerning that company's examinable affairs. These submissions render it necessary, they contend, to consider legislative provisions for examinations from those considered in *In re Imperial Continental Water Corporation*[25] and leading to s 596A.

Text and statutory context

26 The text of s 596A does not provide much assistance in determining the statutory purpose of the examination and the question which follows from it, namely whether that purpose places limits upon when a summons may properly issue.

27 It may be accepted that, subject to the purpose of the examination being consistent with the statutory purpose, it is intended that a summons will issue under s 596A where the two stated conditions are met: the applicant is an eligible applicant and the person to be examined is an officer or provisional liquidator to whom that section applies. That much may be drawn from the mandatory terms of the provision. But this says nothing about the purpose of s 596A. Its context is not discovery and investigation for the purposes of litigation generally.

28 During argument attention was directed to the requirements of s 596B. By comparison with s 596A, s 596B requires the Court to be satisfied, at a minimum, that the person to be summoned may be able to give information about the examinable affairs of the corporation. To that end an affidavit in support of the application must be filed (s 596C). The difference is explicable. The persons to whom s 596B refers may not have been officers of the corporation or otherwise persons examinable for the purposes of s 596A. Section 596A concerns officers, who may be considered to have a duty to co-operate in an external administration[26]. It is for that reason that it is intended that they be summoned without further inquiry, subject to the purpose of the examination being one contemplated by the statute.

29 The subject with which Pt 5.9 is concerned is the external administration of corporations. Section 596A (and s 596B) applies to a corporation in some form of external administration. The reference in s 596A itself to a provisional liquidator and the forms of external administration there mentioned bear this out. The circumstance of external administration is clearly why the power is made available.

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25 (1886) 33 Ch D 314.

26 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988) at [585].

It is principally for the purposes of the external administration and what is sought to be achieved by it.

30 In *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd*[27], French J drew attention to the place of Pt 5.9 in Ch 5. His Honour observed that the context in which the Part appears, as a set of miscellaneous provisions in Ch 5, strongly suggests that the examination power is intended to be ancillary to the functions of the Court and the functions of external receivers, controllers or liquidators of corporations for which Ch 5 makes provision. Clearly the purpose of Pt 5.9 is to assist persons who have the responsibility for the external administration of a corporation, as Gageler J observed in *Palmer v Ayres*[28].

31 The statutory context of s 596A points strongly to a purpose of aiding the external administration of a corporation in the tasks necessary to be carried out, such as locating and realising assets and investigating the affairs of the corporation. The latter might involve proceedings by which monies are made available to the corporation. It would follow that the examination power is intended to be used for the benefit of the administration and those who have an interest in it, namely creditors and contributories. An examination may be directed to misconduct on the part of the officer in relation to the corporation, conduct which s 596B identifies as relevant.

32 True it is, as the appellants submit, that not all the forms of external administration in Pt 5.9 will be of commercial benefit to a corporation or its general body of creditors. They give as examples a receivership and a members' voluntary winding up. It may be arguable that the actions of a receiver could have a benefit wider than to the creditor who appoints the receiver. An examination is unlikely to be relevant in a voluntary winding up. But examples such as these do not detract from what may generally be understood to be the purposes of s 596A.

33 The appellants also point to ASIC, who, as an eligible applicant, may itself seek an examination summons, although its concern will more likely be with respect to penalties rather than procuring benefits for the company, its creditors or its contributories. There may be a question whether ASIC would ever need to resort

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27 (2007) 156 FCR 501 at 527 [87].

28 (2017) 259 CLR 478 at 515 [98], referring to *Evans v Wainter Pty Ltd* (2005) 145 FCR 176 at 216 [245], *New Zealand Steel (Australia) Pty Ltd v Burton* (1994) 13 ACSR 610 at 613 and *Meteyard v Love* (2005) 65 NSWLR 36 at 40 [7].

to s 596A, given its other statutory powers[29]. In any event its position as an eligible applicant does not affect the question of what are the purposes of s 596A.

Historical context and purpose

34 A survey of the legislative history of examination powers from those of the 1862 Act to the enactment of Pt 5.9 reveals that amendments have been made so as to align them with examination provisions in earlier statutes dealing with personal bankruptcy; that they have always been directed to persons who had been concerned in or might be able to provide information about the affairs of the company, or persons who might have been involved in misconduct with respect to the company; that the context for the powers' use has extended beyond a winding up to other forms of external administration; and that the class of persons who could apply for them has likewise broadened. What the history does not show is that the provisions were altered in such a way as to be said to effect a change in the statutory purposes of the examination. Nothing in the cases dealing with the various iterations of these provisions suggests to the contrary.

Early statutes

35 In England, a statute of 1542[30], regarded as the first bankruptcy statute[31], provided for the examination of third persons about a debtor's estate. The earliest similar provision in the companies law of the United Kingdom was s 15 of the *Joint Stock Companies Winding Up Act 1844* (UK)[32]. It gave the court the power to summon and examine persons who were thought to be able to give information about the property and past transactions of the company. The provision's primary purpose was to assist the liquidator in the location of assets[33].

36 Like powers for the court to summon and examine persons were conferred by s 115 of the 1862 Act, the provision discussed in *In re Imperial Continental*

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29 *Australian Securities and Investments Commission Act 2001* (Cth), Pt 3.

30 Statute 34 & 35 Hen VIII c 4.

31 See Keay, "'Gone Fishing!' Is it legitimate in an examination under Section 597 of the Corporations Law (Companies Code, Section 541)?" (1991) 9 *Company and Securities Law Journal* 70 at 71 fn 5.

32 7 & 8 Vict c 111.

33 *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501 at 515 [46], referring to *McPherson's Law of Company Liquidation*, 5th ed (2006) at [15.500].

Water Corporation[34], in connection with the winding up of a company. Section 115 was analogous to s 120 of the *Bankrupt Law Consolidation Act 1849* (UK)[35], which was in force when the 1862 Act was passed. Another purpose of s 115 was thus to bring the practice in a company's winding up in line with that in bankruptcy, which was established to enable trustees in bankruptcy to find out facts before they brought an action in order to avoid the expense of an unsuccessful action[36].

37 In *Hong Kong Bank*[37], Gleeson CJ summarised the Court of Appeal's conclusion in *In re Imperial Continental Water Corporation* about the purpose of the section as follows: "[t]he object of the section was to enable information to be obtained for the general benefit of a company's contributories and creditors". Section 115 was not the only provision of the 1862 Act concerned with examinations. In *In re Imperial Continental Water Corporation*[38], Lindley LJ said "[t]his section is one of a group with which we are all familiar, sects 100, 115, 165, and 168, which authorize proceedings against directors. The object of them all is to enable the company, through its liquidator, with a view to the benefit of the creditors or contributories, or both of them, to ascertain what has been going on, and what has been done with the assets of the company."

38 Section 165 of the 1862 Act permitted a liquidator, creditor or contributory of the company to apply for an examination as to the conduct of, among others, an officer of the company where it appeared that the officer had misapplied or retained company monies, become liable or accountable for any monies of the company, or been guilty of any misfeasance or breach of trust (in the balance of these reasons such provisions will be referred to as an "examination for misfeasance provision"). Provisions of this kind have been regarded as providing an alternative summary procedure to ordinary legal proceedings designed to facilitate the recovery of

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34 (1886) 33 Ch D 314.

35 12 & 13 Vict c 106.

36 *In re Gold Company* (1879) 12 Ch D 77 at 85 per Jessel MR.

37 (1992) 28 NSWLR 512 at 519.

38 (1886) 33 Ch D 314 at 321.

assets improperly dealt with and enable a liquidator to obtain compensation for misconduct which has caused loss to the company[39].

39 In court-ordered windings up, creditors and contributories could apply under s 115 as well as the liquidator, but it was the better and the usual course to entrust the examination to the liquidator. The circumstances in which creditors and contributories might be granted an order were accordingly more limited[40]. Likewise an applicant under s 165 was usually required to show some benefit, in the form of an improvement to the pool of assets to be distributed to the applicant, which would be gained from the making of the order[41].

40 Section 8 of the *Companies (Winding up) Act 1890* (UK)[42] provided for an examination of promoters, officers and other persons who had a past connection with the company, following a report to the court by the official receiver. Unlike s 115 of the 1862 Act, which remained in force, these examinations could be held in public. The introduction of s 8 has been described as being part of the general policy in England to assimilate liquidations with bankruptcy[43].

41 The position historically in Australia was much the same. The process of examining persons in a winding up of companies was borrowed from the law of bankruptcy. The purposes of the inquisitorial power conferred by bankruptcy and company legislation were regarded as much the same[44].

42 Prior to Federation, the Australian colonies enacted companies statutes based on the 1862 Act. General examination provisions to the same effect as s 115 of the 1862 Act were introduced into New South Wales by the *Companies Act*

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39 McPherson, *The Law of Company Liquidation* (1968) at 322 (speaking of s 305 of the Uniform Companies Acts). See also *Coventry and Dixon's Case* (1880) 14 Ch D 660 at 670.

40 *Halsbury's Laws of England*, 1st ed (1910), vol 5 (Companies) at 474 [807], citing *Whitworth's Case* (1881) 19 Ch D 118.

41 *Cavendish Bentinck v Fenn* (1887) 12 App Cas 652 at 664-665 per Lord Herschell, 666-667 per Lord Watson, 671-672 per Lord Macnaghten.

42 53 & 54 Vict c 63.

43 *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501 at 516 [48], referring to *McPherson's Law of Company Liquidation*, 5th ed (2006) at [15.500].

44 *Re Csidei; Ex parte Andrew* (1979) 39 FLR 387 at 390 per Lockhart J.

1874 (NSW)[45]. The Act also contained an examination for misfeasance provision[46], similar to s 165 of the 1862 Act. Likewise, these applications could be brought by a liquidator, a creditor or a contributory.

43 The general examination power of the *Companies Act 1899* (NSW) was located in s 123[47]. The section was considered by Street J in *In re John Pringle & Company Ltd*[48]. On the application of the liquidator under that provision, an examination of, among others, three directors of the company took place. Two of the directors sought copies of the evidence given in the examination to use against the third director in potential proceedings for misfeasance. Street J[49] noted that the proceedings would in no way benefit the company, or any of the creditors or contributories of the company. Any amount recovered would be for the sole benefit of the two directors in their individual capacities. His Honour applied the principles stated in *In re Imperial Continental Water Corporation* and held that the directors would not have been entitled to an order for examination and therefore could not be said to have a right to inspect the records of the examination which had occurred[50].

44 The *Companies Act 1936* (NSW) provided that the court may summon an officer or other person for examination at any time after the appointment of a provisional liquidator[51] and also contained an examination for misfeasance provision[52].

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45 s 173.

46 s 216.

47 The relevant examination for misfeasance provision in the *Companies Act 1899* (NSW) was s 162.

48 (1934) 34 SR (NSW) 508.

49 *In re John Pringle & Company Ltd* (1934) 34 SR (NSW) 508 at 512-513.

50 *In re John Pringle & Company Ltd* (1934) 34 SR (NSW) 508 at 513-514.

51 s 253.

52 s 308.

The Uniform Companies Acts and ss 249, 250 and 367A

45 In the first half of the 20th century the United Kingdom laws relating to company examinations were reviewed at intervals, resulting in consolidations of those laws[53]. The Companies Acts of the Australian States continued to be based on the United Kingdom models, but differences developed over time[54]. By agreement between the States and the Commonwealth a Uniform Companies Bill was developed. The Bill was offered as a proposal for adoption throughout the States and Territories, and implemented in 1961 and 1962, with each State enacting a Companies Act broadly based on the terms of that Bill[55].

46 The general powers of examination of persons in connection with court-ordered windings up of companies were provided by ss 249 and 250 of those Acts. They were based on ss 268 and 270 of the *Companies Act 1948* (UK). The purpose of s 268 of the 1948 Act was said to be to assist the liquidator "to discover the truth of the circumstances connected with the affairs of the company, information of trading, dealings, and so forth" and to enable the liquidator with as little expense as possible and with much expedition to put the affairs of the company in order and to carry out the liquidation[56].

47 Section 249 conferred power on the court to summon any officer of the company or, relevantly, person the court considered capable of giving information concerning the promotion, formation, trade dealings, affairs or property of the company. *In re Imperial Continental Water Corporation* continued to be regarded by a leading text as stating the permissible limits of an examination for the purposes of s 249[57].

48 The various Companies Rules in force in each State at the time recognised that liquidators, creditors and contributories could apply for an order for a summons. Under the rules, a liquidator could apply *ex parte* but creditors or

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53 Concluding with the *Companies Act 1948* (UK), see ss 268, 270 and 333.

54 *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501 at 516 [49].

55 The Commonwealth made Companies Ordinances in like terms for, relevantly, the Australian Capital Territory and the Northern Territory. In New South Wales, the *Companies Act 1961* (NSW) was enacted. See also New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 November 1961 at 2608.

56 *Re Rolls Razor Ltd* [1968] 3 All ER 698 at 700 per Buckley J.

57 Wallace and Young, *Australian Company Law and Practice* (1965) at 714.

contributories were required to serve a summons on the liquidator and provide a supporting affidavit which, it has been said, needed to show a strong case for participation in the examination[58].

49 Section 250 enabled the court to make directions for the public examination of a wide ambit of persons after consideration of a report made by the liquidator to the court alleging the commission of a fraud or concealment of any material fact by a person involved in the promotion or formation of the company or any officer of the company since formation. In *Rees v Kratzmann*[59], speaking of s 250 of the *Companies Act 1961* (Qld), Windeyer J said that the boundaries of the court's discretion to order a public examination were not defined, but "the purpose of the inquiry is to gain information that may be relevant for the proper conduct of the winding-up of the affairs of a company in relation to which there are prima facie grounds for thinking that some fraud has been committed or some material fact concealed".

50 At a later point in his reasons, Windeyer J compared the common law's traditional objection to compulsory interrogation with the practice which had developed in bankruptcy jurisdiction, where the debtor in their public examination cannot refuse to answer questions. In a passage to which the appellants referred in their submissions, his Honour described the purpose of the bankruptcy statute as being "to secure a full and complete examination and disclosure of the facts relating to the bankruptcy in the interests of the public"[60]. In his view the *Companies Act 1961* (Qld) reflected the same idea. "The honest conduct of the affairs of companies is a matter of great public concern to-day"[61], his Honour said.

51 Windeyer J was speaking of the conduct of the public examination, which is inquisitorial in nature. His Honour recognised the higher public interest which is served by requiring full disclosure by a person, which may be understood to prevail over personal freedoms. In these remarks, his Honour was not suggesting that, because an examination might expose wrongful conduct, that was sufficient

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58 McPherson, *The Law of Company Liquidation* (1968) at 315-316, citing *Companies Rules 1968* (NSW), r 123, *Supreme Court (Companies) Rules 1962* (Vic), r 61, *Rules of Court (Companies Act) 1965* (SA), r 73, *Companies Rules 1963* (Qld), r 61, *Supreme Court (Companies) Rules 1963* (WA), r 61 and *Supreme Court (Companies) Rules 1963* (Tas), r 51.

59 (1965) 114 CLR 63 at 79.

60 *Rees v Kratzmann* (1965) 114 CLR 63 at 80.

61 *Rees v Kratzmann* (1965) 114 CLR 63 at 80.

to warrant a summons for an examination, as the appellants contend. His Honour identified the relevant purpose of a public examination as being to gain information for the proper conduct of the winding up in circumstances where there was reason to think fraud or concealment of facts had taken place.

52 The examination for misfeasance provision in the *Companies Act 1961* (NSW) was s 305. In 1971, that provision was repealed and in effect re-enacted as s 367B. A broader power of examination of a similar nature was also introduced at the same time by s 367A[62]. This new provision provided that an application could be made to the court for an examination of a current or former officer of a company who appeared to the Corporate Affairs Commission ("the CAC")[63] to have conducted himself in such a way that he has rendered himself liable to action by the company in relation to the performance of his duties as an officer. The companies to which ss 367A and 367B applied were extended and relevantly included those: in the course of being wound up; under official management; to which a receiver or manager had been appointed; or, which had ceased business or were unable to pay their debts[64]. An application under s 367A or s 367B could be brought by the CAC or a person authorised by it.

53 An amendment in 1973[65] provided that a "prescribed person" could bring an application under s 367B. Under the new s 367B(1A), a "prescribed person" was defined to include the liquidator or provisional liquidator of the company, a contributory, the official manager and a person authorised by the CAC to make an application. Additionally, the words "negligence, default, breach of duty" replaced the reference to "misfeasance" in s 367B(1)[66].

The Companies Codes and s 541

54 In 1981, the Uniform Companies Acts were replaced by the Cooperative Scheme. Each State passed a Companies Code reflecting the statute enacted by the Commonwealth Parliament for the Australian Capital Territory[67]. The scheme was

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62 Introduced by the *Companies (Amendment) Act 1971* (NSW).

63 Established by the *Securities Industry Act 1970* (NSW).

64 *Companies Act 1961* (NSW), s 367C.

65 *Companies (Amendment) Act 1973* (NSW), s 7(b).

66 *Companies (Amendment) Act 1973* (NSW), s 7(b)(ii) and (v).

67 *Companies Act 1981* (Cth).

overseen by the National Companies and Securities Commission ("the NCSC"), which was established in 1980[68] and worked in conjunction with State regulatory authorities, such as the CAC[69]. In New South Wales, the provisions of the *Companies Act 1981* (Cth) were given force by the *Companies (Application of Laws) Act 1981* (NSW) and published as the *Companies (New South Wales) Code*.

55 An important change effected by s 541 of the *Companies Act 1981* (Cth) was to amalgamate the more general examination provisions with the examination for misfeasance provisions[70]. Section 541 was now located in Pt XIV ("Miscellaneous") in Div 1 ("General").

56 Section 541, "Examination of persons concerned with corporations", relevantly provided that:

> "(2) Where it appears to the [NCSC] or to a prescribed person that –
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> (a) a person who has taken part or been concerned in the promotion, formation, management, administration or winding up of, or has otherwise taken part or been concerned in affairs of, a corporation has been, or may have been, guilty of fraud, negligence, default, breach of trust, breach of duty or other misconduct in relation to that corporation; or
>
> (b) a person may be capable of giving information in relation to the promotion, formation, management, administration or winding up of, or otherwise in relation to affairs of, a corporation,
>
> the [NCSC] or prescribed person may apply to the Court for an order under this section in relation to the person.
>
> (3) Where an application is made under sub-section (2) in relation to a person, the Court may, if it thinks fit, order that the person attend before the Court on a day and at a time to be fixed by the Court to be examined on oath or affirmation on any matters relating to the promotion, formation,

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68 *National Companies and Securities Commission Act 1979* (Cth).

69 *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501 at 517 [54].

70 See Australia, House of Representatives, *Companies Bill 1981*, Explanatory Memorandum at 506 [1174].

> management, administration or winding up of, or otherwise relating to affairs of, the corporation concerned."

57 In terms similar to the 1973 amendment to s 367B of the *Companies Act 1961* (NSW)[71], a "prescribed person" was defined to include an official manager, liquidator or provisional liquidator of the corporation or "any other person authorized by the [NCSC]" to make applications under the section[72].

58 In *Hamilton v Oades*[73], Mason CJ identified two important public purposes that the examination provided by s 541 was 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 connexion with the company's affairs".

59 The examination, his Honour said[74]:

> "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."

60 These observations are consistent with what had been said by Windeyer J in *Rees v Kratzmann*[75]. Mason CJ went on to describe[76] s 541 as creating "a system of discovery", but his Honour was not speaking of the interrogation provided by the examination as an adjunct to, or in aid of, ordinary litigation unconnected with the winding up or the interests of the company and others in its outcome, as the appellants' submissions imply. His Honour went on to describe[77] the system of

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71 And other State analogues.

72 *Companies Act 1981* (Cth), s 541(1).

73 (1989) 166 CLR 486 at 496.

74 *Hamilton v Oades* (1989) 166 CLR 486 at 496-497.

75 (1965) 114 CLR 63.

76 *Hamilton v Oades* (1989) 166 CLR 486 at 497.

77 *Hamilton v Oades* (1989) 166 CLR 486 at 497.

discovery as being for the purpose of bringing charges and observed that the section gave to the liquidator "rights not possessed by an ordinary litigant".

The Corporations Act and s 597

61 The unsuccessful attempt by the Commonwealth to impose a national scheme of corporate regulation in 1989[78] led to the introduction of the 1991 Cooperative Scheme. Section 597 of the *Corporations Law*[79] reflected s 541 of the Companies Codes. It has been described as, in many respects, a conflation of the powers of ss 249, 250 and 367A of the Uniform Companies Acts[80]. It retained the provisions of s 541 relating to prescribed persons who might apply to the Court for an examination order. By this time, the Australian Securities Commission ("the ASC") had been established to replace the NCSC[81].

62 In *Hong Kong Bank*, Gleeson CJ[82] said of s 597 that:

> "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. They are not, however, confined to the need for such protection in the case of winding up. Winding up is only one form of external administration. The scope of s 597 is wider."

63 In that case the ASC had authorised the new trustees of certain unit trusts to make an application under s 597 in relation to the former trustee, which was

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78 See *New South Wales v The Commonwealth* (1990) 169 CLR 482.

79 *Corporations Act 1989* (Cth), s 82 and given force by each of the States in their respective legislation. See *Corporations (New South Wales) Act 1990* (NSW); *Corporations (Victoria) Act 1990* (Vic); *Corporations (South Australia) Act 1990* (SA); *Corporations (Queensland) Act 1990* (Qld); *Corporations (Western Australia) Act 1990* (WA); *Corporations (Tasmania) Act 1990* (Tas).

80 *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501 at 519 [59], quoting Keay, "'Gone Fishing!' Is it legitimate in an examination under Section 597 of the Corporations Law (Companies Code, Section 541)?" (1991) 9 *Company and Securities Law Journal* 70 at 70.

81 *Australian Securities Commission Act 1989* (Cth).

82 (1992) 28 NSWLR 512 at 521.

undergoing a court-ordered winding up. The new trustees intended bringing proceedings in connection with breaches of trust and other misconduct by the former trustee. The "interested members of the public", to whom Gleeson CJ had referred, were no doubt the 52,000 members of the public who had invested in the unit trusts[83]. The purpose of the new trustees with regard to the examinations was held not to be improper. Their purpose was to obtain information for litigation brought where a large number of investors were owed money as a consequence of the financial failure of the trusts and they were unlikely to be fully informed about the affairs of the trusts[84]. The fact that a forensic advantage was gained did not mean that the order for examination would not advance a purpose intended to be secured by the legislation, his Honour held[85]. His Honour did not seek to explore the outer limits of the purposes of s 597, considering it sufficient that the proposed examinations were to be held in circumstances "closely analogous to those for which examinations have traditionally been conducted by liquidators"[86].

64 Section 597 was also considered by a Full Court of the Federal Court (Gummow, Hill and Cooper JJ) in *Re Excel Finance Corporation Ltd (Receiver and Manager Appointed); Worthley v England*[87]. A question for the Court was whether an application under s 597 made by the receiver and manager of a company, who had been appointed by the trustee of debenture holders and was authorised by the ASC to make the application, was an abuse of process. The Court held that that question turned on the purpose of the application and the circumstances of the case[88]. Where the purpose is foreign to the purpose of the statutory power it would be an abuse of the power[89].

65 In *Re Excel*, the Court identified the applicant's purpose to be to obtain an advantage in proceedings brought by the trustee and debenture holders against

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83 *Hong Kong Bank of Australia Ltd v Murphy* (1992) 28 NSWLR 512 at 515.

84 *Hong Kong Bank of Australia Ltd v Murphy* (1992) 28 NSWLR 512 at 520.

85 *Hong Kong Bank of Australia Ltd v Murphy* (1992) 28 NSWLR 512 at 519.

86 *Hong Kong Bank of Australia Ltd v Murphy* (1992) 28 NSWLR 512 at 519-520.

87 (1994) 52 FCR 69.

88 *Re Excel Finance Corporation Ltd (Receiver and Manager Appointed); Worthley v England* (1994) 52 FCR 69 at 89.

89 *Re Excel Finance Corporation Ltd (Receiver and Manager Appointed); Worthley v England* (1994) 52 FCR 69 at 91.

third parties, the advantage being to obtain pre-trial depositions which would not otherwise be available in the proceedings[90]. There was no benefit to the corporation, its contributories or its creditors, except in the most indirect way. The relevant purpose of an examination, the Court held[91], is to gather information in relation to the management and administration and affairs of the corporation, to determine the assets which may be available for distribution to creditors and the location of the assets, and to determine whether assets may be recovered by the corporation for the benefit of creditors[92]. This may arise out of transactions which may have involved misconduct in relation to the corporation. The power of examination is ultimately in aid of the corporation itself, not the person seeking it[93].

1992 Amendments and Pt 5.9

66 Sections 596A to 596F were introduced by the *Corporate Law Reform Act 1992* (Cth) ("the 1992 Act"), which introduced Div 1 of Pt 5.9 under its present title, "Examining a person about a corporation". Section 597 was reduced to its present form, to deal with how examinations under ss 596A and 596B are to be conducted.

67 The 1992 amendments implemented the *General Insolvency Inquiry* of the Australian Law Reform Commission ("the Harmer Report"). The chief purposes of an examination in bankruptcy and in company insolvency were said to be "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"[94]. The principal purpose of the examination was acknowledged to be "the discovery of information which will assist in the administration of the estate". The

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90 *Re Excel Finance Corporation Ltd (Receiver and Manager Appointed); Worthley v England* (1994) 52 FCR 69 at 93.

91 *Re Excel Finance Corporation Ltd (Receiver and Manager Appointed); Worthley v England* (1994) 52 FCR 69 at 86.

92 cf *Flanders v Beatty* (1995) 16 ACSR 324 at 331.

93 *Re Excel Finance Corporation Ltd (Receiver and Manager Appointed); Worthley v England* (1994) 52 FCR 69 at 91.

94 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988) at [584].

interests of "'public policy' in prosecuting criminal offences", although recognised as important, were said to be secondary[95].

68 The most significant difference between the bankruptcy and company examination procedures, which was noted in the Harmer Report[96], was that in bankruptcy a trustee was entitled to examine a bankrupt without first obtaining a court order. It expressed concern that the formalities and expense involved in company administrations might operate as a deterrent and observed that it would be consistent with the duty of directors of an insolvent company to assist in a winding up if they were examined. It recommended that there be provision made for examination without court order of persons who have acted in certain capacities within two years before the commencement of the winding up of the company[97]. It recommended that where a person does not fall within the category of an "officer" of the company, but may nonetheless be able to provide information as to the company's affairs, the requirement for an order for examination be retained[98].

69 Sections 596A and 596B clearly have their genesis in the Harmer Report, but the Bill for the 1992 Act did not adopt the recommendation that there be no court order with respect to officers of the company. Rather, the procedure outlined in the Explanatory Memorandum to the *Corporate Law Reform Bill 1992* (Cth), in respect of s 596A, was that the Court was to issue a summons to an examinable officer about a company's examinable affairs on the application of an eligible applicant. The Court would do so where satisfied that a person is an examinable officer, without the need to inquire further into matters such as whether the person has taken part or been concerned in the examinable affairs of the corporation, has been guilty of misconduct, or is able to give relevant information. The Explanatory Memorandum envisaged that the issue of a summons in these circumstances would be a formality which might be undertaken by a Registrar or equivalent official[99].

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95 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988) at [605].

96 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988) at [585].

97 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988) at [586].

98 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988) at [588].

99 Australia, House of Representatives, *Corporate Law Reform Bill 1992*, Explanatory Memorandum at [1155].

It further said that the Court would have a discretion, under s 596B, to issue a summons to a person who was not an examinable officer, and that an application for such a summons should continue to be supported by an affidavit[100].

70 The Explanatory Memorandum advised that the proposed definition of a company's "examinable affairs" was based upon the definition of that term in the *Bankruptcy Act 1966* (Cth)[101]. This accorded with the Harmer Report's recommendation[102]. The proposed definition of an "examinable officer" would include all persons who may have had a significant role in the management of the company[103]. In relation to the proposed definition of "eligible applicant", it said "[t]he list of persons is similar to the list in existing subsection 597(1), except that an administrator of a corporation and an administrator of a deed of company arrangement … have been added" and official managers had been omitted[104].

71 At the time the provisions of Pt 5.9 were introduced in 1992, the ASC was the body which could authorise a person to be an eligible applicant. In 1998 it was renamed ASIC[105]. ASIC's roles and functions were later set out in their present form in the *Australian Securities and Investments Commission Act 2001* (Cth).

72 *Evans v Wainter Pty Ltd*[106] is a decision of a Full Court of the Federal Court (Ryan, Lander and Crennan JJ) concerning ss 596A and 596B. There, Wainter Pty Ltd, having been authorised by ASIC to be an "eligible applicant", applied for orders under both sections for the issue of examination summonses against persons who had been directors of a company, New Tel Ltd, which was now in liquidation,

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100 Australia, House of Representatives, *Corporate Law Reform Bill 1992*, Explanatory Memorandum at [1156]-[1159].

101 Australia, House of Representatives, *Corporate Law Reform Bill 1992*, Explanatory Memorandum at [347].

102 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988) at [590].

103 Australia, House of Representatives, *Corporate Law Reform Bill 1992*, Explanatory Memorandum at [350].

104 Australia, House of Representatives, *Corporate Law Reform Bill 1992*, Explanatory Memorandum at [344].

105 *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998* (Cth).

106 (2005) 145 FCR 176.

and the company's legal representatives. The purpose of the examinations was to assist in proceedings against the firm of solicitors that had advised New Tel Ltd in respect of a transaction between New Tel Ltd and Wainter Pty Ltd. Wainter Pty Ltd claimed damages for misleading and deceptive conduct, which it alleged caused it to agree to forgo a debt and a substantial shareholding in another company that New Tel Ltd was proposing to take over, in exchange for shares and options in New Tel Ltd.

73 Lander J applied the principle in *Re Excel*, which his Honour took to be "that it is an abuse of process to use the Pt 5.9 procedure if the predominant purpose of the applicant seeking the order is not for the purpose of benefiting the corporation, its contributories or its creditors"[107]. His Honour rejected an argument that because s 596A is expressed in mandatory terms its purposes have changed. In his Honour's view, s 596A was enacted to simplify the procedures and make it easier for an eligible applicant to examine examinable officers and recognised that those officers should be available for examination. There is nothing in the 1992 Act which derogates from the reasons in *Re Excel* that the purpose in seeking the examination summons must be in the interests of the corporation, its creditors or its contributories[108]. But his Honour held that that purpose would be served by the proceedings against the solicitors' firm because New Tel Ltd would be released from any liability owed to Wainter Pty Ltd, to the benefit of New Tel Ltd and its creditors[109].

74 At the conclusion of his reasons, his Honour distilled a series of propositions, including that relied upon by the appellants, as to what is a legitimate purpose. His Honour listed five such "purposes", although they combine some activities such as gathering information and the identification of assets with more general purposes such as the protection of the interests of creditors. The fourth was: "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"[110].

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107 *Evans v Wainter Pty Ltd* (2005) 145 FCR 176 at 200 [143], Ryan and Crennan JJ agreeing.

108 *Evans v Wainter Pty Ltd* (2005) 145 FCR 176 at 208 [192]-[194], Ryan and Crennan JJ not deciding.

109 *Evans v Wainter Pty Ltd* (2005) 145 FCR 176 at 218 [259].

110 *Evans v Wainter Pty Ltd* (2005) 145 FCR 176 at 217 [252 (3.4)].

75 The appellants' reliance on this statement as one of the general purposes of s 596A is misplaced. In context, it is intended only as an example of what may legitimately be done where a statutory purpose is being pursued. His Honour makes it plain[111] that if a person applies for an order unconnected with the purposes authorised by the legislation, where there is no benefit to the corporation, its creditors or its contributories, there will be an abuse of process.

A wider purpose?

76 *In re Imperial Continental Water Corporation* recognised that there were limits to the purposes for which an examination under s 115 of the 1862 Act could be put. The statutory purpose was confined to investigations by the liquidator as to the assets of the company in order to benefit those interested in the winding up. To this may be added the purpose contemplated by s 165, to investigate possible misconduct by an officer of the company. In light of these purposes, and the refusal of the Court of Appeal in that case to hold that the purpose of an individual to pursue litigation for their own benefit was a proper one, the appellants need to point to some evidencing of change in statutory purposes over time. They are unable to do so.

77 Statutory context is important to the ascertainment of the purpose of an examination. Resort to statutory context will not avail the appellants. It has been and remains corporate insolvency and the resulting external administration of a company. Amendments which have been made to the examination power up to and including Pt 5.9 of the *Corporations Act* continue to pursue a policy of more closely aligning examinations in corporate insolvency with those in personal insolvency. The types of external administration to which the examination power is relevant have expanded over time. But the general powers have always been framed largely by reference to that administration and never by reference to litigation by individuals for their benefit.

78 That must be in part because the examination powers are extraordinary, as Chitty J described them in *In re Imperial Continental Water Corporation*[112]. In *Hamilton v Oades*[113], Mason CJ made a similar observation. As his Honour said, they are a form of discovery not available to an ordinary litigant. They are special powers which are intended for wider, public purposes. It needs also to be borne in mind that they involve the denial of certain privileges, including that against self-incrimination, in order that their public purpose can be achieved. The fact that the

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111 *Evans v Wainter Pty Ltd* (2005) 145 FCR 176 at 217 [252 (4) and (8)].

112 (1886) 33 Ch D 314 at 318.

113 (1989) 166 CLR 486 at 497.

examination proposed by the appellants might possibly reveal wrongful conduct which may be the subject of charges or other regulatory action does not convert their purpose in seeking the examination to the second purpose stated in *Hamilton v Oades*.

79 *In re Imperial Continental Water Corporation* cannot be distinguished on the basis that there the application was brought by a liquidator and now the class of persons who may apply for an examination summons is wider. Creditors and contributories have always been able to apply for both a general examination summons and an examination for misfeasance summons, although they might be required to show good reason for the making of such an order, such as that some benefit will accrue to the company or its creditors or contributories. That position maintains today.

80 Creditors and contributories would no doubt come within the class of eligible applicants who may be authorised by ASIC to bring an application under s 596A or s 596B, just as the new trustees were authorised in *Hong Kong Bank*, where the litigation was held to be productive of benefit. The conferral of standing upon a person to bring an application for an examination summons, by way of authorisation by a regulatory authority, was not first provided by s 541 of the Companies Codes. It had been available since the Uniform Companies Acts[114]. Contrary to the appellants' contention, s 541 did not expand the examination power. It consolidated what had been treated separately as a power to examine to obtain information for the general benefit of the external administration and one to investigate misconduct.

81 At points in their argument the appellants suggested that the authorisation given by ASIC is in some way linked to the statutory purpose. That cannot be so. ASIC's authorisation merely provides standing to a person to bring proceedings[115]. It occurs prior to the bringing of the application for an examination summons, which is when questions of abuse of process may arise. It cannot inform the question of statutory purpose.

82 It may be accepted that Pt 5.9 introduced some changes to the process respecting an examination summons and the conduct of the examination. Most obviously in the former respect it provided separately for examinations of persons who are provisional liquidators or officers of the company or who had been in a period prior to the commencement of the external administration. It recognised that

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114 As relevantly amended by *Companies (Amendment) Act 1973* (NSW), s 7(b) and other State analogues.

115 *Re Excel Finance Corporation Ltd (Receiver and Manager Appointed); Worthley v England* (1994) 52 FCR 69 at 86.

officers are to be expected to co-operate in the external administration about the affairs of the company. It mandated the making of an order for examination in their case. But such an order would always be subject to the purpose of the examination being one of the statute's purposes. It is also noteworthy in this regard that the list of eligible applicants in s 9 of the *Corporations Act*, consistently with the legislative history set out above, does not include a person who claims to have suffered loss by reason of misconduct in or relating to the affairs of the company.

83 So far as concerns the conduct of the examination, Pt 5.9 provides that its subject is the "examinable affairs" of the company, as defined. Both the Harmer Report[116] and the Explanatory Memorandum[117] explain that it was considered desirable to adopt the wider definition of "examinable affairs" in s 5(1) of the *Bankruptcy Act 1966* (Cth). No wider purpose such as that for which the appellants contend can be discerned by that adoption.

84 The decided cases have consistently identified the purposes of the examination power. In no way do they depart from those identified in *In re Imperial Continental Water Corporation*. The decision in *Hong Kong Bank* confirms that decision's currency in recent times. Whilst the Harmer Report acknowledged that they may include the investigation of possible causes of action, this was as part of the general recovery of property, which, in the context of insolvency, is for the benefit of the company's creditors or contributories. The decided cases referred to above, and in particular *Hong Kong Bank* and *Re Excel*, have consistently held an order for an examination summons for some other, foreign purpose to be an abuse of the power and of the process of the court. The decision in *In re Imperial Continental Water Corporation* has never been doubted, consistently with an acceptance that the law on this subject has been settled.

85 An exception to these cases is *Flanders v Beatty*, where it was held that the purpose of an examination under s 596A is no longer required to provide the benefits spoken of[118]. The Full Court of the Supreme Court of Victoria did not state what any new purposes of Pt 5.9 are, but held it would be for the court to rule on any oppressive or foreign purposes in any particular application[119]. This begs the question of how it is to be discerned whether a purpose is foreign to the

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116 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988) at [590].

117 Australia, House of Representatives, *Corporate Law Reform Bill 1992*, Explanatory Memorandum at [1172]-[1173].

118 (1995) 16 ACSR 324 at 331 per Ormiston J, Tadgell and Harper JJ agreeing.

119 *Flanders v Beatty* (1995) 16 ACSR 324 at 335.

statute. This decision was not relied on by the appellants and does not accord with the approach historically taken to the purpose of examinations, which *Hong Kong Bank* and *Re Excel* clearly consider to be settled. It should not be followed.

86 One result of the broader purpose for which the appellants contend would be that the special power of examination would be available in all manner of proceedings, wholly unconnected with the external administration of a company or the interests of persons in its outcome. By way of example, there would seem to be nothing to prevent a person seeking an examination in aid of an industrial dispute or an action for personal injuries arising in the workplace. If such a significant change had been introduced it might have been expected that some mention might have been made of it in the Harmer Report or the Explanatory Memorandum to the 1992 Act.

Conclusion

87 For these reasons the Court of Appeal was right to adhere to the settled understanding that the purposes which inform s 596A confine its application so that it does not authorise an examination to facilitate the investigation or prosecution of a claim that has nothing to do with the external administration of the company and which is being pursued exclusively for the benefit of persons other than the company, or its creditors or contributories considered as a whole.

88 The appeal should be dismissed with costs.

89 GAGELER J. Part 5.9 of the *Corporations Act 2001* (Cth) makes provision for the compulsory examination of a person before "the Court"[120] about the "examinable affairs"[121] of a corporation that is in "external administration" within the meaning of Ch 5 of the *Corporations Act*. The Part was examined in detail in *Palmer v Ayres*[122]. The process for which it provides includes creation of a record of the examination which is to be open for public inspection and able to be used in evidence in legal proceedings against the person[123].

90 The gateway to the process of compulsory examination for which the Part provides is the making of an order summoning a person for examination about a corporation's examinable affairs. The Court is empowered to make such an order, on the application of an "eligible applicant"[124], under either s 596A or s 596B.

91 There is an important difference between s 596A and s 596B. Section 596A imposes a duty on the Court to make an order summoning a person for examination. The duty arises if the Court is satisfied that the person is, or was during a specified period, an "officer"[125] or "provisional liquidator"[126] of the corporation[127]. Section 596B, by contrast, confers a discretion on the Court to make an order summoning a person for examination. The discretion arises if the Court is satisfied that the person "has taken part or been concerned in examinable affairs of the corporation and has been, or may have been, guilty of misconduct in relation to the corporation"[128] or if the Court is satisfied that the person simply "may be able to give information about examinable affairs of the corporation"[129].

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120 Section 58AA.

121 Section 9 (definition of "examinable affairs").

122 (2017) 259 CLR 478 at 486-489 [9]-[19], 513-515 [94]-[99].

123 Section 597(13)-(14A).

124 Section 9 (definition of "eligible applicant").

125 Section 9 (definition of "officer").

126 Section 9 (definition of "provisional liquidator").

127 Section 596A(b).

128 Section 596B(1)(b)(i).

129 Section 596B(1)(b)(ii).

92 There is also an important commonality between s 596A and s 596B. The commonality is that the s 596A duty is imposed and the s 596B discretion is conferred conformably with the ordinary incidents of the exercise of jurisdiction by the Court[130]. Indispensable to the ordinary incidents of the jurisdiction of the Court is the capacity of the Court to prevent abuse of its process[131]. The Court can accordingly refuse to make an order under either section if it is satisfied in advance that summoning a person on the application of an eligible applicant would amount to an abuse of the process of compulsory examination for which the Part provides. The Court can also stay an order it has made under either section if it is later satisfied that subjecting or continuing to subject the person to the process of compulsory examination amounts to an abuse of that process.

93 "The possible varieties of abuse of process are only limited by human ingenuity and the categories are not closed."[132] That said, abuses of process "usually fall into one of three categories: (1) the court's procedures are invoked for an illegitimate purpose; (2) the use of the court's procedures is unjustifiably oppressive to one of the parties; or (3) the use of the court's procedures would bring the administration of justice into disrepute"[133]. Those categories can overlap in practice. A pertinent example is where one party invokes a procedure of the court for a purpose unjustifiably oppressive to another. The illegitimacy of the purpose then lies in the unjustifiable oppression. But an invocation of a procedure can be unjustifiably oppressive even if invoked for a legitimate purpose.

94 This appeal is concerned only with whether the appellants' application to the Supreme Court of New South Wales for an order under s 596A summoning the third respondent for examination about the eligible affairs of the first respondent was an abuse of process within the first of those categories. That is to say, it is concerned only with whether the application was an invocation of the process of compulsory examination for an illegitimate purpose unrelated to oppression.

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130 *Electric Light and Power Supply Corporation Ltd v Electricity Commission of NSW* (1956) 94 CLR 554 at 559-560.

131 *Williams v Spautz* (1992) 174 CLR 509 at 518; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 60-61 [41], 107-108 [187].

132 *Sea Culture International Pty Ltd v Scoles* (1991) 32 FCR 275 at 279. See *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 265-267 [9]-[15].

133 *Rogers v The Queen* (1994) 181 CLR 251 at 286. See *PNJ v The Queen* (2009) 83 ALJR 384 at 386 [3]; 252 ALR 612 at 613; *Victoria International Container Terminal Ltd v Lunt* (2021) 95 ALJR 363 at 368 [14]; 388 ALR 376 at 380.

95 There is no dispute that the appellants had the immediate purpose of examining the third respondent about the examinable affairs of the first respondent. There is also no dispute that the appellants' ultimate purpose in examining the third respondent about the examinable affairs of the first respondent was to investigate and pursue a potential class action on behalf of some former shareholders of the first respondent against former officers and advisers of the first respondent. In that potential class action, the appellants would seek to recover losses sustained as a result of events that occurred during the course of the examinable affairs of the first respondent.

96 The question in the appeal is whether the New South Wales Court of Appeal was correct to conclude that the appellants' application for the order was an invocation of the process of compulsory examination for an illegitimate purpose because their ultimate purpose, if fulfilled, would not confer a demonstrable benefit on the company or its creditors[134].

97 Invocation of a process of a court as a step in the pursuit of an ultimate purpose amounts of itself to an abuse of process only if pursuit of the ultimate purpose is "foreign to the nature of the process in question"[135]. The question in the appeal therefore reduces to whether, and if so how, the ultimate purpose of the appellants can be said to have been foreign to the process of compulsory examination for which provision is made in Pt 5.9 of the *Corporations Act*.

98 Treating *Re Excel Finance Corporation Ltd (Receiver and Manager Appointed); Worthley v England*[136], as referred to in *Evans v Wainter Pty Ltd*[137], as authority for the proposition that "an application for the predominant purpose of advancing the cause of the applicant in litigation against third parties and not for the benefit of the corporation, its contributories or its creditors is a use of the provision for a purpose foreign to the power"[138], the Court of Appeal concluded

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134 *ACN 004 410 833 Ltd (formerly Arrium Ltd) (In liq) v Walton* (2020) 383 ALR 298 at 332 [140]-[141].

135 *Clyne v Deputy Commissioner of Taxation* (1984) 154 CLR 589 at 599, citing *Dowling v Colonial Mutual Life Assurance Society Ltd* (1915) 20 CLR 509 at 521-523. See *Williams v Spautz* (1992) 174 CLR 509 at 526-527, 535; *Victoria International Container Terminal Ltd v Lunt* (2021) 95 ALJR 363 at 369-370 [23]-[24]; 388 ALR 376 at 382-383.

136 (1994) 52 FCR 69 at 91, 93.

137 (2005) 145 FCR 176 at 200 [143], 216 [247].

138 (2020) 383 ALR 298 at 331 [137]. See also at 332 [140].

that the appellants' ultimate purpose in seeking the examination summons was foreign to the process of compulsory examination for which provision is made in Pt 5.9 on the basis that fulfilment of their purpose would not confer a demonstrable benefit on the first respondent or its creditors[139]. Relying predominantly on observations in *Hamilton v Oades*[140], the first respondent sought to defend the conclusion of the Court of Appeal on the basis that the ultimate purpose of the appellants was neither to aid those responsible for the external administration of the first respondent in the performance of their duties nor to bring criminal or regulatory proceedings in connection with the affairs of the first respondent.

99 An obvious point to be made at the outset is that neither *Hamilton v Oades* nor *Re Excel* arose under Pt 5.9 of the *Corporations Act*. What was said in those cases reflected the precise form of the legislation in issue. The same is true of *In re Imperial Continental Water Corporation*[141] and *Rees v Kratzmann*[142], to which attention was drawn in the course of argument.

100 *In re Imperial Continental Water Corporation* concerned the discretionary power of a court under the *Companies Act 1862* (UK)[143], on the application of a liquidator or contributory[144], to summon for examination a person thought capable of giving information concerning the trade, dealings, estate or effects of a company in winding up. For the discretion to be exercised, it had earlier been held that the court needed to be satisfied that the making of the order was "just and beneficial for the purposes of the winding-up"[145]. The outcome in *In re Imperial Continental Water Corporation*, staying an order made on the application of a contributory who sought it for the purpose of obtaining information to be used by him in an action against the company and its directors, reflected that basic limitation[146]. Substantially the same discretionary power was reproduced in legislation in

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139 (2020) 383 ALR 298 at 332 [141].

140 (1989) 166 CLR 486.

141 (1886) 33 Ch D 314.

142 (1965) 114 CLR 63.

143 Section 115.

144 Section 138.

145 *In re Metropolitan Bank* (1880) 15 Ch D 139 at 142.

146 (1886) 33 Ch D 314 at 316, 320-322.

Australia up to and including the uniform *Companies Acts* of 1961[147], where it was interpreted and applied subject to the same limitation[148].

101 *Rees v Kratzmann* concerned the distinct discretionary power of a court under the uniform *Companies Acts*[149] to order the public examination of a person about the promotion or formation or conduct of the business of a company in liquidation after receiving and considering a report of the liquidator stating the opinion of the liquidator that a fraud had been committed in the promotion or formation of the business of a company. The progenitor of that distinct discretionary power was a provision of the *Companies (Winding-up) Act 1890* (UK) which had been interpreted by the House of Lords to limit the scope of the discretion to ordering examination of a person about that person's part in the fraud stated in the liquidator's report[150].

102 In *Rees v Kratzmann*, no justification was found for importing a similar limitation into the more liberally expressed discretionary power conferred by the uniform *Companies Acts*[151]. Noting that "[t]he honest conduct of the affairs of companies is a matter of great public concern to-day" and that "[i]f 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 this policy", Windeyer J expressed the opinion that "[t]he only general conclusion that, as it seems to me, can be drawn from the statute is that the legislature thought it in the public interest to widen the scope of public examinations but to entrust a considerable measure of control to courts concerned"[152].

103 *Hamilton v Oades* concerned the discretionary power of a court under s 541 of the *Companies Code*, in the form in which it commenced in 1982[153], to order the compulsory examination of a person in relation to "the promotion, formation,

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147 eg ss 249 and 305 of the *Companies Act 1961* (NSW).

148 *Re Hugh J Roberts Pty Ltd (In liq)* [1970] 2 NSWR 582 at 583.

149 Section 250 of the *Companies Act 1961* (Qld).

150 Section 8(3), as considered in *Ex parte Barnes* [1896] AC 146.

151 (1965) 114 CLR 63 at 78-79.

152 (1965) 114 CLR 63 at 80-81.

153 *Companies Act 1981* (Cth). See, relevantly, *Companies (Application of Laws) Act 1981* (NSW).

management, administration or winding up of, or otherwise relating to affairs of" a corporation in liquidation or under official management[154]. The power was capable of being exercised on the application of the National Companies and Securities Commission or a State or Territory delegate, or an official manager, liquidator or provisional liquidator of the corporation, or any other person authorised by the Commission to make the application[155] if it appeared to the applicant that the person either: had "taken part or been concerned in the promotion, formation, management, administration or winding up of, or [had] otherwise taken part or been concerned in affairs of, a corporation [and had] been, or may have been, guilty of fraud, negligence, default, breach of trust, breach of duty or other misconduct in relation to that corporation"[156] ("sub-section (2)(a)"); or "may be capable of giving information in relation to the promotion, formation, management, administration or winding up of, or otherwise in relation to affairs of, a corporation"[157] ("sub-section (2)(b)"). The court had a further discretion on making the order for an examination or at any later time, on the application of any person concerned, to give such directions as to the matters to be inquired into as it thought fit[158].

104 In respect of that further discretion, Mason CJ said in *Hamilton v Oades*[159]:

> "In exercising this discretion the judge is confronted with a difficult task. He has to take account of the competing public and private interests. 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 connexion with the company's affairs ... Sub-section (2)(a) and (b) emphasizes the high public importance of these purposes."

105 Two things are apparent about that statement. The first is that, in identifying those "two important public purposes", Mason CJ was adhering closely to the text

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154 Section 541(3).

155 Section 541(1)-(2).

156 Section 541(2)(a).

157 Section 541(2)(b).

158 Section 541(5).

159 (1989) 166 CLR 486 at 496.

and structure of the limitations that sub-section (2)(a) and sub-section (2)(b) placed on the making of an application for an order for compulsory examination. The second is that, in describing those purposes, his Honour was plainly not purporting to be exhaustive.

106 The text and structure of the discretionary power conferred on a court by s 541 of the *Companies Code* as considered in *Hamilton v Oades* was carried over into the discretionary power conferred on a court by s 597 within Pt 5.9 of the *Corporations Law*, in the form in which it commenced in 1991[160]. The power was to order the compulsory examination of a person in relation to "the promotion, formation, management, administration or winding up of, or otherwise relating to affairs of" a corporation in external administration under Ch 5 of the *Corporations Law*[161].

107 In *Hong Kong Bank of Australia Ltd v Murphy*[162], the New South Wales Court of Appeal held that s 597 of the *Corporations Law* permitted the ordering, on the application of new trustees of publicly traded unit trusts who were authorised by the Australian Securities Commission ("the ASC") to make the application, of the compulsory examination of persons connected with the previous administration of the trusts by a company in liquidation. That was despite the examination having been found to be for the purpose of allowing the new trustees to obtain information that may assist them in proceedings against the company and others brought for the ultimate benefit of the investors in the trusts.

108 The Court of Appeal in *Hong Kong Bank* refuted the notion that the need which had existed under the uniform *Companies Acts* for a compulsory examination to be shown to be for the purposes of the winding up of the company in liquidation had been carried over into s 597 of the *Corporations Law*. Gleeson CJ, with whom Mahoney and Priestley JJA agreed, said[163]:

> "As appears from its place in the legislative scheme, and from its terms, whilst s 597 has an important role to play in relation to companies that are being wound up, and liquidators or provisional liquidators will be amongst those who most commonly take advantage of its provisions, the

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160 *Corporations Act 1989* (Cth) as amended by the *Corporations Legislation Amendment Act 1990* (Cth) and applied relevantly by the *Corporations (New South Wales) Act 1990* (NSW).

161 Section 597(3).

162 (1992) 28 NSWLR 512.

163 (1992) 28 NSWLR 512 at 521.

> operation of the section is by no means confined to liquidators. 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. They are not, however, confined to the need for such protection in the case of winding up. Winding up is only one form of external administration. The scope of s 597 is wider."

109 *Re Excel*, which was decided by the Full Court of the Federal Court two years later, likewise concerned s 597 of the *Corporations Law* in the form in which it commenced in 1991[164]. There an appointee of the trustee of debenture holders who was authorised by the ASC to make an application for examinations was found to have abused the process of the Federal Court by making an application for an order to conduct an examination of a former auditor of a company in liquidation in circumstances where the trustee and the debenture holders had already commenced proceedings against the former auditor for damages for loss arising from his conduct in that capacity. In joint reasons for judgment, Gummow, Hill and Cooper JJ stated their conclusion as follows[165]:

> "[W]e are of the view that the use of the power to obtain an examination summons for the principal purpose of furthering the cause of the applicant for the summons or, as in this case, appointor of the applicant in litigation against third parties, not for the benefit of the corporation, its contributories or creditors (other than in the most indirect way) is a use of the power for a purpose foreign to that power and thus an abuse of the power. Such a purpose would provide to the examiner the opportunity for pre-trial depositions which would not be available in the litigation."

110 The first sentence of that statement of conclusion in *Re Excel* was expressed in terms suggestive of a reversion to the notion rejected in *Hong Kong Bank* of the need for a compulsory examination to be for the purposes of the winding up. The second sentence, however, anchored the abuse found to the illegitimacy of the forensic advantage which the compulsory examination would confer on the examiner over the examinee as parties to existing litigation. An abuse of that nature is a form of oppression. The joint reasons in *Re Excel*[166] had earlier drawn attention

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164 As relevantly applied by the *Corporations (South Australia) Act 1990* (SA).

165 (1994) 52 FCR 69 at 93.

166 (1994) 52 FCR 69 at 89-91, referring to *Re Hugh J Roberts Pty Ltd (In liq)* [1970] 2 NSWR 582 at 585. See also *Hamilton v Oades* (1989) 166 CLR 486 at 498; *Re Auto Import Company (Australia) Ltd* (1924) 25 SR (NSW) 52 at 56.

to the fact that an abuse of that nature had long been understood to be capable of being committed even by a liquidator who had commenced proceedings against the examinee for the purposes of the winding up.

111 Nothing was said in *Re Excel* to cast doubt on the reasoning or conclusion in *Hong Kong Bank*. Indeed, the conclusion reached in *Re Excel* had been foreshadowed by the observation of Gleeson CJ in *Hong Kong Bank* that "the court will not permit a liquidator, or other eligible person, to abuse its process by using an examination solely for the purpose of obtaining a forensic advantage not available from ordinary pre-trial procedures, such as discovery or inspection"[167].

112 Much was sought to be made in the present appeal of the hypothetical example given in *Re Excel* of it being "an abuse of process for a creditor approved by the [ASC] ... to obtain an examination summons to conduct an examination for the purpose of obtaining evidence in proceedings which the creditor proposed to bring against the examinee for defamation"[168]. The rhetorical force of hypothetical examples often lies in tacit assumptions. If the assumption made is that the connection between the putative defamation and the examinable affairs of the corporation in administration was one of mere happenstance, the abuse of process is apparent enough. The abuse would lie in the oppression to the examinee of being subjected to a form of preliminary discovery which would not be available to the examiner but for that happenstance. The putative defamation, for example, might have arisen in the context of a personal quarrel but have been contained in a statement made during a meeting of shareholders or officers of the corporation. The rhetorical force of the example changes dramatically if the assumption made is that the putative defamation was intimately connected with the examinable affairs of the corporation in external administration. The putative defamation, for example, might have been the publication by the corporation of a press release or other communication falsely attributing its impending financial failure to unconscionable conduct on the part of a creditor, and the examination might be sought by the creditor to investigate and pursue potential claims in defamation against the officers and advisers of the corporation who might have participated in its publication[169].

113 Part 5.9 of the *Corporations Act*, which commenced in 2001, reproduces the form of Pt 5.9 of the *Corporations Law*. The form of Pt 5.9 of the *Corporations Law* had been the result of extensive amendments introduced by the *Corporate Law Reform Act 1992* (Cth). The first and second respondents are correct to point

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167 (1992) 28 NSWLR 512 at 519.

168 (1994) 52 FCR 69 at 91.

169 cf *Webb v Bloch* (1928) 41 CLR 331.

out that nothing in the background to the *Corporate Law Reform Act* was suggestive of a legislative intention fundamentally to alter the circumstances in which a compulsory examination into the examinable affairs of a corporation in external administration would be permitted to occur. The *Corporate Law Reform Act* nevertheless continued the trend of expanding those circumstances which had already been evident in Pt 5.9 of the *Corporations Law* in the form in which it commenced in 1991. Soon after these amendments, Hayne J observed in *New Zealand Steel (Australia) Pty Ltd v Burton*[170] that "the evident intention of the legislature revealed in many of the recent changes to companies legislation is that directors and those engaged in the management of companies should be accountable and, in at least some cases, publicly accountable for their conduct".

114 In *Flanders v Beatty*[171], the Full Court of the Supreme Court of Victoria highlighted three main changes to Pt 5.9 in the form it took after the extensive amendments effected by the *Corporate Law Reform Act*. The first was an expansion in the range of eligible applicants, corresponding to an expansion in the forms of external administration within the meaning of Ch 5. The second was the inclusion of the new and expansive definition of "examinable affairs". The third was the elimination of the need for an eligible applicant to apply for any exercise of discretion on the part of a court to obtain an order summoning for examination a person who is, or was during the period specified in s 596A, an officer or provisional liquidator of the corporation in external administration.

115 The observations made, and the decisions rendered, in both *New Zealand Steel* and *Flanders* were flatly inconsistent with the discretion conferred by s 596B, and by parity of reasoning with the duty imposed by s 596A, being limited by any implicit requirement for the examination sought by an eligible applicant to be shown to be for the purpose of benefiting the corporation or the general body of creditors or contributories. The eligible applicant for the order under s 596B made in *New Zealand Steel* was a person authorised by the ASC who sought information to be used against the examinee in litigation the subject matter of which arose out of the examinable affairs of the corporation. The eligible applicant for the s 596B order upheld in *Flanders* was the administrator of deeds of company arrangement who sought information to be used in the enforcement only of the rights of participating creditors.

116 Notwithstanding *New Zealand Steel* and *Flanders*, the Full Court of the Federal Court in *Evans v Wainter*, undertaking a survey of the prior case law after the enactment of the *Corporations Act*, treated *Re Excel* as standing for "the

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170 (1994) 13 ACSR 610 at 619.

171 (1995) 16 ACSR 324 at 332.

proposition that it is an abuse of process to use the Pt 5.9 procedure if the predominant purpose of the applicant seeking the order is not for the purpose of benefiting the corporation, its contributories or its creditors"[172]. Then, soon after *Evans v Wainter*, its statement of the proposition was quoted without disapproval in the New South Wales Court of Appeal in *Meteyard v Love*[173] in circumstances where it was not determinative of the outcome.

117 The statement of the proposition in *Evans v Wainter* accords with some of the language in the statement of the conclusion in *Re Excel*. The statement in *Evans v Wainter* nevertheless draws too much from *Re Excel*. For reasons already given, the better explanation of the abuse found in *Re Excel* was that it lay not in an absence of benefit to the corporation, its contributories or its creditors, but rather in the unfair forensic advantage which the examination would have given to the examiner over the examinee in existing litigation. To the extent that courts have adopted the proposition drawn from *Re Excel* in *Evans v Wainter*, they have been led into error.

118 Consistently with *Hong Kong Bank* before *Re Excel*, and consistently with *New Zealand Steel* and *Flanders* after *Re Excel*, there was not under Pt 5.9 of the *Corporations Law* any requirement for an examination sought by an eligible applicant to be for the purpose of benefiting the corporation or the general body of creditors or contributories. Nor can that, or any other, purposive requirement be discerned in the text or structure of Pt 5.9 of the *Corporations Act*.

119 The circumstances in which a corporation can be in external administration within the meaning of Ch 5 of the *Corporations Act* extend beyond circumstances of winding up of a corporation. They include, for example, circumstances in which some but not all of the property of the corporation is in receivership under Pt 5.2[174] as well as circumstances in which a corporation is operating under a deed of company arrangement under Pt 5.3A. Not every circumstance of external administration necessarily operates for the benefit of the corporation or for the benefit of the general body of creditors or contributories.

120 Yet in every circumstance of external administration, the compulsory examination procedure under Pt 5.9 of the *Corporations Act* is available. And in every circumstance of external administration, the Australian Securities and Investments Commission ("ASIC") and any person authorised by ASIC (either

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172 (2005) 145 FCR 176 at 200 [143]. See also at 216 [247].

173 (2005) 65 NSWLR 36 at 40 [7].

174 eg *Saraceni v Jones* (2012) 246 CLR 251.

generally or in relation to the corporation) is an eligible applicant for an order under both s 596A and s 596B[175].

121 In conformity with reasoning in *Re Excel* adopted in *Saraceni v Australian Securities and Investments Commission*[176], it may be accepted that "in determining whether to authorise a particular person to make applications in relation to a particular corporation, [ASIC] will be required only to consider the relationship which that person has to the external administration and in a particular case the appropriateness of that person being given standing to apply to the Court"[177]. In considering the appropriateness of the person being given standing to apply for an order under s 596A or s 596B, however, ASIC can be expected to heed the exhortation of the *Australian Securities and Investments Commission Act 2001* (Cth) that, in performing its functions and exercising its powers under the *Corporations Act*, ASIC "must strive" to "maintain, facilitate and improve 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 to "promote the confident and informed participation of investors and consumers in the financial system"[178].

122 Under Pt 9.4B of the *Corporations Act*, ASIC is empowered to pursue corporate misfeasance by itself bringing proceedings for orders which include declarations of contravention, pecuniary penalty orders and compensation orders. But ASIC is not obliged to limit its vision of what can be done to maintain, facilitate and improve the performance of the financial system to what it might achieve in proceedings that it might bring. Having regard to the range of functions and powers with which it is invested, ASIC can take the view that the confident and informed participation of investors and consumers in the financial system would be promoted by authorising investors or consumers who might have suffered loss through corporate misfeasance to investigate that misfeasance through the public process for which Pt 5.9 provides with a view to them pursuing recovery of their losses by bringing civil proceedings of their own either under the ordinary processes of a court or under class action regimes like that in Pt IVA of the *Federal Court of Australia Act 1976* (Cth), inserted shortly before the enactment of the *Corporate Law Reform Act*[179]. The Australian Law Reform

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175 Section 9 (definition of "eligible applicant").

176 (2013) 211 FCR 298 at 313-314 [106]-[109].

177 (1994) 52 FCR 69 at 86.

178 Section 1(2)(a) and (b).

179 *Federal Court of Australia Amendment Act 1991* (Cth).

Commission noted in 2018 that class actions "frequently perform a public function by being employed to vindicate broader statutory policies"[180].

123 The attempt by the first respondent to limit the ultimate purpose for which a compulsory examination might be conducted as being either to aid those responsible for the external administration of a corporation in the performance of their duties or to bring criminal or regulatory proceedings in connection with the affairs of the corporation must therefore be rejected. Not only does such a limitation as to purpose find no anchor in the text or structure of s 596A or s 596B or of Pt 5.9 as a whole, but to impose such a limitation would unduly constrain the outworking of the regulatory choices available to ASIC in the exercise of its authorisation function.

124 In accepting the proposition drawn from *Re Excel* in *Evans v Wainter*, the Court of Appeal properly applied the interpretative approach first laid down in *Australian Securities Commission v Marlborough Gold Mines Ltd*[181] in the context of the *Corporations Law* that "an intermediate appellate court – and all the more so a single judge – should not depart from an interpretation placed on such legislation by another Australian intermediate appellate court unless convinced that that interpretation is plainly wrong". A consequence of the approach is that it occasionally falls to this Court on appeal from an intermediate appellate court to rechart a course of decision-making incorrectly set by another intermediate appellate court. That is what needs to happen here.

125 The legitimacy of any purpose to which the process of compulsory examination under Pt 5.9 of the *Corporations Act* might ultimately be put may well lie in the nature and quality of the connection between the purpose and the examinable affairs of the corporation that is in external administration. That said, I do not think it necessary or prudent to attempt to map out the metes and bounds of the legitimate purposes to which the process might ultimately be put in order to resolve the present appeal. Indeed, borrowing from another field of discourse, I doubt whether any court considering whether an application is or was an invocation of the process of compulsory examination for an illegitimate purpose can be expected to do more than to pronounce in a particular case that a specifically

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180 Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Report No 134 (2018) at 32 [1.47]. See also *Kirby v Centro Properties Ltd* (2008) 253 ALR 65 at 67-68 [8].

181 (1993) 177 CLR 485 at 492.

identified purpose is "definitely extraneous to any objects the legislature could have had in view"[182].

126 Suffice it for the purpose of the present case to conclude that the appellants did not seek to examine the third respondent for a purpose foreign to the nature of the process of compulsory examination for which Pt 5.9 of the *Corporations Act* provides by reason only that the result which the appellants intended to achieve would bring no commercial or demonstrable benefit to the first respondent or its creditors. The appellants' ultimate purpose of enabling evidence and information to be obtained to support the bringing of proceedings against officers and other persons in connection with the examinable affairs of the first respondent was not illegitimate.

127 The appeal should be allowed with costs. The substantive orders made by the Court of Appeal should be set aside. In their place, the appeal to that Court should be dismissed with costs.

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182 cf *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505.

128 EDELMAN AND STEWARD JJ. The appellants were shareholders in the company formerly known as Arrium Limited ("Arrium"). Arrium was a publicly listed company on the Australian Stock Exchange that formerly produced steel and iron ore. It is now in liquidation. The appellants, in their capacity as "eligible applicants" under the *Corporations Act 2001* (Cth), sought an order from the Supreme Court of New South Wales that a summons be issued for the public examination of a former director of Arrium. The order was sought pursuant to s 596A of the *Corporations Act* and was duly made by a Registrar in Equity. Arrium sought to have the order stayed or set aside[183]. The primary judge declined to do so. The Court of Appeal of the Supreme Court of New South Wales disagreed. The Court of Appeal decided that the predominant purpose of the examination sought was not to confer a benefit on Arrium, its creditors, or its contributories; rather, the purpose of that examination was to pursue a "private" benefit for only a "limited group" of shareholders[184]. As such, the Court of Appeal decided that the examination would have served a purpose foreign to s 596A and was therefore an abuse of process.

129 For the reasons which follow, and with great respect, the Court of Appeal erred in limiting the purposes for which an examination may be sought pursuant to s 596A. If the appellants' purpose for the examination were truly foreign to the purpose of s 596A then it would be an abuse of process. But the purpose of the appellants was not so foreign.

Abuse of process

130 Although the categories are not closed, the doctrine of abuse of process has conveniently, but loosely, been divided into three overlapping categories[185]. These

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183 Certain orders for the production of documents under s 68 of the *Civil Procedure Act 2005* (NSW) and s 597(9) of the *Corporations Act 2001* (Cth) were also made in relation to KPMG, being Arrium's former auditors and the second respondent to this appeal, and UBS AG, being a former adviser to the company. It was agreed that, if the examination order were to be set aside, the orders for production should also be set aside.

184 *ACN 004 410 833 Ltd (formerly Arrium Ltd) (In liq) v Walton* (2020) 383 ALR 298 at 332 [141] per Bathurst CJ, Bell P and Leeming JA.

185 *Rogers v The Queen* (1994) 181 CLR 251 at 286 per McHugh J. See also *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 267 [15] per Gleeson CJ, Gummow, Hayne and Crennan JJ; *PNJ v The Queen* (2009) 83 ALJR 384 at 386 [3] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ; 252 ALR 612 at 613; *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at 452

are: (i) the use of the court's processes for an illegitimate purpose; (ii) the use of the court's processes in a manner that is unjustifiably oppressive to one of the parties; and (iii) a category which might better be described as concerned with the integrity of the court and not merely its processes[186], and which is sometimes described as concerned with bringing the administration of justice into disrepute.

131 This appeal is concerned with the first category. The category arises where the predominant purpose of a litigant invoking the processes of the court is illegitimate in the sense that the purpose is outside the scope of a court process authorised by statute. Once the scope of the statute has been identified, the focus is upon whether the purpose of the litigant was outside that scope. That purpose is conceptually separate from the *effect* or result of the litigant's conduct in invoking the court's process[187].

132 Within the category of abuse of process by use of the court's process for an illegitimate purpose, a distinction has been drawn between (i) a litigant's immediate purpose in the sense of the end to be achieved and the means of doing so and (ii) the litigant's ultimate purpose in the sense of their motive. The doctrine of abuse of process has been said to be concerned with the immediate purpose, not the ultimate purpose[188]: "If the [immediate] object sought to be effected by the process is within the lawful scope of the process, it is a *use* of the process within the meaning of the law, though it may be [for an ultimate purpose that is] malicious, or even fraudulent"[189]. Hence, in *Williams v Spautz*[190], Mason CJ,

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[89] per Gummow A-CJ, Hayne, Crennan and Bell JJ; *Moti v The Queen* (2011) 245 CLR 456 at 464 [10] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

186 *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (2018) 266 CLR 325 at 412 [259] per Edelman J.

187 See, eg, *Zaburoni v The Queen* (2016) 256 CLR 482 at 489 [10] per Kiefel, Bell and Keane JJ; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 395-397 [98]-[102] per Edelman J.

188 *Williams v Spautz* (1992) 174 CLR 509 at 526-527 per Mason CJ, Dawson, Toohey and McHugh JJ; *Victoria International Container Terminal Ltd v Lunt* (2021) 95 ALJR 363 at 369-370 [23]-[24] per Kiefel CJ, Gageler, Keane and Gordon JJ, 372 [38] per Edelman J; 388 ALR 376 at 382-383, 385-386.

189 *Dowling v Colonial Mutual Life Assurance Society Ltd* (1915) 20 CLR 509 at 521 per Isaacs J (emphasis in original).

190 (1992) 174 CLR 509 at 526-527. See also at 535 per Brennan J.

Dawson, Toohey and McHugh JJ gave the example of a councillor who prosecutes another councillor with the "immediate purpose" of securing a conviction and the "ultimate purpose" of having their opponent disqualified from office. Such a prosecution was said not to be an abuse of process because the scope of the legal process was characterised broadly as concerned with securing convictions of offenders and the immediate purpose was within that scope.

133 In *Victoria International Container Terminal Ltd v Lunt*[191], Mr Lunt's proceeding was not an abuse of process because his immediate purpose (means and ends), which was to set aside an Enterprise Agreement, was not outside the scope of the statute. It did not matter that his ultimate purpose (or motive), which was to obtain a benefit for the union of which he was a member, was outside the scope of the statute. By contrast, in *Williams v Spautz*, it was held to be an abuse of process for the plaintiff to bring criminal proceedings for the immediate purpose of causing the defendant to reinstate his employment or to agree to a favourable settlement of civil proceedings rather than to obtain a conviction. That was to use the proceedings to obtain "some advantage for which they are not designed"[192].

134 The distinction between an immediate purpose and an ultimate purpose can be confusing because "ultimate purpose", in the sense of motive, can be what underlies "immediate purpose", in the sense of the means and ends to be achieved. The distinction can also distract from the central question, which is whether the litigant's predominant purpose, in the sense of the end to be achieved and the means by which that end will be achieved, is inconsistent with the express or implied scope of the court's process. The terminology of a litigant's purpose should therefore be understood to mean both the end which the litigant seeks to achieve and the means by which they will do so.

135 A better way of expressing the first category of abuse of process is therefore simply to ask whether the predominant means adopted and ends to be achieved by a litigant (in other words, the litigant's purpose) are inconsistent with the express or implied scope of the legal process. Where the legal process is statutory, if the purpose of the litigant is consistent with the scope of the legislation then it will not usually matter whether the litigant has some ulterior motive. After the identification of the litigant's predominant means and ends, the question that is

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191 (2021) 95 ALJR 363; 388 ALR 376.

192 (1992) 174 CLR 509 at 526 per Mason CJ, Dawson, Toohey and McHugh JJ.

"implicit in, indeed at the very heart of, that process" is to ask whether the "scope and purpose of the statute" will be contradicted or stultified[193].

136 In cases of statutory processes, once the purpose of the litigant has been identified, the existence of the first category of abuse of process may often depend upon the degree of generality at which the legislative scope and purpose is identified. At the lowest level of generality, the scope and purpose of a statutory process might, in rare cases, be identified simply by the meaning of its terms so that there "is no purpose to the [provision], other than its achievement"[194]. There, a litigant whose means require satisfying the statutory terms will not have an illegitimate purpose within the first category of abuse of process, whatever motive they might have. But the scope and purpose of a statutory process will generally be characterised at a higher level of generality, by reference to the goal or mischief to which it is directed[195].

137 Although the scope and purpose of a statute can be identified in a manner that is generally applicable, the existence of the first category of abuse of process might depend greatly upon the particular facts and circumstances of an individual case. It would be a fool's errand to attempt to chart the legitimacy of an almost infinite variety of purposes – means and ends – for which a litigant might seek to invoke the statutory process. Each case should be assessed on its own facts and circumstances in light of the statutory scope and purpose.

The purpose of the examination sought by the appellants

138 In August 2014, Arrium published its results for the financial year ended 30 June 2014. On 15 September 2014, it announced that it would undertake a capital raising. For that purpose, shareholders were provided with an Information Memorandum. The capital raising was successfully completed in October 2014. In January 2015, Arrium announced that its Southern Iron mining operation would be suspended or closed. A month later, it recognised an impairment in the value of its mining operations in excess of $1 billion. In April 2016, Arrium was placed

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193 Compare *Miller v Miller* (2011) 242 CLR 446 at 459 [27] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

194 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 557-558 [51]-[52] per French CJ, Hayne, Crennan, Kiefel and Bell JJ. See also *Monis v The Queen* (2013) 249 CLR 92 at 133 [73] per French CJ.

195 *Brown v Tasmania* (2017) 261 CLR 328 at 392 [209] per Gageler J; *Unions NSW v New South Wales* (2019) 264 CLR 595 at 657 [171] per Edelman J.

into administration and, in June 2019, the administrators were appointed as liquidators.

139 The appellants believe they may have potential claims arising out of the capital raising against the former directors of Arrium and its auditors (KPMG) in relation to the accuracy of the contents of Arrium's 2014 financial results and the Information Memorandum. The appellants may ultimately commence some form of class action. They accept that they have no claim against Arrium itself, and that there are no claims that might be made by Arrium or its creditors against any former officer of the company in circumstances where it was accepted that Arrium had benefited from the capital raising. They also concede that any future proceedings would be confined to a potential class of shareholders of Arrium, namely those who purchased shares on or after 19 August 2014; that class would necessarily include those who participated in the capital raising. It might also include members who had ceased to be shareholders before Arrium went into administration.

140 The appellants' end or goal in seeking to examine the former director is to investigate and to pursue personal claims in their capacity as shareholders against the former directors and auditors of Arrium[196]. The means by which that goal would be achieved necessarily involved the appellants satisfying the criteria in s 596A of the *Corporations Act* by securing authorisation from the Australian Securities and Investments Commission ("ASIC") to examine the former director about the corporation's "examinable affairs" in circumstances where the corporation is in liquidation.

141 At first instance, after noting the "heavy onus" on Arrium of establishing that an examination of the former director would be an abuse of process, the primary judge decided that, because such an examination might have validly been pursued by the liquidators of Arrium, it necessarily followed that an examination could validly be sought by the appellants as contributories who "have likely suffered loss"[197]. In addition, the primary judge found that the information to be produced from the examination "would also likely advance the interests of Arrium and its creditors, so far as it either produces additional relevant information that supports further causes of action by Arrium, or does not do so and therefore

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196 *ACN 004 410 833 Ltd (formerly Arrium Ltd) (In liq) v Walton* (2020) 383 ALR 298 at 305 [36], 324-325 [93], 330 [129] per Bathurst CJ, Bell P and Leeming JA.

197 *In the matter of ACN 004 410 833 Ltd (formerly Arrium Ltd) (subject to a deed of company arrangement)* [2019] NSWSC 1606 at [50] per Black J; the liquidators earlier had informally interviewed this director.

supports the liquidators' present assessment that their insolvent trading claims are more likely to benefit Arrium and its creditors than the claims which the [appellants] seek to investigate"[198].

142 By contrast, the Court of Appeal decided that an examination sought predominantly for the purpose of pursuing private litigation against a third party or third parties, and not for the purposes of conferring a "demonstrable"[199] or "commercial"[200] benefit on "the company or its creditors (and possibly on all of its contributories)"[201], was an abuse of process. It was concluded that this was the position here – the appellants' purpose was an abuse of process[202].

143 Although there was little dispute in this Court about the purpose of the appellants, the first and second respondents (Arrium and KPMG respectively) sought to deny or dilute the finding below that any future claims would be brought by the appellants in their "capacity [as] shareholders". That aspect of the appellants' purpose, namely the means by which they would achieve their desired end, is important. So is the aspect of the appellants' purpose that their potential claim against the former directors of Arrium and its auditors would be part of a class action. It cannot be doubted that the appellants' class action, if brought, would include claims arising from the participation of the appellants in the capital raising, and thus as shareholders of Arrium, as the appellants were only able to participate in the capital raising by virtue of already being shareholders. These matters demonstrate that the appellants' purpose in seeking the examination included the administration or enforcement of the law concerning the public dealings of the corporation in external administration and its officers.

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198 *In the matter of ACN 004 410 833 Ltd (formerly Arrium Ltd) (subject to a deed of company arrangement)* [2019] NSWSC 1606 at [50] per Black J.

199 *ACN 004 410 833 Ltd (formerly Arrium Ltd) (In liq) v Walton* (2020) 383 ALR 298 at 332 [140] per Bathurst CJ, Bell P and Leeming JA.

200 *ACN 004 410 833 Ltd (formerly Arrium Ltd) (In liq) v Walton* (2020) 383 ALR 298 at 329 [123] per Bathurst CJ, Bell P and Leeming JA.

201 *ACN 004 410 833 Ltd (formerly Arrium Ltd) (In liq) v Walton* (2020) 383 ALR 298 at 332 [140] per Bathurst CJ, Bell P and Leeming JA.

202 *ACN 004 410 833 Ltd (formerly Arrium Ltd) (In liq) v Walton* (2020) 383 ALR 298 at 332 [141] per Bathurst CJ, Bell P and Leeming JA.

The scope and purpose of s 596A

Statutory history

144 Courts have long possessed a statutory power to summon for examination officers of a company that is being wound up to compel the giving of information concerning the trade, dealings, estate, or effects of the company. Section 115 of the *Companies Act 1862*[203] is an example of this type of power. That provision empowered the court, "after it has made an Order for winding up the Company", to "summon before it" for examination various classes of person, including those whom the court considered capable of giving information concerning the trade, dealings, estate, or effects of the company. The provision was later described in Parliament as "a means by which directors, managers, and auditors can be examined and brought to book, and anyone acquainted with winding-up proceedings in the Chancery Courts knows that this was proved a most powerful and successful provision"[204].

145 The powers of compulsory examination in Australia evolved from similar provisions[205]. The predecessors of the modern provisions can be seen in the 1981 *Companies Codes*[206]. Notably, s 541 permitted any person so authorised by the then National Companies and Securities Commission (a "prescribed person")[207] to apply for an order for a compulsory examination. Section 541(2) provided as follows:

> "Where it appears to the Commission or to a prescribed person that –
>
> (a) a person who has taken part or been concerned in the promotion, formation, management, administration or winding up of, or has otherwise taken part or been concerned in affairs of, a corporation has been, or may have been, guilty of fraud, negligence, default, breach of trust, breach of duty or other misconduct in relation to that corporation; or

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203 25 & 26 Vict c 89.

204 House of Commons Debates, 27 February 1890, vol 341, col 1405.

205 See, eg, *Companies Act 1874* (NSW), s 173.

206 eg, *Companies Act 1981* (Cth); *Companies (Application of Laws) Act 1981* (NSW); *Companies (Application of Laws) Act 1981* (Vic).

207 See, eg, *Companies (New South Wales) Code*, s 541.

(b) a person may be capable of giving information in relation to the promotion, formation, management, administration or winding up of, or otherwise in relation to affairs of, a corporation,

the Commission or prescribed person may apply to the Court for an order under this section in relation to the person."

146 When the national co-operative scheme led by the *Corporations Act 1989* (Cth) ("the *1989 Corporations Law*") was enacted, the power to compel the public examination of an officer of a company was conferred by s 597 of that Act. Relevantly, the lawful capacity to make an application for a compulsory examination was expressed in s 597(2) as follows:

"Where it appears to the Commission or to a prescribed person that:

(a) a person who has taken part or been concerned in the promotion, formation, management, administration or winding up of, or has otherwise taken part or been concerned in affairs of, a corporation has been, or may have been, guilty of fraud, negligence, default, breach of trust, breach of duty or other misconduct in relation to that corporation; or

(b) a person may be capable of giving information in relation to the promotion, formation, management, administration or winding up of, or otherwise in relation to affairs of, a corporation;

the Commission or prescribed person may apply to the Court for an order under this section in relation to the person."

147 In general terms, para (a) of s 597(2) was concerned with the examination of an "insider" in the company who might have committed some form of misconduct. In contrast, and again in general terms, para (b) of s 597(2) was concerned with any "person" who might have had knowledge about the affairs of the company. Section 597(1) provided that the reference to a "prescribed person" in s 597(2) was to an official manager, liquidator, or provisional liquidator of the corporation or to any other person authorised by the then Australian Securities Commission ("the ASC") to apply for an examination. The power of the court to order a compulsory examination was conferred by s 597(3) of the *1989 Corporations Law*, which was in the following terms:

"Where an application is made under subsection (2) in relation to a person, the Court may order that the person attend before the Court on a day and at a time to be fixed by the Court to be examined on oath on any matters relating to the promotion, formation, management, administration or winding up of, or otherwise relating to affairs of, the corporation concerned."

As with s 541 of the *Companies Codes*, the court had a discretion as to whether to make an order for a compulsory examination. The existence of such a discretion was confirmed by the use of the phrase "may order" in s 597 and the phrase "may, if it thinks fit, order" in s 541.

148 In 1992, a series of related provisions, including ss 596A and 596B, were inserted into the *1989 Corporations Law* by the *Corporate Law Reform Act 1992* (Cth). Section 596B, for the reasons expressed below, replaced s 597. Section 596A, however, conferred an entirely new power of examination. In general terms, it permitted the examination of an insider of the company by limited classes of examiners. Both provisions were re-enacted in 2001 with the passing of the *Corporations Act*.

149 Section 596A provides[208]:

"**Mandatory examination**

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:

(i) if the corporation is under administration – on the section 513C day in relation to the administration; or

(ii) if the corporation has executed a deed of company arrangement that has not yet terminated – on the section 513C day in relation to the administration that ended when the deed was executed; or

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208 Sub-paragraphs (iia) and (iib) were enacted on 1 January 2021 by the *Corporations Amendment (Corporate Insolvency Reforms) Act 2020* (Cth) in connection with the introduction of Pt 5.3B. In broad terms, that Part sets out a new formal debt restructuring process for eligible small companies, supervised by "small business restructuring practitioners". As that process is another form of external administration that is subject to an overarching supervisory power of the court to "make such order as it thinks appropriate" (see s 458A), the introduction of sub-paras (iia) and (iib) has no real bearing on the proper purposes for issuing a summons for examination under s 596A.

(iia) if the corporation is under restructuring – on the section 513CA day in relation to the restructuring; or

(iib) if the corporation has made a restructuring plan that has not yet terminated – on the section 513CA day in relation to the restructuring that ended when the plan was made; or

(iii) if the corporation is being, or has been, wound up – when the winding up began; or

(iv) otherwise – when the application is made."

150 The word "officer" is broadly defined in s 9 of the *Corporations Act* to include a director, receiver, administrator, or liquidator of a company. The term "examinable affairs" of a company is also broadly defined in s 9 as, amongst other matters, the promotion, formation, management, administration, or winding up of a company or any other affairs of a company. And the "affairs of a body corporate", by s 53, are themselves extremely broad, including "the promotion, formation, membership, control, business, trading, transactions and dealings" of the company.

151 Section 596B provides:

"**Discretionary examination**

(1) The Court may 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:

(i) has taken part or been concerned in examinable affairs of the corporation and has been, or may have been, guilty of misconduct in relation to the corporation; or

(ii) may be able to give information about examinable affairs of the corporation.

(2) This section has effect subject to section 596A."

152 By s 596B, the court retains the same discretion it had under s 597 of the *1989 Corporations Law* not to issue a summons. By contrast, the issue of a summons pursuant to s 596A is mandatory once the criteria contained therein are satisfied. The phrase used in s 596A is "[t]he Court *is to* summon", whereas the phrase deployed in s 596B is "[t]he Court *may* summon" (emphasis added). If the terms of s 596A are satisfied, the court "is to summon a person for examination".

The court has "no discretion to decline to issue a summons if an application is made under s 596A and the criteria identified in paras (a) and (b) of the section are satisfied"[209]. In such circumstances, subject to the doctrine of abuse of process, an applicant may obtain a summons "as of right"[210]. As Hayne J said in *New Zealand Steel (Australia) Pty Ltd v Burton*, in the case of s 596A, "the court is bound to order an examination"[211].

153 Another striking change in the terms of s 596A from the predecessor legislation is that no affidavit evidence is required in support of a summons for examination under s 596A. Although s 596C requires an applicant for a s 596B summons to file an affidavit "that supports the application and complies with the rules", no such affidavit is mandated for the purposes of making an application to issue a s 596A summons[212]. The statutory scheme thus contemplates that a court could make an order for an examination pursuant to s 596A without the need for any supporting affidavit[213]. The court might not need to look beyond the face of an application to determine whether to issue a summons in accordance with the five criteria set out below. Alternatively, the court might only need a supporting affidavit that confirms the satisfaction of those criteria[214].

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209 *Carter v Gartner* (2003) 130 FCR 99 at 107 [25] per Branson J, citing *Simionato v Macks* (1996) 19 ACSR 34 at 56 per Lander J and *Hill v Smithfield Service Centre Pty Ltd (In liq)* (2002) 196 ALR 246 at 249-250 [21]-[22], 254-255 [47] per Austin J.

210 *Flanders v Beatty* (1995) 16 ACSR 324 at 332 per Ormiston J (Tadgell and Harper JJ agreeing).

211 (1994) 13 ACSR 610 at 618.

212 Rule 11.3 of the *Supreme Court (Corporations) Rules 1999* (NSW) nonetheless requires the filing of an affidavit in support of an application for a summons pursuant to both ss 596A and 596B. As the application here was supported by an affidavit, it is not necessary to decide whether r 11.3 should be read down to be in accordance with ss 596A and 596C.

213 *Carter v Gartner* (2003) 130 FCR 99 at 107 [25] per Branson J, citing *Simionato v Macks* (1996) 19 ACSR 34 at 56 per Lander J and *Hill v Smithfield Service Centre Pty Ltd (In liq)* (2002) 196 ALR 246 at 249-250 [21]-[22], 254-255 [47] per Austin J.

214 cf *Kimberley Diamonds Ltd v Arnautovic* (2017) 252 FCR 244 at 249 [21]-[22] per Foster, Wigney and Markovic JJ.

154 In the absence of any affidavit material, as Santow JA observed in *Meteyard v Love*[215], the breadth of the definition of "examinable affairs" in the criterion that the examination be "about a corporation's examinable affairs" means that a court might only be able to determine whether a summons had been issued for a foreign or abusive purpose once the resulting examination is under way. This breadth, his Honour continued, reflected a change by the 1992 legislative amendments to the *1989 Corporations Law* with[216]:

> "an expansionist approach to permitting examinations under the *Corporations Act*. They further underpin the wisdom of generally permitting the examinations to go ahead, given that there remains the protective safeguard of an intervention more precisely focussed at the examination stage. That said, if a clear-cut case of abuse emerges earlier, courts have to intervene if examinees are not to be put to potentially huge expense and inconvenience."

155 The capacity of a court to prevent questioning that would constitute an abuse of process is not denied by s 596A. But, the prevailing means of preventing such abuse are different because the issue of a summons is mandatory. Once again, statutory context is important. The identification of that statutory context commences with the obvious proposition, already mentioned, that s 596C mandates that an application for a summons for examination pursuant to s 596B be supported by an affidavit; and that there is no equivalent statutory requirement in the case of s 596A. Where an application is made for a summons pursuant to s 596A without any supporting affidavit, it may well be difficult, if not impossible, for a court to know the purpose for which the examination is sought.

156 Sections 596F and 597 are also important for the identification of the scope and purpose of s 596A. Formerly, s 597(5) empowered a court to give directions as to the matters to be enquired into and, subject to s 597(4), as to the procedure to be followed at an examination. Moreover, as the legislative history reveals, the court has always had the power to supervise the conduct of such examinations[217]. The *Corporate Law Reform Act*, however, more explicitly gave a court control over how examinations may take place pursuant to s 596A. Pursuant to s 596F, a court may give directions about: the matters to be enquired into; the procedure to be followed; who may be present when an examination is held in private; who may be excluded when an examination is held in public; access to the records of the

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215 (2005) 65 NSWLR 36 at 40-41 [9], [12].

216 *Meteyard v Love* (2005) 65 NSWLR 36 at 41 [12].

217 See *Hamilton v Oades* (1989) 166 CLR 486 at 498 per Mason CJ.

examination; prohibiting publication or communication of information about the examination; and destroying a document that relates to an examination which was created at the examination. In addition, there is now an express power whereby a court may also control, as appropriate, the questions that may be asked at an examination to ensure that they are directed at the examinable affairs of a company[218].

The lowest level of generality of statutory scope and purpose: criteria for the issue of a s 596A summons

157 At the lowest level of generality, the purpose of s 596A could be confined to its criteria. As to those criteria, given the objectives expressed in the "Harmer Report" and the Explanatory Memorandum (discussed below[219]), it is unsurprising that the language found in s 596A is very different from the language in former s 597(2)(a) of the *1989 Corporations Law*. Whilst it has been said that s 596A contains only two criteria to be satisfied[220], a more complete statement is that it has five criteria.

158 First, the application for a summons must be made by an "eligible applicant" as defined[221]. Secondly, the person to be examined must be an existing officer or provisional liquidator of the company, or must have been such an officer or provisional liquidator during or after the two years ending on certain specified days set out in s 596A(b). Thirdly, the summons must be "about a corporation's examinable affairs". Fourthly, the form of a summons must comply with s 596D. Fifthly, the company in question must be subject to some form of external administration for the purposes of Ch 5 of the *Corporations Act*. That fifth criterion is supported by the context of s 596A as contained within Ch 5 of the *Corporations Act*, a chapter that addresses the various ways in which a company may be externally administered. It is also supported by the legislative history discussed above. As French J said in *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd*[222]:

> "the historical roots of the power lie deep in corporate insolvency law nourished by the development of the examination powers in respect of

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218 *Corporations Act 2001* (Cth), s 597(5B).

219 See below at [165]-[167].

220 *Palmer v Ayres* (2017) 259 CLR 478 at 487 [12] per Kiefel, Keane, Nettle and Gordon JJ.

221 *Corporations Act 2001* (Cth), s 9.

222 (2007) 156 FCR 501 at 527 [88]. See also *Palmer v Ayres* (2017) 259 CLR 478 at 513 [94] per Gageler J.

> bankrupt individuals. The proposition that s 541 of the Companies Codes introduced, by a sidewind, unrecognised in the Explanatory Memorandum, a general power in the courts to examine persons about the affairs of corporations is, with respect, improbable. It is remarkable that the Harmer Report would have failed to recognise the statutory divergence from that closer alignment with bankruptcy law which it proposed. The Explanatory Memorandum for the 1992 amendments which introduced ss 596A and 596B into the *Corporations Law* was focused on insolvency and forms of external administration. Moreover if a general power of judicial examination of persons about the affairs of corporations were intended, the question arises whether there was any point in retaining specific references to the various categories of external administration mentioned in s 596A."

159 No party disputed that the summons applied for here satisfied these five criteria. It follows that, unless the appellants' purpose was an abuse of process by reference to the purpose of s 596A at a higher level of generality, the Supreme Court of New South Wales was obliged to issue the summons to the former director of Arrium.

The scope and purpose of s 596A at a higher level of generality: the approaches of the parties

160 The valid exercise of the power conferred by s 596A is not conditioned upon an examination being for the benefit of the company, its creditors, or its contributories. But, as mentioned above, the purpose of a statutory provision is usually expressed at a higher level of generality than its terms and by reference to the broader mischief to which it is directed. As explained at the outset of these reasons, the centrepiece of the reasoning of the Court of Appeal set the purpose of s 596A at a higher level of generality. That purpose was said to be the conferral of a benefit on the company, its creditors, or its contributories. In this Court, there was a disconnect between the submissions of the appellants and the first respondent, on the one hand, and the reasoning of the Court of Appeal, on the other. The Court of Appeal was not asked to address the correctness of the submissions now put to this Court by both the appellants and the first respondent.

161 The appellants contended that the application for a summons pursuant to s 596A serves the following two purposes. First, s 596A aids the process of external administration, which is not limited to assisting liquidators to protect the interests of creditors. Secondly, the provision assists in the bringing of proceedings against the examinable officers of a company and others in connection with the company's examinable affairs. Inferentially, an application for a summons not made in conformity with either purpose would be an abuse of process. Here, it was submitted by the appellants that the summons was sought in aid of the second, and not the first, purpose.

162 The first respondent agreed with the appellants' expression of the permissible purposes for seeking a summons, save that, importantly, in the case of the second purpose, the proceedings must be confined to those of a regulatory nature. The first respondent also submitted that the expression by the Court of Appeal of the test that an examination must be for the benefit of the company, its creditors, or its contributories was confined to the first purpose. Here, the first respondent contended that, because the proposed class action was not a regulatory proceeding, it followed that the summons sought by the appellants was an abuse of process. No serious attempt was made to defend the Court of Appeal's suggestion that, in the case of an examination made to benefit contributories, it must be for the benefit of "all" contributories[223].

163 The source of the approach of the parties to the asserted purposes of s 596A being twofold was the following observation of Mason CJ in *Hamilton v Oades*[224]:

> "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 [them] 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 connexion with the company's affairs."

That observation was made with respect to s 541 of the *Companies (New South Wales) Code*, which, as set out above, referred to the compulsory examination of a person who is, or may be, guilty of fraud, negligence, default, breach of trust or duty, or other misconduct. The observation was also made in the context of a case concerned with the availability of the privilege against self-incrimination. In that respect, in support of its contention that the second purpose was to be confined to regulatory proceedings, the first respondent relied upon the reference to misconduct in s 596B(1)(b)(i). The absence of that word in s 596A was of no moment, it was said, because one needed to read that provision and s 596B together.

164 With respect, neither the approach of the appellants nor that of the first respondent as to the purpose of s 596A should be accepted. *Hamilton*, as already mentioned, concerned a different provision which expressed a different test for the making of an order for compulsory examination, a test which is not found in s 596A. Section 541 was the predecessor provision to s 596B, not s 596A. This can

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223 *ACN 004 410 833 Ltd (formerly Arrium Ltd) (In liq) v Walton* (2020) 383 ALR 298 at 332 [140] per Bathurst CJ, Bell P and Leeming JA.

224 (1989) 166 CLR 486 at 496, citing *Mortimer v Brown* (1970) 122 CLR 493 at 496 per Kitto J, 499 per Walsh J.

be seen in the fact that both ss 541 and 596B confer a discretion on the court for the purpose of making an order for examination, and both describe those liable to be examined in the same essential way. The similarity with the expression of who is eligible to be examined pursuant to s 596B(1)(b) (and s 597(2) of the *1989 Corporations Law*) is obvious. By contrast, s 596A is new and finds no direct analogy with any former provision in any earlier companies legislation.

165 The break from legislative history in the enactment of s 596A is confirmed in the Explanatory Memorandum to the *Corporate Law Reform Bill 1992* (Cth). It states that, prior to 1992, a noteworthy difference between the procedures for corporate insolvency and for personal bankruptcy was that a trustee in bankruptcy was entitled to examine a bankrupt without the need to obtain a court order[225]. According to the Explanatory Memorandum, this difference led the Harmer Report to recommend the creation of a similar power for the examination of company officers without the need for any court order where the person to be examined was, or had been within two years before the commencement of the winding up, a director or other officer of the company[226]. But, where the person to be examined was an outsider, the Harmer Report recommended the retention of the need to obtain an order of the court to permit an examination to take place[227].

166 The Explanatory Memorandum indicates that Parliament did not accept the recommendation contained in the Harmer Report to create an examination power exercisable without any court order[228]. But the Parliament did accept the need to create a new power to make it easier for an eligible applicant to obtain a summons from the court to examine a company's officers. Indeed, to use the language of the

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225 Australia, House of Representatives, *Corporate Law Reform Bill 1992*, Explanatory Memorandum at [1152].

226 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988) at 250 [585]-[586]. See Australia, House of Representatives, *Corporate Law Reform Bill 1992*, Explanatory Memorandum at [1153]-[1155].

227 Australia, House of Representatives, *Corporate Law Reform Bill 1992*, Explanatory Memorandum at [1156]-[1158]; Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988) at 250 [585]-[586].

228 cf Australia, House of Representatives, *Corporate Law Reform Bill 1992*, Explanatory Memorandum at [1153]-[1155].

Explanatory Memorandum, the obtaining of a s 596A summons was intended to be only a "formality"[229]. The Explanatory Memorandum thus states[230]:

> "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, without the need to inquire further into such matters as whether that person has taken part or been concerned in the examinable affairs of the corporation, been guilty of misconduct in relation to the corporation or is able to give information about examinable affairs of the corporation. *It is envisaged that the issue of a summons in such circumstances will be a formality, and that the respective Court rules may provide for execution of the function by a Registrar or equivalent official, where appropriate*."

167 The Explanatory Memorandum also records that Parliament accepted the Harmer Report recommendation for the examination of outsiders[231]; this partly explains the nature of the power conferred by s 596B. The Explanatory Memorandum states that the purpose of this express power is to "cast a very broad net in defining the matters on which a person may be examined"[232]. The breadth of that net is measured by the term "examinable affairs". As noted earlier, that term is broadly defined, and extends to "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"[233]. That term replaced the phrase "matters relating to the promotion, formation, management, administration or winding up of, or otherwise relating to affairs of, the corporation concerned", which had previously appeared in s 597(3) of the *1989 Corporations Law*.

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229 Australia, House of Representatives, *Corporate Law Reform Bill 1992*, Explanatory Memorandum at [1155].

230 Australia, House of Representatives, *Corporate Law Reform Bill 1992*, Explanatory Memorandum at [1155] (emphasis added).

231 Australia, House of Representatives, *Corporate Law Reform Bill 1992*, Explanatory Memorandum at [1156]-[1158].

232 Australia, House of Representatives, *Corporate Law Reform Bill 1992*, Explanatory Memorandum at [1173].

233 *Corporations Act 2001* (Cth), s 9; see also s 53.

168 Although s 596A of the *Corporations Act* preserved some of the criteria in its legislative forebears, it broke away from the general model by: (i) expanding the range of eligible applicants; (ii) expanding the scope of examinations by the broad definitions of "examinable affairs" and "affairs of a body corporate"; and (iii) removing the discretion of the court to grant the order summoning a person for examination.

The wider purpose, or statutory scope, of s 596A

169 The statutory history, context, and terms of s 596A, set out above, demonstrate that a characterisation of the purpose of s 596A at a higher level of generality than its terms should not be curtailed by "muffled echoes of old arguments" concerning its predecessors[234]. In particular, the purpose of s 596A cannot be confined by reference to benefit to the company, its creditors, or its contributories. As the scope of application of s 596A expanded, so did its underlying purpose and concern. That expanded concern is with the administration or enforcement of the law concerning the public dealings of the corporation in external administration and its officers. The only vestige that remains of the old approaches to purpose that might have confined the predecessors to s 596A is the public aspect of the purpose of the power.

170 The purpose of s 596A, at a higher level of generality than its terms, and reflecting the underlying mischief to which the provision is directed, is therefore to address, by examinations of present or former corporate officers or provisional liquidators, the administration or enforcement of the law concerning the corporation and its officers in public dealings. A summons for examination will not be an abuse of process unless the predominant purpose of the examination would contradict or stultify – in some way – this public interest in the external administration of a company.

171 The underlying public administration and compliance purpose of s 596A is reflected in the persons eligible to apply for a summons, generally being those serving in offices which serve a public function or who are subject more generally to the supervision of the court, such as a liquidator or an administrator. The persons who can apply for a summons under s 596A also include ASIC or persons authorised by ASIC. ASIC is under a statutory duty to strive to: maintain, facilitate, and improve the performance of the financial system, and the entities within that system, in the interests of commercial certainty, reducing business costs, and the

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234 See *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 at 414 per Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ, quoting *Ex parte Professional Engineers' Association* (1959) 107 CLR 208 at 276 per Windeyer J. See also *Rees v Kratzmann* (1965) 114 CLR 63 at 78 per Menzies J (Barwick CJ and Taylor J agreeing), 80 per Windeyer J.

efficiency and development of the economy; promote the confident and informed participation of investors and consumers in the financial system; administer the laws that confer functions and powers on ASIC effectively and with a minimum of procedural requirements; receive, process, and store, efficiently and quickly, the information given to ASIC under the laws that confer functions and powers on it; ensure that information is available as soon as practicable for access by the public; and take whatever action it can take, and which is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers upon ASIC[235].

172 There is no reason to suppose that ASIC cannot apply for a summons pursuant to s 596A in the pursuit of any of the foregoing objectives. And, as the appellants have observed, the result of any subsequent examination may ultimately confer no benefit on a company, its creditors, or its contributories. Yet that examination will not be an abuse of process. Enforcement of the law serves the public interest and is a legitimate purpose for the issue of a summons pursuant to s 596A.

173 An eligible applicant also includes a person authorised by ASIC in writing to make an application for a summons pursuant to s 596A. It is not to be assumed or expected that ASIC might authorise a person to make an illegitimate, vexatious or oppressive examination of a company officer. Rather, the power of authorisation exists to enable a person to undertake enforcement functions similar to those conferred on ASIC. It also exists to enable a creditor or contributory to advance claims they may or may not have against a company in external administration or its current or former officers. For the reasons set out below, both purposes serve the public interest.

174 The underlying public administration and compliance purpose of s 596A is also reflected in the fact that the provision invokes the jurisdiction of a court. As the plurality held in *Palmer v Ayres*[236], the s 596A power is an instance of judicial power for the purposes of Ch III of the *Constitution* and involves a matter. In separate reasons in the same case, Gageler J held that the matter to which the exercise of the judicial power of supervision under s 596A is directed was the

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235 *Australian Securities and Investments Commission Act 2001* (Cth), s 1(2).

236 (2017) 259 CLR 478 at 492 [31] per Kiefel, Keane, Nettle and Gordon JJ, citing *Abebe v The Commonwealth* (1999) 197 CLR 510 at 524-525 [25] per Gleeson CJ and McHugh J and *Hooper v Kirella Pty Ltd* (1999) 96 FCR 1 at 16 [57] per Wilcox, Sackville and Katz JJ.

external administration of a company arising under a law made by the Parliament[237].

175 Legitimate purposes under s 596A therefore include the enforcement of the *Corporations Act*, the promotion of compliance with that Act, and the protection of shareholders or creditors from corporate misconduct. An examination conducted for a purpose that included investigating the possible existence of misconduct on the part of a company's officers might be expected to serve the public interest in ways such as these. Hence, regardless of whatever ultimate purpose a litigant might have, a summons that is sought for a substantial purpose that includes the public purpose of enforcement of the *Corporations Act*, whether by ASIC or another eligible applicant, is not a summons sought for a purpose foreign to s 596A in the sense that it is inconsistent with the purposes of s 596A. And the purpose of enforcement of the *Corporations Act* includes examination for the purpose of determining whether relief might be obtained in respect of potential corporate misconduct.

The authorities concerning the purpose of s 596A and its predecessors

176 For the reasons above, the authorities concerning the predecessor provisions to s 596A are of limited assistance in identifying the purpose of s 596A. For instance, since s 115 of the *Companies Act 1862* was bound up with the process of winding up, it was decided that the power existed for the purpose of winding up and for the benefit of those interested in it[238]. Section 115 thus could not be used in the pursuit of a purely private cause of action against the company or its officers[239]. Nor could the provision be used in the pursuit of other foreign purposes, such as a vexatious or oppressive purpose[240] or to obtain some unfair forensic advantage in pending litigation[241].

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237 *Palmer v Ayres* (2017) 259 CLR 478 at 516 [103].

238 *In re Imperial Continental Water Corporation* (1886) 33 Ch D 314 at 320-321 per Cotton LJ.

239 *In re Imperial Continental Water Corporation* (1886) 33 Ch D 314 at 320-321 per Cotton LJ.

240 *Re Hugh J Roberts Pty Ltd (In liq)* [1970] 2 NSWR 582 at 583 per Street J.

241 *Hong Kong Bank of Australia Ltd v Murphy* (1992) 28 NSWLR 512 at 519 per Gleeson CJ (Mahoney and Priestley JJA agreeing).

177 As Hayne J explained in *New Zealand Steel*[242], the early English decisions concerning the power conferred by s 115 of the *Companies Act 1862* and its predecessors reflected the statutory context in which they were made[243]. As noted above, those provisions conferred power on a court to "summon before it" an officer of the company or a person capable of giving information about the trade, dealings or estate of the company. A section such as s 115 was cast in terms that permitted the court to act of its own motion, but it was held that such a course would be most unusual[244].

178 The early jurisprudence concerning s 115 emphasised that it conferred an "extraordinary power" that was "of an inquisitorial kind"[245]. Accordingly, there was a concern that the power only be exercised when it was "just and beneficial"[246] to do so. No matter who applied, an order for examination would properly be made only "if the examination was for the purposes of the winding up and for the benefit of those interested in it"[247]. Since applications under s 115 were made by liquidators (in the usual case), as well as by creditors or contributories, it followed that an application for the purpose of the winding up needed to be for the benefit of the company or its creditors or contributories. But s 596A expanded both the range of eligible applicants and the scope of examinations.

179 In *Re Excel Finance Corporation Ltd*[248], the Full Court of the Federal Court of Australia considered the scope of operation of s 597 of the *1989 Corporations Law*. It decided that the use of the power for the principal purpose of furthering the "personal advantage"[249] of an applicant for the summons, and "not [a purpose] for

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242 (1994) 13 ACSR 610.

243 (1994) 13 ACSR 610 at 613.

244 See *Re Land Securities Company* (1894) 42 WR 624 at 624 per Vaughan Williams J.

245 *In re North Australian Territory Company* (1890) 45 Ch D 87 at 93 per Bowen LJ.

246 *In re Metropolitan Bank (Heiron's Case)* (1880) 15 Ch D 139 at 142 per Baggallay LJ and Bramwell LJ.

247 *New Zealand Steel (Australia) Pty Ltd v Burton* (1994) 13 ACSR 610 at 615 per Hayne J.

248 (1994) 52 FCR 69.

249 *Re Excel Finance Corporation Ltd* (1994) 52 FCR 69 at 91 per Gummow, Hill and Cooper JJ.

the benefit of the corporation, its contributories or creditors (other than in the most indirect way)", was an abuse of the power[250]. The phrase "for the benefit of the corporation, its contributories or creditors" was a modern expression of the requirement deriving from s 115 of the *Companies Act 1862* that the power be exercised for the purpose of a winding up of a company, on the application of a liquidator, a contributory, or a creditor.

180 The distinction drawn between a private purpose for examination, and a purpose of investigation that benefits the corporation, its creditors, or its contributories, is not stable. When a company is being wound up, it can be presumed that *all* of its shareholders and *all* of its creditors want a monetary or other return on their investment. The same is true whether shareholders and creditors are considered as individual entities or collectively. Thus, in the Court of Appeal of the Supreme Court of New South Wales decision in *Hong Kong Bank of Australia Ltd v Murphy*, Gleeson CJ recognised that there was no "strict dichotomy" between the advantage to be gained by an applicant for examination and a benefit that might flow to the creditors or contributories or members of the public[251].

181 Perhaps for that reason, the Full Court observed in *Excel* that there could be no objection to the use of an examination by a creditor for the purpose of ensuring that their debt would be paid[252]. If the creditor were unsecured, it was observed, the creditor's interest would be no different from that of all the other unsecured creditors of the company, who would share equally in the distributable assets of the company[253]. If the creditor were a secured creditor, the Full Court said[254]:

> "the fact that the purpose of the examination was to aid the ultimate recovery of the secured debt, by, for example, the ascertaining of the existence of assets, would operate to the benefit of the company by ensuring

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250 *Re Excel Finance Corporation Ltd* (1994) 52 FCR 69 at 93 per Gummow, Hill and Cooper JJ.

251 (1992) 28 NSWLR 512 at 519 (Mahoney and Priestley JJA agreeing).

252 *Re Excel Finance Corporation Ltd* (1994) 52 FCR 69 at 93 per Gummow, Hill and Cooper JJ.

253 *Re Excel Finance Corporation Ltd* (1994) 52 FCR 69 at 93 per Gummow, Hill and Cooper JJ.

254 *Re Excel Finance Corporation Ltd* (1994) 52 FCR 69 at 93 per Gummow, Hill and Cooper JJ.

that it paid out the secured creditors and that there was then revealed what other assets (if any) were available for distribution to unsecured creditors."

182 It may be that a better characterisation of purpose in the authorities on the older legislative provisions concerning winding up, such as s 115 of the *Companies Act 1862*, would have avoided any focus upon benefit to the corporation and instead expressed the purpose, as McLelland J did in *Re BPTC Ltd*[255], in relation to s 387 of the *Companies (New South Wales) Code*, as one of "[f]acilitation 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".

183 In any event, the broader purposes of the power conferred by the wider s 596A, as distinct from its predecessors, were recognised by the Full Court of the Supreme Court of Victoria in *Flanders v Beatty*, where Ormiston J said[256]:

> "Now the powers given under s 596A to 597B are clearly so wide and so easily exercised by 'eligible applicants' (cf s 596A) that the purposes to be served by examinations ought not be limited by reference to the benefit of the company or its creditors or contributories. The objects to be served by the issue of an examination summons and the making of orders for examination should be discerned only by reference to the statutory provisions which invest those powers. If those powers are being used for oppressive purposes or to serve ends entirely outside the scope of the sections, such as to gather evidence for libel proceedings, then the court will intervene to prevent the examination. As to the precise ambit of the power of the commission to authorise applications under the new sections, it is unnecessary to express any further opinion."

Ormiston J was also of the view that, given the variety of external company arrangements permitted then by the *1989 Corporations Law*, "an examination intended to assist the enforcement of the rights or claims of relatively few persons affected by an arrangement may nevertheless be proper and appropriate"[257]. In other words, it appears that Ormiston J would have considered the summons in issue in this case to be entirely valid.

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255 (1992) 7 ACSR 291 at 292-293.

256 (1995) 16 ACSR 324 at 335 (Tadgell and Harper JJ agreeing).

257 *Flanders v Beatty* (1995) 16 ACSR 324 at 333 (Tadgell and Harper JJ agreeing).

184 In *Evans v Wainter Pty Ltd*[258], the Full Court of the Federal Court appeared to express a contrary view. Lander J, with whom Ryan and Crennan JJ relevantly agreed, concluded that the mandatory nature of s 596A did not justify a conclusion that the purpose of the examination power had changed[259]. Lander J decided that an applicant was only entitled to a summons under s 596A if the purpose of the resulting examination was, concordantly with *Excel*, in the interests of the corporation, its creditors, or its contributories[260]. But his Honour did not explain why that limited purpose, which had been derived from the more limited identity of applicants in a winding up under s 115 of the *Companies Act 1862*, should continue to apply to the new and expanded s 596A.

185 Despite his reference to the need for the purpose of the examination to conform to the interests of the corporation, its creditors, or its contributories, when Lander J came to characterise the statutory purpose, his Honour did so in broader terms. In amplification of what he considered were legitimate purposes for the issue of a s 596A summons, Lander J referred, without suggesting that these purposes were exhaustive, to the following[261]:

> "First, an examination is designed to serve the purpose of enabling an eligible applicant to gather information to assist the eligible applicant in the administration of the corporation.
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> Second, it assists the corporation's administrators to identify the corporation's assets, both tangible and intangible. It also allows the corporation's liabilities to be identified.
>
> Third, the purpose is to protect the interests of the corporation's creditors.
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> 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.

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258 (2005) 145 FCR 176.

259 *Evans v Wainter Pty Ltd* (2005) 145 FCR 176 at 208 [193].

260 *Evans v Wainter Pty Ltd* (2005) 145 FCR 176 at 216 [247] (Ryan and Crennan JJ agreeing).

261 *Evans v Wainter Pty Ltd* (2005) 145 FCR 176 at 216-217 [252(3)] (Ryan and Crennan JJ agreeing).

Fifth, it assists in the regulation of corporations by providing a public forum for the examination of examinable officers of corporations."

186 Each of those examples given by Lander J is an instance of administration or enforcement of the law concerning the public dealings of the corporation in external administration and its officers. More fundamentally, however, the result in *Evans v Wainter*, like that in *Flanders v Beatty*, is inconsistent with any requirement that an applicant have a *purpose* of conferring a benefit on the company, its creditors, or its contributories. The Full Court in *Evans v Wainter* concluded that it was not an abuse of process for an applicant, authorised by ASIC, to apply for an examination summons for the purpose of obtaining information in order to bring proceedings for misleading or deceptive conduct, including against a firm of solicitors who had advised the company (now in liquidation) about a transaction between the company and the applicant. In bringing that proceeding, the applicant in *Evans v Wainter* had no purpose of benefiting the company, its creditors, or its contributories. However, the applicant's purpose involved enforcement of the law concerning the corporation and its officers in public dealings.

187 The Full Court in *Evans v Wainter* considered that there would be a benefit to the company in the *effect* of successful proceedings by the applicant against the solicitors because any recovery would release the company from liability[262]. But it cannot be a requirement for a summons for examination that the effect of the summons would be a "benefit" to the company. As the Full Court of the Federal Court correctly observed in *Kimberley Diamonds Ltd v Arnautovic*[263], an applicant does not need to demonstrate practical utility; they need not show that the examination would achieve any specific result or outcome. Indeed, it is unnecessary for an applicant to demonstrate that the examination "would be in any sense desirable or efficacious"[264].

188 The approach which does not confine the statutory purpose to the interests of the corporation, its creditors, or its contributories has also been taken in relation to s 596B. That reasoning must apply *a fortiori* to s 596A with its potentially wider purpose. In *New Zealand Steel*[265], a creditor (New Zealand Steel Pty Ltd) had sued

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262 *Evans v Wainter Pty Ltd* (2005) 145 FCR 176 at 218 [259] per Lander J (Ryan and Crennan JJ agreeing).

263 (2017) 252 FCR 244 at 249 [21] per Foster, Wigney and Markovic JJ.

264 *Kimberley Diamonds Ltd v Arnautovic* (2017) 252 FCR 244 at 249 [21] per Foster, Wigney and Markovic JJ.

265 (1994) 13 ACSR 610.

officers of an insolvent company, to which a receiver and manager had been appointed, for trading whilst insolvent. An application for discovery had already been dismissed when that creditor obtained an adjournment of the trial to enable it to undertake an examination, pursuant to s 596B, of a person who had taken part in the management of the insolvent company. The creditor had been authorised to apply for a s 596B examination by the ASC. The person set to be examined made an application to set aside the summons for examination.

189 Hayne J dismissed that application to set aside the summons. The proposed examination was not an abuse of process because the creditor's purpose necessarily involved enforcement of the law concerning the corporation in its public dealings. The creditor's purpose was consistent with "the evident intention of the legislature ... that directors and those engaged in the management of companies should be accountable"[266]. The examination would have "[been] of matters of concern to others"[267]. The examination would have concerned a period of trading that would have affected other creditors, and the ASC, "in its role as regulator", could have chosen to participate[268]. The record of the examination would have been open to any such creditor and to the ASC[269]. Finally, Hayne J observed[270]:

> "If any question arose of the examination being conducted in a particular way that amounted to an abuse or was vexatious, then application might be made to stop that abuse."

190 It follows that examining an officer of a company for the purpose of pursuing a claim against the company or one of its officers or advisers for the enforcement of the law can be an entirely legitimate use of the power conferred by s 596A. It should not matter whether the claim relates to all creditors or all contributories, or only a smaller group. Generally speaking, where a company is subject to external administration, each creditor and each shareholder wishes to recover their loss; the recompense they seek is money or an *in specie* distribution.

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266 *New Zealand Steel (Australia) Pty Ltd v Burton* (1994) 13 ACSR 610 at 619.

267 *New Zealand Steel (Australia) Pty Ltd v Burton* (1994) 13 ACSR 610 at 619.

268 *New Zealand Steel (Australia) Pty Ltd v Burton* (1994) 13 ACSR 610 at 619. For example, ASIC may seek declarations or compensation or other orders following a compulsory examination pursuant to s 1317J of the *Corporations Act 2001* (Cth).

269 Under the *Corporations Act 2001* (Cth), the examination is also normally held in public: s 597(4).

270 *New Zealand Steel (Australia) Pty Ltd v Burton* (1994) 13 ACSR 610 at 619.

No doubt some are more altruistic than others and may pursue a remedy directed at, or which includes, other creditors or shareholders being compensated. But the existence of such fine feelings is of no consequence to the court's application of s 596A. As conceded by the first respondent, the pursuit of a claim for the benefit of *some* shareholders can be as legitimate as a claim made for the benefit of *all* shareholders. In both cases, the recovery of money in respect of corporate misadventure serves the public interest by necessarily including a purpose to enforce the law. The making of such claims is a means of protecting shareholders and creditors and of ensuring compliance with the law. An examination made pursuant to s 596A for such a purpose is no abuse of process.

191 It should also be emphasised that setting aside a summons for an improper purpose would be, in the usual case, inapt where the threat of abuse is capable of being addressed by the court in other ways[271]. In the case of a summons issued pursuant to s 596A, the integrity of any examination should be capable of protection by the court through the making of appropriate directions and by the controlling of what questions might be asked[272]. It would only be when these alternatives were unable adequately to address the threat of an abuse of process that a more "draconian"[273] remedy might be appropriate, such as the setting aside of the summons. Even then, the setting aside of a summons on the grounds that it is an abuse of process should be a measure of "last resort"[274]; such a remedy must be reserved for only the most exceptional or extreme cases[275].

192 Contrary to the first and second respondents' contentions, to permit a creditor or contributory to examine an officer of a company in external administration in order to pursue an individual claim or claims arising out of the company's "examinable affairs" will not expose that officer to the risk of

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271 *Victoria International Container Terminal Ltd v Lunt* (2021) 95 ALJR 363 at 369 [20] per Kiefel CJ, Gageler, Keane and Gordon JJ, 372 [38] per Edelman J; 388 ALR 376 at 381, 385. See also *Jago v District Court (NSW)* (1989) 168 CLR 23 at 71 per Toohey J.

272 *Corporations Act 2001* (Cth), ss 596F, 597(5B).

273 *Victoria International Container Terminal Ltd v Lunt* (2021) 95 ALJR 363 at 369 [20] per Kiefel CJ, Gageler, Keane and Gordon JJ; 388 ALR 376 at 381.

274 *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (2018) 266 CLR 325 at 409 [248] per Edelman J.

275 *Kimberley Diamonds Ltd v Arnautovic* (2017) 252 FCR 244 at 251 [33] per Foster, Wigney and Markovic JJ.

examination "to the possible detriment of the corporation"[276]. Only limited classes of individuals or entities are eligible to apply for the issue of a summons pursuant to s 596A. It should not be assumed that ASIC, a liquidator, or an administrator would, in the discharge of their respective offices, use the power conferred by s 596A oppressively or vexatiously. Nor, as already mentioned, should it be assumed that there is a realistic risk that ASIC would authorise a person to be an eligible applicant who might seek an examination without good reason. In any event, the court retains a capacity at all times to prevent an examination which is oppressive, vexatious, or otherwise an abuse of process. Moreover, the very cost of carrying out an examination should defer frivolous applications. In that regard, s 597B permits a court to order an applicant to pay the costs of an examinee where it is satisfied that the relevant summons has been "obtained without reasonable cause".

The purpose of the summons to the former director was within the scope of s 596A

193 The appellants are aggrieved because they suspect that Arrium misled them during the 2014 capital raising. Potentially all shareholders who participated in that raising may be members of a future class action. The appellants believe that they may be able to recover their losses from the former directors of Arrium or its former auditors or both. The appellants are eligible applicants for the purposes of s 596A(a). The former director they seek to examine was an "officer" at the relevant time for the purposes of s 596A(b). And the proposed examination would be "about" the examinable affairs of Arrium for the purposes of s 596A. It follows that, unless it was an abuse of process, the Registrar was obliged to issue the summons sought, as she did.

194 In *New Zealand Steel*, Hayne J said that, if a liquidator had been appointed to the company and had applied for an examination to determine if the company had traded whilst insolvent, with a view to recommending criminal proceedings to the ASC, "it is clear that such an examination would [have been] for the purposes of the statute"[277]. No different result, it was said, would have been justified if, instead, a creditor, pursuing "ends which [were] private to and concern only it"[278], had put such a liquidator "in funds in order that the examination might be

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276 *Evans v Wainter Pty Ltd* (2005) 145 FCR 176 at 216 [249] per Lander J (Ryan and Crennan JJ agreeing).

277 *New Zealand Steel (Australia) Pty Ltd v Burton* (1994) 13 ACSR 610 at 619.

278 *New Zealand Steel (Australia) Pty Ltd v Burton* (1994) 13 ACSR 610 at 619.

prosecuted"[279]. Adopting the same reasoning here, if the liquidators had instead obtained a summons to examine a former Arrium director about the existence of possible misleading or deceptive conduct arising out of the capital raising, the legitimacy of pursuing such a course under s 596A could not have been questioned. As it happens, the director in question was "informally interviewed" by the liquidators. Some shareholders now want the matter more thoroughly examined. To do so is not to pursue any purpose foreign to s 596A. A similar conclusion was reached applying similar reasoning by the primary judge[280]. His Honour was, with respect, correct.

195 The furtherance of the appellants' purpose, in the sense of the means by which the appellants will achieve their end, will involve conducting the examination, which will probably take place in public[281] and as to which ASIC may choose to take part[282], in which there will be consideration of issues concerning whether Arrium's officers engaged in misleading or deceptive conduct in the 2014 capital raising. Whilst the proposed class action, if successful, undoubtedly would not benefit all of Arrium's shareholders, it is a legitimate use of the power conferred by s 596A for those shareholders who stand to benefit to seek to test the merits of that class action with a compulsory examination by means that include the administration or enforcement of the law concerning the public dealings of the corporation in external administration and its officers. The exposure of any wrongdoing may well encourage greater compliance with the law. In that respect, the record of the examination will also be open for inspection[283], as well as for use in subsequent legal proceedings[284].

196 Finally, the foregoing conclusion is strengthened in light of the effective abandonment at the hearing of any defence of the proposition, suggested by the Court of Appeal below[285], that in the case of an examination sought for the benefit

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279 *New Zealand Steel (Australia) Pty Ltd v Burton* (1994) 13 ACSR 610 at 619.

280 *In the matter of ACN 004 410 833 Ltd (formerly Arrium Ltd) (subject to a deed of company arrangement)* [2019] NSWSC 1606 at [50] per Black J.

281 *Corporations Act 2001* (Cth), s 597(4).

282 *Corporations Act 2001* (Cth), s 597(5A)(a).

283 *Corporations Act 2001* (Cth), s 597(14A).

284 *Corporations Act 2001* (Cth), s 597(14), subject to the privilege against self-incrimination specified in sub-s (12A).

285 *ACN 004 410 833 Ltd (formerly Arrium Ltd) (In liq) v Walton* (2020) 383 ALR 298 at 332 [140] per Bathurst CJ, Bell P and Leeming JA.

of contributories, it must be for the benefit of "all" contributories. As noted earlier, the potential class of Arrium shareholders for which any class action would be brought would include those who purchased shares on or after 19 August 2014. As Arrium was not placed into administration until April 2016, it can safely be assumed that the potential class could include a substantial number of shareholders.

The notice of contention

197 By notice of contention, KPMG, being the second respondent and Arrium's former auditors, contended that it was an abuse of process for an eligible applicant to conduct an examination for the predominant subjective purpose of investigating a potential claim by that applicant against a third party, even if the success of that claim would benefit the company, its creditors, or its contributories. An incidental or coincidental benefit, it was said, could not save the use of a power for an improper purpose. With respect, that submission assumes that a summons issued for the purpose of investigating a potential claim against a third party is necessarily an abuse of process. For the reasons already given, that would not necessarily be so.

Conclusion

198 The appeal should be allowed. Orders 3-5 of the orders made by the Court of Appeal on 30 July 2020 should be set aside and in their place it should be ordered that the appeal be dismissed with costs. The first and second respondents should pay the appellants' costs of the application for special leave to appeal and of this appeal.