A NEW SHERIFF IN TOWN? SECTION 596A AND SHAREHOLDERS' NEWFOUND POWERS

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In the case of *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) In Liq* ('*Walton*'), the High Court of Australia interpreted section 596A of the *Corporations Act 2001* (Cth) in a way that benefits shareholders and former shareholders. Before this ruling, it was believed that examining company officers could only be done for the benefit of the company, its creditors, or contributories. However, post-*Walton*, eligible applicants, including shareholders and former shareholders, can now examine certain company officers about the examinable affairs of the company for their own benefit. This includes uncovering information about misconduct to potentially reclaim financial losses. As a result, there may be an increase in applications for eligible applicant status received by ASIC and an overall increase in the enforcement of the *Corporations Act*.

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I INTRODUCTION

The High Court of Australia's recent interpretation of s 596A of the *Corporations Act 2001* (Cth) in *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) In Liq* ('*Walton*') has significantly increased shareholders' and former shareholders' access to information to help them decide whether a claim for relief exists against one or more company officers. Before *Walton*, the widely held view was that to seek the examination of an officer, the outcome must be for the benefit of the company, its creditors or contributories. Post-*Walton*, shareholders, former shareholders and other eligible applicants can examine a company officer for their benefit, including seeking to uncover information about misconduct in the hope of reclaiming financial losses. Unlike the requirements for preliminary discovery under the *Federal Court Rules*,[1] an eligible applicant under s 596A is not confined to documentary evidence. Instead, under s 596A, the applicant can ask questions of an eligible officer under oath. Furthermore, providing the statutory requirements under s 596A are met, there is no need to demonstrate to a Court that the applicant reasonably believes that the prospective respondent has documents in their control to help them decide whether to commence proceedings for relief against the prospective respondent.

This development in the interpretation and application of s 596A will interest individual shareholders, shareholder interest groups, litigation funders, company officers, and possibly creditors and others that fall within the definition of 'eligible applicant'. The effective widening of the mandatory examination power by the High Court will, it is argued, lead to an increase in the number of applications for 'eligible applicant' status received by the Australian Securities and Investments Commission ('ASIC'), the number of s 596A applications received by the courts, which will increase the overall enforcement of the *Corporations Act 2001* (Cth) ('*Corporations Act*'). Providing ASIC and the judiciary can handle the increased demand,[2] greater enforcement of the *Corporations Act*, especially as it relates to punishing corporate misfeasance, is desirable as it deters others from engaging in similar conduct.

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[1] *Federal Court Rules 2011* (Cth), r 7.23.
[2] This is discussed in Part IV.

Part II examines the common law from the two previous decades before *Walton* in other cases where the applicant was a shareholder or former shareholder. This analysis evidences the widespread and settled understanding that the examination power in s 596A must benefit the company, its contributories or creditors. This Part concludes by considering alternatives otherwise potentially available to shareholders and former shareholders seeking information about suspected corporate misconduct. The finding that no clear alternative exists supports my subsequent argument that the new interpretation of s 596A from *Walton* will increase the number of examination applications received by ASIC and the judiciary and ultimately improve the enforcement of the *Corporations Act*.

Part III analyses the *Walton* litigation in the Supreme Court, Court of Appeal and High Court of Australia. In this analysis, the High Court's formulation of the limbs of the 'abuse of process' test is discussed, including its relationship with the statutory framework in Pt 5.9 of the *Corporations Act* and ASIC's regulatory responsibilities. Finally, Part IV explains why the precedent in *Walton* will likely lead to an increase in the number of shareholders seeking an examination under s 596A. It shows how the New South Wales Supreme Court has applied the precedent to a shareholder applicant in refusing to set aside a summons for examination. This Part also examines publicly available data and finds that ASIC has a less than four per cent rejection rate for applications seeking 'eligible applicant' status before this article is concluded.

II BEFORE WALTON

Section 596A was first introduced in the *Corporate Law Reform Act 1992* (Cth),[3] which amended the 1989 Corporations Law. Section 596A was an entirely new power of examination based partly on the recommendations of the Australian Law Reform Commission's *General Insolvency Inquiry*, often referred to as the Harmer Report.[4] It

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[3] *Corporate Law Reform Act 1992* (Cth), s 116.

[4] Australian Law Reform Commission, "General Insolvency Inquiry" (No 45, Australian Government, Canberra, ACT, 1988) at [585]-[587], http://www.austlii.edu.au/au/other/lawreform/ALRC/1988/45.html; Explanatory Memorandum, Corporate Law Reform Bill 1992 at [1152]-[1155]; *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3 at [148], [157] (Edelman and Steward JJ) (majority).

differs from s 596B, which replaced s 597, in that it confers no discretion on a court.[5] In other words, s 596A *requires* a court to issue a summons to an eligible officer of the company if the statutory requirements are met. Nevertheless, the court has the inherent jurisdiction to stay or set aside a summons for examination if it appears that the application would constitute an abuse of the court's process.[6] Both ss 596A and 596B were re-enacted in the *Corporations Act 2001* (Cth).

Section 596A of the *Corporations Act* requires a court to summon an officer or provisional liquidator of a company (or an officer or provisional liquidator in the last two years from the date of external administration or restructuring) ('examinable officer') for examination about the company's 'examinable affairs' on the application of an 'eligible applicant'.[7] An 'eligible applicant' is defined as ASIC; a liquidator (or provisional liquidator), an administrator or restructuring practitioner for the corporation; or a person authorised by ASIC in writing.[8]

The decision by ASIC to appoint an individual as an 'eligible applicant' can be challenged under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).[9] According to *Saraceni v ASIC*,[10] the regulator is not required to afford the proposed examinee natural justice before deciding whether to grant 'eligible applicant' status to the applicant.

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[5] Explanatory Memorandum, Corporate Law Reform Bill 1992 [1157]; *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [148] (Edelman and Steward JJ)(in majority).
[6] See, for example, *Capital Options (Aust) Pty Ltd v Hazratwala, in the matter of Weststate Consortium (in liq)* [2023] FCA 458 at [26], [28] citing *Walton* at [130] and [152] and *Evans v Wainter* (2005) 145 FCR 176 at [85].
[7] These requirements were split into five criteria by Edleman and Steward JJ (in the majority) in *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [157]-[158] stating: 'First, the application for a summons must be made by an "eligible applicant" as defined. 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' (citations omitted); for a discussion on the wide meaning given to "examinable affairs", see *Grosvenor Hill (Qld) Pty Ltd v Barber* (1994) 48 FCR 301 at 305.
[8] *Corporations Act 2001* (Cth), s 9 ('eligible applicant').
[9] *Mercantile Mutual Life Insurance Co Ltd v ASC* (1993) 40 FCR 409 at [67]; *Worthley v ASC* (1993) 42 FCR 578; see also Murray M and Harris J, *Keay's Insolvency: Personal and Corporate Law and Practice* (11th ed, Thomson Reuters, Pyrmont, NSW, 2022) p 625.
[10] *Saraceni v Australian Securities and Investments Commission* [2013] FCAFC 42; see also Murray and Harris, n 10, p 625.

Between 2002 and 2022, there were 10 cases concerning s 596A where the eligible applicant was a shareholder or former shareholder of a company in external administration.[11] Four cases were appeals, dropping the number of unique cases to six. In all but one case,[12] the Court held (in part) that the mandatory examination would be an abuse of the court's processes if a shareholder could examine an eligible officer for their own benefit.[13] Based on their interpretation of the common law at that time, the respective courts found that the benefit of the examination must accrue to the company, its creditors or contributories. The benefit here is the knowledge of whether to commence proceedings for relief against the eligible officer for a breach of duty. The concern was that if the benefit were not so confined, the courts' processes would be used for an 'impermissible purpose; namely pre-trial interrogation and discovery for the benefit of parties to *private* litigation'[14] or to gain an 'impermissible forensic advantage'.[15] This analysis lays the foundation for evaluating the impact of *Walton* and the High Court's formulation of the 'abuse of process' test for shareholders approved as eligible applicants under s 596A. Each case is discussed in chronological order.

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[11] Between 13 May 2022 and 20 May 2022, I downloaded all the cases in Australia that referred to s 596A of the *Corporations Act 2001* (Cth) through Austlii (http://www.austlii.edu.au/). Austlii was selected over other databases as it is open access meaning the research is transparent and more easily reproducible: see Chin JM, DeHaven AC, Heycke T, Holcombe AO, Mellor DT, Pickett JT, Steltenpohl CN, Vazire S and Zeiler K, "Improving the Credibility of Empirical Legal Research: Practical Suggestions for Researchers, Journals and Law Schools" (2021) 3 LTHLJ 107. After deleting duplicates, the dataset was 248 cases. The cases were imported into ATLAS.ti (v 22.1.0) for coding and analysis. During this process, I also coded the cases in Atlas.ti based on who the eligible applicant was in each case.

[12] When a liquidator commences an examination under s 596A, which is most common, the likelihood of the examinee discharging the summons on the grounds that it is an abuse of process is much lower: see Murray and Harris, n 10, p 628; see also Paltridge AL, "The Scope and Effectiveness of Examinations Pursuant to Division 1 of Part 5.9 of the Corporations Law" (1996) 9 Corp Bus Law J 59 at 75 who states "there have been few reported decisions, at least in Australia, where orders have been refused or set aside on the ground of improper purpose or abuse of process".

[13] There are three "loosely" but "overlapping categories" of an abuse of process. The first, which was in contention in Walton, was the "use of the court's processes for an illegitimate purpose". Second, "the use of the court's processes in a manner that is unjustifiably oppressive to one of the parties". Finally, the 'category which might better be described as concerned with the integrity of the court and not merely its processes, and which is sometimes described as concerned with bringing the administration of justice into disrepute *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [130]-[131] Edelman and Steward JJ.

[14] See, for example, *Hong Kong Bank of Australia Ltd v Murphy* (1992) 28 NSWLR 512 at 519.

[15] *In the matter of ACN 168 479 614 Pty Ltd (Rec & Mgrs apptd) (Admins apptd)* [2020] VSC 614 at [27]ff; *Re IPO Wealth Holdings No 2 Pty Ltd (in liq); Mawhinney v Giasoumi* [2022] VSC 199 at [48]; *Re IPO Wealth Holdings No 2 Pty Ltd (in prov liq) & Ors* [2021] VSC 821 at [169]; *International Swimwear Logistics Ltd v Australian Swimwear Company Pty Ltd* [2011] NSWSC 488 at [64]; *Hewson v Gothard; In the Matter of Allco Finance Group Ltd (Receivers and Managers Appointed) (In Liq)* [2014] FCA 412 at [71]; *Accord Pacific Holdings Pty Limited v Accord Pacific Land Pty Limited (in liquidation) & ors* [2011] NSWSC 707 at [135].

A Hill v Smithfield Service Centre [2002] NSWSC 999

Mr Hill was a director, shareholder and substantial creditor of Smithfield Service Centre ('SSC'), although his status as a creditor was disputed.[16] Hill sought to examine Mr Sutherland, the receiver and manager appointed to SSC.[17] ASIC authorised Hill as an 'eligible applicant'.[18] However, within six months of receiving authorisation, Hill was declared bankrupt.[19]

Justice Austin held that Hill's application for a summons under s 596A would, if approved, amount to an abuse of process because the predominate purpose of the examination was illegitimate. His Honour held that the examination would be an abuse of process because neither the liquidator of SSC nor the trustee in bankruptcy had taken steps to examine Sutherland.[20] In fact, Hill's trustee in bankruptcy had sought to discontinue the s 596A application under s 60 of the *Bankruptcy Act 1966* (Cth).[21] The Court viewed this as an indication that 'Mr Hill's purpose is to intermeddle in matters not directly of concern to him and thereby gain a forensic advantage not otherwise available to him.'[22]

The Court assessed whether the use of the court's processes would be for a legitimate purpose; however, the judgment is not particularly useful to the current enquiry. This is because the Court used the lack of interest by the company's liquidator and the trustee in bankruptcy as evidence of the applicant's illegitimate purpose in seeking the examination.[23] Not discussed were reasons why a liquidator or trustee may decide not to pursue a mandatory examination, which is unrelated to whether the applicant has a legitimate purpose for seeking the application. For example, a liquidator or trustee may be concerned about incurring costs where the outcome of the application and subsequent examination is uncertain. The case, therefore, does not assist in understanding the common law principles pre-*Walton* that applied to shareholders seeking an examination for their personal benefit.

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[16] *Hill v Smithfield Service Centre* [2002] NSWSC 999 at [3].
[17] *Hill v Smithfield Service Centre* [2002] NSWSC 999, [1].
[18] *Hill v Smithfield Service Centre* [2002] NSWSC 999, [10].
[19] *Hill v Smithfield Service Centre* [2002] NSWSC 999, [15].
[20] *Hill v Smithfield Service Centre* [2002] NSWSC 999, [51].
[21] *Hill v Smithfield Service Centre* [2002] NSWSC 999, [17], [50].
[22] *Hill v Smithfield Service Centre* [2002] NSWSC 999, [51].
[23] *Hill v Smithfield Service Centre* [2002] NSWSC 999, [51].

B Ryan v Australian Securities and Investments Commission; in the matter of Allstate Explorations NL (Subject to Deed of Company Arrangement) [2007] FCA 59 ('Allstate Explorations')

The Australian Securities and Investments Commission authorised trustees of a superfund as 'eligible applicants' who were also shareholders in Allstate Explorations NL ('Allstate'). The Allstate administrators sought to set aside ASIC's approval through judicial review. Justice Gyles held that the 'purpose of the examinations [by the eligible applicants'] is to investigate the potential for possible causes of action that Allstate or its shareholders may have, including but not limited to (a) against the administrators; and (b) Macquarie Bank.'[24] As in *Walton*, Allstate Explorations shareholders sought to examine an eligible officer to decide whether to commence private legal action, which may only serve the interests of the eligible applicants.

Gyles J reviewed ASIC's considerations in deciding whether to approve 'eligible applicant' status. In particular, ASIC considers the nature of the relationship between the applicant, the company, and the applicant and the potential examinee.[25] The reason for this, according to internal ASIC correspondence disclosed during the trial, is to ensure the authorised person is only:

- gathering information to assist the eligible applicant in the administration of the corporation;
- assisting the corporation's administrators in identifying the corporation's assets and liabilities;
- protecting the interests of the corporation's creditors;
- 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; and

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[24] *Ryan v Australian Securities and Investments Commission; in the matter of Allstate Explorations NL (Subject to Deed of Company Arrangement)* [2007] FCA 59 at [28].
[25] *Ryan v Australian Securities and Investments Commission; in the matter of Allstate Explorations NL (Subject to Deed of Company Arrangement)* [2007] FCA 59, 9–10.

- assisting in regulating corporations by providing a public forum for examining examinable officers of corporations.[26]

As discussed in more detail below, this demonstrates ASIC's enduring view that one of the objectives of s 596A is to improve the enforcement of the corporations law. This is a view shared by the majority of the High Court of Australia in *Walton*.[27] However, both ASIC's internal guidance (at that time) and the view of this Court are that the beneficiaries of any subsequent legal action must be the company, its creditors or its contributories.[28]

Ultimately, all grounds for relief failed, and the proceedings were dismissed.[29] Subject to any further legal challenge, the examination was to proceed. *Allstate Explorations* reflected the settled interpretation of s 596A before *Walton* that the benefit of mandatory examinations must be directed to the company, its creditors or contributories – the shareholders, in this case, seeking information to commence an action that the company or its shareholders (being contributories) may benefit from.[30]

C Kimberley Diamonds Litigation

Kimberley Diamonds Ltd ('KDL'), a shareholder of Kimberley Diamond Company Pty Ltd ('KDC'), was concerned that the liquidator of KDC did not satisfy their obligations in attempting to sell a diamond mine before disclaiming it. Accordingly, KDL sought to examine the liquidator under s 596A to investigate the extent of the sales and marketing activities undertaken before the liquidator disclaimed the property.[31] The liquidator applied to discharge, set aside or stay the examination summons as an abuse of process.

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[26] *Ryan v Australian Securities and Investments Commission; in the matter of Allstate Explorations NL (Subject to Deed of Company Arrangement)* [2007] FCA 59, 10 (emphasis added).
[27] See Part III.
[28] *Ryan v Australian Securities and Investments Commission; in the matter of Allstate Explorations NL (Subject to Deed of Company Arrangement)* [2007] FCA 59, [21], at [28] internal correspondence of ASIC states 'Part 5.9 of the Act contemplates that applications for examination summons should only be made whore the purpose of the examination is for the benefit of the corporation, its contributories or its creditors'.
[29] *Ryan v Australian Securities and Investments Commission; in the matter of Allstate Explorations NL (Subject to Deed of Company Arrangement)* [2007] FCA 59, [79].
[30] *Ryan v Australian Securities and Investments Commission; in the matter of Allstate Explorations NL (Subject to Deed of Company Arrangement)* [2007] FCA 59, [28].
[31] *Kimberley Diamonds Ltd, in the matter of Kimberley Diamond Company Pty Ltd (in liq)* [2016] FCA 1016 at [3], [14].

1 Kimberley Diamonds Ltd, in the matter of Kimberley Diamond Company Pty Ltd (in liq) [2016] FCA 1016

In the first instance, Gleeson J took the view that the purpose of the examination must be 'to benefit the company, its creditors, members or the public generally.'[32] Her Honour held that because there was no 'positive evidence' that the liquidator had failed to discharge their duty before disclaiming the mine,[33] the examination had 'no realistic prospect [of serving] any practical utility' and would, therefore, be an abuse of process.[34] As such, the examination summons was set aside.[35]

2 Kimberley Diamonds Ltd v Arnautovic [2017] FCAFC 91

The decision of Gleeson J was overturned on appeal to the Full Court of the Federal Court of Australia. The Full Court disagreed with her Honour that, inter alia, the examination would 'amount to a substantial intrusion into the liquidation' and 'that KDL's desire to explore the circumstances of the sales process did not justify the exercise of the examination power under s 596A.'[36] Regarding the latter, the Court noted that a legitimate purpose for an examination under s 596A is to uncover information that may result in further legal action, but not necessarily so.[37] However, the Court reaffirmed 'the overarching purpose of an examination under s 596A must be to benefit the corporation, its creditors, members or interested members of the public generally'.[38] Notably, an examination summons will be an abuse of process

> if it is found that the eligible applicant's predominant purpose in obtaining the examination summons was to secure a private benefit or advantage, as opposed to a benefit for the company, its creditors or contributories. Thus, for example, if an eligible applicant obtained an examination summons for the purpose of securing a benefit for itself in other litigation, not involving the company, that purpose would be "offensive",

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[32] *Kimberley Diamonds Ltd, in the matter of Kimberley Diamond Company Pty Ltd (in liq)* [2016] FCA 1016, [62].
[33] *Kimberley Diamonds Ltd, in the matter of Kimberley Diamond Company Pty Ltd (in liq)* [2016] FCA 1016, [70].
[34] *Kimberley Diamonds Ltd, in the matter of Kimberley Diamond Company Pty Ltd (in liq)* [2016] FCA 1016, [74].
[35] *Kimberley Diamonds Ltd, in the matter of Kimberley Diamond Company Pty Ltd (in liq)* [2016] FCA 1016, [74].
[36] *Kimberley Diamonds Ltd v Arnautovic* [2017] FCAFC 91 at [87].
[37] *Kimberley Diamonds Ltd v Arnautovic* [2017] FCAFC 91, [102]-[103], [107], [109].
[38] *Kimberley Diamonds Ltd v Arnautovic* [2017] FCAFC 91, [100].

> such that the summons could be stayed as an abuse. Such a summons could not be of any benefit to the company, its members or creditors.[39]

Their Honours relied on *Evans & Anor v Wainter Pty Ltd*[40] in concluding that a personal benefit was synonymous with an abuse of process.[41] Accordingly, as there was no evidence 'that KDL's purpose in obtaining the summons was to secure a private benefit, or was otherwise offensive or illegitimate, in the sense of being foreign to the purpose of s 596A',[42] the order to discharge the examination summons was dismissed.

This judgment is interesting as it did not overturn Gleeson J's widening of the potential beneficiaries of an examination. Earlier cases, including *Allstate Explorations*, have referred to the beneficiaries of an examination as 'the company, its creditors or contributories'. In contrast, the Full Court, in this case, referred to 'the corporation, its creditors, members or interested members of the public generally'.[43] This is significant because contributories include existing and past members (of no more than 12 months) of a company who are liable when a company commences winding up.[44] Thus, the reference to 'members', if not inadvertent, would exclude former members that otherwise satisfy the definition of contributory. The Full Federal Court also referenced 'members of the public generally' when referring to Gleeson J's reasoning. Still, the Full Federal Court declined to use the phrase when applying the law to the case before them, indicating some uncertainty as to whether an examination could benefit members of the public generally.[45] Nevertheless, the Court reaffirmed that the benefit of a s 569A examination must be for the company, its creditors or its contributories.[46]

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[39] *Kimberley Diamonds Ltd v Arnautovic* [2017] FCAFC 91, [101] (citations omitted).
[40] *Evans v Wainter* (2005) 145 FCR 176, [247].
[41] *Kimberley Diamonds Ltd v Arnautovic* [2017] FCAFC 91, [101].
[42] *Kimberley Diamonds Ltd v Arnautovic* [2017] FCAFC 91, [101].
[43] *Hill v Smithfield Service Centre* [2002] NSWSC 999, [7], [24]; *Ryan v Australian Securities and Investments Commission; in the matter of Allstate Explorations NL (Subject to Deed of Company Arrangement)* [2007] FCA 59, [41], [52]; *Kimberley Diamonds Ltd v Arnautovic* [2017] FCAFC 91, [100], [101].
[44] Austin RP and Ramsay IM, *Ford, Austin and Ramsay's Principles of Corporations Law* (17th ed, LexisNexis, 2018) p 177.
[45] *Kimberley Diamonds Ltd v Arnautovic* [2017] FCAFC 91, [101].
[46] *Kimberley Diamonds Ltd v Arnautovic* [2017] FCAFC 91, [101], [103].

D La La Land Litigation

1 Thomas, in the matter of La La Land Byron Bay Pty Ltd (In Liq) [2019] FCA 552

Mr Thomas was a creditor and shareholder in the company ('La La Land').[47] Mr Thomas sought to examine several individuals associated with the external administration of the company. Specifically, the administrator, appointed by Mr Taiaroa, a former director of La La Land, disposed of the company's remaining property to a company jointly owned by Mr Taiaroa and another former director of La La Land.[48] Having found that the statutory requirements of s 596A were satisfied, Greenwood ACJ ordered the Registrar to issue a summons to Mr Taiaroa, Mr Poulter (the administrator) and Mr Raftopoulos (an officer of La La Land).[49]

In this judgment, the Court was satisfied that the beneficiary of the examination would be the company and not Mr Thomas personally.[50] No reference was made to benefiting creditors or contributories. However, this judgment is consistent with the settled understanding that the examination must benefit the company, its creditors or contributories.

2 Thomas, in the matter of La La Land Byron Bay Pty Ltd (in liq) (No 2) [2019] FCA 1559

Mr Taiaroa appealed the decision by Greenwood ACJ on the grounds that the examination was an abuse of process. Mr Taiaroa argued that Mr Thomas would use the examination 'to obtain a "forensic advantage" in connection with a pending proceeding and as "a dress rehearsal for [his] cross-examination" in that proceeding'.[51] Justice Reeves noted that the pending proceeding was pending when Greenwood ACJ issued the summons.[52] Even on appeal, the early stage of the pending proceeding meant that it was impossible to say whether Mr Taiaroa would have to give evidence, let alone on what issues.[53]

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[47] *Thomas, in the matter of La La Land Byron Bay Pty Ltd (in liq)* [2019] FCA 552 at [1].
[48] *Thomas, in the matter of La La Land Byron Bay Pty Ltd (in liq)* [2019] FCA 552, [3].
[49] *Thomas, in the matter of La La Land Byron Bay Pty Ltd (in liq)* [2019] FCA 552, [33].
[50] *Thomas, in the matter of La La Land Byron Bay Pty Ltd (in liq)* [2019] FCA 552, [27].
[51] *Thomas, in the matter of La La Land Byron Bay Pty Ltd (in liq) (No 2)* [2019] FCA 1559 at [2].
[52] *Thomas, in the matter of La La Land Byron Bay Pty Ltd (in liq) (No 2)* [2019] FCA 1559, [18].
[53] *Thomas, in the matter of La La Land Byron Bay Pty Ltd (in liq) (No 2)* [2019] FCA 1559, [19].

In the first instance, Greenwood ACJ held that Mr Thomas was primarily 'concerned with compensation for the company (now in liquidation) and not for his own personal benefit.'[54] On appeal, Reeves J was satisfied that Mr Thomas' purposes for seeking the examination had not changed;[55] in other words, Mr Thomas was still concerned with benefiting the company. For these reasons, Reeves J dismissed Mr Taiaroa's application to set aside the summons. Although there was no explicit discussion or affirmation of who the beneficiaries are from an examination under s 596A, the La La Land litigation is consistent with previous case law on this issue.

E Alternatives for shareholders concerned about officer misconduct in a company in external administration?

Before *Walton*, what options existed for shareholders and former shareholders who wanted information to decide whether to take further legal action for their personal benefit? Three potential alternatives are available, depending on the circumstances:[56]

- s 173: right to inspect and get copies;
- s 247A: order for inspection of books of the company or registered scheme; and
- s 247D: company or directors may allow a member to inspect books.

Preliminary discovery is, of course, another avenue for applicants to access documentary evidence. However, this is generally considered a higher threshold than applying for an inspection order under s 247A and,[57] by extension, inspection orders under s 173 and s 247D. Specifically, under the Federal Court Rules, applicants must demonstrate that they reasonably believe that the prospective respondent has documents in their control to help them decide whether to commence proceedings for relief against the prospective respondent.[58]

The test for preliminary discovery is arguably a higher threshold than an application for examination under s 596A, which does not specify any required objective knowledge.

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[54] *Thomas, in the matter of La La Land Byron Bay Pty Ltd (in liq)* [2019] FCA 552, [27].
[55] *Thomas, in the matter of La La Land Byron Bay Pty Ltd (in liq) (No 2)* [2019] FCA 1559, [18].
[56] For potential alternatives available to an external administrator or controller, see Paltridge, n 13 at 103–109.
[57] Mantziaris C, "The Member's Right to Inspect the Company Books: Corporations Act, s 247A" (2009) 83 Aust Law J 621 at 624. As will be demonstrated in the coming paragraphs, similar considerations when apply for an inspection under under s 247A as do with applications under ss 173 and 247D.
[58] *Federal Court Rules 2011* (Cth), r 7.23.

Although not statutorily required, ASIC requires those applying for 'eligible applicant' status to specify their reasons, which would disclose the suspected misconduct leaving the evaluation of whether these suspicions are credible with ASIC.[59] However, given the low rejection rate (less than 4 %, discussed in Part IVB) below), applying for 'eligible applicant' status does not appear comparable to the test for preliminary discovery. Similar arguments can be made about the three alternatives discussed below. For reasons soon disclosed, these alternative orders are arguably easier to obtain than trying to satisfy a court that the applicant reasonably believes the prospective respondent has documents in their control to help them decide whether to commence proceedings. As such, preliminary discovery is not a relevant alternative to s 596A, like those discussed below.

Assuming that the alternative orders discussed below approximate the standard required to obtain a summons for examination under s 596A, these alternatives face many of the same restrictions as an application under s 596A pre-*Walton*. This limits the ability of some shareholders and former shareholders to get the information they need to assess whether a cause of action exists against one or more company officers.

1 Section 173: right to inspect and get copies

Company members can inspect a register kept under Ch 2C of the *Corporations Act* for free, including the register of members. Former members of the company, including other non-members, can inspect a register but may be required to pay a fee. The provision is directed to the company (or registered scheme) rather than company officers, so it would appear not to apply to companies in external administration. This

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[59] According to Australian Securities and Investment Commission, *ASIC Corporate Insolvency Update - Issue 10* (December 2018), https://asic.gov.au/about-asic/corporate-publications/newsletters/asic-corporate-insolvency-update/asic-corporate-insolvency-update-issue-10/ viewed 29 May 2023 the process for applying for eligible applicant status to conduct a public examination under s 596A is to pay the requisite fee, at that time $468, and provide the following information: confirm the nature of the relationship between the applicant and the company and that there is no conflict of interest; the reason(s) for the proposed public examination; why it is for the benefit of the corporation, its creditors or contributories and is not an abuse of process; why the matters proposed to be examined fall within the examinable affairs of the company; and where relevant, details of any current or anticipated court proceedings against any officers or related entities of the company.

conclusion is based on the lack of case law where a party has some reference to external administration in the case title and mentions s 173 of the *Corporations Act*.[60]

Another limitation of s 173 is that it only applies to registers kept under Ch 2C of the *Corporations Act*, being the register of members, a register of options holders (if the company has granted options over unissued shares or interests), and a register of debenture holders (again, only if relevant). Accordingly, if the issue or concern does not relate to these registers, then s 173 does not assist.

2 Section 247A: order for inspection of books of the company or registered scheme

This provision permits a member of a company (or registered scheme) to inspect the books of the company (or scheme) with court approval. Court approval is contingent on demonstrating that the applicant is 'acting in good faith and the inspection is … for a proper purpose.'[61]

As with the previous alternative, s 247A only applies to documented information, which is a limitation in itself. Nevertheless, s 9 of the *Corporations Act* defines 'books' expansively to include (but not limited to) a register, any record of information, financial reports and records (regardless of how they were generated or stored), and a document - except for indexes or recordings generated in compliance with the Takeover Procedure in Pt 6.5. A 'document' is defined under s 9 as 'any record of information' including 'anything on which there is writing' and copies of such documents.[62] Nevertheless, s 247A does not give the applicant access to all documents in the company's possession. The documents must form part of the company's records.[63] The 'of' in the phrase 'books of the company' means that the books must either belong to the company, are created by the company, or 'are in the possession of the company in

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[60] A search was conducted on 11 May 2023 across Jade.io, Westlaw AU and LexisNexis using the following search terms: 'liq* OR administrator OR receiver' and filtered for "s 173" in the same sentence as "Corporations Act"
[61] *Corporations Act 2001* (Cth), s 247A(1).
[62] *Caratti v Harris & Kirman as joint liquidators of GH1 Pty Ltd* [2019] FCAFC 124 at [87].
[63] *In the matter of Cromwell Property Securities Ltd* (2019) 101 NSWLR 559 at [29] citing *Sun Hung Kai Investment Services Ltd v Metals X Ltd* (2019) 139 ACSR 361 at [23].

circumstances which permit the company to make the books available for inspection and copying'.[64]

In *Mesa Minerals Limited v Mighty River International Ltd*, the Full Court of the Federal Court of Australia identified numerous principles relevant to consider whether the applicant is acting in good faith and for a proper purpose under s 247A.[65] Most relevant to the current enquiry is that investigating a reasonable suspicion that a breach of duty occurred is deemed a proper purpose.[66] The Court relied upon *Yarra Australia Pty Ltd v Burrup Holdings Ltd*, where investigating 'a range of unexplained irregularities in the management of the company, including the financial management of the company and the related concerns about contravention of the Corporations Act' was for a proper purpose.[67] So, a shareholder with a reasonably held concern about misconduct by the company or its officer(s) would likely qualify as acting in good faith and for a proper purpose, which is proximate to one of the legitimate purposes for an applicant seeking an examination.

Whether a former shareholder, who is no longer a contributory, may use s 247A to inspect the company's books is less clear. In *Leadenhall Australia Pty Ltd v Cape Lambert Resources Ltd* ('*Leadenhall*'), Charlesworth J held that the 'preferable construction [of s 247A] is one that so limits the category of persons for whose benefit an order may be made to … actual members.'[68] According to Dr Tim Bowley and Professor Jennifer G Hill, this means 'a court will not grant an inspection order unless the applicant remains a member as at the date the court makes the order'.[69] However, Charlesworth J in *Leadenhall* left the possibility of an application under s 247A open to former shareholders, stating, 'A former member may, of course, apply for an order pursuant to s 247A(3) [now s 247A(5)] of the Act (provided that the additional criteria for the

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[64] *In the matter of Cromwell Property Securities Ltd* (2019) 101 NSWLR 559, [28]; *Hall v Sherman* [2001] NSWSC 810 at [47].
[65] *Mesa Minerals Limited v Mighty River International Ltd* (2016) 241 FCR 241 at [22].
[66] *McNeil v Hearing and Balance Centre Pty Ltd* [2007] NSWSC 942 at [17] citing *Barrack Mines Ltd v Grants Patch Mining Ltd* (1987) 12 ACLR 357.
[67] *Yarra Australia Pty Ltd v Burrup Holdings Ltd* (2010) 80 ACSR 641 at [129]; see also *Barrack Mines Ltd v Grants Patch Mining Ltd* (1987) 12 ACLR 357; *McNeil v Hearing and Balance Centre Pty Ltd* [2007] NSWSC 942, [17]; *Humes Ltd v Unity APA Ltd [No 1]* [1987] VR 467.
[68] *Leadenhall Australia Pty Ltd v Cape Lambert Resources Ltd* (2018) 125 ACSR 484 at [41].
[69] Bowley T and Hill JG, "Shareholder Inspection Rights in Australia: Then and Now" in Thomas RS, Giudici P and Varottil U (eds), *Research Handbook on Shareholder Inspection Rights* (Edward Elgar Publishing, 2023) p 330, viewed 2 June 2023.

application are met)'.[70] Under s 247A(4)-(5), a 'member, former member, or person entitled to be registered as a member' or 'an officer or former officer' of the company who is granted leave, applies for leave or is 'eligible to apply for leave' to bring a statutory derivative action under s 237, may also seek a court order to inspect the company books.[71] But, if leave is granted under s 237, the proceedings must be brought on behalf of and for the company's benefit. This replicates the pre-*Walton* limitation regarding s 596A, which now appears to be lifted.

Thus, s 247A is one potential alternative to s 596A for shareholders and former shareholders. However, unlike s 596A, this provision is confined to information in 'books' and 'documents'. And a former member will only be able to access the information if they act in the company's best interests, as required under s 237.

3 Section 247D: members inspect company book

Section 247D states, 'The directors of a company, or the company by a resolution passed at a general meeting, may authorise a member to inspect books of the company'. The *Corporations Act* defines 'a member of a company if they: (a) are a member of the company on its registration; or (b) agree to become a member of the company after its registration and their name is entered on the register of members'.[72] Note that (b) uses the present tense 'is' rather than 'was', precluding a former member from the definition. Arguably, (a) leaves open the possibility that a person who was a company member at its registration remains a member even after their name is removed from the register. However, it is unlikely a court would take such a literal approach given the past tense in (b), and no case law supports this interpretation. Such an interpretation would also mean that a founding member is always a member for the purposes of inspecting the company books. Given that a founding shareholder may have sold their shares to invest in similar startups, it would be absurd if this shareholder could still request authorisation to inspect the company books.

In addition, if one or more directors are concerned about someone uncovering their impropriety, they are unlikely to grant a member access to the company books. If the

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[70] *Leadenhall Australia Pty Ltd v Cape Lambert Resources Ltd* (2018) 125 ACSR 484, [41].
[71] See also Mantziaris, n 58 at 623.
[72] *Corporations Act 2001* (Cth), ss 9 ('member'), 231.

shareholder(s) holds five per cent or more of shares, they can convene a general meeting to propose such a resolution, assuming they are willing to pay the expenses of calling and holding the meeting.[73] The shareholder could not rely on s 249D (to hold a meeting to consider a resolution granting them access to inspect the company books) if the company is in liquidation because the directors have lost control of the company.[74] However, section 249D may be relevant when a company is in receivership, is under restructuring or has made a restructuring plan that has not yet been terminated.[75]

The above discussion highlights the difficulties a member or former member could encounter in seeking the information to decide whether to pursue further legal action. The lack of alternatives highlights the significance of the High Court of Australia's interpretation of s 596A in *Walton*, which promotes access to information for individual shareholders' benefit. The post-*Walton* interpretation of s 596A will assist in enforcing the *Corporations Act* (discussed below) by helping to uncover potential misfeasance.

A lack of access to information is 'frequently the biggest obstacle to relief for minority shareholders and investigating authorities.'[76] Therefore, an interpretation of s 596A that helps investigate suspicious or dubious conduct reduces the costs of resolving the dispute. Sometimes, the resulting information will mean no further action is warranted or appropriate. But, if the examination uncovers information indicating that the applicant can seek relief against one or more of the company's officers, then the evidence collected during the examination helps reduce the scope of the dispute and the costs associated with discovery, ultimately reducing the burden on the judiciary.

The role of s 596A in improving the enforcement of the *Corporations Act* and access to justice were issues considered by the High Court in *Walton*. Part III below highlights how the majority in *Walton* viewed s 596A as a way for ASIC to expand its enforcement powers by authorising 'eligible applicants'.

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[73] *Corporations Act 2001* (Cth), s 249F.
[74] *Corporations Act 2001* (Cth), s 198G, sch 2 5-15.
[75] *Corporations Act 2001* (Cth), s 198G(4A), sch 2 5-15.
[76] Austin and Ramsay, n 45, p [10-500]; in *Adler v Qintex Group Management Services Pty Ltd* 22 ACSR 446 at 449 the examination process was designed to help liquidators overcome the "particular disability of knowing as much about the company and its affairs as the directors and others"; see also Murray and Harris, n 10, p 625; see generally Maiden S, "Tensions between the Public and Private Purposes of Examinations under Pt 5.9 of the Corporations Act 2001 (Cth)" (2004) 12 Insolv Law J 28 at 39.

III THE *WALTON* LITIGATION

Arrium Limited was an Australian mining and materials company that produced and distributed steel. In April 2016, Arrium Ltd was placed in administration. Two years later, while the company was still in administration, current and former shareholders of Arrium Ltd sought and were granted 'eligible applicant' status from the ASIC. In June 2019, liquidators were appointed. The shareholders claimed that the financial results the company relied upon during its capital-raising efforts in 2014 were misleading.[77]

The application for mandatory examination of the company director, Mr Galbraith, was initially heard in the New South Wales Supreme Court.[78] The decision by Black J to refuse to set aside the examination summons was appealed to the New South Wales Supreme Court of Appeal, which set aside the summons. Finally, the applicants appealed to the High Court of Australia, where a 3:2 majority upheld the examination of Mr Galbraith. Each stage of the litigation will now be discussed in more detail.

A In the matter of ACN 004 410 833 Limited (formerly Arrium Limited) (subject to a deed of company arrangement) [2019] NSWSC 1606

As stated, Black J refused to set aside the summons issued by the Registrar of the Court under s 596A. Citing on a factual similarity with *Hong Kong Bank of Australia Ltd v Murphy*,[79] Black J reasoned that the information to come from the former director's evidence, Mr Galbraith,[80] would

> 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 supports the liquidators' present assessment that their insolvent trading claims are *more likely to benefit Arrium and its creditors than the claims which the Plaintiffs seek to investigate*.[81]

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[77] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [193].
[78] The examination under s 596A was only ever for Mr Galbraith. The auditors KPMG and UBS AG were requested for produce certain documents under: *Corporations Act 2001* (Cth), s 597(9); *Civil Procedure Act 2005* (NSW), s 68.
[79] (1992) 28 NSWLR 512.
[80] Mr Galbraith was also the chair of Arrium's Governance and Nominations Committee and a member of the company's Audit and Compliance Committee.
[81] *In the matter of ACN 004 410 833 Limited (formerly Arrium Limited) (subject to a deed of company arrangement)* [2019] NSWSC 1606 at [50] (emphasis added).

While Black J acknowledged that the information could be used to advance the plaintiffs' private claims as shareholders, there existed 'a proper purpose of first obtaining that information [which] was necessarily implicit in that approach.'[82] The Court held that the company and Mr Galbraith had failed to satisfy the heavy onus that the examination of Mr Galbraith would be an abuse of process.[83] Although Mr Galbraith had been informally questioned, the plaintiffs' legal representation did not have the opportunity to attend, and Mr Galbraith had not been previously questioned by the liquidators.[84] In these circumstances, there was no abuse of process and thus, Black J (among other things) refused the order to set aside the examination summons.

B *ACN 004 410 833 Ltd (formerly Arrium Limited) (in liq) v Michael Thomas Walton* [2020] NSWCA 157

In a joint judgment, the New South Wales Court of Appeal set aside Black J's order to summon Mr Galbraith for examination (among other things). The Court emphasised the private purpose that the examination was sought, which would only benefit a limited group of shareholders who held the shares at the time of the fundraising in question and who may or may not have held the shares when administrators were appointed.[85] Thus, the class of shareholders who would potentially benefit from the examination would include persons who were not 'contributories' of the company.[86] As existing and former shareholders, the Court viewed the purpose of the examination as ultimately to further a private claim.[87] This purpose, their Honours held, was foreign to the statutory power conferred by s 596A (i.e. to benefit the company, its creditors or contributories) and, therefore, constituted an abuse of process.[88]

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[82] *In the matter of ACN 004 410 833 Limited (formerly Arrium Limited) (subject to a deed of company arrangement)* [2019] NSWSC 1606, [50].
[83] *In the matter of ACN 004 410 833 Limited (formerly Arrium Limited) (subject to a deed of company arrangement)* [2019] NSWSC 1606, [50].
[84] *In the matter of ACN 004 410 833 Limited (formerly Arrium Limited) (subject to a deed of company arrangement)* [2019] NSWSC 1606, [50].
[85] *ACN 004 410 833 Ltd (formerly Arrium Limited) (in liq) v Michael Thomas Walton* [2020] NSWSCA 157 at [128].
[86] *ACN 004 410 833 Ltd (formerly Arrium Limited) (in liq) v Michael Thomas Walton* [2020] NSWSCA 157, [128].
[87] *ACN 004 410 833 Ltd (formerly Arrium Limited) (in liq) v Michael Thomas Walton* [2020] NSWSCA 157, [128].
[88] *ACN 004 410 833 Ltd (formerly Arrium Limited) (in liq) v Michael Thomas Walton* [2020] NSWSCA 157, [141].

This decision by the New South Wales Court of Appeal firmly reflected the settled interpretation of s 596A (discussed in Part II) up to this point, as it equated personal benefit with an abuse of process.

C *Walton & Anor v ACN 004 410 833 Limited (formerly Arrium Limited) (in liq)* [2022] HCA 3

In the subsequent appeal to the High Court of Australia, the shareholders were successful (3:2 majority) in their application to summon Mr Galbraith for examination.

Their Honours, Kiefel CJ and Keane J, in dissent, emphasised the location of s 596A within Pt 5.9 of the *Corporations Act* in identifying the statutory purpose of the provision.[89] For their Honours, s 596A's location in Pt 5.9 the *Corporations Act*, which concerns the external administration of corporations, framed their interpretation of the provision as being 'for the purposes of the external administration and what is sought to be achieved'.[90] Specifically, their Honours listed activities including 'locating and realising assets and investigating the affairs of the corporation' that may result in monies being 'made available to the corporation.'[91] Based on this statutory context, their Honours surmised, '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.'[92] This conclusion seeks to maintain the previously settled interpretation of s 596A, which requires an examination to benefit the company, its creditors or contributories.

Chief Justice Kiefel and Keane J acknowledged that not all forms of external administration under Pt 5.9 of the *Corporations Act* would result in some 'commercial benefit' to the corporation or its creditors.[93] But, these instances should not detract from the otherwise settled interpretation of the purpose of s 596A.[94] Their Honours saw

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[89] Citing *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501 at 527 [87]; *Palmer v Ayers* (2017) 259 CLR 478 at 515 [98].
[90] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [29]; where provisions are located can affect the interpretation of a provision: see Barnes J, Dharmananda J and Moran E, *Modern Statutory Interpretation: Framework, Principles and Practice* (Cambridge University Press, Cambridge, 2023) p 308 citing *Australian Postal Corporation v Sinnaiah* (2013) 213 FCR 449 at 456 [24] and *R v Rolfe* (2021) 395 ALR 201 at [20].
[91] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [31].
[92] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [31].
[93] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [32].
[94] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [32].

a close alignment between the examination powers in external administration (of which s 596A belongs) and those in personal insolvency. For their Honours, the focus must remain on the company's administration and not potential litigation to benefit an affected class of individuals.[95] As such, anything that departed from the administration of a failed or failing company and did not benefit the company, its creditors or its contributories was an abuse of the examination power.

Justice Gageler, in the majority but delivering a separate judgment, framed the abuse of process issue differently from Kiefel CJ and Keane J.[96] His Honour stated that an application for examination would amount to an abuse of process where the appellants 'ultimate purpose is "foreign to the nature of the process in question"'.[97] Gageler J then sought to identify the appellants' ultimate purpose to determine whether it is 'foreign to the process of compulsory examination for which provision is made in Pt 5.9 of the Corporations Act."'[98]

Justice Gageler questioned the validity of the principle from *Re Excel*,[99] which has come to mean that any purpose that does not benefit the company, its creditors or its contributories is an abuse of process.[100] His Honour concludes

> Consistently with *Hong Kong Bank* before *Re Excel*, and consistently with *New Zealand Steel (Australia) Pty Ltd v Burton* and *Flanders v Beatty* 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.[101]

In discussing the role of ASIC in authorising 'eligible applicants', Gageler J notes ASIC's statutory obligation 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

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[95] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [77].
[96] As discussed below, this interpretation is consistent with Edelman and Steward JJ, also in the majority.
[97] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [97].
[98] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [97].
[99] (1994) 52 FCR 69.
[100] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [116].
[101] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [118] (citations omitted).

'promote the confident and informed participation of investors and consumers in the financial system'.[102] His Honour states that constraining applications under s 596A to situations where the examination benefits the company, its creditors, or contributories is wrong and 'would unduly constrain the outworking of the regulatory choices available to ASIC in the exercise of its authorisation function'.[103] Accordingly, the applicants' so-called private purpose or benefit (gaining information to support bringing proceedings against the company's officers and recouping financial losses suffered due to alleged misrepresentation) was not foreign to the statutory purpose of s 596A, and the examination should be allowed to proceed.

Justices Edelman and Steward, in the majority, also disagreed with the Court of Appeal's decision that the shareholders' purpose was a purpose that was foreign to the purpose of s 596A.[104] After reviewing the historical evolution of the provision, their Honours affirmed that a valid exercise of s 596A does not require that the examination benefit the company, its creditors, or its contributories.[105] According to their Honours', '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.'[106]

Justices Edelman and Steward accepted the appellants' argument that the application of s 596A has expanded over time. This expansion affected the 'underlying purpose and concern' of the provision so that it includes 'the administration or enforcement of the law concerning the public dealings of the corporation in external administration and its officers.'[107] Therefore, an examination under s 596A will only be an abuse of process where the 'predominant purpose of the examination would contradict or stultify – in some way – this public interest in the external administration of a company.'[108] In their Honours view, the shareholders' purpose in seeking the examination was 'the administration or enforcement of the law concerning the public dealings of the

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[102] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [121].
[103] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [123].
[104] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [129].
[105] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [160], [169].
[106] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [135].
[107] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [169].
[108] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [170].

corporation in external administration and its officers'.[109] Such purpose promotes the public interest in the external administration of a company.

Like Gageler J, Edelman and Steward JJ cited ASIC's broad statutory duties to 'enforce and give effect to the laws of the Commonwealth that confer functions and powers upon ASIC.'[110] Their Honours understood the legislature's definition of 'eligible applicant' as including anyone authorised by ASIC as a clear indication that ASIC could authorise others to take enforcement action similar to the powers conferred on ASIC.[111] According to their Honours, '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.'[112] Under this interpretation, investigating potential corporate misconduct is in the public interest.[113]

To avoid any doubt regarding the scope and purpose of s 596A, Edelman and Steward JJ stated

> 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.[114]

The supposed 'private' benefit of the shareholders (attempting to recoup their financial losses) serves the public interest by helping to enforce the law.[115]

In assessing purpose, Justices Edelman and Steward said what may constitute an abuse of process should be based on the applicants' immediate purpose (i.e. the end and the means) and not any ultimate or ulterior purpose.[116] If the immediate purpose of the examination and how it is achieved are inconsistent with the express or implied scope

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[109] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [143].
[110] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [171].
[111] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [173].
[112] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [175].
[113] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [175].
[114] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [190].
[115] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [190].
[116] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [132]; see also Murray and Harris, n 10, p 629.

of the legislation, then it is an abuse of process.[117] The scope of the legislation was, therefore, an important consideration in deciding whether a mandatory examination is an abuse of process.

Justices Edelman and Steward noted that the scope of the legislation would depend on the level of generality applied to s 596A. Generally, the scope and purpose of the legislation will be ascertained by considering the mischief targeted by the legislation.[118] In the present case, and as previously discussed, s 596A seeks to promote 'the administration and enforcement of the law concerning the corporation and its officers in public dealings' through 'examinations of present or former corporate officers or provisional liquidators'.[119] The enforcement of the law concerning the corporation and its officers in public dealings is something that ASIC is statutorily responsible for, among other responsibilities. Specifically, under s 1(2) of the *Australian Securities and Investments Commission Act 2001* (Cth), ASIC has the power to take whatever action is required 'to enforce and give effect to the law of the Commonwealth that confer functions and powers upon ASIC.'[120] Justices Edelman and Steward note that the power of authorisation conferred on ASIC through granting eligible applicant status 'exists to enable a person to undertake enforcement functions similar to those conferred on ASIC.'[121] Any subsequent claims that may be brought against eligible officers serve the public interest by enforcing the *Corporations Act* and, more broadly, acting as a general deterrent. Both outcomes protect 'shareholders or creditors from corporate misconduct' directly or indirectly.[122]

The majority's judgment is a significant departure from the previous applications of s 596A regarding shareholders and former shareholders seeking personal benefit. The implications of this decision are considered in the next Part.

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[117] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [135].
[118] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [136].
[119] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [170].
[120] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [171].
[121] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [173].
[122] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [175].

IV THE FUTURE OF SHAREHOLDER MANDATORY EXAMINATIONS

In light of the majority's decision in *Walton*, eligible applicants can examine an eligible officer about the examinable affairs of a company in external administration, providing their predominate motivation is not to obstruct or undermine the public interest in the external administration of the company.[123] Investigating suspected contravention(s) of the *Corporations Act* for private legal action supports the public interest in the external administration of the company. This is the correct interpretation of s 596A. As noted by the majority in *Walton*, nothing in the *Corporations Act* supports narrowing the operation of the provision to benefit the company, its creditors or contributories. In this regard, the majority decision in *Walton* is correcting the course of the common law, which began straying since *Re Excel*, with some noted exceptions.

A wider range of eligible applicants may successfully apply to examine a company officer than previously permitted, including former shareholders who are not contributories because they sold their shares before administration ('non-contributory shareholders'). Non-contributory shareholders were one of the entities who could not benefit from the examination as it would have previously amounted to an abuse of process.

Setting aside a summons under s 596A as an abuse of process post-*Walton* is now more difficult. First, the majority in *Walton* acknowledged that the permissible purposes of a mandatory examination have expanded over time.[124] Second, as noted by Edelman and Steward JJ, the setting aside of a summons issued pursuant to s 596A is a '"draconian" remedy' and should be 'reserved for only the most exceptional or extreme cases.'[125]

Post-*Walton*, an examination can be for a personal benefit rather than only benefiting the company, its creditors or its contributories. Using s 596A to determine whether the applicant(s) has a cause of action against one or more company officers is permissible. This fact will enable more instances of corporate misfeasance to be uncovered and

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[123] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [170].
[124] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [119], [123] (Gageler J), [169]-[175], [183], [188] (Edelman, Steward JJ).
[125] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [191].

redressed through a claim for relief that redistributes the financial loss to the party that caused it, helping to promote public confidence in corporate governance.

Now that eligible applicants can use s 596A to pursue their self-interest, this will undoubtedly increase the number of applications for 'eligible applicant' status received by ASIC and the s 596A applications before the courts. In the following two sections, I support this conclusion by showing how the post-*Walton* interpretation of s 596A has been applied to another application by shareholders before examining ASIC's propensity to approve applications for 'eligible applicant' status.[126]

A *In the matter of Jewel of India Holdings Pty Ltd* [2022] NSWSC 356

Having been decided after *Walton*, Williams J applied the precedent from the High Court's decision in refusing to set aside the summons issued to the liquidators and former administrators of Jewel of India Holdings Pty Ltd ('Jewel Holdings'). The liquidators and former administrators argued that the examination would be an abuse of process because Mr Matta, a director of every company within the Jewel Holdings group of companies and 50 per cent shareholder in Jewel Holdings,[127] only wanted to create leverage against a creditor holding a personal guarantee against Mr Matta and potential insolvent trading claim.[128] Further, they argued that the examination was oppressive because the liquidators and former administrators were unfunded.[129]

His Honour held that the liquidators and former administrators had failed to 'discharge their onus of establishing on the balance of probabilities that the Respondents' [Mr Matta and Avia Corporate FS Pty Ltd] predominant purpose was to attempt to secure commercial leverage against the Applicants'.[130] The fact that the respondents had not raised concerns about the sale process during liquidation was not evidence of an

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[126] Other cases have been decided in relation to s 596A, however, as consistent with the scope of the intial research cases where the applicant is not a shareholder of the company in external administration were excluded: see, eg, *Capital Options (Aust) Pty Ltd v Hazratwala, in the matter of Weststate Consortium (in liq)* [2023] FCA 458; *Re Mervyn Jonathan Kitay As Liquidator Of T&L Produce Marketing* [2022] WASC 299; *Lombe, in the matter of Babcock and Brown Ltd (in liq)* [2022] FCA 957; *In the matter of Fogo Brazilia Holdings Pty Ltd (in liq)* [2022] NSWSC 556; *In the matter of PIC Lindfield 19 Pty Ltd (in liq)* [2022] NSWSC 271; *Krok v Shangri-La Construction Pty Ltd* [2022] FCAFC 32.
[127] *In the matter of Jewel of India Holdings Pty Ltd* [2022] NSWSC 356 at [8].
[128] *In the matter of Jewel of India Holdings Pty Ltd* [2022] NSWSC 356, [131].
[129] *In the matter of Jewel of India Holdings Pty Ltd* [2022] NSWSC 356, [131], [132].
[130] *In the matter of Jewel of India Holdings Pty Ltd* [2022] NSWSC 356, [133].

improper purpose.[131] On the contrary, his Honour held that the concerns raised by the respondents were 'prima facie worthy of investigation' and 'falls squarely within the purpose of s 596A' as expounded in *Walton*.[132] The Court explicitly acknowledged that the examination's outcome would benefit Mr Matta.[133]

This case serves as an example of how s 596A can be used by shareholders to investigate suspected misconduct, even in circumstances where the shareholder may have an ulterior purpose. The fact that the shareholder, in this case, may ultimately be able to reduce their liability against one of the parties implicated in the suspected misconduct is a tertiary benefit to the need to uncover potential misfeasance. So, whether the benefit sought through examination is to recoup losses (as per *Walton*) or reduce personal liabilities (*Jewel of India*), what is determinative for the court in deciding whether the examination is an abuse of process is whether there is a credible allegation of misconduct that requires investigation.

ASIC must still approve the shareholder or former shareholders as an 'eligible applicant'. However, as demonstrated in the next section, this is unlikely to represent an impediment where legitimate concerns exist that potential misfeasance has occurred.

B ASIC and approval rates of 'eligible applicants.'

Based on the limited materials publicly available,[134] ASIC has a high approval rate for granting 'eligible applicant' status. Based on publicly available information,[135] ASIC has less than a four per cent rejection rate for those seeking 'eligible applicant' status. While the results summarised in Table 1 represent a small dataset, it nevertheless indicates that ASIC approves a high proportion of applications it receives.[136]

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[131] *In the matter of Jewel of India Holdings Pty Ltd* [2022] NSWSC 356, [134].
[132] *In the matter of Jewel of India Holdings Pty Ltd* [2022] NSWSC 356, [139], [141].
[133] *In the matter of Jewel of India Holdings Pty Ltd* [2022] NSWSC 356, [159], [162].
[134] Attempts were made to contact ASIC via insolvencystatistics@asic.gov.au on 17 May 2023 and 13 June 2023 to supplement this information. As of 20 July 2023, the author is yet to receive a reply.
[135] Australian Securities and Investment Commission, "ASIC Regulation of Registered Liquidators: January 2017 to June 2018" (610, ASIC, February 2019) at 38, https://asic.gov.au/media/5009174/rep610-published-14-february-2019.pdf viewed 11 April 2022; Australian Securities and Investment Commission, "ASIC Regulation of Registered Liquidators: July 2018 to June 2019" (658, ASIC, April 2020) at 34, https://asic.gov.au/media/5555304/rep658-published-14-april-2020.pdf viewed 11 April 2022.
[136] The total outcomes for FY 2019 exceed the number of applications received by ASIC for the same period due to the finalisation of previously 'ongoing' applications.

In several of its *Regulation of Registered Liquidators Reports*, ASIC states that it grants authorisation to help 'receivers and managers to recover assets and report fully to ASIC. We can then determine whether we need to conduct our own investigations and take enforcement action.'[137] This quote offers insight into the role ASIC views itself as playing regarding s 596A applications. In particular, mandatory examinations can help uncover potential malfeasance that the corporate watchdog would not otherwise be aware of. Justices Edelman and Steward of the High Court in *Walton* endorsed such an approach to enforcement, stating that it is consistent and appropriate given ASIC statutory objectives to enforce the Corporations Law and protect the public interest.[138]

For the above reasons, providing a sufficient and appropriate nexus exists between the applicant and the company, and the applicant's predominant purpose would not contradict or stultify the public interest in the external administration of a company,[139] ASIC will likely grant 'eligible applicant' status.

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[137] Australian Securities and Investment Commission, "ASIC Regulation of Registered Liquidators: January to December 2015" (479, ASIC, 8 June 2016) at [121], https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-479-asic-regulation-of-registered-liquidators-january-to-december-2015/ viewed 13 May 2022; Australian Securities and Investment Commission, "ASIC Regulation of Registered Liquidators: January to December 2016" (532, ASIC, 22 June 2017) at [122], https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-532-asic-regulation-of-registered-liquidators-january-to-december-2016/ viewed 13 May 2022; Australian Securities and Investment Commission, "ASIC Regulation of Registered Liquidators: January 2017 to June 2018", n 136 at [148]; Australian Securities and Investment Commission, "ASIC Regulation of Registered Liquidators: July 2018 to June 2019", n 136 at [141].

[138] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [121] (Gageler J), [170], [171] (Edelman and Steward JJ).

[139] *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq)* [2022] HCA 3, [170].

Year	**Total applications**	**Outcomes**								
		Authorised	Rejected	Withdrawn	No decision req	Company not in ext. admin	Ongoing	Total	% approved	% rejected
2011	17	Not available								
2012	17	Not available								
2013	12	Not available								
2014	25	Not available								
2015	9	Not available								
2016	8	Not available								
2017-FY 2018	28	17	1	2	1	2	5	28	60.7	3.6
FY 2019	16	12	0	2	1	1	6	22	54.5	0.0
FY 2020	0	Not available								
FY 2021	17	Not available								

V CONCLUSION

This article demonstrates that the High Court of Australia's decision in *Walton* marked a significant departure from the established view regarding s 596A examinations, especially for shareholders and former shareholders. This was achieved through a detailed analysis of the case law involving shareholder applicants attempting to use s 596A of the *Corporations Act* to uncover evidence or information that could serve as a basis for future litigation. We established that a settled interpretation of s 596A existed before *Walton*, which limited the use of this provision to situations where it would benefit the company, its creditors or contributories. As discussed in Part II(E), this left concerned shareholders and former shareholders with few options to gain the information or evidence required to decide whether a claim for relief existed.

This article then examined the *Walton* litigation from the first instance through to the appeal to the High Court. For the majority, an important consideration in interpreting s 596A was the public interest in enforcing the *Corporations Act*. If company officers have not conducted themselves lawfully, private legal action is appropriate to redistribute the financial loss suffered and promote confidence among investors and consumers in the financial system. The enforcement of the *Corporations Act* is a key statutory responsibility for ASIC, which manifests in their approval powers to grant 'eligible applicant' status under s 596A.

Now that the role of s 596A in investigating potential misconduct has been clarified and eligible applicants can seek a personal benefit, this article argued that ASIC and the judiciary would likely see an increase in the number of requests for 'eligible applicant' status and applications for examination under s 596A respectively. We may be entering a new phase of enforcement where an increasing number of shareholders and former shareholders will seek to recover the financial losses they have incurred due to the misdeeds of others.

The new interpretation of s 596A is a cautionary reminder for company officers to adhere to their legal responsibilities. For officers who comply with their legal obligations, the increasing number of public examinations may cause undue stress as

they attempt to ‘clear their names’ from allegations of misconduct, raising issues of access to justice and the rule of law. However, this is the subject of a different article.