HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

JOHN DAVID RICH & ANOR APPELLANTS

AND

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION RESPONDENT

Rich v Australian Securities and Investments Commission [2004] HCA 42
Date of Order: 22 April 2004
Date of Publication of Reasons: 9 September 2004
S131/2004

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 26 November 2003 and in their place order:*

   (i) appeal allowed with costs;

   (ii) set aside paragraphs 1, 2 and 3 of the order of Austin J made on 30 April 2003 and paragraphs 1, 4, 5 and 6 of the order of Austin J made on 7 October 2003 and in their place order that the plaintiff's application for discovery is dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

Mr B W Walker SC with D L Williams SC and S A Goodman for the appellants (instructed by Joanne Kelly)

R B S Macfarlan QC with M A Wigney and N J Beaumont for the respondent (instructed by Australian Securities and Investments Commission)

CATCHWORDS

Rich v Australian Securities and Investments Commission

Practice and procedure – Discovery – Privileges against exposure to penalties and forfeitures – Proceedings brought by Australian Securities and Investments Commission seeking declarations of contravention under the *Corporations Act* 2001 (Cth), s 1317E, compensation orders pursuant to the *Corporations Act* 2001, s 1317H and orders pursuant to the *Corporations Act* 2001, ss 206C and 206E disqualifying each defendant from managing corporations – Rules of evidence and procedure for civil matters to apply – Where defendant ordered to make discovery – Where disqualification described as "civil penalty provision" by the *Corporations Act* 2001 – Whether exposure to disqualification order is exposure to a penalty – Whether order is "punitive" or "protective" and whether this classification is useful – Whether order for discovery should have been made.

Statutes – Interpretation – Construction of *Corporations Act* 2001 – Provision for disqualification of company officers from managing corporations in the future – Disqualification contained in "civil penalty provisions" of the *Corporations Act* 2001 – Whether exposure to disqualification order is exposure to a penalty for purposes of the penalty privilege – Whether order for discovery should have been made.

Words and phrases – "penalty", "civil penalty provision", "punitive", "protective".

Corporations Act 2001 (Cth), ss 180(1), 206C, 206E, 1317E, 1317H, 1317L.

1 GLEESON CJ, GUMMOW, HAYNE, CALLINAN AND HEYDON JJ. The appellants were directors of One.Tel Ltd ("One.Tel"), a company now in liquidation. The respondent ("the Commission") has commenced proceedings in the Supreme Court of New South Wales against the appellants. The Commission seeks three kinds of relief in those proceedings:

(a) declarations under s 1317E of the *Corporations Act* 2001 (Cth) ("declarations of contravention");

(b) orders pursuant to s 1317H(1) of the Act ("the 2001 Act") that the appellants pay One.Tel compensation ("compensation orders"); and

(c) orders pursuant to ss 206C and 206E of the 2001 Act disqualifying each appellant from managing a corporation for such period as the Court considers appropriate ("disqualification orders").

2 The Commission sought an order in those proceedings that the appellants make discovery of documents. The appellants resisted that application, contending that the proceedings exposed the appellants to penalties and that, for that reason, they should not be ordered to make discovery.

3 The primary judge, Austin J, ordered the appellants to make discovery of documents by verified list[1]. The appellants' appeal to the Court of Appeal of New South Wales against that order, and against an order that the appellants file and serve affidavits giving the evidence they would intend to adduce at the trial of the proceedings, was dismissed[2]. Spigelman CJ, with whose reasons Ipp JA agreed, concluded[3] that the Commission's proceedings against the appellants were not penal. In their Honours' view[4], the power to disqualify the appellants from managing a corporation was "purely protective", and was not a power that could "be exercised in order to punish". The third member of the Court of Appeal, McColl JA, disagreed, concluding[5] that the distinction between

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1 *Australian Securities and Investments Commission v Rich* (2003) 45 ACSR 305; 21 ACLC 920.

2 *Rich v Australian Securities and Investments Commission* (2003) 203 ALR 671.

3 (2003) 203 ALR 671 at 693 [114]-[116].

4 (2003) 203 ALR 671 at 693 [115].

5 (2003) 203 ALR 671 at 733 [344].

"punitive" and "protective" purposes was a false dichotomy. Rather, in her Honour's view[6], a long stream of authority, including this Court's decision in *Police Service Board v Morris*[7], required the conclusion that a proceeding which sought orders disabling a person from acting as a director was a proceeding for a penalty, even if[8] the making of such an order may also have had some protective purpose.

4 By special leave, the appellants appealed to this Court. The only question argued in this Court was whether an order for discovery should have been made. The questions agitated in the courts below about the order requiring the appellants to file their affidavit evidence, before the commencement of the trial, were not argued in this Court. The Commission accepted that if discovery should not have been ordered, the order requiring the appellants to file and serve affidavits should not have been made.

5 At the conclusion of the oral argument of the appeal, the Court ordered that the appeal be allowed with costs, the orders of the Court of Appeal made on 26 November 2003 be set aside and in their place there be orders: (i) appeal allowed with costs; (ii) set aside paragraphs 1, 2 and 3 of the order of Austin J made on 30 April 2003, and paragraphs 1, 4, 5 and 6 of the order of Austin J made on 7 October 2003, and in their place order that the plaintiff's application for discovery is dismissed with costs.

6 What follows are our reasons for joining in those orders.

7 Consideration of the issues raised in the appeal must begin from an examination of the statutory provisions that are sought to be engaged in the Commission's proceedings against the appellants.

8 The conduct and events which the Commission alleges warrant the making of the orders sought all occurred before 15 July 2001, when the 2001 Act came into force, and at a time when the legislative provisions governing corporations and their officers were principally found in the Corporations Laws

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6 (2003) 203 ALR 671 at 739 [386].

7 (1985) 156 CLR 397.

8 (2003) 203 ALR 671 at 739 [383].

of the States[9]. The *Corporations Act* 1989 (Cth) was repealed, with effect from 15 July 2001, by the *Corporations (Repeals, Consequentials and Transitionals) Act* 2001 (Cth) and State legislation was enacted to accommodate that repeal. It was not suggested that, for the purposes of this appeal, anything turned on these legislative events or upon the related changes made to the legislation establishing and regulating the Commission[10].

9 The Commission commenced its proceedings against the appellants in December 2001, after the commencement of the 2001 Act. It was accepted that the 2001 Act regulated the procedures to be followed in the Commission's proceedings. Argument of the appeal went forward by reference to the 2001 Act which, when first enacted, in all relevant respects was substantially identical to the equivalent provisions of the Corporations Law. Despite some subsequent amendments, the relevant provisions do not now differ in any material respect. It is convenient to refer to the provisions of the 2001 Act and the *Australian Securities and Investments Commission Act* 2001 (Cth) ("the ASIC Act") in the form they took at the time the order for discovery was made.

10 Three particular features of those provisions will be noted: first, the basis of the Commission's authority to institute the proceedings; secondly, the interrelationship of the several provisions under which the Commission seeks relief; and, thirdly, the legislative description of the nature of the relief for which the 2001 Act provides.

The Commission's authority

11 The Commission is a body corporate established under the ASIC Act. It has[11] such functions and powers as are conferred on it by or under the ASIC Act, the 2001 Act and regulations made under the 2001 Act.

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9 The Corporations Law of each State was the Law set out in s 82 of the *Corporations Act* 1989 (Cth) applied by the relevant State's *Corporations Act* of 1990.

10 *Australian Securities and Investments Commission Act* 1989 (Cth), repealed by Sched 1, Pt 1, Item 1 of the *Corporations (Repeals, Consequentials and Transitionals) Act* 2001 (Cth) and replaced by the *Australian Securities and Investments Commission Act* 2001 (Cth) ("the ASIC Act").

11 The ASIC Act, s 11(1).

12 As noted earlier, the Commission seeks declarations of contravention, under s 1317E of the 2001 Act, compensation orders pursuant to s 1317H and disqualification orders pursuant to ss 206C and 206E disqualifying each appellant from managing a corporation. Section 1317J(1) of the 2001 Act provides that the Commission may apply for a declaration of contravention of any of a number of provisions (identified in s 1317E) including s 180(1) of the 2001 Act (and its equivalent provision under the Corporations Law[12]) and may apply for a compensation order. Both ss 206C and 206E expressly provide that disqualification orders may be made on application by the Commission.

13 The second feature of the relevant provisions that is to be noted is the relationship between some, but not all, aspects of the relief which the Commission seeks in the proceedings against the appellants.

Related relief

14 The declarations of contravention which the Commission seeks are declarations of contravention of s 180(1) of the Corporations Law. That sub-section provided at relevant times that:

> "A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
>
> (a) were a director or officer of a corporation in the corporation's circumstances; and
>
> (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer."

The power to seek declarations of contravention is given by s 1317E. So far as now relevant, that section provides:

> "(1) If a Court is satisfied that a person has contravened 1 of the following provisions, it must make a declaration of contravention:
>
> (a) subsections 180(1) ... (officers' duties);

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12 *Corporations Act* 2001 (Cth) ("the 2001 Act"), s 1400.

...

These provisions are the ***civil penalty provisions***.

(2) A declaration of contravention must specify the following:

(a) the Court that made the declaration;

(b) the civil penalty provision that was contravened;

(c) the person who contravened the provision;

(d) the conduct that constituted the contravention;

(e) ... the corporation ... to which the conduct related."

15 Section 1317DA[13] divided the civil penalty provisions identified in s 1317E into two classes: "corporation/scheme civil penalty provision[s]" and "financial services civil penalty provision[s]". Contravention of s 180(1) of the 2001 Act and its equivalent provision under the Corporations Law is of the first class.

16 The compensation orders which the Commission seeks are orders under s 1317H. Section 1317H(1) provides that:

"A Court may order a person to compensate a corporation ... for damage suffered by the corporation ... if:

(a) the person has contravened a corporation/scheme civil penalty provision in relation to the corporation ...; and

(b) the damage resulted from the contravention.

The order must specify the amount of the compensation."

Sub-sections (2) to (5) of s 1317H provide (among other things) some amplification of what is meant by damage and provide for the way in which compensation orders may be enforced. For present purposes, nothing turns on those provisions. What is important to note is that the availability of both the

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13 Added by the *Financial Services Reform Act* 2001 (Cth) and subsequently amended by the *Financial Services Reform (Consequential Provisions) Act* 2002 (Cth).

relief for which s 1317E provides, and the relief for which s 1317H provides, depends upon demonstration of contravention of particular provisions of the Act which are identified as "corporation/scheme civil penalty provision[s]", a subset of the provisions described as "civil penalty provisions".

17 Most attention was directed in the courts below to the relief sought by the Commission under s 206C and s 206E of the 2001 Act and much of the argument in this Court focused upon those provisions. Section 206C(1) provides that:

> "On application by [the Commission], the Court may disqualify a person from managing corporations for a period that the Court considers appropriate if:
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> (a) a declaration is made under section 1317E (civil penalty provision) that the person has contravened a corporation/scheme civil penalty provision; and
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> (b) the Court is satisfied that the disqualification is justified."

The relationship between a claim for relief under s 206C and a claim for a declaration of contravention under s 1317E is evident.

18 By contrast, the power of disqualification conferred by s 206E is not conditioned upon the making of a declaration of contravention. Section 206E(1) provides that:

> "On application by [the Commission], the Court may disqualify a person from managing corporations for the period that the Court considers appropriate if:
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> (a) the person:
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> (i) has at least twice been an officer of a body corporate that has contravened this Act while they were an officer of the body corporate and each time the person has failed to take reasonable steps to prevent the contravention; or
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> (ii) has at least twice contravened this Act while they were an officer of a body corporate; or
>
> (iii) has been officer of a body corporate and has done something that would have contravened

> subsection 180(1) or section 181 if the body corporate had been a corporation; and
>
> (b) the Court is satisfied that the disqualification is justified."

In the present proceedings the Commission seeks to rely upon s 206E(1)(a)(ii), alleging that the appellants at least twice contravened a relevant provision of the Corporations Law while each was an officer of One.Tel, rather than upon s 206E(1)(a)(i) (which would require demonstration of contraventions by One.Tel which the appellants failed to take reasonable steps to prevent). (Although not explored in argument, it may be assumed that it is said that, by operation of s 1400 of the 2001 Act, the liability for a contravention of the Corporations Law was replaced by a new liability under the corresponding provisions of the 2001 Act.) Apart from the claim for relief under s 206E, in all other respects the relief which is sought in the proceedings is either relief under Pt 9.4B or relief predicated upon the making of a declaration of contravention.

19 It is important to notice that the relief which is sought by the Commission includes the making of declarations of contravention (and that much of the other relief sought is predicated upon the making of such a declaration) because s 1317L provides that:

> "The Court must apply the rules of evidence and procedure for civil matters when hearing proceedings for:
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> (a) a declaration of contravention; or
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> (b) a pecuniary penalty order".

It follows from s 1317L that the statute itself requires the application of the body of law which has developed in relation to the privileges against penalties and forfeitures, when deciding whether the appellants should be ordered to make discovery of documents in the proceedings. It should be emphasised that, rightly, this proposition is not disputed by the Commission, and, in the course of oral argument in this Court, its counsel affirmed that it had not argued that "such privilege as there may be has been abrogated".

20 There are several consequences for the disposition of the appeal. First, the operation of s 1317L requires consideration of whether the relief sought against the appellants or any head of that relief is "a penalty, or anything in the nature of

a penalty"[14]. Secondly, that is not a question of disobedience to the statute, or of whether the statute affords an exemption to the appellants from, or does not leave any room for the operation of, the ordinary incidents of the rules of evidence and procedure for civil matters spoken of in s 1317L; the body of law respecting the privileges relied upon by the appellants is encompassed within s 1317L, the debate between the parties being as to their application in the particular proceedings here in question. That is apparent from the competing submissions, to which we now turn.

The competing submissions

21 The Commission submitted that because no pecuniary penalty order was being sought in the present proceedings – only declarations of contravention, compensation orders and disqualification orders – the appellants were not exposed to penalties. The appellants, by contrast, submitted that the declarations of contravention and disqualification orders being sought required the conclusion that they were exposed to penalties.

22 It may be noted that the 2001 Act provides for what it describes as the *civil* consequences of contravening provisions that it classes as "civil penalty provisions". But neither the use of the expression "civil penalty provisions", nor the reference to civil consequences, conclusively determines whether these proceedings (seeking some sorts of relief under Pt 9.4B and, as well, disqualification orders) expose the appellants to penalties. The expression "civil penalty provisions" no doubt points towards that conclusion, but does so only because of its adoption as a convenient description for a disparate group of provisions. In the end, it is necessary to focus upon the content of the privilege against exposure to penalties and forfeitures rather than upon the use of the tag "civil penalty provisions".

The privilege against exposure to penalties

23 Four members of the Court, in their joint reasons in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*[15],

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14 *Smith v Read* (1736) 1 Atk 526 at 527 per Lord Hardwicke [26 ER 332] cited by Isaacs J in *R v Associated Northern Collieries* (1910) 11 CLR 738 at 744.

15 (2002) 213 CLR 543 at 553-554 [13] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

pointed out that the privilege against exposure to penalties is one of a trilogy of privileges that bear some similarity with the privilege against incrimination. (The other two privileges are the privilege against exposure to forfeiture and the privilege against exposure to ecclesiastical censure.) As was also pointed out in those joint reasons[16]:

> "The privilege against exposure to penalties and that against exposure to forfeiture had their origins in the rules of equity relating to discovery[17], but it is clear, as noted by Mason ACJ, Wilson and Dawson JJ in *Pyneboard* [*Pty Ltd v Trade Practices Commission*], that the privilege against exposure to penalties has long been recognised by the common law and is no longer simply a rule of equity relating to discovery[18]."

24 Although the privilege against exposure to penalties had its origins in the rules of equity relating to discovery, when discovery and interrogatories were provided for under the rules made under the *Judicature Act*, the Court of Equity's principle (that an order for discovery or for the administration of interrogatories in favour of the prosecutor, whether the prosecutor was the Crown or a common informer or some other person, should not be made where the proceeding was of such nature that it might result in a penalty or forfeiture) was applied more

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16 (2002) 213 CLR 543 at 554 [13].

17 See *R v Associated Northern Collieries* (1910) 11 CLR 738 at 744 per Isaacs J citing the judgment of Lord Hardwicke LC in *Smith v Read* (1737) 1 Atk 526 at 527 [26 ER 332]; *Naismith v McGovern* (1953) 90 CLR 336 at 341-342 per Williams, Webb, Kitto and Taylor JJ; *Refrigerated Express Lines (A/Asia) Pty Ltd v Australian Meat and Live-stock Corporation* (1979) 42 FLR 204 at 208 per Deane J; *Sorby v The Commonwealth* (1983) 152 CLR 281 at 318-319 per Brennan J; Maddock, *A Treatise on the Principles and Practice of the High Court of Chancery*, 2nd ed (1820), vol 1 at 214-215; Spence, *The Equitable Jurisdiction of the Court of Chancery*, (1846), vol 1 at 680; Mitford, *A Treatise on the Pleadings in suits in the Court of Chancery*, 5th ed (1847) at 229-230; Daniell, *The Practice of the High Court of Chancery*, 5th ed (1871), vol 1 at 485, vol 2 at 1473-1474.

18 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 336 referring to *Mexborough (Earl of) v Whitwood Urban District Council* [1897] 2 QB 111 at 115 per Lord Esher MR. See also Ligertwood, *Australian Evidence*, (1988) at [5.67]; McNicol, *Law of Privilege*, (1992) at 136, 186-189; *Sorby v The Commonwealth* (1983) 152 CLR 281 at 317-318 per Brennan J.

generally[19]. As was further pointed out in the joint reasons in *Daniels Corporation*[20], the privilege against exposure to penalty now serves the purpose of ensuring that those who allege criminality or other illegal conduct should prove it[21]. That is not to say that the privileges against exposure to penalties or exposure to forfeitures are substantive rules of law, like legal professional privilege, having application beyond judicial proceedings[22]. In the present matter, however, the only issue is about the application of these privileges to discovery in judicial proceedings. No wider question arises.

25 Nor, as has already been pointed out, is there any question about the statutory abrogation of the privileges. As noted earlier, s 1317L of the 2001 Act obliges the Court to apply the rules of evidence and procedure for civil matters when hearing proceedings for a declaration of contravention. That provision requires the application of the principles governing the application of the privilege against exposure to penalties. The Commission pointed to no provision of the Act as abrogating or qualifying the privilege against exposure to penalties in relation to the procedure which gave that privilege its birth – discovery. In particular, no provision like those found in ss 597(12) and 1316A of the 2001 Act, which limit the availability of the privilege against exposure to penalties, was said to apply to discovery in the proceedings instituted by the Commission. Thus the question in the present matter becomes whether the privileges against exposure to penalties or forfeitures are engaged. Do the proceedings expose the appellants to penalties or forfeitures?

Penalties and forfeitures

26 The penalties and forfeitures which attract the privileges include, but are not confined to, monetary exactions. The privilege against exposure to penalties

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19 *Naismith v McGovern* (1953) 90 CLR 336 at 341-342 per Williams, Webb, Kitto and Taylor JJ.

20 (2002) 213 CLR 543 at 559 [31].

21 See *Trade Practices Commission v Abbco Iceworks Pty Ltd* (1994) 52 FCR 96 at 129 per Burchett J.

22 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 559 [31].

has been applied in common informer proceedings[23] and actions for monetary penalties[24] or treble damages[25]. But:

> "[t]he term 'penalty' was not used in courts of equity merely in the sense of an exaction pursuant to statute as a punishment for contravention thereof. It embraced the wider concept of penalty as understood in the law of relief in equity against the exaction of penal payments in contractual disputes and the forfeiture of property interests."[26]

That is why the privileges against exposure to penalties or forfeiture have been allowed in cases as diverse as those already mentioned and to cases of forfeiture of estate, as for simony[27], for infringing the *Pluralities Act* (1 & 2 Vict c 10)[28], for breaches of covenants in leases[29], by marriage without consent[30], or by having acted as agent for the Confederate States of America[31]. Moreover, the privilege against exposure to penalties has been held applicable to preclude an order for discovery by the debtor in a petition for bankruptcy[32] on the basis that the loss of civil status consequent on bankruptcy is penal.

27 These considerations respecting the scope of the privileges against exposure to penalties or forfeiture, necessarily drawn from experience in the legal

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23 *Orme v Crockford* (1824) 13 Price 376 [147 ER 1022]; *Martin v Treacher* (1886) 16 QBD 507.

24 *Associated Northern Collieries* (1910) 11 CLR 738.

25 *Jones v Jones* (1889) 22 QBD 425.

26 *Trade Practices Commission v Abbco Iceworks Pty Ltd* (1994) 52 FCR 96 at 143 per Gummow J.

27 *Parkhurst v Lowten* (1816) 1 Mer 391 [35 ER 718].

28 cf *Boteler v Allington* (1746) 3 Atk 453 [26 ER 1061].

29 *Mexborough (Earl of) v Whitwood Urban District Council* [1897] 2 QB 111.

30 *Chancey v Fenhoulet* (1751) 2 Ves Sen 265 [28 ER 171].

31 *United States of America v McRae* (1867) LR 3 Ch App 79.

32 *In re a Debtor* [1910] 2 KB 59 at 66.

tradition inherited in this country, do more than shed vague illumination upon the central issue on this appeal. They explain, why, for example, to conclude that the legislation has the character of a regulatory law to be applied in accordance with civil procedures, including those respecting discovery, would be to stop well short of resolving the issue whether the proceedings expose the appellants to penalties or forfeitures.

28 In several cases[33] it has been held that exposure to loss of office is exposure to a penalty or forfeiture. And in *Police Service Board v Morris*[34] it was at least assumed that exposure to dismissal from a police force was a form of penalty. By contrast, however, orders for compensation have been held[35] not to be penalties.

29 That stream of authority would suggest that for the Commission to seek an order disqualifying a person from acting in the management of a corporation on the ground that the person has contravened the law is to seek a penalty or forfeiture. The order is sought by a regulatory authority; its grant would be founded on demonstration of a contravention of the law; it is an order which leads to the vacation of existing offices in a corporation and imposition of a continuing disability for the duration of the order. What is it that would deny that conclusion?

30 The decisions of the primary judge and the majority in the Court of Appeal proceeded from the premise that a distinction between "punitive" and "protective" proceedings was possible and useful and that, when applied to the present proceedings, it led to the conclusion that the present proceedings have a protective not punitive purpose. There are several reasons to reject that reasoning.

31 First, adopting such a classification diverts attention from the relevant question which is whether the privilege against exposure to penalties applies. That requires consideration of the kinds of relief which are sought in the

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33 *Honeywood v Selwin* (1744) 3 Atk 276 [26 ER 961]; *Nelme v Newton* noted as a footnote to *MacCallum v Turton* (1828) 2 Y & J 183 [148 ER 883 at 884]; *Scott v Miller (No 2)* (1859) Johns 328 [70 ER 448].

34 (1985) 156 CLR 397 at 403 per Gibbs CJ, 408 per Wilson and Dawson JJ.

35 *Adams v Batley*; *Cole v Francis* (1887) 18 QBD 625.

proceeding. Neither the purpose which the applicant may have in seeking relief of that kind, nor the effects on persons other than the appellants of obtaining that relief, bears upon whether the proceedings expose the appellants to penalties. Yet an attempt to classify the proceedings as "punitive" or "protective" appears to require consideration of only those purposes or effects. Thus it is said that to disqualify a person from managing a corporation *protects* shareholders or creditors of the corporations in which the person concerned would otherwise have held office. If a disqualification order has that effect, and it may well, that is not relevant to whether exposing the person concerned to the possibility of such an order being made is to expose that person to a penalty.

32 Secondly, and more fundamentally, the supposed distinction between "punitive" and "protective" proceedings or orders suffers the same difficulties as attempting to classify all proceedings as either civil or criminal[36]. At best, the distinction between "punitive" and "protective" is elusive. That point is readily illustrated when it is recalled that, as McColl JA pointed out[37], account must be taken in sentencing a criminal offender of the need to protect society, deter both the offender and others, to exact retribution and to promote reform[38].

33 Thirdly, and no less fundamentally, not only does the supposed distinction between punitive and protective procedures find no sure footing in the course of decisions concerning the application of the privilege against exposure to penalties, it is inconsistent with the principles revealed by those authorities.

34 Both the primary judge[39] and the majority in the Court of Appeal[40] pointed to cases in which it has been said that the purpose of disqualification orders made against directors or other officers of a company is to protect the public rather than to punish. Subject to one exception, *Australian Securities Commission v Kippe*[41],

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36 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 77 ALJR 1629; 201 ALR 1.

37 (2003) 203 ALR 671 at 734 [353].

38 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 476.

39 (2003) 45 ACSR 305 at 313 [31]-[32]; 21 ACLC 920 at 927-928.

40 (2003) 203 ALR 671 at 680-682 [48]-[62].

41 (1996) 67 FCR 499.

those cases were all concerned, directly or indirectly, with setting an appropriate period of disqualification[42]. It by no means follows, however, that this leads to the conclusion[43] that the privilege against exposure to penalties has some narrower or different application in connection with proceedings against officers of corporations from the application it would ordinarily have. The relevant question is not, as the majority in the Court of Appeal appears to have understood it, whether there is some special rule of corporations law. (The early cases about discovery in relation to stock jobbing[44] would tend to deny that there is such a special rule.) The question is how should the general principles of the privileges against exposure to penalties and forfeiture find application in the particular circumstances of these proceedings. That inquiry is not assisted by examining why the orders sought in the proceedings might be made or what purposes might

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42 See *Re Altim Pty Ltd and Companies Act 1961* [1968] 2 NSWR 762 at 764; *Poyser v Commissioner for Corporate Affairs* [1985] VR 533 at 537 and *Commissioner for Corporate Affairs v Bracht* [1989] VR 821 at 827, all of which concerned the operation of s 117 of the *Companies Acts* 1961; *Re Magna Alloys & Research Pty Ltd* (1975) 1 ACLR 203 at 205; *Re Ferrari Furniture Co Pty Ltd and the Companies Act* [1972] 2 NSWLR 790 at 791 and *Zuker v Commissioner for Corporate Affairs* [1981] VR 72 at 77, all of which concerned the operation of s 122 of the *Companies Acts* 1961; *Nicholas v Commissioner for Corporate Affairs* (1986) 5 ACLC 258 and on appeal [1988] VR 289 at 299, 305 and *Friend v Corporate Affairs Commission* (1988) 7 ACLC 106 at 115 which concerned s 562A(3) of the *Companies Codes*; *Re Tasmanian Spastics Association; Australian Securities Commission v Nandan* (1997) 23 ACSR 743 at 751; *Australian Securities Commission v Donovan* (1998) 28 ACSR 583 at 602-603 and *Australian Securities Commission v Forem-Freeway Enterprises Pty Ltd* (1999) 30 ACSR 339 at 349-350; 17 ACLC 511 at 521-522, all of which concerned the operation of s 1317EA(3) of the Corporations Law; *Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty Ltd* (2002) 41 ACSR 561 at 580-581 [101], 581-582 [105] which concerned s 206E of the 2001 Act; and *Re HIH Insurance Ltd (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80 at 97-99 [56] and on appeal (2003) 46 ACSR 504 at 643-644 [659] which concerned ss 206C and 206E of the 2001 Act.

43 cf (2003) 203 ALR 671 at 682 [63] per Spigelman CJ.

44 For example, *Green v Weaver* (1827) 1 Sim 404 [57 ER 630]; *Williams v Trye* (1854) 18 Beav 366 [52 ER 145].

be achieved by their making. Rather, attention must be focused upon the nature of the orders that are sought.

35 That it may be possible to characterise proceedings as having a purpose of protecting the public is not determinative. And to begin the inquiry from an a priori classification of proceedings as *either* protective *or* penal invites error. It invites error primarily because the classification adopted assumes mutual exclusivity of the categories chosen when they are not, and because the classification is itself unstable. To assume mutual exclusivity of the categories is to fall into the same kind of error as was identified in the constitutional context in *Actors and Announcers Equity Association v Fontana Films Pty Ltd*[45]. Just as a law may bear several characters, a proceeding may seek relief which, if granted, would protect the public but would also penalise the person against whom it is granted. That a proceeding may bear several characters does not deny that it bears *each* of those characters[46]. Moreover, as Hayne J emphasised in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd*[47], those who seek the "essential character" of statutory provisions do not proffer explanations of that process of distillation.

36 It was not suggested, and could not seriously be suggested, that directors, alternate directors and company secretaries do not hold offices to which the privileges against forfeiture and penalties may apply. Rather, the contention of the Commission was that discussed above, namely that the relevant proceedings were protective rather than penal.

37 If a disqualification order is made, the person against whom the order is made ceases to be a director, alternate director, or a secretary of a company[48], unless given permission under s 206F or s 206G of the 2001 Act to manage the corporation concerned. The order for disqualification thus causes the person against whom it is made to forfeit any office then held in a corporation and

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45 (1982) 150 CLR 169 at 192-194. See also *Re F; Ex parte F* (1986) 161 CLR 376 at 387-388; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 188; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 295; *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16].

46 Stone, *Legal System and Lawyers' Reasonings*, (1964) at 248-252.

47 (2003) 77 ALJR 1629 at 1653 [136]; 201 ALR 1 at 34.

48 s 206A(2).

forbids that person from holding office in a corporation for the duration of the disqualification order. Those consequences, whether taken separately or in combination, when inflicted on account of a defendant's wrongdoing, are penalties. That the penalty is not exacted in the form of a money payment does not deny that conclusion. As the authorities referred to earlier in these reasons reveal, equity's concern with penalties was never confined to *pecuniary* penalties. If exposure to loss of office or exposure to dismissal from a police force[49] is exposure to penalty, exposure to a disqualification order is exposure to a penalty.

38 The company cases referred to earlier, as cases concerning how an appropriate period of disqualification should be set, rightly focused upon why the orders sought might be made and what purposes might be achieved by their making. To that stream of authority *Kippe* stands as an exception. It concerned a different question. In *Kippe*, the question was whether statements made in an examination under s 19 of the *Australian Securities Commission Act* 1989 (Cth) were admissible in evidence in proceedings before the Administrative Appeals Tribunal in which banning orders were sought under ss 829 and 830 of the Corporations Law. Section 68(3) of the *Australian Securities Commission Act* provided that the statements were not admissible in "a proceeding for the imposition of a penalty". The Full Court of the Federal Court held[50] that a proceeding which might result in a banning order was to be characterised as "'protective' in purpose and not as one for the imposition of a penalty". For the reasons given earlier, that conclusion was wrong. *Kippe* should be overruled.

What order should have been made?

39 The primary judge ordered that the appellants make discovery of documents by verified list. That order would permit the appellants to object to production of any document on a ground of privilege. At first sight, that might suggest that the appellants' challenge to the order for provision of a verified list of documents is premature. That is, it might suggest that any question of privilege is one about privilege from production rather than privilege from making discovery. That is not so. As Isaacs J pointed out in *R v Associated Northern Collieries*[51], once it is determined that the proceedings expose a person

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49 *Police Service Board v Morris* (1985) 156 CLR 397.

50 (1996) 67 FCR 499 at 508.

51 (1910) 11 CLR 738 at 747.

to penalty, the proper course is to refuse any order for discovery. As Isaacs J said[52], to leave the party at risk of penalty to object to production of documents, having first listed them, may lead to the very mischief which the privilege is designed to prevent. In the words of Lord Coleridge CJ in *Jones v Jones*[53], to which Isaacs J referred[54]:

> "The whole case for the plaintiff may depend upon his power to trace a particular document into the possession of the defendant, and, upon its non-production, to prove its contents by secondary evidence."

That being so, the proper course in this matter was to refuse the application for discovery.

Conclusion

40 It is for these reasons that we joined in the orders set out earlier.

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52 (1910) 11 CLR 738 at 747.

53 (1889) 22 QBD 425 at 428-429.

54 (1910) 11 CLR 738 at 747-748.

41 McHUGH J. My reasons for agreeing that this appeal should be allowed are substantially contained in the reasons of Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ. In addition to those reasons, however, I think that the factors that courts take into account when ordering disqualification and fixing periods of disqualification under the corporations legislation make it impossible to hold that the "civil penalty" provisions and, in particular, the disqualification provisions, are purely protective in nature. Despite frequent statements by the judges who administer the legislation that the purpose of the disqualification provisions is protective, what the judges actually do in practice is little different from what judges do in determining what orders or penalties should be made for offences against the criminal law. Elements of retribution, deterrence, reformation and mitigation as well as the objective of the protection of the public inhere in the orders and periods of disqualification made under the legislation.

42 If the disqualification provisions were purely protective, the only issue for the court would be whether the defendant is now or will in the future be a fit and proper person to manage corporations. If the court were to find that, despite the misconduct, the defendant is now a fit and proper person to manage corporations, the court should refuse to make an order of disqualification. If the court were to find that the defendant would be a fit and proper person to manage corporations in the future, the only issue for determination would be the time when that would occur. Moreover, if the jurisdiction were purely protective, it is hard to see why orders for disqualification should be for fixed periods, as they almost invariably are. Fixed periods of disqualification suggest punishment rather than protection in the same way that disqualification from driving for a period is a punishment rather than an act protective of the public. If the jurisdiction were purely protective, one might have thought that the proper order would be indefinite disqualification with the onus on the defendant to show at some future date that he or she were now a fit and proper person to manage corporations[55]. At all events, if the jurisdiction were purely protective, the defendant should have liberty to apply during the period of disqualification to show that he or she is now a fit and proper person to manage corporations.

43 In exercising their discretion, however, courts which administer the legislation do not concern themselves solely with the issue of whether the defendant now is or in the future will be a fit and proper person to manage corporations. They take into account a wide variety of factors in addition to determining whether any and, if so, what period of disqualification should be imposed. They consider more than the present and future fitness of the defendant

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55 For example, in *Australian Securities and Investments Commission v Hutchings* (2001) 38 ACSR 387, Windeyer J ordered that the defendant directors be disqualified from managing corporations for life, with the right to apply on three months' notice after five years for a variation of the order: at 395.

to manage corporations. They take into account factors such as the size of any losses suffered by the corporation, its creditors and consumers, legislative objectives of personal and general deterrence, contrition on the part of the defendant, the gravity of the misconduct, the defendant's previous good character, prejudice to the defendant's business interests, personal hardship and the willingness of the defendant to render assistance to statutory authorities and administrators. No doubt some – maybe all – of these matters are relevant in determining whether the defendant ought to be disqualified or the period of disqualification that is required in order to protect the public. But in practice courts do not use these matters merely as evidentiary indicators of the time when the defendant will, if ever, be fit to manage corporations. Rather, they become part of a synthesis from which the judges make a value judgment concerning whether to order disqualification and, if so, the period of disqualification that should be imposed. It is not the practice of judges to say: "On the evidence, I find that after (say) five years, the defendant will be sufficiently reformed to make it safe for him or her to manage corporations." This suggests that the disqualification provisions are not purely protective in nature.

44 The legislative history of the disqualification provisions, in particular, ss 206C and 206E of the *Corporations Act* 2001 (Cth), also indicates that the provisions are not purely protective. Sections 206C and 206E of the *Corporations Act* essentially replicate ss 206C and 206E of the former Corporations Law. Those provisions were inserted into that Law by the *Corporate Law Economic Reform Program Act* 1999 (Cth). The Explanatory Memorandum to the Corporate Law Economic Reform Program Bill 1998 (Cth) suggested that the provisions would merely "rewrite without substantial change" the previous "civil penalty" provisions of the Corporations Law[56]. The previous provisions included ss 230 and 1317EA of the Corporations Law. Section 230 empowered the court to prohibit a person from managing a corporation where the corporation repeatedly contravened the corporations legislation while the person was an officer of that corporation and the person failed to prevent the corporation from repeatedly breaching that legislation, or the person in their capacity as an officer of the corporation repeatedly breached that legislation, for example, by acting dishonestly or failing to exercise a reasonable degree of care and diligence. In 1992, the *Corporate Law Reform Act* 1992 (Cth) inserted s 1317EA into the Corporations Law. Section 1317EA(3) empowered the court, if satisfied that a person had contravened a civil penalty provision, to prohibit a person from managing a corporation[57].

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56 Australia, Corporate Law Economic Reform Program Bill Explanatory Memorandum, (1998) at 12.

57 For a discussion of the relevant provisions under the former Corporations Law, *Companies Code* and *Companies Acts*, see Cassidy, "Disqualification of Directors under the Corporations Law", (1995) 13 *Company and Securities Law Journal* 221;

(Footnote continues on next page)

45 An explanatory paper accompanying the first draft of the Corporate Law Reform Bill 1992 (Cth) stated[58]:

> "173. Subsection 1317AJ [the equivalent of s 1317EA(1) when enacted] enables the Court to make a civil penalty order against a person who has contravened a civil penalty provision. A civil penalty order may be an order prohibiting the person, for such period as is specified in the order, from managing a corporation ...
>
> 178. It is expected that in settling an appropriate [civil penalty] order, the Court would first give consideration to whether it should impose a civil penalty disqualification. The issue should be whether the defendant's conduct, whilst not criminal in nature, was so reprehensible and had such serious consequences as to warrant an order prohibiting the person from managing a corporation. For example, if gross negligence by a director had led directly to massive losses for shareholders, the Court may consider that a director should be disqualified for a substantial period, even where there was no question of a dishonest intent. The emphasis should be on preventing a recurrence of the contravention by the defendant, and providing a deterrent to other persons involved in the management of corporations. It is expected that the Courts would consider imposing a pecuniary penalty only if it considered that a civil penalty disqualification provided an inadequate or inappropriate remedy.
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> 179. A Court might, in appropriate circumstances, such as where it proposes to give the defendant leave to manage a corporation under proposed section 1317AQ, impose both a civil penalty disqualification and a pecuniary penalty in relation to the one contravention.
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> 180. Whilst a civil penalty order may prohibit a person from managing a corporation, the civil penalty provision contravened by the person may not necessarily relate to the person's participation in the

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Hicks, "Disqualification of Directors - Forty Years On", [1988] *Journal of Business Law* 27; Corkery, "Convicted Offenders and Section 227 of the National Companies Code: Restrictions on Certain Persons Managing Companies", (1983) 1 *Company and Securities Law Journal* 153. See also in relation to the *Company Directors Disqualification Act* 1986 (UK), Hicks, "Director Disqualification: Can it Deliver?", [2001] *Journal of Business Law* 433.

58 Australia, Corporate Law Reform Bill 1992: Draft Legislation and Explanatory Paper, (1992) at 296-298.

> management of a corporation. For example, a contravention of proposed Corporations Law section 588G, a civil penalty provision, may relate to the person's conduct in connection with ... for example, certain incorporated associations. In appropriate circumstances, the Court may be satisfied that a person's conduct in relation to [that body] warrants the making of an order prohibiting the person from managing a corporation."

46 In the second reading speech for the Bill, the federal Attorney-General, Mr Michael Duffy, observed that the Bill[59]: "says that shareholders should be protected against breaches [of directors' duties] by the substitution of appropriate civil penalties, including … disqualification in the case of serious breaches." Statements in both the Explanatory Memorandum and the second reading speech that disqualification may be appropriate in the case of serious breaches or breaches with serious consequences also suggest that the disqualification provisions contain a retributive element and, accordingly, are not simply protective.

47 Many and varied are the contraventions of the *Corporations Act* that give rise to applications for the disqualification of a person from managing corporations. Those contraventions are the grounds for the exercise of the court's discretion to order disqualification. The *nature and seriousness* of the contraventions are important matters to which the courts have regard when determining whether to order disqualification. Contraventions under the *Corporations Act* and its predecessor legislation that have been found to enliven the court's discretion include breaches of directorial duties of honesty, good faith and due care and diligence[60], making improper use of the position of director to gain an advantage for that person or for others to the detriment of the company[61],

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59 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 November 1992 at 2400.

60 *Australian Securities Commission v Donovan* (1998) 28 ACSR 583; *Australian Securities Commission v Roussi* (1999) 32 ACSR 568; *Australian Securities Commission v Forem-Freeway Enterprises Pty Ltd* (1999) 30 ACSR 339; *Re Gold Coast Holdings Pty Ltd (in liq); Australian Securities and Investments Commission v Papotto* (2000) 35 ACSR 107; *Australian Securities and Investments Commission v Parkes* (2001) 38 ACSR 355; *Australian Securities and Investments Commission v Forge* [2002] NSWSC 760; *Re HIH Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80; *Re One.Tel Ltd (in liq); Australian Securities and Investments Commission v Rich* (2003) 44 ACSR 682.

61 *Re Strikers Management Pty Ltd; Australian Securities Commission v Dimitri* (unreported, Federal Court of Australia, 7 May 1997, Burchett J); *Roussi* (1999) 32 ACSR 568; *Parkes* (2001) 38 ACSR 355; *Forge* [2002] NSWSC 760.

making inappropriate use of company funds[62], engaging in misleading and deceptive conduct[63], permitting corporations to trade while insolvent[64], operating unregistered schemes unlawfully or carrying on a business such as a securities business or an investment advice business without a licence[65] and failing to comply with administration obligations[66]. In substance, the nature of these contraventions is little different from those which attract the sanctions of the criminal law.

48 The leading authority on the reasons for a court exercising its powers under ss 206C and 206E to order the disqualification of a person from managing corporations is *Re HIH Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler*[67]. In that case, Santow J derived 15 propositions from the case law on both ss 206C and 206E (and their predecessor sections in the Corporations Law and the *Companies Code*)[68]. The propositions assume that a disqualification order is protective, rather than punitive[69]. But, when examined, they track the various matters that judges take into account in the criminal jurisdiction when sentencing offenders.

49 The 15 propositions formulated by Santow J are as follows[70]:

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62 *Re Tasmanian Spastics Association; Australian Securities Commission v Nandan* (1997) 23 ACSR 743; *Parkes* (2001) 38 ACSR 355; *Forge* [2002] NSWSC 760.

63 *Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty Ltd* (2002) 41 ACSR 561; *Adler* (2002) 42 ACSR 80; *Australian Securities and Investments Commission v Starnex Securities Pty Ltd* [2003] FCA 1375.

64 *Australian Securities and Investments Commission v Plymin (No 2)* (2003) 21 ACLC 1237.

65 *Hutchings* (2001) 38 ACSR 387; *Pegasus Leveraged Options Group Pty Ltd* (2002) 41 ACSR 561.

66 *Commissioner for Corporate Affairs (WA) v Ekamper* (1987) 12 ACLR 519; *Roussi* (1999) 32 ACSR 568.

67 (2002) 42 ACSR 80.

68 *Adler* (2002) 42 ACSR 80 at 97-99.

69 *Adler* (2002) 42 ACSR 80 at 97 per Santow J.

70 *Adler* (2002) 42 ACSR 80 at 97-99.

1. Disqualification orders are designed to protect the public from the harmful use of the corporate structure or from use that is contrary to proper commercial standards.

2. The banning order is designed to protect the public by seeking to safeguard the public interest in the transparency and accountability of companies and in the suitability of directors to hold office.

3. Protection of the public also envisages protection of individuals who deal with companies, including consumers, creditors, shareholders and investors.

4. The banning order is protective against present and future misuse of the corporate structure.

5. The order has a motive of personal deterrence, though it is not punitive.

6. General deterrence is an object of the legislation.

7. In assessing the fitness of an individual to manage a company, it is necessary that the individual have an understanding of the proper role of the company director and the duty of due diligence that is owed to the company.

8. Longer periods of disqualification are reserved for cases where contraventions have been of a serious nature such as those involving dishonesty.

9. In assessing an appropriate length of prohibition, consideration is given to the degree of seriousness of the contraventions, the propensity of the defendant to engage in similar conduct in the future and the likely harm that may be caused to the public.

10. It is necessary to balance the personal hardship to the defendant against the public interest and the need for protection of the public from any repeat of the defendant's conduct.

11. A mitigating factor in considering a period of disqualification is the likelihood of the defendant reforming.

12. The eight criteria to govern the exercise of the court's powers of disqualification set out in *Commissioner for Corporate Affairs*

(WA) v Ekamper[71] have been influential. It was held that in making such an order it is necessary to assess:

(a) the character of the defendant;

(b) the nature of the breaches;

(c) the structure of the company or companies and the nature of its or their business;

(d) the interests of shareholders, creditors and employees;

(e) the risks to others from the continuation of the defendant as a director;

(f) the honesty and competence of the defendant;

(g) hardship to the defendant and to his or her personal and commercial interests; and

(h) the defendant's appreciation that future breaches could result in future proceedings.

13. Factors that have led to the imposition of the longest periods of disqualification (that is, disqualifications of 25 years or more) include:

(a) large financial losses;

(b) high propensity that the defendant may engage in similar activities or conduct;

(c) activities undertaken in fields in which there was potential to do great financial damage such as in management and financial consultancy;

(d) the defendant's lack of contrition or remorse;

(e) disregard for the law and compliance with corporate regulations;

(f) dishonesty and intent to defraud; and

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71 (1987) 12 ACLR 519.

(g) previous convictions and contraventions for similar activities.

14. In cases in which the period of disqualification ranged from 7 years to 12 years, the factors that led to the conclusion that these cases were serious though not the "worst cases", included:

(a) serious incompetence and irresponsibility;

(b) substantial loss;

(c) the fact that the defendant had engaged in deliberate courses of conduct to enrich himself or herself at others' expense, but with lesser degrees of dishonesty;

(d) continued, knowing and wilful contraventions of the law and disregard for legal obligations; and

(e) lack of contrition or acceptance of responsibility, although that must be weighed against the prospect that the defendant may reform.

15. The factors leading to the shortest disqualifications (that is, disqualifications for up to 3 years) were:

(a) although the defendant had personally gained from the conduct, he or she had endeavoured to repay or partially repay the amounts misappropriated;

(b) the defendant had no immediate or discernible future intention to hold a position as manager of a company; and

(c) the defendant had expressed remorse and contrition, acted on advice of professionals and had not contested the proceedings against him or her.

50 The first four propositions formulated by Santow J go directly to the protection issue, that is, the protection of the public from the defendant's future conduct. Other propositions, such as the ninth, tenth and twelfth propositions, also pertain to the protection of the public. Some propositions, however, which relate to considerations that operate to reduce the period of disqualification, such as personal hardship to the defendant, mitigating factors, repayment of amounts misappropriated and the defendant's expressed intention no longer to hold a management position, benefit the defendant rather than protect the public. Still others, such as the fifth and sixth propositions, recognise that the disqualification provisions also have the objectives of personal and general deterrence. These latter propositions strongly resemble sentencing principles under the criminal law.

51 In *Elliott v Australian Securities and Investments Commission*[72], the Court of Appeal of the Supreme Court of Victoria said, correctly in my opinion:

> "Many of the propositions and factors listed by Santow J bear a similarity to sentencing principles. Matters going to aggravation and mitigation in relation to contraventions of s 588G [of the Corporations Law] need to be considered and accorded proper weight. But above all else protection of the public and deterrence, specific and general, must also be given appropriate consideration."

52 Both Santow J's list of propositions and the comments of the Victorian Court of Appeal indicate that the factors taken into account in the criminal jurisdiction – retribution, deterrence, reformation, contrition and protection of the public – are also central to determining whether an order of disqualification should be made under the *Corporations Act* and, if so, the appropriate period of disqualification. Those factors also support the conclusion that the jurisdiction exercised under this part of the *Corporations Act* cannot properly be characterised as purely protective.

53 A good example of the approach of judges in this particular area of the law is found in the judgment of Bryson J in *Re One.Tel Ltd (in liq); Australian Securities and Investments Commission v Rich*[73]. His Honour's reasons show that the jurisdiction cannot be characterised as purely protective. They reflect an approach that can be found in many other cases concerning the disqualification from office of company officers. Among the matters Bryson J thought were relevant were the second defendant's age and stage of career at which disqualification would fall, the office held, the extent of the second defendant's responsibilities in terms of the value of assets, the complexity of the activities and the number of people within the range of adverse effects of the second defendant's breaches of duty[74]. His Honour warned that the guidance to be obtained from other decisions with respect to the reasons for ordering disqualification and the period of disqualification is limited. Each decision is closely related to its own facts, which tend to be highly complex. Further, the circumstances of each defendant are special to that person[75]. Bryson J also said that there is "not much to be gained from considering or attempting to classify

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72 (2004) 48 ACSR 621 at 658.

73 (2003) 44 ACSR 682.

74 *Rich* (2003) 44 ACSR 682 at 692.

75 *Rich* (2003) 44 ACSR 682 at 691 per Bryson J, citing *Adler* (2002) 42 ACSR 80 at 97-99 per Santow J.

periods of disqualification which have been imposed in other cases."[76] That is because breaches of the *Corporations Act*, the circumstances of the breaches and the outcomes of the breaches, including the number of persons and the value of the interests affected, may take many forms. In addition, the personal circumstances of persons in breach vary greatly[77].

54 In accepting that a 10 year period of disqualification was appropriate for the second defendant in that case, Bryson J said[78]:

> "Severe though the expression is, I have to say that the admitted facts show incompetence. To be managing director of a public company, and not to know or find out, by a margin of tens of millions of dollars, its current cash position, or by a margin of hundreds of millions of dollars its need for cash, reveal incompetence of a high order. It is also important to say that the facts show nothing in the nature of dishonesty or other moral failing. His practical expressions of contrition and the financial remedy which he has submitted to favour amelioration of the disqualification, and favour selection of a period *which will leave to him some prospect* that, late in his career, *he may again participate* in the management of companies. *I do not think it would be right to impose a term of disqualification which, in practical terms, would close off forever a return* to the kind of management occupation he has followed for the last 2 decades." (emphasis added)

55 His Honour went on to say[79]:

> "Conduct such as that of [the second defendant] in acknowledging his breaches, expressing appropriate contrition and agreeing to be subject to remedies including judgment for an enormous sum, ought to be recognised when it occurs and given encouragement by accepting some moderation in what must be a severe outcome."

56 It is difficult to read these passages without concluding that there is little difference in the approach of his Honour and the approach of judges making orders or imposing sentences in the criminal jurisdiction. It is hard to escape the conclusion that, in determining the period of disqualification, the courts consider that the larger the loss the longer the period of disqualification that is justified. If

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76 *Rich* (2003) 44 ACSR 682 at 692.

77 *Rich* (2003) 44 ACSR 682 at 692 per Bryson J.

78 *Rich* (2003) 44 ACSR 682 at 692.

79 *Rich* (2003) 44 ACSR 682 at 693.

that is so, and I think that it is, it indicates that *retribution* is as much a factor as protection of the public. There is no *a priori* reason why the protection of the public requires a person who is responsible for the loss of $100 million to be disqualified for a longer period than a person who is responsible for the loss of $100,000. The person responsible for the smaller loss may be a far greater danger to the public than the person responsible for the larger loss. Yet, given the approach of the courts, if other things are equal, the person responsible for the major loss will almost certainly receive a far longer period of disqualification.

57 Another matter which suggests that retribution is a factor behind the making of a disqualification order, including the appropriate length of disqualification, is the relevance of the defendant's having obtained some personal benefit from the conduct that gives rise to the application for disqualification. Thus, in *Australian Securities Commission v Donovan*, Cooper J said[80] that in determining whether a disqualification order is appropriate and, if so, the length of such disqualification, the extent to which the person benefited from the conduct personally or tried to conceal it are relevant matters.

58 Further, the fact that courts take into account mitigating factors suggests that the jurisdiction is not purely protective. For example, both the Victorian Supreme Court and the Court of Appeal in *Australian Securities and Investments Commission v Plymin (No 2)*[81] and *Elliott*[82] and Gzell J in the New South Wales Supreme Court in *Australian Securities and Investments Commission v Whitlam (No 2)*[83] took into account mitigating factors when determining whether to order disqualification and when assessing the appropriate period of disqualification of the defendant company directors. In *Plymin* and *Elliott* such factors included the defendants' previous unblemished corporate record, remorse and their co-operation with relevant authorities, including the Australian Securities and Investments Commission and external administrators[84]. In *Whitlam (No 2)*, Gzell J also took into account the loss to the community of the defendant's services if he were disqualified and the irreparable effect of the proceedings upon the defendant's reputation, income, career and family[85].

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80 (1998) 28 ACSR 583 at 606.

81 (2003) 21 ACLC 1237.

82 (2004) 48 ACSR 621.

83 (2002) 42 ACSR 515.

84 *Plymin* (2003) 21 ACLC 1237 at 1247-1248, 1252 per Mandie J; *Elliott* (2004) 48 ACSR 621 at 660.

85 (2002) 42 ACSR 515 at 520-521.

59 It is for the reasons given in the joint judgment and these additional reasons that I join in the orders of the Court in the present case.

60 KIRBY J. Two related points lead me to a conclusion different from that reached by the other members of this Court[86]. I would have dismissed the appellants' appeal from the judgment of the New South Wales Court of Appeal[87]. I accept, as that Court did[88], that some considerations favour the conclusion now endorsed by this Court. However, the opposite conclusion is to be preferred.

61 The first consideration, critical for me, concerns the approach to the task in hand. As I see it, it involves, fundamentally, the ascertainment of the meaning and application of the *Corporations Act* 2001 (Cth) ("the Act"). The case was turned, instead, into one addressed to the principles of the common law affording a privilege in certain circumstances against exposure to penalties or forfeiture ("the penalty privilege"). Whilst the survival of the penalty privilege in the context of the Act was an issue presented in argument, the fundamental duty of the Court is to interpret, and give effect to, the Act according to its true meaning.

62 Secondly, in fulfilling that duty, this Court could scarcely minimise the indications in the Act, and in the corporate context to which the Act responds, of the serious problems which the provisions of the Act were designed to address. These have both an Australian and global character. When those problems are remembered, the provisions of the Act can be better understood. They were designed to fulfil very important purposes concerned with corporate governance.

63 Those purposes are part of a very detailed regulatory scheme enacted to contribute to the improved management and control of Australian corporations. They are not, as such, "inflicted"[89] or "imposed"[90] as a "penalty"[91], or as punishment, or as an order "in the nature of a penalty"[92], on the appellants. Getting the character of the provisions of the Act right is essential to the proper application in this context of any residual rule of the common law as to penalty privilege.

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86 Reasons of Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ ("the joint reasons") and reasons of McHugh J.

87 *Rich v Australian Securities and Investments Commission* (2003) 203 ALR 671.

88 *Rich* (2003) 203 ALR 671 at 693 [113] per Spigelman CJ, [119] per Ipp JA (concurring).

89 *Smith v Read* (1737) 1 Atk 527 at 527 per Lord Hardwicke LC [26 ER 332 at 332].

90 *Adams v Batley* (1887) 18 QBD 625 at 629 per Lord Esher MR.

91 *Smith v Read* (1737) 1 Atk 527 at 527 per Lord Hardwicke LC [26 ER 332 at 332].

92 *R v Associated Northern Collieries* (1910) 11 CLR 738 at 744 per Isaacs J; *Police Service Board v Morris* (1985) 156 CLR 397 at 403 per Gibbs CJ.

64 Mine is a minority view. The other members of the Court joined in the orders announced at the end of oral argument[93]. I now state my reasons for coming to the opposite conclusion.

The facts, legislation and decisional history

65 *The facts and legislation*: Most of the facts, particular to the proceedings involving Mr John Rich and Mr Mark Silbermann ("the appellants") and their resistance to the application for discovery brought by the Australian Securities and Investments Commission ("the Commission") are set out in the joint reasons[94]. Also explained there, by reference to the Act and other legislation[95], may be found descriptions of the functions and authority of the Commission and the proceedings it has taken against the appellants under the Act for a "declaration of contravention"[96], compensation orders[97], and disqualification "from managing corporations for the period that the Court considers appropriate"[98]. As is explained, the Commission relied upon one subparagraph of the Act providing for a person's disqualification if such person[99]:

> "has at least twice contravened this Act while they were an officer of a body corporate".

66 Like the other members of this Court, I will assume that breach of the nominated provision of the former Corporations Law would be picked up by the transitional provision in the Act[100], so that past contravention of the Corporations

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93 See joint reasons at [5] and reasons of McHugh J at [59].

94 Joint reasons at [1]-[10].

95 *Australian Securities and Investments Commission Act* 2001 (Cth); *Australian Securities and Investments Commission Act* 1989 (Cth) and the former Corporations Law; see joint reasons at [11]-[20].

96 The Act, s 1317E(1).

97 The Act, s 1317H(1).

98 The Act, s 206E(1).

99 The Act, s 206E(1)(a)(ii).

100 The Act, s 1400.

Law, if proved, would amount, for these purposes, to a contravention of the Act[101].

67 I will not repeat the other provisions of the Act or of the Corporations Law. As appears from those provisions, the Parliament has made it plain that "[i]f a Court is satisfied that a person has contravened 1 of the … provisions [including contravention of s 180(1) of the Act], it *must* make a declaration of contravention"[102].

68 The provisions giving rise to the obligatory declaration are described by the Parliament as "civil penalty provisions". The reference to the concept of "civil penalty" is contained in the heading to the part of the Act in which the provision for declarations of contravention appears ("Part 9.4B – Civil consequences of contravening civil penalty provisions"). The words "civil penalty provisions" appear repeatedly, as if in emphasis, throughout that Part. As the joint reasons observe, such legislative descriptions do not foreclose the classification by a court of the true character of the relief consequent upon "declarations of contravention"[103]. By the same token, these references and the companion provisions (by contra-distinction) for "criminal proceedings"[104], are not unimportant. They make it clear that the concept of "civil penalty" was deliberately introduced.

69 On the face of things, the language employed by the Act was designed to draw a sharp distinction between remedies for the enforcement of corporations law that are to be classified as "criminal" (or "penal") in character and those that are to be classified as "civil". This distinction has a history in Australian federal legislation[105]. It can be traced to early provisions of the *Customs Act* 1901 (Cth) and the *Excise Act* 1901 (Cth)[106]. Similar distinctions have long existed in the

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101 See joint reasons at [18].

102 The Act, s 1317E(1) (emphasis added).

103 Joint reasons at [22]. See also *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* [2004] HCA 36 at [107]-[111] of my own reasons; *Al-Kateb v Godwin* [2004] HCA 37 at [155].

104 The Act, ss 1317M, 1317N, 1317P, 1317Q.

105 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 77 ALJR 1629; 201 ALR 1.

106 The history is described in *Labrador* (2003) 77 ALJR 1629 at 1633 [24] per Gummow J, 1646 [101]-[107] per Hayne J; 201 ALR 1 at 6-7, 24-26. See also Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia,* Report No 95, (2002) at 115 [3.45].

legislation of other countries[107]. In more recent times, the distinction has been supported, as a matter of principle, because of the large growth in the number of statutory criminal offences, with the suggested consequence that the notion of criminality itself is becoming debased. That concern has led to the view that "true" crimes should be distinguished from substantially regulatory concerns. Such a distinction is particularly important where the law in question is addressed to the regulation of economic conduct, including the management of corporations[108].

70 *The decisional history*: The joint reasons describe the conclusions adverse to the appellants on the present point, reached successively by the primary judge in the Supreme Court of New South Wales (Austin J)[109] and the majority of the Court of Appeal[110]. It is impossible, in a brief description, to do full credit either to the view of the majority judges below or to the dissenting opinion that is now vindicated by the majority of this Court. All of the judges addressed themselves to the language, and imputed purposes, of the Act read in its legislative context and considered alongside the longstanding common law (and equitable) principles relating to the penalty privilege.

71 In resolving the point of objection raised by the appellants, the primary judge was greatly influenced by what he took to be the "well established" principles governing penalty privilege explained by Deane J in *Refrigerated Express Lines (Australasia) Pty Ltd v Australian Meat and Livestock Corporation*[111]. He noted that Deane J's exposition in this regard had been referred to, and applied, by the majority of this Court in *Pyneboard Pty Ltd v*

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107 Notably in the United States and Germany. In Germany, regulatory offences (*Ordnungswidrigkeiten*) follow procedures different from those governing criminal offences (*Straflichkeiten*). See Ogus, *Regulation: Legal Form and Economic Theory*, (1994) at 80.

108 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95, (2002) at 113 referring to Yeung, "Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective", (1999) 23 *Melbourne University Law Review* 440 at 458-459.

109 *Australian Securities and Investments Commission v Rich* (2003) 45 ACSR 305; 21 ACLC 920.

110 *Rich* (2003) 203 ALR 671 per Spigelman CJ, Ipp JA concurring; McColl JA (diss). See joint reasons at [3], [30]-[34].

111 (1979) 42 FLR 204 at 207. See *ASIC* (2003) 45 ACSR 305 at 309-310 [19]; 21 ACLC 920 at 925.

Trade Practices Commission[112]. After an analysis of *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*[113], the primary judge decided that the principles in *Refrigerated Express* remained the law following *Daniels*[114]. Certainly, that view is consistent with my own opinion as stated in *Daniels*[115]. As a matter of principle, because *Daniels* was basically concerned with the *Trade Practices Act* 1974 (Cth) and legal professional privilege, the primary judge's analysis of the law in this regard cannot be faulted.

72 In *Refrigerated Express*[116], Deane J said:

> "[I]n a case such as the present where the proceedings are not for the recovery of a penalty, there is no general rule precluding the making of an order for discovery or interrogatories and there will ordinarily be no proper ground for objecting to an order for production of documents or provision of information being made. The party against whom such an order is made is left to object to producing particular documents or providing particular information on the ground that such production or provision may tend to expose him to a penalty (see *Mayor of the County Borough of Derby v Derbyshire County Council*[117])".

73 It was this principle that the primary judge proceeded to apply. His orders, described in the joint reasons[118], reflected the principle. Upon his analysis of the Act, it afforded no exemption to the appellants from the ordinary incidents inherent in the civil character of the legal proceedings initiated by the Commission. It followed that the obligation, usual in proceedings of such a character, applied. The appellants were bound to make discovery of documents relevant to the proceedings by verified list. The primary judge reserved any other privilege which the appellants might subsequently claim and to which they might be entitled. However, he refused them the blanket exemption, sought by the appellants, from the obligation to make discovery of the affected documents. No

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112 (1983) 152 CLR 328 at 336 per Mason ACJ, Wilson and Dawson JJ.

113 (2002) 213 CLR 543 at 559 [31].

114 *ASIC* (2003) 45 ACSR 305 at 312 [29]; 21 ACLC 920 at 927.

115 (2002) 213 CLR 543 at 569 [65].

116 (1979) 42 FLR 204 at 208.

117 [1897] AC 550 at 553.

118 Joint reasons at [39].

such exemption was provided by the Act. Applying *Refrigerated Express*, endorsed by *Pyneboard*, the primary judge concluded that no such exemption should be read into the Act. The majority of the Court of Appeal affirmed this approach.

The suggested error warranting correction is not established

74 *Suggested error: punitive/protective*: It would not be sufficient for this Court to disturb the conclusions reached by the primary judge, and the majority of the Court of Appeal, simply because it formed a different impression as to the meaning of the Act and its operation where a claim of the penalty privilege had been made. Because the process before this Court is an appeal, it was necessary for the appellants to establish error in the reasoning of the Court of Appeal majority, endorsing the conclusion of the primary judge. Most matters involving statutory construction – including as it relates to pre-existing principles of equity and the common law – are contestable by the time they reach this Court. Upon many such questions there is no absolutely correct decision, certainly in the objective sense[119]. That is one reason why it is necessary for appellants to point to error. The present appellants assumed that obligation.

75 They contended that the error that had intruded into the reasons of Spigelman CJ (who delivered the majority opinion in the Court of Appeal) was to be found in his Honour's repeated reference to the "protective purpose" of the provisions of the Act invoked against the appellants by the Commission[120]. The appellants argued that, by drawing a distinction between "protective" and "punitive" purposes, the majority of the Court of Appeal had given effect to a false dichotomy. Much indisputably punitive legislation also has a purpose of protecting society, particular segments of society or identified victims from the conduct that is sanctioned. Indeed, one of the recognised objects of the criminal law itself is the protection of society[121]. A majority of this Court now accepts that this was an error in the approach of the majority of the Court of Appeal, justifying and requiring correction by this Court[122]. I disagree.

76 It is true that there are several references in the reasons of Spigelman CJ to the distinction between a "punitive" and a "protective" purpose of legislation.

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119 *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 77 ALJR 1515 at 1524 [42] per McHugh J; 200 ALR 157 at 168.

120 *Rich* (2003) 203 ALR 671 at 679 [45], 680-685 [50]-[80].

121 A point well made by McColl JA in *Rich* (2003) 203 ALR 671 at 739 [381], by reference to authority.

122 Joint reasons at [30]-[33] and reasons of McHugh J at [41], [59].

They appear in reasoning that necessarily had to address the question of how the Act operated in circumstances where the appellants claimed immunity from the duty of discovery because they were subjected to a "penalty or [something] in the nature of a penalty"[123]. Thus, in an important section of his reasons, under the heading "The punitive/protective distinction"[124], Spigelman CJ referred to, and elaborated, passages in the reasoning of the primary judge recounting[125] "a long line of authority which identifies orders for the disqualification of persons from being involved in the management of corporations as having a 'protective' rather than a 'punitive' purpose"[126].

77 Spigelman CJ also pointed out that "the distinction between a 'protective' and 'punitive' purpose has been made in numerous legal contexts"[127]. He cited passages from the reasons in *Chu Kheng Lim v Minister for Immigration*[128] where Brennan, Deane and Dawson JJ, as well as McHugh J, differentiated "punitive" and "non-punitive" objectives and effects of federal legislation for constitutional purposes[129]. From these, it was argued (and is now decided) that the judges of the majority opinion below fell into error, necessitating reversal of their orders by this Court.

78 *Attention to classification and characterisation*: I regard this conclusion as unsustained by a careful reading both of the reasons of the primary judge and of Spigelman CJ in the Court of Appeal.

79 The primary judge was most careful to emphasise the caution that had to be taken in transposing remarks made for other purposes "into the context in which a *classification* must be made for the purposes of the privilege against exposure to penalties"[130]. The word that the primary judge repeatedly used in his

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123 *Smith v Read* (1737) 1 Atk 527 at 527 per Lord Hardwicke LC [26 ER 332 at 332].

124 *Rich* (2003) 203 ALR 671 at 680 [48].

125 *ASIC* (2003) 45 ACSR 305 at 313 [31]; 21 ACLC 920 at 927.

126 *Rich* (2003) 203 ALR 671 at 680 [48].

127 *Rich* (2003) 203 ALR 671 at 680 [50].

128 (1992) 176 CLR 1 at 28, 71.

129 In the context of distinguishing between "immigration detention" that might be imposed by legislative provisions or executive action and "imprisonment" that might only be imposed as punishment pursuant to a judicial order.

130 *ASIC* (2003) 45 ACSR 305 at 313 [32]; 21 ACLC 920 at 927 (emphasis added).

reasons was "classification"[131]. He recognised, as is self-evident, that many things done by courts in the exercise of civil jurisdiction have "catastrophic consequences" upon parties. They imposed "substantial hardship" on them. He accepted that a disqualification order, such as that sought here, would be such an instance. However, addressing himself to the claim for exemption from the ordinary obligation to make discovery, that would otherwise be required in proceedings classified by the Act as "civil" in character, the primary judge said that the submission of hardship consequences "misses the point"[132]. For his Honour, "the issue" was "whether a disqualification order should be placed in the same group as punishment, penalty, forfeiture and ecclesiastical censure"[133] – those being the historical categories from which the penalty privilege originated.

80 The primary judge's repeated references to "classification" and placing the disqualification order in an identified "group" makes it clear that he understood his task as one rather more subtle than the appellants have pictured it. Where his Honour referred to the treatment of disqualification orders "as protective rather than punitive in nature"[134], his words must not be divorced from their context and the judicial task he had set himself – to "classify" and "group" the disqualification order as attracting, or not attracting, the penalty privilege in what were otherwise civil proceedings[135].

81 When Spigelman CJ endorsed[136], as he did, the reasoning of the primary judge, he was not embracing a simplistic or universal distinction between orders that were "punitive" or "protective" in purpose. It would be unlikely that a judge regularly engaged in criminal appeals would draw such a manifestly erroneous Pope's Line through the whole world of judicial orders and for all legal purposes. To the contrary, the detail of Spigelman CJ's reasoning makes it clear that he cannot be charged with falling into such a rudimentary error.

82 In fact, the reasons of Spigelman CJ contain two very clear indications that no such error was made. The reasons are full of references to the judicial task as being one of "characterisation" of the subject orders for the purpose of

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131 *ASIC* (2003) 45 ACSR 305 at 313 [32]; 21 ACLC 920 at 927.

132 *ASIC* (2003) 45 ACSR 305 at 313 [32]; 21 ACLC 920 at 928.

133 *ASIC* (2003) 45 ACSR 305 at 313 [32]; 21 ACLC 920 at 928.

134 *ASIC* (2003) 45 ACSR 305 at 313 [32]; 21 ACLC 920 at 928.

135 See also *ASIC* (2003) 45 ACSR 305 at 317 [53]; 21 ACLC 920 at 931, where the primary judge returned to how it was "appropriate to classify" the order.

136 *Rich* (2003) 203 ALR 671 at 680 [48]-[49].

considering whether, subject to the Act, they were of such a "character" as to attract the penalty privilege.

83 The repeated reference to the duty of "characterisation" for penalty privilege purposes[137] makes it clear, to me at least, that Spigelman CJ recognised that his function was to "characterise", "classify" or "catalogue" the provisions of the Act in question and to do so by reference to the legislative scheme and for the purpose of considering whether it had sufficiently excluded the penalty privilege or not. Thus, his Honour said[138]:

> "For some purposes it may be appropriate to *characterise* the consequences of a sanction in terms of language such as 'punitive' and 'punishment'. That does not however determine the issue of *characterisation* with respect to the application of the penalty privilege."

84 If this passage is not sufficient to demonstrate a recognition of the complex evaluative function in which the Court of Appeal was engaged, Spigelman CJ made his position completely clear in his conclusions. He acknowledged countervailing considerations in the Act. He recognised the burden that a disqualification order cast on those affected. However, he concluded, "*on balance*, that an order under either s 206C or s 206E of the Act should not be *characterised* as a penalty for purposes of the penalty privilege"[139]. In such circumstances, to hold that Spigelman CJ simply applied a crude "punitive/protective" dichotomy in reaching the orders of the Court of Appeal ignores the way his Honour reasoned to his result. The reasoning shows that he did what was required. He conducted a search for the "essential character" of the proceedings in order to classify them for the purpose in hand[140].

85 *Analysis of the statutory provisions*: A second indication confirms this conclusion. A substantial part of the reasons of Spigelman CJ involved a detailed analysis of the provisions of the Act[141]. It was this that brought his Honour to the conclusion that he finally expressed as to the characterisation of the disqualification order "as a penalty for purposes of the penalty privilege"[142].

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137 See *Rich* (2003) 203 ALR 671 at 683 [73], 686 [88], [90], [92], 687 [93], 693 [114].

138 *Rich* (2003) 203 ALR 671 at 686 [88] (emphasis added).

139 *Rich* (2003) 203 ALR 671 at 693 [114] (emphasis added).

140 *Labrador* (2003) 77 ALJR 1629 at 1653 [136] per Hayne J; 201 ALR 1 at 34.

141 *Rich* (2003) 203 ALR 671 at 687-691 [94]-[107].

142 *Rich* (2003) 203 ALR 671 at 691-693 [108]-[114].

Words may be taken from his reasons to support the suggested error of imposing a false dichotomy of "punitive/protective" as a sole criterion for the availability or otherwise of the penalty privilege. However, a fair reading of the entire reasons makes it plain that no such error was made. Nor was that error made by the primary judge. At both levels below, it was recognised that the judicial task was one of "classification" and "characterisation" of the disqualification order for the instant purpose. That task had to be discharged by a close examination of the language, scheme and purposes of the Act. That examination was understood and accurately discharged.

86 In his reasons[143], McHugh J has sought to sustain the order favoured by the majority of this Court by reference to cases at first instance that have approached questions of disqualification of company officers in ways similar to criminal sentencing[144]. Those decisions are not themselves under review in this appeal. Accordingly, their correctness (and in particular the correctness of the "fifteen point guide" to disqualification orders considered in one of them[145]) was not argued or considered in this appeal. Principle and fair procedures require that this Court reserve its position upon them.

87 Given that the relevant part of the Act provides separately for *criminal* and *civil* sanctions, it is erroneous to conflate the two or to approach disqualification orders, classified by the Parliament as civil, in the same way as if they imposed criminal sanctions. This is not to question the correctness of the actual orders made in the cited decisions. Nor is it to doubt that, in resolving disqualification questions, it is necessary for the trial court to consider in detail the nature, quality, duration and intent of the alleged contraventions of the Act by the officer concerned. Only in that way will the trial court be able to decide whether the disqualification in the future is "justified" or not[146]. The Act obliges consideration to be given to "conduct in relation to the management, business or property of any corporation" and other matters considered appropriate[147]. But it does so not, as such, to measure any criminal punishment on the officer concerned. It does so to judge the likely future conduct of the officer if

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143 Reasons of McHugh J at [48]-[58].

144 *Re HIH Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80; *Re One.Tel Ltd (in liq); Australian Securities and Investments Commission v Rich* (2003) 44 ACSR 682. See reasons of McHugh J at [48]-[58].

145 *Re HIH Insurance Ltd (in prov liq)* (2002) 42 ACSR 80 at 97-99 [56] per Santow J.

146 See the Act, ss 206C(1)(b), 206E(1)(b).

147 See the Act, s 206E(2).

disqualification is refused. Of its nature, disqualification looks to the future; not to the past. It protects the investing public, shareholders and others by immobilising the proved contravener and depriving him or her, for the specified period, of the position of trust and power that office in a corporation involves. Of course, the order has a serious economic and reputational consequence for the officer who is disqualified. But its purpose is not, as such, to impose criminal punishment. If it were punitive, it would say so and it would have been placed in a different part of the Act.

88 *Conclusion: error is not shown*: It follows that the suggested error that was said to justify the intervention of this Court was not made good. In any case, I consider that the conclusion reached by the majority judges below involved the correct application of the relevant legal authority, taking into account applicable considerations of legal principle and legal policy.

89 This brings me back to the matters mentioned at the outset of these reasons: the primacy of the Act and the relevant national and global circumstances to which the Act is intended to respond.

The primacy of the Act

90 *Duty to the written law*: Despite appearances to the contrary, which would have been left as a lasting impression to anyone who heard the argument of this appeal, properly analysed, this case is not about the enforcement of principles of the common law affording a privilege to persons against exposure to penalties. That issue is only incidentally raised. The fundamental duty of the Court is one with which the appellants appeared much less happy to grapple. This was, and is, the duty, where there is valid legislation made by an Australian Parliament, to give effect to the written law, discovering its purposes from the language, structure and context.

91 I made this point in *Daniels*[148], in explaining my more hesitant acceptance of the conclusion reached in that case. The Court there decided that, notwithstanding the terms of s 155 of the *Trade Practices Act* 1974 (Cth), legal professional privilege, afforded by the common law, was not abrogated by the section[149]. In *Daniels*, I explained my approach (to which I adhere) in these terms[150]:

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148 (2002) 213 CLR 543 at 571 [73].

149 *Daniels* (2002) 213 CLR 543 at 578 [95]. See also at 560 [35], 561 [37], 563-564 [45], 567 [56], 585 [115].

150 *Daniels* (2002) 213 CLR 543 at 571 [73] (footnotes omitted).

> "[T]he law on the subject having been reduced to statutory form (and no constitutional objection being raised as to its validity), the correct starting point for analysis is the language of s 155, not pre-existing doctrines of the common law. Where valid legislation has been enacted, the function of a court is to give effect to it, not to common law rights as if the Parliament had not spoken. This is obviously the approach favoured by Brennan J in *Pyneboard*. It has the merit of concentrating the attention of the decision-maker upon the enactment of the Parliament and giving primacy to its purposes as stated in its words."

92 As I pointed out in *Daniels*[151], this approach is conformable with the repeated insistence by this Court on focussing upon the terms of any applicable legislation "rather than use [of] pre-existing common law or unconnected expositions" to distract the decision-maker from the primary obligation.

93 Later, in *Trust Company of Australia Ltd v Commissioner of State Revenue*[152], I returned to this point[153]:

> "Obedience to the text of legislative provisions is founded on a critical postulate of democratic governance that is inherent in the Australian Constitution. In our Commonwealth it is the first duty of the courts to give effect to a valid legislative purpose where it is expressed in law. The primacy of that obligation derives from the special legitimacy of the written law that may, in turn, be traced to the imputed endorsement of such a law by legislators elected by the people."

94 It is important to repeat these observations in the present appeal. Excessive attention was paid in argument to the history of the penalty privilege. I do not say that the history is without interest. After all, it rekindles memories of the urgent need in earlier times of a privilege "against exposure to

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151 *Daniels* (2002) 213 CLR 543 at 571 [73], by reference to *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 207 CLR 72 at 77 [9], 89 [46]; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 38-39 [14]-[15], 111-112 [249]. See also *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 77 ALJR 1893 at 1897 [24] per Gleeson CJ, McHugh, Gummow and Hayne JJ; 201 ALR 414 at 420.

152 (2003) 77 ALJR 1019; 197 ALR 297.

153 (2003) 77 ALJR 1019 at 1029 [68]; 197 ALR 297 at 310. See also *Attorney-General (WA) v Marquet* (2003) 78 ALJR 105 at 130-131 [146]-[148]; 202 ALR 233 at 268.

ecclesiastical censure" and the like[154], to prosecutions by common informers[155], to cases involving forfeiture of estates for simony[156] and to the activities of the disreputable Mr McRae who acted, during the American Civil War, as an agent for the Confederate States[157]. Such exotic relics of legal history demonstrate the lineage of the penalty privilege. However, they throw but a candle's light upon the issue in this appeal. That issue, from first to last, is the meaning of Australian federal statute law. It is whether the Act, read to achieve the important objectives of the Federal Parliament, leaves any room for the penalty privilege to operate in the appellants' case.

95 *Assignment to civil procedure*: Difficulties sometimes arise in classifying a statutory proceeding as a "civil" or "criminal" procedure. A recent illustration may be found in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd*[158]. That case demonstrates that the starting point in questions of this kind must always be a close analysis of the legislation. If the matter in question is not dealt with expressly or by clear implication in the Act, a judgment is required. It will be informed both by textual analysis and by consideration of legal principle and policy.

96 In this case, the applicable provisions of the Act draw the clearest possible distinction between "civil proceedings" and "criminal proceedings" in respect of conduct constituting a contravention of a civil penalty provision as defined[159]. The proceedings that the Commission brought against the appellants were for contravention of "civil penalty provisions"[160]. Here, there was no civil remedy in the nature of a "conviction" (a word whose appearance proved decisive for the resolution of the question in *Labrador*[161]). The Act in this case expressly

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154 See eg *Trial of Sir John Freind* (1696) 13 St Tr 1 at 17; *R v Lord George Gordon* (1781) 2 Doug 591 [99 ER 372].

155 Joint reasons at [23], citing *Naismith v McGovern* (1953) 90 CLR 336 at 341-342.

156 Joint reasons at [26], citing *Parkhurst v Lowten* (1816) 1 Mer 391 [35 ER 718].

157 Joint reasons at [26], citing *United States of America v McRae* (1867) LR 3 Ch App 79.

158 (2003) 77 ALJR 1629; 201 ALR 1.

159 The Act, ss 1317M, 1317N, 1317P, 1317Q.

160 The Act, s 1317E(1).

161 (2003) 77 ALJR 1629 at 1638 [56], 1648 [110], 1653-1654 [137]; 201 ALR 1 at 12, 26-27, 34-35.

envisages criminal proceedings that may lead to a "conviction". However, such proceedings are differentiated in the legislative text from the proceedings that the Commission has brought against the appellants.

97 The relief claimed by the Commission includes the making of declarations of contravention. This imports the requirement of s 1317L of the Act obliging the trial court to "apply the rules of evidence and procedure for civil matters when hearing [the] proceedings". The joint reasons derive from that instruction the importation of the principle governing the penalty privilege. This is not how I read the Act, including s 1317L. For me, that section is simply one of a number by which the Parliament has taken pains to make it clear that in specifying "[c]ivil consequences of contravening civil penalty provisions"[162], it is deliberately classifying the remedies provided as "civil" (regulatory) and not "criminal" (penal) – including for the penalty privilege.

98 It is true that, by the Act, a "declaration of contravention" is sought in this case in respect of breaches of provisions that the Parliament has described as "civil *penalty* provisions"[163]. However, in the context, the noun ("penalty") is less important than the adjective ("civil"). On its own, a "penalty provision" might attract the penalty privilege. However, by expressly qualifying these penalties by the adjective "civil", the Parliament has, in my view, deliberately placed them outside the category that would otherwise enliven that privilege.

99 Where (as in this case) neither "pecuniary penalty orders"[164], nor other relief of a hybrid and clearly punitive or penal kind[165] have been sought against the appellants, issues that might have been relevant to assigning the remedies sought to the "nature of a penalty" (for the purpose of the penalty privilege) have been avoided. The relief claimed by the Commission was restricted to declarations of contravention (s 1317E), compensation orders (s 1317H) and disqualification orders (ss 206C and 206E). Whatever might be the case where other relief is sought, that claimed by the Commission against the appellants is neither overtly "criminal" or "penal" in character nor "in the nature of a penalty" when measured against the language, structure and design of the Act. In argument of the appeal, I raised a question whether the very large orders for compensation sought by the Commission might be characterised as penal

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162 The Act, Pt 9.4B (heading).

163 The Act, ss 1317DA, 1317E(1)(a) (emphasis added).

164 The Act, s 1317G.

165 See eg the Act, s 206F, and *Rich* (2003) 203 ALR 671 at 692 [108], where possible constitutional issues are noted, should such provisions be deemed penal in character.

because of their size. However, this was not contended and the better view is that they are, in character, as they are described: "compensatory".

100 *The over-reach of "prove it"*: For people who have derived a livelihood as company officers, disqualification from holding such offices is doubtless a very serious personal, financial and reputational burden. But so may be the outcome of a civil action in the courts asserting negligence or misconduct against professional defendants. The consequences for the person affected cannot, alone, determine the characterisation of the contested order for the instant purpose. Such a view would expand enormously the application of the penalty privilege. Subject to any statutory provisions, it would, for example, allow professionals summoned before disciplinary proceedings to refuse discovery and to deny access to relevant documents, meeting such demands with the dismissive statement "you prove it".

101 To the extent that anything said in the joint reasons in *Daniels* would give support to such an over-wide view of the reach of the penalty privilege[166], it goes far beyond the previous law. It does so in a case where it was unnecessary for the decision. And it expands the penalty privilege in a way, and at a time, when such an expansion is out of harmony with the introduction of a "pyramid" of statutory responses to the complex subjects of contemporary social and economic regulation[167].

102 *Disqualification of directors*: Because it was not suggested that the compensatory orders sought by the Commission were penal, so as to attract the penalty privilege, the ultimate issue in the appeal became whether the disqualification orders were such.

103 Provision for court orders preventing a person from engaging in relevant acts of management of corporations can be traced, at least, to amendments of the *Companies Act* 1928 (UK). The provisions then enacted followed complaints about the suggested abuse of the protection of limited liability accorded to corporations. The amendments were accepted following the report of an expert committee[168] that identified a mischief by which bankrupts were reportedly using

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166 See *Daniels* (2002) 213 CLR 543 at 559 [31]; *Rich* (2003) 203 ALR 671 at 677 [32].

167 Australia, Senate, Standing Committee on Legal and Constitutional Affairs, *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors*, (1989) ("the Cooney Committee Report"). See *Rich* (2003) 203 ALR 671 at 688 [100].

168 United Kingdom, *Report of the Company Law Amendment Committee*, (1926) at [56].

corporations "to continue trading under the guise of a limited company, with results often disastrous to those who have given credit to the company".

104 Disqualification from corporate management was a *quid pro quo* for the trust essential to the enjoyment of the powers and privileges of that position. Because corporations are creatures of statute, as are their officers, the entitlement of corporate governance is a statutory privilege. It is inherently susceptible to variation or withdrawal upon demonstrated unfitness to enjoy that privilege. An impact of that withdrawal on the person affected is inescapable. However, that impact does not give the disqualification order its *character*. That character derives from the regulation of corporations and of the officers whom the community permits to hold themselves out to the world as fit managers of shareholders' funds, entitled as such to the confidence of investors, employees, traders and the community generally.

105 People such as the appellants (or anyone else for that matter) have no *right* to be involved in company management. It is a statutory *privilege* to be earned each day. That privilege may be withdrawn for misconduct but also for incompetent, improper or lax activities in the functions of corporate management. Given the critical importance of the good management of corporations for investors, employees, traders, the nation and the wider world, the Act, like its 1928 predecessor in Britain, has provided for the removal from corporate management of persons guilty of repeated contraventions of the Act[169].

106 The burdens of disqualification for a manager affected are recognised in the Act by the provision of defences and by the protection afforded by judicial evaluation and assessment of the claim. However, in the scheme of the Act, the disadvantages for the individual manager are entirely incidental to the achievement of the legitimate statutory objective of ensuring the integrity of the management of corporations in Australia for all who are involved with them. It is destructive of this high purpose to adopt a construction of the Act that reads down the relevant section with a view to the protection of the personal rights of the director as such. Such a reading undermines the strong policy of Pt 2D.6 of Ch 2D of the Act ("Disqualification from managing corporations"). It is not a reading of the Act that the Parliament intended. It is not a reading that this Court should accept.

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169 The Act, s 206E(1).

107 *The graduated enforcement pyramid*: Both the primary judge[170], and the majority in the Court of Appeal[171], examined at length the statutory texts together with the legislative history and materials relevant to the debates concerning graded non-criminal responses to the necessities of contemporary economic regulation[172].

108 As McColl JA remarked in the Court of Appeal[173], much of this background material reflects a rejection of the rigid "bipolar" classification of legislative provisions as "civil" or "criminal". That rejection is harmonious with recent decisions of this Court[174]. However, an understanding of the very significant shift in the design of legislative sanctions and remedies to enforce the Parliament's will makes it important that this Court should avoid superimposing on the graduated statutory pyramid of sanctions and remedies any over-simplification inherent in past common law and equitable principles reflected in the penalty privilege. That privilege developed in an earlier time of less legislation and simpler provisions. To graft it now onto every statutory provision that casts a burden on an individual and to describe that burden as a "penalty" may risk undermining legislative attempts to develop graduated sanctions and remedies that go beyond the strict civil/penal paradigm. In the approach urged for the appellants, I saw no reflection of any appreciation of these major debates about economic and social regulation and differentiated legislative responses. The Act is clearly one such response.

109 *The legislative indications*: Significant parts of the reasons of the primary judge and of the Court of Appeal were devoted to an analysis of the Act and of the equivalent provisions in the former Corporations Law. I will not retrace all

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170 *ASIC* (2003) 45 ACSR 305 at 307 [5], 308-309 [15]; 21 ACLC 920 at 922-923, 924.

171 *Rich* (2003) 203 ALR 671 at 687-693 [94]-[113].

172 See Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95, (2002) at 76 [2.60]; see also Mann, "Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law", (1992) 101 *Yale Law Journal* 1795 at 1799; Gillooly and Wallace-Bruce, "Civil Penalties in Australian Legislation", (1994) 13 *University of Tasmania Law Review* 269 at 288.

173 *Rich* (2003) 203 ALR 671 at 736 [366]-[371].

174 See *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 8; *Labrador* (2003) 77 ALJR 1629; 201 ALR 1.

of these steps. I incorporate them by reference[175]. Some telling points, however, should be noticed.

110 Under the Corporations Law as at 1991 there was no provision empowering a court to disqualify a person from managing the affairs of a corporation by reason of a contravention of s 232(4)[176] as such. Such contravention amounted to an offence against the Corporations Law[177]. It rendered the offender liable, upon conviction, to a fine of $5,000[178]. That conviction empowered a court to order the payment of compensation to the corporation[179]. The corporation itself had wider rights of recovery[180]. Under the Law, where a person was an officer of a corporation who "repeatedly breached relevant legislation", the court could make an order prohibiting the person from managing a corporation[181]. There were other provisions in the Corporations Law by which a court could prohibit a person from managing a corporation[182].

111 The provisions of the Corporations Law were amended in 1992 by the insertion of the new Pt 9.4B, with its comprehensive treatment of "civil penalty provisions". The 1992 reforms were designed to implement the principle of a "pyramid of enforcement containing a hierarchy of sanctions"[183]. The explanatory paper accompanying the first draft of the Bill for the 1992 amendments explained the basic parliamentary objects[184]:

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175 *ASIC* (2003) 45 ACSR 305 at 307-309 [5]-[15]; 21 ACLC 920 at 922-924; *Rich* (2003) 203 ALR 671 at 687-692 [94]-[113].

176 The relevant statutory duty of care and diligence and predecessor to ss 180(1) and 181 of the Act.

177 Corporations Law, s 1311.

178 Corporations Law, Sched 3.

179 Corporations Law, s 232(7).

180 Corporations Law, s 232(8).

181 Corporations Law, s 230(1)(c).

182 Corporations Law, ss 599, 600; see *Rich* (2003) 203 ALR 671 at 687 [94]-[97].

183 *Rich* (2003) 203 ALR 671 at 688 [100].

184 Australia, Parliament, *Corporate Law Reform Bill 1992: Draft Legislation and Explanatory Paper*, (1992) at 50-51 [178], cited in *Rich* (2003) 203 ALR 671 at 688 [101] per Spigelman CJ.

> "It is expected that in settling an appropriate order, the Court would first give consideration to whether it should impose a civil penalty disqualification. The issue should be whether the defendant's conduct, while not criminal in nature, was so reprehensible and had such serious consequences as to warrant an order prohibiting the person from managing a corporation. For example, if gross negligence by a director had led directly to massive losses for shareholders, the Court may consider that a director should be disqualified for a substantial period, even where there was no question of a dishonest intent. The emphasis should be on preventing a recurrence of the contravention by the defendant, and providing a deterrent to other persons involved in the management of corporations. It is expected that the Court would consider imposing a pecuniary penalty only if it considered that a civil penalty disqualification provided an inadequate or inappropriate remedy."

112 With some minor variations[185], the provisions of the Corporations Law described above were incorporated in the Act when it was adopted. Given this history and the purposes thus revealed, together with the important economic objectives of the legislation, the insertion by this Court into the Act of an unexpressed protection from production on discovery of the documents of a manager cannot be justified. Because it arises as an issue in civil proceedings concerned with a manager's possible disqualification and removal from managing corporations, it impermissibly cuts across the achievement of the Parliament's clear purposes stated in its carefully calibrated provisions. So long as the legislation is constitutionally valid (a matter not here in dispute) the function of this Court is to give effect to those purposes. It is not to frustrate them[186].

113 It is clear from an examination of s 206C of the Act that its essential character is one of regulating the proper governance of corporations. The same conclusion applies to s 206E under which the Commission has sought the contested relief against the appellants. Only sub-par (ii) of s 206E(1)(a) requires a personal contravention of the Act by the relevant officer. By contrast, sub-par (i) requires only that the person has twice failed, while an officer of a body corporate that contravened the Act, to take reasonable steps to prevent such contraventions, that is, even if the failure to take those reasonable steps was not itself a contravention of the Act. Similarly, sub-par (iii) of s 206E(1)(a) refers to something that "would have contravened" ss 180(1) or 181, if the body corporate had been a corporation. No actual contravention is necessary.

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185 *Corporate Law Economic Reform Program Act* 1999 (Cth).

186 *Bropho v Western Australia* (1990) 171 CLR 1 at 20; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382.

114 These provisions of s 206E indicate clearly to my mind that the purpose and character of the Act in this respect, enlivened by the Commission's application for disqualification orders against the appellants, is not, as such, punishment of the appellants or something of that nature. True, a consequence is a burden on the appellants. However, viewed in the particular context of corporations law, that is not the *character* of the provisions in issue. Properly characterised, they constitute part of a law for the regulation of acceptable corporate management in Australia. It is a regulatory law to be applied in accordance with civil procedures. That incorporates obligations of verified discovery by parties such as the appellants.

115 *Conclusion: no glossing the Act*: For this Court to insert judicial protections against discovery for managers in the position of the appellants undermines the provisions of the Act. It contradicts this Court's repeated endorsement of the primacy of statute and of a purposive approach to the ascertainment of legislative meaning. It makes these errors by starting the examination of the problem at the wrong point – with the old common law and equitable principle of the penalty privilege rather than with the contemporary Act and its implementation to achieve important purposes of corporate governance introduced successively by legislatures throughout Australia in the 1990s and then enacted by the Parliament in 2001 in the form of the Act.

National and global corporate context

116 *The national corporate environment*: If the Court's function is to give effect to the Act, in accordance with its purpose stated in its language, there can be little doubt that the purpose of the provision for the disqualification of persons from the management of corporations was to improve the standard of corporate governance in Australia by monitoring the performance of corporate managers. Cases of dishonest intent might require the initiation of criminal proceedings. However, the innovation of the 1992 reforms was the introduction of a range of civil sanctions for serious cases of incompetence, neglect and repeated mismanagement of corporations.

117 Such were the demonstrated abuses and errors in the management of Australian corporations in the 1980s that widespread demands were made for an end to complacency and for an attack on "bad corporate governance" along a broad and varied front[187]. The provisions for court declarations of contravention of the civil penalty provisions and for the disqualification of directors were the

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187 du Plessis, "Reverberations after the HIH and other recent corporate collapses: the role of ASIC", (2003) 15 *Australian Journal of Corporate Law* 225 at 229. See generally Sykes, *The Bold Riders*, (1996).

outcome. The provisions cannot be viewed in isolation. They must be understood as a response by the legislatures of Australia to the serious dangers to the economy of the nation inherent in the multiple corporate collapses of the 1980s, repeated in equally "spectacular" form in more recent years[188]. Where the Parliament goes to the trouble of enacting reforms addressed to this large problem, it behoves this Court (unless there is a compelling reason to the contrary) to construe the resulting provisions so that they hit their mark and do not misfire[189].

118 The provision to the Commission of a wide range of remedies has resulted in many reported criminal proceedings; still more civil proceedings resulting in large recoveries and compensation orders; multiple successful cases of disqualification from corporate management; and other actions designed to improve the standards of corporate governance in this country[190]. Such considerations do not, of course, resolve the legal issue presented by this appeal. However, its resolution, without regard to the social and economic problem to which the Act was targeted, is equivalent to reading the Act with one eye closed.

119 *The international corporate environment*: Nor is the national context in which the Act provides for disqualification orders against corporate managers special to Australia. Developments in global and regional markets have "been a major driver of change in many aspects of financial markets and communications [and have had an] impact on corporate governance"[191]. International bodies, in which Australia participates, have developed regulatory principles designed to improve corporate regulation and behaviour[192]. These principles, in turn, have

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188 du Plessis, "Reverberations after the HIH and other recent corporate collapses: the role of ASIC", (2003) 15 *Australian Journal of Corporate Law* 225 at 225. See also Farrar, *Corporate Governance in Australia and New Zealand*, (2001) at 6.

189 Lord Diplock, "The Courts as Legislators", in Harvey (ed), *The Lawyer and Justice*, (1978) at 274, cited in *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 424 per McHugh JA.

190 The Commission statistics for 2001-2002 are cited in du Plessis, "Reverberations after the HIH and other recent corporate collapses: the role of ASIC", (2003) 15 *Australian Journal of Corporate Law* 225 at 242. They include reference to 20 disqualification orders in that interval.

191 Segal, "Corporate governance: substance over form", (2002) 25 *University of New South Wales Law Journal* 320 at 336.

192 eg Organisation for Economic Cooperation and Development, *Principles of Corporate Governance*, (1999). See Segal, "Corporate governance: substance over form", (2002) 25 *University of New South Wales Law Journal* 320 at 322.

drawn upon the work of advisory bodies in Australia[193], the United Kingdom[194] and elsewhere[195]. Such developments respond, in a transnational way, to publicised cases of corporate failures which now often have economic significance far beyond national borders. They emphasise managerial and directorial responsibilities and community expectations of a more proactive regulation of corporations, aimed at the steady maintenance of standards of integrity and competence in corporate governance. They reflect the view that participation in corporate governance is a privilege enjoyed by individuals subject to compliance with conditions. It is not a private right to be defended, as such, by notions such as the penalty privilege.

120 *Conclusion: upholding the Act's objectives*: This Court should therefore favour an interpretation of the Act, read in this national and global environment, that responds to such expectations. It should prefer that interpretation to one that frustrates the achievement in Australia of these large objectives.

Conclusions: the preferable construction of the Act

121 *Express reference to the privilege*: Like the Court below, I accept that there are some textual indications and arguments that could be invoked to support the appellants in their appeal. One such consideration was the inclusion in the Act of a specific provision addressing the penalty privilege in the context of mandatory examinations about a corporation's manageable affairs[196]. By s 597(12) a person is not excused from answering a question put at an examination "on the ground that the answer might tend to incriminate the person *or make the person liable to a penalty*"[197]. The terms of this provision gave rise

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193 Australia, Working Group on Corporate Practices and Conduct, *Corporate Practices and Conduct: a Public Discussion Paper*, (1995); Australia, Report of the Independent Working Party into Corporate Governance, *Strictly Boardroom: Improving Governance to Enhance Company Performance*, (1993).

194 United Kingdom, Committee on the Financial Aspects of Corporate Governance, *The Code of Best Practice*, (1992); United Kingdom, Committee on Corporate Governance, *Final Report*, (1998).

195 See Segal, "Corporate governance: substance over form", (2002) 25 *University of New South Wales Law Journal* 320 at 322, noting General Motors Corporation, *Board Guidelines on Significant Corporate Governance Issues*, (1994).

196 Under the Act, Pt 5.9, Div 1. See the Act, s 596A.

197 Emphasis added.

to an argument[198] that, where the Parliament intended to remove the application of the penalty privilege, it said so expressly.

122 However, this Court has warned many times that care must be exercised in the use of the *expressio unius* rule of construction[199]. Especially in an Act as large and cumbersome as that under consideration (with its history of patchwork accretions) it is impossible to be confident that the express exclusion of penalty privilege in s 597(12) indicates affirmatively the continued operation of the privilege in the context of civil proceedings for the disqualification of persons from the management of corporations. If one starts from the assumption that such provisions are substantially regulatory, to be distinguished from the criminal proceedings for which provision is separately made, the need expressly to exclude the penalty privilege is not obvious.

123 *Adherence to accusatorial features*: Secondly, it must be acknowledged that, in some cases, "civil penalties" and the remedies attaching to them could constitute penal or quasi-penal sanctions. The character and the context determine whether this is so, and not, as such, the legislative appellation. Where that character is established, there are good reasons of principle for preserving the accusatorial features of criminal procedure and resisting erosion of those elements of our law by language that is unclear or ambiguous[200].

124 By the same token, it is a mistake to pick up the penalty privilege and to apply it in a modern statutory context without paying close regard to that context. Unless such attention is given, a great deal of carefully calibrated regulatory law will be judged, not by its language and character, but simply by reference to its burdens. A swathe will then be cut through such laws so as to afford the penalty privilege to many undeserving beneficiaries contrary to the legislative design. Those who condemn the supposed dichotomy between "protection" and "punishment" should not replace it by an equally rigid dichotomy between penal sanctions and "truly" civil remedies.

125 The distinction between a power given by statute for the purposes of protection of the public (or a section of the public) and a power that is punitive

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198 Joint reasons at [25]. See also the Act, s 597(12A)(d).

199 (That the express mention of one subject excludes by implication others not mentioned.) See *Houssein v Under Secretary, Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 94.

200 See *RPS v The Queen* (2000) 199 CLR 620 at 630 [22]; *Ousley v The Queen* (1997) 192 CLR 69 at 132-133; *Daniels* (2002) 213 CLR 543 at 582-583 [108].

and involves criminal sanctions is well known to the law[201]. Thus, orders for the removal of the name of a legal practitioner from the roll of practitioners are commonly described as protective[202]. Self-evidently, such orders have features of punishment about them, especially when viewed from the standpoint of the person subject to them[203]. But the essential character and purpose of the court's powers are protective and, subject to legislative provision, that fact affects many things: the mode of trial, the standard of proof and the procedures available to the complainant.

126 So it is in the case of a disqualification under the Act. The provision for disqualification for fixed periods is the compromise struck by the Parliament. The court is expected to fix the period, within the statutory prescription, by reference to protective purposes but taking into account proved past conduct. No maximum length for the disqualification period is prescribed by the Act[204]. For serious contraventions, the period could conceivably cover the greater part of the productive life of the average company officer. But even if a disqualification order's "punitive" consequences led to a conclusion that it was not "purely protective", that would not be determinative of the issue in this appeal. The question remains whether a court is justified in this context to impose a common law gloss on the clearly expressed will of the Parliament. In my view, we have no authority to do so in this case.

127 The appellants relied on the decision of this Court in *Police Service Board v Morris*[205]. However, the statutory scheme in *Morris* was completely different from that of the Act. The legislation there provided that a member of the police force "charged" with an "offence" and then found "guilty" could be subject to "disciplinary action". Such disciplinary action might include dismissal from the police force[206]. In such a context, it can readily be understood why this Court treated the order of "dismissal" in that legislation as penal in character.

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201 *Weaver v Law Society of New South Wales* (1979) 142 CLR 201 at 207; *O'Reilly v Law Society of New South Wales* (1988) 24 NSWLR 204 at 211; *Law Society of New South Wales v Foreman* (1991) 34 NSWLR 408 at 440-441.

202 *Ex parte Lenehan* (1949) 77 CLR 403 at 421-425.

203 *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 287, 289, 300.

204 The Act, s 206C.

205 (1985) 156 CLR 397.

206 *Morris* (1985) 156 CLR 397 at 403.

Indeed, no argument seems to have been advanced in *Morris* to the contrary[207]. It does not follow that every effective removal from office under a statutory provision is penal or in the nature of a penalty for this purpose. The differentiation of the provisions of the Act and the law considered in *Morris* is obvious. Disqualification from participating in the future management of corporations is different from a sanction of dismissal of a police officer from that rank as part of a legislative scheme labelled "disciplinary".

128 *Legislatures and privilege modification*: Thirdly, I accept that there are arguments of principle that support an insistence, where privileges are abolished or modified, that the Parliament responsible for doing so should normally assume clear accountability to the electors for that action[208]. I gave effect to that principle in *Daniels* and have done so in other cases.

129 However, the privileges involved in *Daniels* were those against self-incrimination and suggested derogations of legal professional privilege. Those privileges are different from the penalty privilege invoked in this case[209]. Compared to the penalty privilege, each of those privileges has a longer history in the law. Each is more fundamental to its operation. Each is reflected in universal principles of human rights[210]. The penalty privilege is not. The penalty privilege is of a lower order of priority. It has a more recent and specialised origin and purpose in our law. It should not be blown into an importance that contradicts or diminishes the operation of the Act and the achievement of its purposes.

130 *Effect of the decision in this case*: This point can be illustrated by the consequences of this Court's order in the appellants' case. The primary judge's determination and orders fully protected the appellants against any risk of self-incrimination. No one suggested in this appeal (as was attempted in *Daniels*) invasion of the legal professional privilege belonging to the appellants. In this regard, it is worth mentioning that English authority since our decision in

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207 (1985) 156 CLR 397 at 398.

208 *Daniels* (2002) 213 CLR 543 at 582-583 [108] citing *R (Morgan Grenfell and Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563.

209 *Daniels* (2002) 213 CLR 543 at 569 [65].

210 International Covenant on Civil and Political Rights, done at New York on 19 December 1966, [1980] *Australian Treaty Series* No 23. See Art 14.3.b ("to communicate with counsel") and Art 14.3.g ("[n]ot to be compelled to testify against himself or to confess guilt").

Daniels has adopted a more stringent approach to the ambit of legal professional privilege in the corporate context than this Court did[211].

131 By this Court's order, the appellants in the present case will be released from the obligation that the Act would otherwise have imposed on them in civil proceedings for disqualification. They would have had to produce documents in their possession that are relevant to the issues concerning their management of One.Tel Ltd. Such documents were not prepared for their lawyers in order that the appellants might receive confidential legal advice. They are not, as such, documents exposing them to self-incrimination. They are documents prepared for corporate purposes at the very time the appellants were managing the corporation where such documents might be important for the determination of the disqualification issue in the way that the Parliament envisaged.

132 The construction of the Act now adopted needlessly restricts the Commission and the court trying the claim. The restriction has no foundation in the language of the Act. Judges should not insert it. Doing so seriously impedes the attainment of the Act's important purposes for corporate governance in this country. The Parliament validly provided for *civil* procedures in such cases. There are good reasons of legal principle and policy for adhering to the *civil* standards and procedures. According to civil procedures, a party must produce relevant documents by the procedure called discovery. The appellants should be obliged to produce the documents in their possession as they would have to do in any other *civil* proceeding. If the Parliament had intended to exempt them from that obligation, it would have said so expressly. It enacted precisely the contrary. This Court should uphold, and not frustrate, the will of Parliament. It protects very important social and economic purposes.

Orders

133 Although the Court has upheld the appeal, I favoured an order dismissing it with costs.

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211 *Three Rivers District Council v Bank of England* [2004] 2 WLR 1065; 3 All ER 168.