Visnic v Australian Securities and Investments Commission - [2007] HCA 24

HIGH COURT OF AUSTRALIA

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

MILAN VISNIC PLAINTIFF

AND

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION DEFENDANT

Visnic v Australian Securities and Investments Commission [2007] HCA 24
24 May 2007
S389/2006

ORDER

The action is dismissed.

Representation

A W Street SC with G D Wendler and J S Emmett for the plaintiff (instructed by Van Houten Law)

Submitting appearance for the defendant

Intervener

H C Burmester QC with G M Aitken intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

CATCHWORDS

Visnic v Australian Securities and Investments Commission

Constitutional law (Cth) – Separation of powers -– -Judicial power – The Australian Securities and Investments Commission ("ASIC") disqualified the plaintiff from managing corporations pursuant to s 206F of the *Corporations Act* 2001 (Cth) – Whether the power of disqualification contained in s 206F of the *Corporations Act* 2001 (Cth) invalidly confers the judicial power of the Commonwealth upon ASIC.

Constitutional law (Cth) – Separation of powers – Whether a power of disqualification can validly be conferred concurrently upon a Chapter III court and an administrative body –

Relevance of the existence of curial powers of disqualification alongside those conferred upon ASIC – Relevance of chameleon principle – Whether conferral of power upon an administrative body is an impermissible circumvention of Ch III of the Constitution .

Constitutional law (Cth) – Judicial power – Meaning of judicial power –Whether the maintenance of professional standards involves the exercise of judicial power – Whether the determination of the "public interest" involves the exercise of judicial power.

Words and phrases – "chameleon principle", "disqualification", "functional analysis", "judicial power of the Commonwealth", "public interest".

Constitution , Ch III.
Corporations Act 2001 (Cth), Pt 2D.6 ; ss 206F, 1317E .

1. GLEESON CJ, GUMMOW, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ. Section 206F of the *Corporations Act* 2001 (Cth) ("the Corporations Act") is found in Pt 2D.6 (ss 206A206HA) of that statute. Part 2D.6 is headed "Disqualification from managing corporations". This may be brought about in three ways.

2. First, s 206B provides for what is identified as "[a]utomatic disqualification". This occurs by force of that section if a person is convicted of an offence of a certain description. Secondly, ss 206C, 206D and 206E confer powers of disqualification upon "the Court", which is defined[1] so as to include the Federal Court and the Supreme Court of a State or a Territory. The powers of the Court under these provisions for disqualification are exercised upon application by the Australian Securities and Investments Commission ("ASIC"). Section 206C is engaged by curial declaration under s 1317E of contravention of a civil penalty provision, s 206D by responsibility for mismanagement of failed corporations, and s 206E by repeated contraventions of the Corporations Act .

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[1] s 58AA.

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3. Thirdly, s 206F confers the power of disqualification not upon one of the designated courts but upon ASIC itself. Section 206F provides that ASIC may disqualify a person from managing corporations for up to five years if the conditions spelled out in s 206F(1) are satisfied. In determining whether disqualification is justified, ASIC is directed to the matters set out in s 206F (2) . The text of these provisions is set out later in these reasons. A decision by ASIC under s 206F may be reviewed by the Administrative Appeals Tribunal (s 1317B).

4. A person who becomes disqualified from managing corporations by the operation of any of these provisions of Pt 2D.6 ceases to be a director, alternate director or a secretary of a company (s 206A (2)). It is an offence for a disqualified person to manage a corporation (s 206A(1)).

5. The litigation in this Court arises in the following manner. On 24 January 2006, a delegate of ASIC served upon the plaintiff a notice stating that he had been disqualified from the time of service of the notice for a period of five years from managing corporations without the leave of ASIC. On the same day, ASIC published a statement of facts, findings and reasons for decision.

6. **Following paragraph cited by:**

Oreb v Australian Securities and Investments Commission (No 2) (24 March 2017) (Rares, Davies and Gleeson JJ)

34. Dr Donaghue QC argued that it is an ordinary use of language to describe the event of a resolution or order that a corporation be wound up in the past as the relevant corporation having been wound up. He referred to the following instances of courts using the language of "was wound up" to describe the commencement of a winding up:

(1) In *Visnic* at [6] , Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ said:

> The plaintiff had been a director of fourteen companies which had been wound up with the appointment of liquidators.

(2) In *Murdaca* at [10] , North, Kenny and Foster JJ said:

> On 12 November 2004, AAMIC was wound up by order of the Supreme Court of Victoria and Mr Colin Nicol was appointed as liquidator of that corporation. The appellant was a director of AAMIC as at the date it was wound up.

The plaintiff had been a director of 14 companies which had been wound up with the appointment of liquidators. ASIC was satisfied, within the meaning of par (a) of s 206F(1), that the plaintiff had been an officer of two or more corporations within the immediately preceding seven years and that, whilst he was such an officer or within 12 months of his ceasing to be so, each corporation had been wound up and a liquidator had lodged a report under s 533(1) of the Corporations Act concerning the inability of the corporation to pay its debts. The statement by ASIC published on 24 January 2006 concluded that the plaintiff was:

> "not fit to manage corporations and should be prohibited from further managing corporations as he has demonstrated a lack of responsibility towards his duties and responsibilities to creditors, to the detriment of those creditors, and it is therefore in the public protection interest that [the plaintiff] should be prohibited from managing a corporation for a period of 5 years fom the date of service of the Notice of Prohibition dated 24 January 2006".

7. Subsections (1) and (2) of s 206F provide as follows:

> "(1) ASIC may disqualify a person from managing corporations for up to 5 years if:
>
> (a) within 7 years immediately before ASIC gives a notice under paragraph (b)(i):
>
> (i) the person has been an officer of 2 or more corporations; and
>
> (ii) while the person was an officer, or within 12 months after the person ceased to be an officer of those corporations, each of the corporations was wound up and a liquidator lodged a report under subsection 533(1) about the corporation's inability to pay its debts; and
>
> (b) ASIC has given the person:
>
> (i) a notice in the prescribed form requiring them to demonstrate why they should not be disqualified; and
>
> (ii) an opportunity to be heard on the question; and
>
> (c) ASIC is satisfied that the disqualification is justified.
>
> (2) In determining whether disqualification is justified, ASIC:
>
> (a) must have regard to whether any of the corporations mentioned in subsection (1) were related to one another; and
>
> (b) may have regard to:
>
> (i) the person's conduct in relation to the management, business or property of any corporation; and
>
> (ii) *whether the disqualification would be in the public interest*; and
>
> (iii) any other matters that ASIC considers appropriate." (emphasis added)

Sub-paragraph (ii) of s 206F(2)(b) does not appear in the criteria for curial disqualification powers in s 206C(2) , s 206D(3) and s 206E(2) . However, in detailing the matters to which the Court may

have regard when determining whether disqualification is justified, language to the effect of subpars (i) and (iii) is employed.

8. A cause then pending in the Federal Court in which the plaintiff sought a declaration on the invalidity of s 206F was by order of this Court made on 30 October 2006 removed into this Court. It then was heard concurrently with the appeals in *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* and *Gould v Magarey* [2] . These reasons should be read with those in the two appeals.

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[2] [2007] HCA 23 .

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9. ASIC is the defendant in the present cause but entered a submitting appearance. The Attorney-General of the Commonwealth intervened and presented opposing submissions to those of the plaintiff.

10. The central issue is whether s 206F purports to confer upon ASIC a function or power pertaining exclusively to the judicial power of the Commonwealth. If, upon its proper construction, the legislation did so, then it would be invalid, ASIC not being one of the courts identified in Ch III of the Constitution .

11. **Following paragraph cited by:**

Zivanovic v Australian Securities and Investments Commission (17 May 2018) (Gleeson J)

27. While the question of Mr Zivanovic's competence is a matter of potential relevance to whether the disqualification was "justified", it was not a matter that the Tribunal was required to consider. Curiously, at para 40 of his written submissions in connection with ground 3, Mr Zivanovic expressly disavows a contention that findings of dishonesty and/or incompetence were necessary for the disqualification power to be enlivened. As the Full Court relevantly observed in *Murdaca v Australian Securities and Investments Commission* [2009] FCAFC 92; (2009) 178 FCR 119; at [101]:

...

(b) ASIC's power to disqualify a person from the management of corporations must be exercised for the purposes for which it was granted. Those purposes are the protection of all those persons who deal with corporations from the consequences of the actions of those corporate officeholders who, either through incompetence or dishonesty or a combination of the two, bring about the failure of corporations and thus cause loss to others (*Rich v Australian Securities and Investments Commission* [2004] HCA 42; (2004) 220 CLR 129 at [47]–[50] (151–155) and the maintenance of

professional management standards in the public interest (*Visnic v Australian Securities and Investments Commission* [2007] HCA 24; (2007) 231 CLR 381 at [11] (p 385) and [26] (p 388)).

(c) Section 206F does not give reports prepared by liquidators pursuant to s 533 of the Act any particular status or weight. ASIC may approach the exercise of its power of disqualification under s 206F(1)(c) in any way it thinks fit, subject to complying with s 206F(1) and s 206F(2) and subject to respecting and applying the principles referred to in subpar (b) above.

...

Re Bolton and Australian Securities and Investments Commission (24 April 2018) (Deputy President S A Forgie)

95. Once the foundation criteria in ss 206F(1)(a) and (b) have been satisfied, ASIC must have regard to whether the two corporations mentioned in s 206F(1) were related to one another as required by s 206F(2)(a) . It must do so in determining whether disqualification is justified as required by s 206F(1)(c) . In making that determination, it may also have regard to the matters set out in s 206F(2)(b) . It is drafted quite broadly and must be interpreted in light of the purpose for which ASIC was given a power to disqualify a person from managing a corporation. That purpose was explained by the Full Court in *Murdaca* :

> "*ASIC's power to disqualify a person from the management of corporations must be exercised for the purposes for which it was granted. Those purposes are the protection of all those persons who deal with corporations from the consequences of the actions of those corporate officeholders who, either through incompetence or dishonesty or a combination of the two, bring about the failure of corporations and thus cause loss to others (* Rich v Australian Securities and Investments Commission *[2004] HCA 42; (2004) 220 CLR 129 at [47]–[50]) and the maintenance of professional management standards in the public interest (* Visnic v Australian Securities and Investments Commission *[2007] HCA 24; (2007) 231 CLR 381 at [11] (p 385) and [26])* ." [120]

Seymour and Australian Securities and Investments Commission (24 November 2017) (Mr P W Taylor SC, Senior Member)

238. It was uncontentious that the fact and circumstances of the liquidation of PCL and Cashflow at least potentially satisfied the criteria for the exercise of the disqualification power in CorpAct s 206F(1) - subject to satisfaction that such an order was "justified". As a matter of practical necessity, the process of achieving any necessary satisfaction must have regard to both the person's conduct, and to the permissible period of any disqualification (a maximum of five years). There is an additional statutory permission to have regard to the public interest, and to any other matter that is considered appropriate:- Corp Act s 206F(2) . In *Murdaca v ASIC* (2009) FCAFC 92; 178 FCR 119 the Full Court of the Federal Court of Australia said this about the exercise of the disqualification decision:-

[101] ... ASIC's power to disqualify a person from the management of corporations must be exercised for the purposes for which it was granted. Those purposes are the protection of all those persons who deal with corporations from the consequences of the actions of those corporate officeholders who, either through incompetence or dishonesty or a combination of the two, bring about the failure of corporations and thus cause loss to others (Rich v ASIC (2004) 220 CLR 129 at [47]-[50]) and the maintenance of professional management standards in the public interest (Visnic v ASIC (2007) 231 CLR 381 at [11] & [26]).

Oreb v Australian Securities and Investments Commission (No 2) (24 March 2017) (Rares, Davies and Gleeson JJ)

28. The operation of s 206F has previously been considered by Full Courts in *Murdaca v Australian Securities and Investments Commission* [2009] FCAFC 92; (2009) 178 FCR 119 and *Culley v Australian Securities and Investments Commission* [2010] FCAFC 43; (2010) 183 FCR 279. In *Murdaca,* at [101], the Court set out the following relevant propositions:

(1) Subsection 206F(1) comprises, in ascending order of importance:

(a) a trigger mechanism (the conditions, filters or gateway) embodied in subs (1)(a) (stage 1);

(b) a procedural fairness requirement (the giving of a show cause notice and an opportunity to be heard): subs (1)(b) (stage 2); and

(c) a merits decision captured in the requirement that ASIC be satisfied that disqualification is justified: subs (1)(c) read with s 206F(2) (stage 3).

(2) ASIC's power to disqualify a person from the management of corporations must be exercised for the purposes for which it was granted. Those purposes are the protection of all those persons who deal with corporations from the consequences of the actions of those corporate officeholders who, either through incompetence or dishonesty or a combination of the two, bring about the failure of corporations and thus cause loss to others (*Rich v Australian Securities and Investments Commission* [2004] HCA 42; (2004) 220 CLR 129 at [47]–[50] (151–155)) and the maintenance of professional management standards in the public interest (*Visnic v Australian Securities and Investments Commission* [2007] HCA 24; (2007) 231 CLR 381 at [11] (385) and [26] (388)).

(3) Section 206F does not give reports prepared by liquidators pursuant to s 533 of the Act any particular status or weight. ASIC may approach the exercise of its power of disqualification under s 206F(1)(c) in any way it thinks fit, subject to complying with s 206F(1) and s 206F(2) and subject to respecting and applying the principles referred to in (2) above.

(4) Section 206F is an alternative to court action that ASIC may commence under Pt 2D.6 . It is meant to be a quick and cheap alternative to court action. The merits consideration by ASIC is intended to take place

only once in the process – not at two stages. The preconditions provided for in ss 206F(1)(a) and (b) are jurisdictional requirements which must be satisfied before ASIC's power to disqualify under s 206F is enlivened.

Oreb v Australian Securities and Investments Commission (No 2) (24 March 2017) (Rares, Davies and Gleeson JJ)

29. In *Culley,* at [31], the Full Court concluded from the terms of s 206F and its location in Pt 2D.6 of the Act that the Parliament had been concerned to strike a balance between competing interests which their Honours identified as follows:

> [32] The section reflects on the one hand, the interest of the public in the existence of a facility for removing from the pool of managers those who are, or have been, officers of two or more corporations which have been wound up for inability to pay their debts. As a result, the public and the market are afforded a measure of protection from those who, as was said in *Murdaca* ... at 143 :
>
> > either through incompetence or dishonesty or a combination of the two, bring about the failure of corporations and thus cause loss to others (*Rich v Australian Securities and Investments Commission* [2004] HCA 42; (2004) 220 CLR 129 at [47]-[50]).
>
> In the same passage, their Honours discerned in s 206F a concern with "the maintenance of professional management standards in the public interest (*Visnic v Australian Securities and Investments Commission* [2007] HCA 24; (2007) 231 CLR 381 at [11] and [26])."
>
> [33] On the other hand, the legislature has recognised the need for corporate officers not to be exposed to disqualification as a result of corporate failures separated by an inordinate length of time. In our view, the concern, which we have imputed to Parliament, to strike a balance between these competing interests has been accommodated by fixing in s 206F(1)(a) a "window" of seven years within which two or more corporate collapses must occur in order for an officer involved in them to be at risk of disqualification from managing any other corporation.

Holden and Australian Securities and Investments Commission (15 August 2016) (Deputy President S A Forgie)

25. Those circumstances and interests must be viewed in light of the purpose for which the power of disqualification was conferred on ASIC. That purpose was summarised by the Full Court of the Federal Court in *Murdaca v Australian Securities and Investments Commission* [42] (*Murdaca*):

> *"ASIC's power to disqualify a person from the management of corporations must be exercised for the purposes for which it was granted. Those purposes are the protection of all those persons who deal with corporations from the consequences of the actions of those corporate officeholders who, either through incompetence or dishonesty or a combination of the two, bring about failure of corporations and*

thus cause loss to others (Rich v Australian Securities and Investments Commission *(2004) 220 CLR 129 at [47]-[50]) and the maintenance of professional management standards in the public interest (* Visnic v Australian Securities and Investments Commission *(2007) 231 CLR 381 at [11] and [26]).* " [43]

Ase16 v Australian Securities and Investments Commission (01 April 2016) (Markovic J)

20. At [101] of its judgment the Full Court sets out its reasons for its conclusions on its interpretation of s 206F in light of the issues raised as follows:

> [101] Our reasons for these conclusions may be shortly stated as follows:
>
> (a) Subsection (1) of s 206F comprises, in ascending order of importance:
>
> (i) A trigger mechanism (the conditions, filters or gateway) embodied in subs (1)(a) (stage 1);
>
> (ii) A procedural fairness requirement (the giving of a show cause notice and an opportunity to be heard): subs (1)(b) (stage 2); and
>
> (iii) A merits decision captured in the requirement that ASIC be satisfied that disqualification is justified: subs (1)(c) read with s 206F(2) (stage 3).
>
> (b) ASIC's power to disqualify a person from the management of corporations must be exercised for the purposes for which it was granted. Those purposes are the protection of all those persons who deal with corporations from the consequences of the actions of those corporate officeholders who, either through incompetence or dishonesty or a combination of the two, bring about the failure of corporations and thus cause loss to others (*Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at [47]-[50]) and the maintenance of professional management standards in the public interest (*Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381 at [11] and [26]).
>
> (c) Section 206F does not give reports prepared by liquidators pursuant to s 533 of the Act any particular status or weight. ASIC may approach the exercise of its power of disqualification under s 206F(1)(c) in any way it thinks fit, subject to complying with s 206F(1) and (2) and subject to respecting and applying the principles referred to in subparagraph (b) above.
>
> (d) Subsection (2) of s 206F informs the exercise of the power given to ASIC by subs (1)(c). Subparagraph (a) of subs (2) lays down a mandatory requirement to which regard must be had and subpara (b) sets out matters to which regard may be had. ASIC is not obliged to have regard to the s 533 report or reports which triggered the disqualification process when considering whether disqualification is justified. No doubt it may do so in an appropriate case but it is not obliged to do so. Rather, it is authorised and empowered to make a decision on the merits as to

whether disqualification is justified. It would make no sense at all if it were also required to involve itself in a merits-based decision in relation to the correctness of the relevant s 533 report or reports at stage 1 of the process. In the event that reliance is placed upon the s 533 report or reports at stage 3 of the process, ASIC will be called upon to assess the worth of that report or those reports at that stage in order to decide whether disqualification is justified.

(e) Section 206F is an alternative to court action by ASIC. It is meant to be a quick and cheap alternative to court action. However, it cannot be utilised just because ASIC feels that it would like to take action against a particular individual. Certain preconditions for action must be satisfied. But, in the end, the merits consideration by ASIC is intended to take place only once in the process — not at two stages. In a sense, the preconditions provided for in subparas (a) and (b) of s 206F(1) are jurisdictional requirements which must be satisfied before ASIC's power to disqualify under s 206F is enlivened.

(f) To interpret s 206F as the appellant has contended would lead to endless challenges during the s 206F disqualification process directed to the validity of the relevant s 533 reports and would be likely to render s 206F unworkable.

Ase16 v Australian Securities and Investments Commission (01 April 2016) (Markovic J)

22. In *Culley v Australian Securities and Investments Commission* (2010) 183 FCR 279 (***Culley***) a Full Court of this Court considered whether s 206F required ASIC to exercise its power of disqualification within any shorter period than the seven years immediately before the giving of a notice under s 206F(1)(b) . It found it did not. Once again the issues before me were not before the Full Court. However, at [31] to [33] of its judgment the Full Court said the following about the purpose of s 206F:

> 31. ... It is clear enough from its terms and its location in Pt 2D.6 of the Corporations Act that the legislature, in framing s 206F, has been concerned to strike a balance between two competing interests.
>
> 32. The section reflects on the one hand, the interest of the public in the existence of a facility for removing from the pool of managers those who are, or have been, officers of two or more corporations which have been wound up for inability to pay their debts. As a result, the public and the market are afforded a measure of protection from those who, as was said in *Murdaca* (su pra), at 143 :
>
> > "either through incompetence or dishonesty or a combination of the two, bring about the failure of corporations and thus cause loss to others (*Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at [47] -[50])."
>
> In the same passage, their Honours discerned in s 206F a concern with "the maintenance of professional management standards in the public interest: *Vi*

snic v Australian Securities and Investments Commission (2007) 231 CLR 381 at [11] and [26] ."

33. On the other hand, the legislature has recognised the need for corporate officers not to be exposed to disqualification as a result of corporate failures separated by an inordinate length of time. In our view, the concern, which we have imputed to Parliament, to strike a balance between these competing interests has been accommodated by fixing in s 206F(1)(a) a "window" of seven years within which two or more corporate collapses must occur in order for an officer involved in them to be at risk of disqualification from managing any other corporation.

Ase16 v Australian Securities and Investments Commission (01 April 2016) (Markovic J)

49. In considering the text of the legislation regard can be had to the context of the text and the purpose of the legislation. The imposition of an interpretation that means ASIC would be prevented from taking steps under s 206F until the end of the winding up process would, in my view, be contrary to the purpose of the section:

(1) in *Nicholas v Commissioner for Corporate Affairs* [1988] VR 289 at 299 Kaye J, in considering s 562A of the *Companies (Victoria) Code*, a predecessor to s 206F of the Act , noted that the object of that section was "clearly to protect the public's interest by preventing persons, who by past conduct are unfit, from directing, promoting or managing the affairs of a corporation";

(2) in *Murdaca* the Full Court said at [101(b)] :

ASIC's power to disqualify a person from the management of corporations must be exercised for the purposes for which it was granted. Those purposes are the protection of all those persons who deal with corporations from the consequences of the actions of those corporate officeholders who, either through incompetence or dishonesty or a combination of the two, bring about the failure of corporations and thus cause loss to others (*Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at [47]–[50] and the maintenance of professional management standards in the public interest (*Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381 at [11] and [26]);

(3) in *Culley,* the Full Court recognised that the legislature had been concerned to strike a balance between two competing interests one of which was the "interest of the public in the existence of a facility for removing from the pool of managers those who are, or have been, officers of two or more corporations which have been wound up for inability to pay their debts" as a result of which the public and market are afforded a measure of protection from those who, as identified in *Murdaca* , bring about the failure of corporations either through incompetence or dishonesty or a combination of the two: at [32] .

Leslie John May and Australian Securities and Investments Commission (28 March 2013) (Deputy President P E Hack SC)

4. In *Murdaca v Australian Securities and Investments Commission* [2] the Full Court described the operation of s 206F of the *Corporations Act* in this way,

> *Our reasons for these conclusions may be shortly stated as follows:*
>
> *(a) Subsection (1) of s 206F comprises, in ascending order of importance:*
>
> *(i) A trigger mechanism (the conditions, filters or gateway) embodied in subs (1)(a) (stage 1);*
>
> *(ii) A procedural fairness requirement (the giving of a show cause notice and an opportunity to be heard): subs (1)(b) (stage 2); and*
>
> *(iii) A merits decision captured in the requirement that ASIC be satisfied that disqualification is justified: subs (1)(c) read with s 206F(2) (stage 3).*
>
> *(b) ASIC's power to disqualify a person from the management of corporations must be exercised for the purposes for which it was granted. Those purposes are the protection of all those persons who deal with corporations from the consequences of the actions of those corporate officeholders who, either through incompetence or dishonesty or a combination of the two, bring about the failure of corporations and thus cause loss to others (Rich v Australian Securities and Investments Commission (2004) 220 CLR 129 at [47]-[50] and the maintenance of professional management standards in the public interest (Visnic v Australian Securities and Investments Commission (2007) 231 CLR 381 at [11] and [26]).*
>
> *(c) Section 206F does not give reports prepared by liquidators pursuant to s 533 of the Act any particular status or weight. ASIC may approach the exercise of its power of disqualification under s 206F(1)(c) in any way it thinks fit, subject to complying with s 206F(1) and (2) and subject to respecting and applying the principles referred to in subparagraph (b) above.*
>
> *(d) Subsection (2) of s 206F informs the exercise of the power given to ASIC by subs (1)(c). Subparagraph (a) of subs (2) lays down a mandatory requirement to which regard must be had and subpara (b) sets out matters to which regard may be had. ASIC is not obliged to have regard to the s 533 report or reports which triggered the disqualification process when considering whether disqualification is justified. No doubt it may do so in an appropriate case but it is not obliged to do so. Rather, it is authorised and empowered to make a decision on the merits as to whether disqualification is justified. It would make no sense at all if it were also required to involve itself in a merits-based decision in relation to the correctness of the relevant s 533 report or reports at stage 1 of the process.*
>
> *In the event that reliance is placed upon the s 533 report or reports at stage 3 of the process, ASIC will be called upon to assess the worth of that report or those reports at that stage in order to decide whether disqualification is justified.*

(e) Section 206F is an alternative to Court action by ASIC. It is meant to be a quick and cheap alternative to Court action. However, it cannot be utilised just because ASIC feels that it would like to take action against a particular individual. Certain preconditions for action must be satisfied. But, in the end, the merits consideration by ASIC is intended to take place only once in the process--not at two stages. In a sense, the preconditions provided for in subparas (a) and (b) of s 206F(1) are jurisdictional requirements which must be satisfied before ASIC's power to disqualify under s 206F is enlivened.

(f) ...

Thompson And Australian Securities And Investments Commission (23 December 2010) (Deputy President P E Hack SC)

30. In *Murdaca v Australian Securities and investments Commission* [2] the Full Court described the operation of s 206F in this way:

[101] ...

(a) Subsection (1) of s 206F comprises, in ascending order of importance:

(i) A trigger mechanism (the conditions, filters or gateway) embodied in subs (1)(a) (stage 1);

(ii) A procedural fairness requirement (the giving of a show cause notice and an opportunity to be heard): subs (1)(b) (stage 2); and

(iii) A merits decision captured in the requirement that ASIC be satisfied that disqualification is justified: subs (1)(c) read with s 206F(2) (stage 3).

(b) ASIC's power to disqualify a person from the management of corporations must be exercised for the purposes for which it was granted. Those purposes are the protection of all those persons who deal with corporations from the consequences of the actions of those corporate officeholders who, either through incompetence or dishonesty or a combination of the two, bring about the failure of corporations and thus cause loss to others (*Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at [47]-[50]) and the maintenance of professional management standards in the public interest (*Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381 at [11] and [26]).

(c) Section 206F does not give reports prepared by liquidators pursuant to s 533 of the Act any particular status or weight. ASIC may approach the exercise of its power of disqualification under s 206F(1)(c) in any way it thinks fit, subject to complying with s 206F(1) and (2) and subject to respecting and applying the principles referred to in subparagraph (b) above.

(d) Subsection (2) of s 206F informs the exercise of the power given to ASIC by subs (1)(c) . Subparagraph (a) of subs (2) lays down a mandatory requirement to which regard must be had and subpara (b) sets out matters to which regard may be had. ASIC is not obliged to have regard to the s 533 report or reports which triggered the disqualification process when considering whether disqualification is justified. No doubt it may do so in an appropriate case but it is not obliged to do so. Rather, it is authorised and empowered to make a decision on the merits as to whether disqualification is justified. It would make no sense at all if it were also required to involve itself in a merits-based decision in relation to the correctness of the relevant s 533 report or reports at stage 1 of the process.

In the event that reliance is placed upon the s 533 report or reports at stage 3 of the process, ASIC will be called upon to assess the worth of that report or those reports at that stage in order to decide whether disqualification is justified.

(e) Section 206F is an alternative to Court action by ASIC. It is meant to be a quick and cheap alternative to Court action. However, it cannot be utilised just because ASIC feels that it would like to take action against a particular individual. Certain preconditions for action must be satisfied. But, in the end, the merits consideration by ASIC is intended to take place only once in the process — not at two stages. In a sense, the preconditions provided for in subparas (a) and (b) of s 206F(1) are jurisdictional requirements which must be satisfied before ASIC's power to disqualify under s 206F is enlivened.

(f) To interpret s 206F as the appellant has contended would lead to endless challenges during the s 206F disqualification process directed to the validity of the relevant s 533 reports and would be likely to render s 206F unworkable."

Culley v Australian Securities and Investments Commission (19 May 2010) (Ryan, Mansfield and McKerracher JJ)

32. The section reflects on the one hand, the interest of the public in the existence of a facility for removing from the pool of managers those who are, or have been, officers of two or more corporations which have been wound up for inability to pay their debts. As a result, the public and the market are afforded a measure of protection from those who, as was said in *Murdaca* (supra), at 143 ;

> either through incompetence or dishonesty or a combination of the two, bring about the failure of corporations and thus cause loss to others (*Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at [47]-[50]).

In the same passage, their Honours discerned in s 206F a concern with "the maintenance of professional management standards in the public interest (*Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381 at [11] and [26])."

Murdaca v Australian Securities and Investments Commission (10 August 2009) (North, Kenny and Foster JJ)

101. Our reasons for these conclusions may be shortly stated as follows:

(a) Subsection (1) of s 206F comprises, in ascending order of importance:

(i) A trigger mechanism (the conditions, filters or gateway) embodied in subs (1)(a) (stage 1);

(ii) A procedural fairness requirement (the giving of a show cause notice and an opportunity to be heard): subs (1)(b) (stage 2); and

(iii) A merits decision captured in the requirement that ASIC be satisfied that disqualification is justified: subs (1)(c) read with s 206F(2) (st age 3).

(b) ASIC's power to disqualify a person from the management of corporations must be exercised for the purposes for which it was granted. Those purposes are the protection of all those persons who deal with corporations from the consequences of the actions of those corporate officeholders who, either through incompetence or dishonesty or a combination of the two, bring about the failure of corporations and thus cause loss to others (*Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at [47]–[50] (151–155) and the maintenance of professional management standards in the public interest (*Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381 at [11] (p 385) and [26] (p 388)).

(c) Section 206F does not give reports prepared by liquidators pursuant to s 533 of the Act any particular status or weight. ASIC may approach the exercise of its power of disqualification under s 206F(1)(c) in any way it thinks fit, subject to complying with s 206F(1) and s 206F(2) and subject to respecting and applying the principles referred to in subpar (b) above.

(d) Subsection (2) of s 206F informs the exercise of the power given to ASIC by subs (1)(c). Subparagraph (a) of subs (2) lays down a mandatory requirement to which regard must be had and subpar (b) sets out matters to which regard may be had. ASIC is not obliged to have regard to the s 533 report or reports which triggered the disqualification process when considering whether disqualification is justified. No doubt it may do so in an appropriate case but it is not obliged to do so. Rather, it is authorised and empowered to make a decision on the merits as to whether disqualification is justified. It would make no sense at all if it were also required to involve itself in a merits-based decision in relation to the correctness of the relevant s 533 report or reports at stage 1 of the process.

In the event that reliance is placed upon the s 533 report or reports at stage 3 of the process, ASIC will be called upon to assess the worth of that report or those reports at that stage in order to decide whether disqualification is justified.

(e) Section 206F is an alternative to Court action by ASIC. It is meant to be a quick and cheap alternative to Court action. However, it cannot be utilised just because ASIC feels that it would like to take action against a particular individual. Certain preconditions for action must be satisfied. But, in the end, the merits consideration by ASIC is intended to take place only once in the process—not at two stages. In a sense, the preconditions provided for in subpars (a) and (b) of s 206F(1) are jurisdictional requirements which must be satisfied before ASIC's power to disqualify under s 206F is enlivened.

(f) To interpret s 206F as the appellant has contended would lead to endless challenges during the s 206F disqualification process directed to the validity of the relevant s 533 reports and would be likely to render s 206F unworkable.

The Attorney-General identifies s 206F as conferring upon ASIC a power to be exercised for the purpose of maintaining professional standards in the public interest and submits that there is nothing inherently judicial in such a power. These submissions should be accepted and the action should be dismissed. We turn to explain why this conclusion should be reached and the contrary submissions by the plaintiff rejected.

12. The plaintiff put several arguments in addition to those of the appellants in *Albarran* and *Gould* . The first submission fixed upon the presence in Pt 2D.6 of the Corporations Act of the curial powers of disqualification conferred by ss 206C, 206D and 206E , alongside the power conferred upon ASIC by s 206F . Then it was said that the Parliament could not vest judicial power at the same time in both a Ch III court and an administrative body.

13. This submission should be rejected. First, a proposition of that width cannot stand with the earlier authority of this Court provided by *R v Quinn; Ex parte Consolidated Foods Corporation* [3] . There, the Court upheld the validity of s 23(1) of the *Trade Marks Act* 1955 (Cth) . That one provision was concurrently addressed to this Court and to the Registrar of Trade Marks and, upon application, conferred authority to remove for nonuse trade marks from the register. Secondly, in any event, the criteria stipulated for the exercise of power by ASIC and by the courts differ and do so to a significant degree. Earlier in these reasons reference has been made to the regard ASIC may have to the public interest in a disqualification (s 206F(2)(b)(ii)) and to the absence of any reference to the public interest in the other sections conferring curial power.

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[3] (1977) 138 CLR 1 .

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14. This Court held in *Precision Data Holdings Ltd v Wills* [4] that the Corporations and Securities Panel, in declaring an acquisition of shares or conduct relating thereto to have been unacceptable, was not exercising the judicial power of the Commonwealth. In its reasons, the Court drew a distinction which is presently material [5] :

"Leaving aside problems that might arise because of the subject-matter involved or because of some prescribed procedure not in keeping with the judicial process, where a discretionary authority is conferred upon a court and the discretionary authority is to be exercised according to legal principle or by reference to an objective standard or test prescribed by the legislature and not by reference to policy considerations or other matters not specified by the legislature, it will be possible to conclude that the determination by the court gives effect to rights and obligations for which the statute provides and that the determination constitutes an exercise of judicial power [6] . How ever, where, as here, the function of making orders creating new rights and obligations is reposed in a tribunal which is not a court and considerations of policy have an important part to play in the determination to be made by the tribunal, there is no acceptable foundation for the contention that the tribunal, in this case the Panel, is entrusted with the exercise of judicial power."

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[4] (1991) 173 CLR 167 .

[5] (1991) 173 CLR 167 at 191 .

[6] *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 377 per Kitto J.

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15. The statement in the final sentence of that extract is sufficiently determinative of the present case. Section 206F empowers ASIC to determine that a person henceforth not manage corporations and to decide that question by reference to criteria including the public interest.

16. It is true that ASIC may look to the conduct of the person in question, in relation to the management of any corporation (s 206F(2)(b)(i)). But, as with the legislation considered in *Albarra n* and *Gould* , there is no determination of guilt with respect to any offence provision. Consideration of such provisions would be but a step in concluding whether there should be a disqualification.

17. The plaintiff also fixed upon what were identified as grounds of contravention of the law which would attract both s 206C and s 206F . Were ASIC to apply under s 206C , the rules of evidence would apply (s 1317L). But, if ASIC itself moved under s 206F , as in the present case, the rules of evidence would not apply and impermissibly would be "circumvented". This argument assumes the proposition, already rejected in these reasons, that the power conferred upon ASIC is inherently or exclusively judicial in nature. If that proposition be rejected, there is no footing for an argument of "circumvention".

18. Likewise the proposition advanced by the plaintiff that s 206F was an ineffective attempt to oust the "original jurisdiction" of this Court under s 75(iii) of the Constitution in "matters ... in which the Commonwealth ... is a party". For the purposes of s 75(iii) , ASIC has the identity of the Commonwealth[7]. But, in acting under s 206F , ASIC does not purport to exercise the judicial power of the Commonwealth. How then can there be a legislative attempt to oust the operation of s 75(iii) ?

[7] *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559.

19. The action should be dismissed. The Attorney-General seeks no costs order.

20. KIRBY J. These proceedings, removed into this Court from the Federal Court of Australia, were heard at the same time as the *Albarran* and *Gould* appeals from that Court [8] . Like those appeals, the proceedings concern s 71 of the Constitution . That is the provision that requires "the judicial power of the Commonwealth" to be vested in a Ch III court and not exercised by a legislative or executive officer, body or tribunal.

[8] *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* [2007] HCA 23.

The facts and legislation

21. *The facts*: The basic facts are set out in the reasons of Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ ("the joint reasons")[9]. Before action was taken to disqualify him, Mr Milan Visnic ("the plaintiff") was an officer (director) of fourteen companies that had been wound up. Pursuant to the *Corporations Act* 2001 (Cth) ("the Corporations Act")[10] , a liquidator reported that the corporations, of which the plaintiff was an officer, might have been unable to pay their unsecured creditors more than $0.50 in the dollar.

[9] Joint reasons at [5]-[6].

[10] s 533(1)(c) , (d).

22. In the result, the Australian Securities and Investments Commission ("ASIC")[11] , by service of a notice in November 2005, afforded the plaintiff an opportunity to be heard as to why he should not be disqualified from managing corporations for a period of up to five years. The notice was issued pursuant to s 206F(1)(b)(i) of the Corporations Act . The plaintiff responded by challenging the constitutional validity of s 206F .

[11] See *Australian Securities and Investments Commission Act* 2001 (Cth) ("the ASIC Act "), s 261. ASIC was formerly known as the Australian Securities Commission: see *Australian Securities Commission Act* 1989 (Cth), s 7 .

23. These proceedings have afforded the plaintiff the opportunity to argue his challenge. Some, but not all, of the plaintiff's arguments overlapped those advanced by the appellants in *Albarran* and *Gould*.

24. *The legislation*: The joint reasons set out the terms of subss (1) and (2) of s 206F [12]. It is unnecessary for me to repeat them. As the joint reasons explain[13], the scheme of the Corporations Act envisages that officers of corporations may be disqualified from holding such office in three ways: (1) by automatic disqualification upon conviction of certain offences [14]; (2) by order of "the Court" (including the Federal Court or the Supreme Court of a State or Territory) [15]; or (3) by order of ASIC itself under s 206F.

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[12] Joint reasons at [7].

[13] Joint reasons at [1]-[2].

[14] Corporations Act, s 206B.

[15] Corporations Act, ss 206C, 206D, 206E. The expression "the Court" is defined in s 58AA.

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25. ASIC proceeded against the plaintiff not by making application to "the Court" but under its own power expressed in s 206F. This is described in the heading to that section as "ASIC's power of disqualification". It is this asserted "power" which the plaintiff argues constitutes an invasion by ASIC – a body within the executive government of the Commonwealth – of the federal judicial power reserved by the Constitution to Ch III courts.

26. *Albarran and Gould: overlap and difference*: The overlap with the *Albarran* and *Gould* appeals is plain. Each of the proceedings concerns an aspect of the regulation of corporations under federal law. That regulation is of large and still growing importance for the economy and the nation. The protection of shareholders, creditors, employees and the community depends on the integrity of officers of corporations and, where such corporations fail, of their liquidators. One obvious mode of securing the protection of such interests is by disqualification (in the case of officers) and deregistration (in the case of liquidators) of persons who hold such positions in order to prevent them, for a time, from exercising the powers of those positions.

27. Orders that deprive those who have held such positions of the entitlement to exercise their powers are public determinations having potentially serious consequences for the property (earning) rights and the reputation of the persons concerned.

28. Nevertheless, for the reasons explained in the *Albarran* and *Gould* appeals [16], the form of discipline provided for in the Corporations Act, in the case of officers of corporations that are wound up, is permissibly administrative in character. It does not involve the exercise of powers which, of their nature, *must* be vested only in a Ch III court because they involve the exercise of "the judicial power of the Commonwealth" [17].

[16] [2007] HCA 23 at [90]-[101] .

[17] Constitution, s 71 ; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 296 .

29. It is not necessary, in these proceedings, to repeat the analysis of the issues and the explanation of the conclusions stated in *Albarran* and *Gould* . The similarity of the disciplinary features of the powers provided to the executive body (ASIC) by the Corporations Act is sufficiently plain to render repetition superfluous.

30. Nevertheless, there is one particular feature of the challenged legislation in the present proceedings upon which the plaintiff fastened. In order to understand the essence of the plaintiff's argument, different from and additional to the arguments in *Albarran* and *Gould* , it is necessary to explain the distinctive statutory provisions on which the present plaintiff relied.

The plaintiff's arguments

31. *Substantial identity of powers*: At the heart of the plaintiff's argument was the essential identity of the powers which the Parliament had conferred on "the Court" with those that it had conferred at the same time on ASIC. It was contended that there could be no clearer demonstration of the content of "the judicial power of the Commonwealth" than this.

32. In order to appreciate this argument, it is necessary to refer to the other relevant provisions of the Corporations Act and to compare their language with the terms of s 206F . I will not set out the full terms of ss 206C and 206D , although the plaintiff submitted that the powers of ASIC under s 206F were a kind of amalgam of the powers of "the Court" under ss 206C and 206D . It will be sufficient, to appreciate the point argued, to note the terms of s 206E , reading that provision alongside s 206F [18]:

[18] Set out in the joint reasons at [7].

"206E Court power of disqualification – repeated contraventions of Act

(1) On application by ASIC, the Court may disqualify a person from managing corporations for the period that the Court considers appropriate if:

(a) the person:

(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

(ii) has at least twice contravened this Act while they were an officer of a body corporate; or

(iii) has been an 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.

(2) In determining whether the disqualification is justified, the Court may have regard to:

(a) the person's conduct in relation to the management, business or property of any corporation; and

(b) any other matters that the Court considers appropriate."

33. **Following paragraph cited by:**

Oreb v Australian Securities and Investments Commission (No 2) (24 March 2017) (Rares, Davies and Gleeson JJ)

43. The appellants' construction requires the word "fully" to be read into s 206F(1)(a)(ii), given that the expression "fully wound up" has been used elsewhere in the Act (in ss 509 and 601AB). In contrast, the primary judge's interpretation is congruent with the use of the words "is wound up" in s 206D, as the primary judge explained at [54] of her Honour's reasons. Section 206D(2)(h) provides that a corporation fails if the corporation "is wound up" and a liquidator lodges a report under s 533(1). In *Visnic*, at [33] and [38], Kirby J noted the clear similarity between the language of ss 206D and 206F, containing "virtually identical criteria, directed to the same outcome".

The similarity between the language of the provisions empowering "the Court" to disqualify a person from managing corporations and the language of s 206F by which ASIC is empowered to so determine is clear. In the case of "the Court", the period of disqualification may be longer (up to 20 years in s 206D and not specifically limited in s 206C or s 206E). Some of the criteria for reaching the satisfaction are different[19]. However, the plaintiff submitted with some cogency

that these were simply differences of degree and not of kind. They did not alter the essential identity of the functions being discharged respectively by the executive government body (ASIC) and by a Ch III court.

[19] See joint reasons at [7].

34. *Parallel legislation*: The plaintiff therefore argued that the effective identity of the "power" of decision-making afforded to "the Court" and to ASIC, demonstrated an attempted conferral by federal law upon each of the bodies named of a power to decide substantially the same type of issue according to the same type of considerations. That "power" is, in essence, to adjudicate a controversy between the regulatory body (ASIC) and the officer of the corporation concerned (the plaintiff). It is to do so by reference to like criteria spelt out in the Corporations Act . It is to do so in a manner apt to deciding, ultimately, whether that officer should be "disqualified". Indeed, the touchstone for the decision in each case is the same. It is whether "the Court" or ASIC, as the case might be, is satisfied that "disqualification is justified" [20] .

[20] Corporations Act, s 206F(1)(c) . Compare ss 206C(1)(b), 206D(1)(b)(ii) and 206E(1)(b) .

35. There are further similarities in the respective legislative provisions. In each case, whether in "the Court" or in ASIC, the decision to disqualify is expressed as a facultative power by the use of the verb "may". In this way, an evaluative decision must be made by each decision-maker by reference to the criteria nominated. So far as those criteria were concerned, in "determining whether disqualification is justified" a very close similarity exists between the factors to which "the Court" and ASIC "may have regard". Thus, in each case, attention is called to "the person's conduct in relation to the management, business or property of any corporation" and "any other matters" that the decision-maker "considers appropriate". The identified considerations are cast in very broad language. The only difference, in the case of ASIC, is the addition of reference to "whether the disqualification would be in the public interest" [21] .

[21] Corporations Act, s 206F(2)(b)(ii) ; joint reasons at [7].

36. **Following paragraph cited by:**

TEDESCO v Director Of Public Prosecutions (06 December 2010) (Judgment of the Honourable Justice White)

58. It is not possible to identify all the various matters which may bear upon the public interest for the purposes of s 76(1)(c) . The concept of "the public interest" is a wide one, and generally involves a discretionary value judgment following consideration of a range of matters. Mason CJ, Brennan, Dawson and Gaudron JJ spoke in *O'Sullivan v Farrer* of the undefined nature of the public interest: [11]

> [T]he expression "in the public interest", when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only "in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view". [12]
>
> (Citation omitted)

Kirby J gave a paraphrase of this passage in *Visnic v Australian Securities and Investments Commission* [13] when he said:

> The use of such expressions ["in the public interest"] in legislation may direct the attention of the court to a "discretionary value judgment to be made by reference to undefined factual matters" but with boundaries that can be fixed by reference to the objects that the legislature is taken to have had in view. [14]

Thus the matters to which a court may have regard will usually be confined only by the scope and purpose of the relevant legislation.

via
[14] Ibid at [36] ; 391.

The plaintiff submitted, also with a certain cogency, that the addition of this last-mentioned consideration was ineffective, if it was designed to deprive the ultimate decision of a "judicial" character. It is true that some functions are committed to judges, by statute and the general law, that ask them to consider the public interest whilst acting judicially [22] . The use of such expressions in legislation may direct the attention of the court to a "discretionary value judgment to be made by reference to undefined factual matters" but with boundaries that can be fixed by reference to the objects that the legislature is taken to have had in view [23] .

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[22] The expression and like expressions are common in defamation statutes: cf *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183 at 205206 . But note *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 377, 400 ; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 126 [83] ; *Cattanach v Melchior* (2003) 215 CLR 1 at 34-35 [75] .

[23] *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 applying *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 .

37. *The plaintiff's complaints*: Once the very high similarity of the powers afforded to "the Court" and to ASIC is appreciated, together with the near identity of many of the criteria for reaching the identical conclusion (disqualification) and the similarity of the considerations called to notice by the Parliament in each case, the force of the plaintiff's constitutional complaint is easier to appreciate.

38. If, by the application of virtually identical criteria, directed to the same outcome, a "power" has purportedly been given by federal law both to a Ch III court and to an executive government agency, the plaintiff asked, in effect, how the exercise of such "power" could not, in each case, equally, be an exercise of "the judicial power of the Commonwealth". If the existence of such a "power" was required for the valid vesting of jurisdiction in a Ch III court, how, why and when did it cease to be a "power" of the same character merely because it was vested in an executive body? The "power" was effectively the same. To allow it to take on a different constitutional quality, simply because it was assigned by the Parliament to ASIC, and not to a court, would amount to permitting the Parliament, in effect, to dictate the constitutional character of the "power" by its own choice, that is, simply by nominating the identity of the repository to which the "power" was assigned[24].

[24] Ratnapala, *Australian Constitutional Law: Foundations and Theory*, 2nd ed (2007) at 136137.

39. The plaintiff argued that, consistently with the rule of law, this could not be so. He pointed to a number of considerations which, he suggested, rendered such a conclusion offensive to basic constitutional principle:

. Effectively, it left the decision on whether the jurisdiction of Ch III courts was engaged at all to a regulatory body which was scarcely neutral as to the outcome of its own determinations;

. It allowed the regulatory body, at its own option, to bypass the courts completely, thereby depriving the officer of the corporation or corporations concerned of the facilities afforded by the courts, including the determination of controversies by an independent and impartial decision-maker; the elucidation of contested facts by application of the law of evidence; and the provision of effective appeal rights in respect of decisions of considerable economic and reputational importance for the officer and corporations concerned;

. It offended constitutional principle by allowing the executive government regulator to become the effective decision-maker of its own accusation without permitting the officer of the corporation or corporations affected the privilege of having such a significant public "punishment" determined by a decision-maker distinct and removed from the regulator. Whereas arguments might be mounted for permitting certain regulatory "punishment" (civil penalties and "onthespot fines") [25] at the option of the person accused, with a concurrent privilege to elect for judicial determination if

unwilling to submit to administrative decision, no such privilege was provided by s 206F to an officer such as the plaintiff. ASIC, by its own decision, transmogrified itself from the accusing regulator into the effective decisionmaker, with consequential orders of large potential importance for those affected. The plaintiff charged that the legislation allowed ASIC to perform at once the functions of investigator, prosecutor, judge and jury and that this represented an impermissible blurring of constitutional roles forbidden to bodies established by federal legislation; and

. In the result, the "disqualification" which ASIC was permitted to determine was in the nature of an injunction forbidding the person disqualified from continuing to earn his or her living as an officer of corporations. Determinations of that character were, so the plaintiff submitted, judicial in their essential character. They could not be vested in an executive government body such as ASIC [26] .

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[25] cf *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 175177 .

[26] *R v Davison* (1954) 90 CLR 353 at 366 ; *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 305 .

The legislation is valid

40. *Reliance on the chameleon principle*: I have endeavoured to explain the plaintiff's submissions because I regard them as presenting a serious question for decision. It is not one to be dismissed by an appeal to "formularies"[27].

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[27] Lane, *Some Principles and Sources of Australian Constitutional Law*, (1964) at 114115.

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41. Once again, the Attorney-General of the Commonwealth, who assumed the defence of the legislative scheme, founded his argument on the "double aspect" or "chameleon" principle. I have myself, to some degree, accepted that principle in the past [28] . In the right context [29] , it can serve a useful function. However, it requires considerable care in its application lest it becomes a self-fulfilling means by which the executive and the legislature, by ingenious legislation, may sideline the independent courts. If that were to happen, serious decision-making of large importance might be transferred from independent and impartial decision-makers (such as judges) protected from external influences, to committed agencies within the other branches of government, lacking the same features of institutional neutrality and impartiality.

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[28] *Pasini v United Mexican States* (2002) 209 CLR 246 at 264-267 [48]-[60], 268269 [62] .

[29] See *Spicer* (1957) 100 CLR 277 at 305 . See also *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617 at 628 .

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42. There has been a clear tendency on the part of the Commonwealth of late to meet virtually every appeal to the separation of powers doctrine in the Constitution by an invocation of the "chameleon" principle. The Commonwealth then says that it can solve virtually all supposed infractions of the doctrine by the decision that it makes to assign the functions in question to courts or to executive bodies at its own pleasure. We need to be careful lest this "doctrine", taken too far, destroys the important objectives which the constitutional separation of powers serves. It is of the nature of executive government (and sometimes parliaments) to be impatient with the requirements of such separation. However, the separation can sometimes protect the interests of the people and serve important constitutional ends that this Court should be vigilant to safeguard.

43. *The investigator as adjudicator*: The danger of which the plaintiff complained is illustrated by contrasting the exercise of the power illustrated in the *Albarran* and *Gould* appeals and that deployed in the plaintiff's proceedings. At least in *Albarran* and *Gould* , the decision resulting in the public sanction, exacted in those matters, was committed to an independent panel, namely the Companies Auditors and Liquidators Disciplinary Board ("the Board"). The Chairperson of the Board is required to have legal qualifications similar to those required for judicial appointment [30] . A feature of public administration in Australia in recent years, including in federal administration, has been the growth of important tribunals with members who enjoy substantial tenure and exhibit independence and impartiality similar to the courts [31] . However, as the corporate "watchdog", with an expected and proper commitment to policing corporations and to corporate law enforcement, ASIC cannot exhibit the appearance of similar institutional independence and impartiality. It is this element in the present case that causes me a degree of unease about the legislative design. The question is whether this unease betokens constitutional invalidity. Obviously, the joint reasons conclude that it does not.

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[30] ASIC Act, ss 203(2), 210A(4)(a)(i) . For specified purposes, the hearing before the Board is "taken to be a judicial proceeding": see ASIC Act, s 222 .

[31] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 485 .

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44. It is true that, in the past, parallel institutional arrangements have existed under federal law for the exercise of substantially similar powers by a court and by an administrator [32] . However, the absence of a facility of a full "appeal" to a court, or of a privilege to elect to proceed in a court, presents a different picture in the plaintiff's case [33] .

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[32] *Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma Pty Ltd* (1959) 101 CLR 652 at 658 ; *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1.

[33] cf *Davison* (1954) 90 CLR 353 at 365 .

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45. The arguments of the plaintiff are by no means meritless. They make a number of effective points. If this field of law were free from legal authority, it might be possible to examine the validity of the legislative model presented in the present case. The "chameleon" principle does not appear to have been adopted in the United States of America where, otherwise, there are similarities in the constitutional provisions requiring separation of the judicial power from the other powers of government. Thus, in the United States Supreme Court it has been held repeatedly that "the nature of a proceeding 'depends not upon the character of the body but upon the character of the proceedings'" [34] . The chameleon principle still has a place in our constitutional doctrine [35] . Yet, as Deane J explained in *Polyukhovich v The Commonwealth* [36] :

> "[T]o construe Ch III of the Constitution as being concerned only with labels and as requiring no more than that the repository of judicial power be called a court would be to convert it into a mockery, rather than a reflection, of the doctrine of separation of powers. ... [I]n insisting that the judicial power of the Commonwealth be vested only in the courts designated by Ch III, the Constitution's intent and meaning were that that judicial power would be exercised by those courts acting as courts with all that that notion essentially requires."

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[34] *District of Columbia Court of Appeals v Feldman* 460 US 462 at 477 (1983) citing *Prentis v Atlantic Coast Line Co* 211 US 210 at 226 (1908) and also referring to *Roudebush v Hartke* 405 US 15 at 20-22 (1972); *Lathrop v Donohue* 367 US 820 at 827 (1961); *Nashville, C & St L R Co v Wallace* 288 US 249 at 259 (1933); *Public Service Co v Corboy* 250 US 153 at 161-162 (1919).

[35] *Spicer* (1957) 100 CLR 277 at 305 .

[36] (1991) 172 CLR 501 at 607 .

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46. *The legislation is valid*: In the end I have concluded that, within the present doctrine, the legislation does not infringe the requirements of s 71 of the Constitution . However, I would express my conclusion narrowly. I would rest it on the essential disciplinary character of the powers committed to ASIC by s 206F ; the differentiation of the larger and somewhat more openended powers conferred by the Corporations Act on "the Court"; the fact that ASIC's decision is not conclusive or enforceable, as such, but forms a basis, where necessary, for curially enforceable rights and liabilities; and that ASIC's powers could not fairly be characterised as determining "basic legal rights" [37] of the kind that must always be reserved to a Ch III court [38] .

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[37] *Quinn* (1977) 138 CLR 1 at 11-12 per Jacobs J. See *Albarran* [2007] HCA 23 at [98] .

[38] *Albarran* [2007] HCA 23 at [99] .

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47. The federal regulation of corporations and their officers evident in s 206F is therefore a constitutionally valid feature of contemporary public administration. Whilst some aspects of that regulation may properly be conferred on Ch III courts (as ss 206C, 206D and 206E illustrate), it cannot be said that the functions conferred by s 206F are of such a kind that they must be vested in the courts. So long as a "functional analysis" [39] continues to be endorsed by this Court and applied in its present form, legislation such as this will not be declared invalid. And in Mr Visnic's proceedings the "functional" approach was not challenged [40] , but accepted.

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[39] See *Albarran* [2007] HCA 23 at [36], [42], [76] ; *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 562 [15] .

[40] Leave to reopen the correctness of *Farbenfabriken* and *Quinn* was sought but refused in *P asini* (2002) 209 CLR 246 at 248, 254 [13] per Gleeson CJ, Gaudron, McHugh and Gummow JJ.

Conclusion and order

48. I therefore agree in the order proposed in the joint reasons. The action should be dismissed.

Cited by:

Zivanovic v Australian Securities and Investments Commission [2018] FCA 676 (17 May 2018) (Gleeson J)

27. While the question of Mr Zivanovic's competence is a matter of potential relevance to whether the disqualification was "justified", it was not a matter that the Tribunal was required to consider. Curiously, at para 40 of his written submissions in connection with ground 3, Mr Zivanovic expressly disavows a contention that findings of dishonesty and/or incompetence were necessary for the disqualification power to be enlivened. As the Full Court relevantly observed in *Murdaca v Australian Securities and Investments Commission* [2009] FCAFC 92; (2009) 178 FCR 119; at [101]:

...

> (b) ASIC's power to disqualify a person from the management of corporations must be exercised for the purposes for which it was granted. Those purposes are the protection of all those persons who deal with corporations from the consequences of the actions of those corporate officeholders who, either through incompetence or dishonesty or a combination of the two, bring about the failure of

corporations and thus cause loss to others (*Rich v Australian Securities and Investments Commission* [2004] HCA 42; (2004) 220 CLR 129 at [47]–[50] (151–155) and the maintenance of professional management standards in the public interest (*Visnic v Australian Securities and Investments Commission* [2007] HCA 24; (2007) 231 CLR 381 at [11] (p 385) and [26] (p 388)).

(c) Section 206F does not give reports prepared by liquidators pursuant to s 533 of the Act any particular status or weight. ASIC may approach the exercise of its power of disqualification under s 206F(1)(c) in any way it thinks fit, subject to complying with s 206F(1) and s 206F(2) and subject to respecting and applying the principles referred to in subpar (b) above.

...

Re Bolton and Australian Securities and Investments Commission [2018] AATA 976 (24 April 2018) (Deputy President S A Forgie)

95. Once the foundation criteria in ss 206F(1)(a) and (b) have been satisfied, ASIC must have regard to whether the two corporations mentioned in s 206F(1) were related to one another as required by s 206F(2)(a) . It must do so in determining whether disqualification is justified as required by s 206F(1)(c) . In making that determination, it may also have regard to the matters set out in s 206F(2)(b) . It is drafted quite broadly and must be interpreted in light of the purpose for which ASIC was given a power to disqualify a person from managing a corporation. That purpose was explained by the Full Court in *Murdaca* :

> "*ASIC's power to disqualify a person from the management of corporations must be exercised for the purposes for which it was granted. Those purposes are the protection of all those persons who deal with corporations from the consequences of the actions of those corporate officeholders who, either through incompetence or dishonesty or a combination of the two, bring about the failure of corporations and thus cause loss to others (* Rich v Australian Securities and Investments Commission *[2004] HCA 42; (2004) 220 CLR 129 at [47]–[50]) and the maintenance of professional management standards in the public interest (* Visnic v Australian Securities and Investments Commission *[2007] HCA 24; (2007) 231 CLR 381 at [11] (p 385) and [26])* ." [120]

Re Bolton and Australian Securities and Investments Commission [2018] AATA 976 (24 April 2018) (Deputy President S A Forgie)

100. Section 206F(2)(b)(ii) relates to whether the disqualification would be in the public interest. That would draw into consideration a range of matters determined by the particular factual circumstances. One would be the integrity of the regulatory scheme and its purposes as described in *Murdaca* referring to *Rich* and *Visnic* . One of those is the maintenance of professional management standards. It is in the public interest that those who manage corporations behave in a way that accords with the law and with the obligations imposed upon them by the law. Behaviour that would lead to a conclusion that a person is not acting in that way would be relevant in determining whether disqualification is justified.

Re Bolton and Australian Securities and Investments Commission [2018] AATA 976 (24 April 2018) (Deputy President S A Forgie)

4. Mr Broadfoot submitted that:

> (1) The Tribunal is not empowered by s 206F to consider a breach of s 206A as a basis for imposing or extending a ban upon Mr Bolton from managing corporations.

(a) In some circumstances, an administrative decision-maker is required to undertake an enquiry as to whether a person has committed an offence. Those circumstances arise if the relevant legislation requires a decision-maker to make that enquiry as a step in the decision-making process. [2]

(b) Section 206F does not improperly confer upon ASIC a function or power pertaining to the exercise of the judicial power of the Commonwealth. [3]

(2) That, however, does not preclude a consideration of Mr Bolton's conduct under s 206F .

(a) If for example, he were found to have acted incompetently or dishonestly, had engaged in misleading or deceptive conduct or involved in breaches of fiduciary duty, misuse of confidential information or other improper behaviour, that would be conduct to which the Tribunal could have regard under s 206F because the public might require protection from such behaviour.

(b) The same conduct might, or might not, amount to a breach of s 206A but the Tribunal cannot conclude that it has amounted to a breach and then, based purely on that conclusion, decide that a further period of disqualification is justified. It must assess whether the conduct itself is worthy of disqualification. [4]

(3) Disqualification under s 206F is a penalty and this proceeding is a proceeding for the imposition of a penalty. That is not inconsistent with the proposition that the function or purpose of s 206F is to protect the public by disqualifying persons who present a risk.

(a) The process by which the protective function is carried out is penal: *Rich v Australian Securities and Investments Commission* [5] (*Rich*) but the primary function of the power to disqualify persons under s 206F is predominantly protective in nature. [6] whereas s 206A is punitive.

(b) The main purpose or function of s 206A is qualitatively different from that of s 206F .

(i) The purpose of s 206A is to punish an individual for committing a breach of the provision. Therefore, disqualification upon breach of s 206A is automatic by virtue of s 206B and there is no need to consider whether that disqualification is justified or necessary to give effect to any purpose of protection.

(ii) Section 206A is concerned with the creation of a criminal offence for managing a corporation once a disqualification decision has been made. By that time, ASIC's role under s 206F has been exhausted. That ensures that an applicant is not exposed to a double jeopardy through being subjected to a penalty in this proceeding for a contravention of s 206A an d then being prosecuted in relation to the same conduct.

(4) Should the Tribunal decide that it is able to consider the s 20 6A matters or Mr Bolton's conduct in relation to Keybridge Capital or Aurora, certain issues arise.

(a) The Tribunal should make two orders.

(i) One order should be made under ss 35(2) and (4) of the *Administrative Appeals Tribunal Act 1975* (AAT Act) restricting the further use that may be made of the evidence in order to avoid prejudice to Mr Bolton.

· This order is necessary to ensure that Mr Bolton is not prejudiced in any future criminal proceeding because of evidence that he has given in a proceeding, such as this, for the imposition of a penalty. The Corporations Act contemp lates that evidence used in civil penalty or pecuniary penalty proceedings will not be used in subsequent criminal proceedings. [7]

(ii) A second order should be directed to ASIC requiring it to produce all documents that were before the Takeovers Panel and requiring it to make available for cross-examination any of the persons who lodged affidavits or who gave evidence in the Takeovers Panel's proceeding and upon whose evidence ASIC wishes to rely in this proceeding.

via

[3] *Attorney-General (Cth) v Alinta Limited* [2008] HCA 2; (2008) 233 CLR 542; 242 ALR 1; 64 ACSR 507 at [160] ; 594-595; 41; 546-547(*Alinta*); *Visnic v Australian Securities and Investments Commission* [2007] HCA 24; (2007) 231 CLR 381; 234 ALR 413; 61 ACSR 512; 95 ALD 18 ; Gleeson CJ, Gummow, Kirby,

Hayne, Callinan, Heydon and Crennan JJ at [16]; 386; 417; 516; 22 (*Visnic*), *Albarran* , *ACMA v Today FM* and *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* [1970] HCA 8; (1970) 123 CLR 361; McTiernan, Kitto, Menzies, Windeyer, Owen and Walsh JJ

Re Bolton and Australian Securities and Investments Commission [2018] AATA 976 (24 April 2018) (Deputy President S A Forgie)

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(b) Section 206F does not improperly confer upon ASIC a function or power pertaining to the exercise of the judicial power of the Commonwealth. [3]

(2) That, however, does not preclude a consideration of Mr Bolton's conduct under s 206F .

(a) If for example, he were found to have acted incompetently or dishonestly, had engaged in misleading or deceptive conduct or involved in breaches of fiduciary duty, misuse of confidential information or other improper behaviour, that would be conduct to which the Tribunal could have regard under s 206F because the public might require protection from such behaviour.

(b) The same conduct might, or might not, amount to a breach of s 206A but the Tribunal cannot conclude that it has amounted to a breach and then, based purely on that conclusion, decide that a further period of disqualification is justified. It must assess whether the conduct itself is worthy of disqualification. [4]

(3) Disqualification under s 206F is a penalty and this proceeding is a proceeding for the imposition of a penalty. That is not inconsistent with the proposition that the function or purpose of s 206F is to protect the public by disqualifying persons who present a risk.

(a) The process by which the protective function is carried out is penal: *Rich v Australian Securities and Investments Commission* [5] (*Rich*) but the primary function of the power to disqualify persons under s 206F is predominantly protective in nature. [6] whereas s 206A is punitive.

(b) The main purpose or function of s 206A is qualitatively different from that of s 206F .

(i) The purpose of s 206A is to punish an individual for committing a breach of the provision. Therefore, disqualification upon breach of s 206A is automatic by virtue of s 206B and there is no need to consider whether that disqualification is justified or necessary to give effect to any purpose of protection.

(ii) Section 206A is concerned with the creation of a criminal offence for managing a corporation once a disqualification decision has been made. By that time, ASIC's role under s 206F has been exhausted. That ensures that an applicant is not exposed to a double jeopardy through being subjected to a penalty in this proceeding for a contravention of s 206A an d then being prosecuted in relation to the same conduct.

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lodged affidavits or who gave evidence in the Takeovers Panel's proceeding and upon whose evidence ASIC wishes to rely in this proceeding.

via

[3] *Attorney-General (Cth) v Alinta Limited* [2008] HCA 2; (2008) 233 CLR 542; 242 ALR 1; 64 ACSR 507 at [160] ; 594-595; 41; 546-547(*Alinta*); *Visnic v Australian Securities and Investments Commission* [2007] HCA 24; (2007) 231 CLR 381; 234 ALR 413; 61 ACSR 512; 95 ALD 18; Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ at [16]; 386; 417; 516; 22 (*Visnic*), *Albarran* , *ACMA v Today FM* and *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* [1970] HCA 8; (1970) 123 CLR 361; McTiernan, Kitto, Menzies, Windeyer, Owen and Walsh JJ

Re Bolton and Australian Securities and Investments Commission [2018] AATA 976 (24 April 2018) (Deputy President S A Forgie)

6. Dr Bender further submitted that an administrative body exercising a disqualification power may take into account breaches of an offence provision such as s 206A of the Corporations Act . To do so is not an exercise of judicial power. He relied on *Albarran* [15] , *Visnic* [16] and *AC MA v Today FM* [17] (*Today FM*) as well as cases decided by the Tribunal in *Re Trkulja and Anor and Inspector General in Bankruptcy* [18] (*Trkulja*), *Re Hill and Inspector-General in Bankruptcy* [19] (*Hill*) and *Re Phillips and Inspector-General.* [20] Subject to its complying with ss 206F(1) and (2) and the need to exercise the power for proper purposes, the Full Federal Court decided in *Murdaca* that the breadth of s 206F(2)(b)(iii) enabled ASIC to "*approach the exercise of its power of disqualification under s 206F(1)(c) in any way it thinks appropriate*".

via [16] [2007] HCA 24 ; (2007) 231 CLR 381; 234 ALR 413; 61 ACSR 512; 95 ALD 18 ; Gleeson CJ,

Seymour and Australian Securities and Investments Commission [2017] AATA 2581 (24 November 2017) (Mr P W Taylor SC, Senior Member)

238. It was uncontentious that the fact and circumstances of the liquidation of PCL and Cashflow at least potentially satisfied the criteria for the exercise of the disqualification power in Corp Act s 206F(1) - subject to satisfaction that such an order was "justified". As a matter of practical necessity, the process of achieving any necessary satisfaction must have regard to both the person's conduct, and to the permissible period of any disqualification (a maximum of five years). There is an additional statutory permission to have regard to the public interest, and to any other matter that is considered appropriate:- Corp Act s 206F(2) . In *Murd aca v ASIC* (2009) FCAFC 92; 178 FCR 119 the Full Court of the Federal Court of Australia said this about the exercise of the disqualification decision:-

> *[101] ... ASIC's power to disqualify a person from the management of corporations must be exercised for the purposes for which it was granted. Those purposes are the protection of all those persons who deal with corporations from the consequences of the actions of those corporate officeholders who, either through incompetence or dishonesty or a combination of the two, bring about the failure of corporations and thus cause loss to others (Rich v ASIC (2004) 220 CLR 129 at [47]-[50]) and the maintenance of professional management standards in the public interest (Visnic v ASIC (2007) 231 CLR 381 at [11] & [26]).*

Oreb v Australian Securities and Investments Commission (No 2) [2017] FCAFC 49 (24 March 2017) (Rares, Davies and Gleeson JJ)

28. The operation of s 206F has previously been considered by Full Courts in *Murdaca v Australian Securities and Investments Commission* [2009] FCAFC 92; (2009) 178 FCR 119 and *Culley v Australian Securities and Investments Commission* [2010] FCAFC 43; (2010) 183 FCR 279. In *Murdaca,* at [101], the Court set out the following relevant propositions:

> (1) Subsection 206F(1) comprises, in ascending order of importance:
>
> (a) a trigger mechanism (the conditions, filters or gateway) embodied in subs (1)(a) (stage 1);
>
> (b) a procedural fairness requirement (the giving of a show cause notice and an opportunity to be heard): subs (1)(b) (stage 2); and
>
> (c) a merits decision captured in the requirement that ASIC be satisfied that disqualification is justified: subs (1)(c) read with s 206F (2) (stage 3).
>
> (2) ASIC's power to disqualify a person from the management of corporations must be exercised for the purposes for which it was granted. Those purposes are the protection of all those persons who deal with corporations from the consequences of the actions of those corporate officeholders who, either through incompetence or dishonesty or a combination of the two, bring about the failure of corporations and thus cause loss to others (*Rich v Australian Securities and Investments Commission* [2004] HCA 42; (2004) 220 CLR 129 at [47]–[50] (151–155)) and the maintenance of professional management standards in the public interest (*Visnic v Australian Securities and Investments Commission* [2007] HCA 24; (2007) 231 CLR 381 at [11] (385) and [26] (388)).
>
> (3) Section 206F does not give reports prepared by liquidators pursuant to s 533 of the Act any particular status or weight. ASIC may approach the exercise of its power of disqualification under s 206F(1)(c) in any way it thinks fit, subject to complying with s 206F(1) and s 206F(2) and subject to respecting and applying the principles referred to in (2) above.
>
> (4) Section 206F is an alternative to court action that ASIC may commence under Pt 2D.6 . It is meant to be a quick and cheap alternative to court action. The merits consideration by ASIC is intended to take place only once in the process – not at two stages. The preconditions provided for in ss 206F(1)(a) and (b) are jurisdictional requirements which must be satisfied before ASIC's power to disqualify under s 206F is enlivened.

Oreb v Australian Securities and Investments Commission (No 2) [2017] FCAFC 49 (24 March 2017) (Rares, Davies and Gleeson JJ)

29. In *Culley,* at [31], the Full Court concluded from the terms of s 206F and its location in Pt 2D.6 of the Act that the Parliament had been concerned to strike a balance between competing interests which their Honours identified as follows:

> [32] The section reflects on the one hand, the interest of the public in the existence of a facility for removing from the pool of managers those who are, or have been, officers of two or more corporations which have been wound up for inability to pay their debts. As a result, the public and the market are afforded a measure of protection from those who, as was said in *Murdaca* ... at 143 :

> either through incompetence or dishonesty or a combination of the two, bring about the failure of corporations and thus cause loss to others (*Rich v Australian Securities and Investments Commission* [2004] HCA 42; (2004) 220 CLR 129 at [47]-[50]).
>
> In the same passage, their Honours discerned in s 206F a concern with "the maintenance of professional management standards in the public interest (*Visnic v Australian Securities and Investments Commission* [2007] HCA 24; (2007) 231 CLR 381 at [11] and [26])."
>
> [33] On the other hand, the legislature has recognised the need for corporate officers not to be exposed to disqualification as a result of corporate failures separated by an inordinate length of time. In our view, the concern, which we have imputed to Parliament, to strike a balance between these competing interests has been accommodated by fixing in s 206F(1)(a) a "window" of seven years within which two or more corporate collapses must occur in order for an officer involved in them to be at risk of disqualification from managing any other corporation.

Oreb v Australian Securities and Investments Commission (No 2) [2017] FCAFC 49 (24 March 2017) (Rares, Davies and Gleeson JJ)

34. Dr Donaghue QC argued that it is an ordinary use of language to describe the event of a resolution or order that a corporation be wound up in the past as the relevant corporation having been wound up. He referred to the following instances of courts using the language of "was wound up" to describe the commencement of a winding up:

    (1) In *Visnic* at [6] , Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ said:

    > The plaintiff had been a director of fourteen companies which had been wound up with the appointment of liquidators.

    (2) In *Murdaca* at [10] , North, Kenny and Foster JJ said:

    > On 12 November 2004, AAMIC was wound up by order of the Supreme Court of Victoria and Mr Colin Nicol was appointed as liquidator of that corporation. The appellant was a director of AAMIC as at the date it was wound up.

Oreb v Australian Securities and Investments Commission (No 2) [2017] FCAFC 49 (24 March 2017) (Rares, Davies and Gleeson JJ)

43. The appellants' construction requires the word "fully" to be read into s 206F(1)(a)(ii) , given that the expression "fully wound up" has been used elsewhere in the Act (in ss 509 and 601AB). In contrast, the primary judge's interpretation is congruent with the use of the words "is wound up" in s 206D, as the primary judge explained at [54] of her Honour's reasons. Section 206D(2)(h) provides that a corporation fails if the corporation "is wound up" and a liquidator lodges a report under s 533(1) . In *Visnic* , at [33] and [38] , Kirby J noted the clear similarity between the language of ss 206D and 206F, containing "virtually identical criteria, directed to the same outcome".

Holden and Australian Securities and Investments Commission [2016] AATA 605 (15 August 2016) (Deputy President S A Forgie)

25. Those circumstances and interests must be viewed in light of the purpose for which the power of disqualification was conferred on ASIC. That purpose was summarised by the Full

Court of the Federal Court in *Murdaca v Australian Securities and Investments Commission* [42] (*Murdaca*):

> *"ASIC's power to disqualify a person from the management of corporations must be exercised for the purposes for which it was granted. Those purposes are the protection of all those persons who deal with corporations from the consequences of the actions of those corporate officeholders who, either through incompetence or dishonesty or a combination of the two, bring about failure of corporations and thus cause loss to others (Rich v Australian Securities and Investments Commission (2004) 220 CLR 129 at [47]-[50]) and the maintenance of professional management standards in the public interest (Visnic v Australian Securities and Investments Commission (2007) 231 CLR 381 at [11] and [26]). "* [43]

Ase16 v Australian Securities and Investments Commission [2016] FCA 321 (01 April 2016) (Markovic J)

54. The applicants contend that the note is necessary to explain the temporal elements in s 206D (2)(h) which are not present or required in s 206F. A contrary view may be taken. That is that the note was included in s 206D(2)(h) to ensure a consistent approach in the application of that subsection and s 206F(1)(a)(ii) . Such a view promotes consistency between the two sections which contain similar language and criteria. In *Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381 , which concerned a constitutional challenge to the validity of s 206F, the High Court recognised the similarity between s 206F and the other sections empowering a court to disqualify persons from managing corporations, including s 206D . At [7] of their judgment, the majority identified one difference between s 206F and ss 206C, 206D and 206E namely, that an additional matter for ASIC to consider in determining whether disqualification is justified is whether the disqualification would be in the public interest. At [33] Kirby J observed:

> The similarity between the language of the provisions empowering "the court" to disqualify a person from managing corporations and the language of s 206F by which ASIC is empowered to so determine is clear. In the case of "the court", the period of disqualification may be longer (up to 20 years in s 206D and not specifically limited in s 206C or s 206E) ....

Ase16 v Australian Securities and Investments Commission [2016] FCA 321 (01 April 2016) (Markovic J)

20. At [101] of its judgment the Full Court sets out its reasons for its conclusions on its interpretation of s 206F in light of the issues raised as follows:

> [101] Our reasons for these conclusions may be shortly stated as follows:
>
> (a) Subsection (1) of s 206F comprises, in ascending order of importance:
>
> (i) A trigger mechanism (the conditions, filters or gateway) embodied in subs (1)(a) (stage 1);
>
> (ii) A procedural fairness requirement (the giving of a show cause notice and an opportunity to be heard): subs (1)(b) (stage 2); and
>
> (iii) A merits decision captured in the requirement that ASIC be satisfied that disqualification is justified: subs (1)(c) read with s 206F(2) (stage 3).

(b) ASIC's power to disqualify a person from the management of corporations must be exercised for the purposes for which it was granted. Those purposes are the protection of all those persons who deal with corporations from the consequences of the actions of those corporate officeholders who, either through incompetence or dishonesty or a combination of the two, bring about the failure of corporations and thus cause loss to others (*Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at [47]-[50]) and the maintenance of professional management standards in the public interest (*Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381 at [11] and [26]).

(c) Section 206F does not give reports prepared by liquidators pursuant to s 533 of the Act any particular status or weight. ASIC may approach the exercise of its power of disqualification under s 206F(1)(c) in any way it thinks fit, subject to complying with s 206F(1) and (2) and subject to respecting and applying the principles referred to in subparagraph (b) above.

(d) Subsection (2) of s 206F informs the exercise of the power given to ASIC by subs (1)(c). Subparagraph (a) of subs (2) lays down a mandatory requirement to which regard must be had and subpara (b) sets out matters to which regard may be had. ASIC is not obliged to have regard to the s 533 report or reports which triggered the disqualification process when considering whether disqualification is justified. No doubt it may do so in an appropriate case but it is not obliged to do so. Rather, it is authorised and empowered to make a decision on the merits as to whether disqualification is justified. It would make no sense at all if it were also required to involve itself in a merits-based decision in relation to the correctness of the relevant s 533 report or reports at stage 1 of the process. In the event that reliance is placed upon the s 533 report or reports at stage 3 of the process, ASIC will be called upon to assess the worth of that report or those reports at that stage in order to decide whether disqualification is justified.

(e) Section 206F is an alternative to court action by ASIC. It is meant to be a quick and cheap alternative to court action. However, it cannot be utilised just because ASIC feels that it would like to take action against a particular individual. Certain preconditions for action must be satisfied. But, in the end, the merits consideration by ASIC is intended to take place only once in the process — not at two stages. In a sense, the preconditions provided for in subparas (a) and (b) of s 206F(1) are jurisdictional requirements which must be satisfied before ASIC's power to disqualify under s 206F is enlivened.

(f) To interpret s 206F as the appellant has contended would lead to endless challenges during the s 206F disqualification process directed to the validity of the relevant s 533 reports and would be likely to render s 206F unworkable.

Ase16 v Australian Securities and Investments Commission [2016] FCA 321 (01 April 2016) (Markovic J)

22. In *Culley v Australian Securities and Investments Commission* (2010) 183 FCR 279 (***Culley***) a Full Court of this Court considered whether s 206F required ASIC to exercise its power of disqualification within any shorter period than the seven years immediately before the giving of a notice under s 206F(1)(b) . It found it did not. Once again the issues before me were not before the Full Court. However, at [31] to [33] of its judgment the Full Court said the following about the purpose of s 206F:

> 31. ... It is clear enough from its terms and its location in Pt 2D.6 of the Corporations Act that the legislature, in framing s 206F, has been concerned to strike a balance between two competing interests.
>
> 32. The section reflects on the one hand, the interest of the public in the existence of a facility for removing from the pool of managers those who are, or have been, officers of two or more corporations which have been wound up for inability to pay their debts. As a result, the public and the market are afforded a measure of protection from those who, as was said in *Murdaca* (supra), at 143 :
>
> > "either through incompetence or dishonesty or a combination of the two, bring about the failure of corporations and thus cause loss to others (*Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at [47]-[50])."
>
> In the same passage, their Honours discerned in s 206F a concern with "the maintenance of professional management standards in the public interest: *Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381 at [11] and [26] ."
>
> 33. On the other hand, the legislature has recognised the need for corporate officers not to be exposed to disqualification as a result of corporate failures separated by an inordinate length of time. In our view, the concern, which we have imputed to Parliament, to strike a balance between these competing interests has been accommodated by fixing in s 206F(1)(a) a "window" of seven years within which two or more corporate collapses must occur in order for an officer involved in them to be at risk of disqualification from managing any other corporation.

Ase16 v Australian Securities and Investments Commission [2016] FCA 321 (01 April 2016) (Markovic J)

49. In considering the text of the legislation regard can be had to the context of the text and the purpose of the legislation. The imposition of an interpretation that means ASIC would be prevented from taking steps under s 206F until the end of the winding up process would, in my view, be contrary to the purpose of the section:

> (1) in *Nicholas v Commissioner for Corporate Affairs* [1988] VR 289 at 299 Kaye J, in considering s 562A of the *Companies (Victoria) Code*, a predecessor to s 206F of the Act , noted that the object of that section was "clearly to protect the public's interest by preventing persons, who by past conduct are unfit, from directing, promoting or managing the affairs of a corporation";
>
> (2) in *Murdaca* the Full Court said at [101(b)] :
>
> ASIC's power to disqualify a person from the management of corporations must be exercised for the purposes for which it was granted. Those purposes are the protection of all those persons who deal with corporations from the consequences of the actions of those corporate officeholders who, either through incompetence or dishonesty or a combination of the two, bring about the failure of corporations and

thus cause loss to others (*Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at [47]–[50] and the maintenance of professional management standards in the public interest (*Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381 at [11] and [26]);

(3) in *Culley,* the Full Court recognised that the legislature had been concerned to strike a balance between two competing interests one of which was the "interest of the public in the existence of a facility for removing from the pool of managers those who are, or have been, officers of two or more corporations which have been wound up for inability to pay their debts" as a result of which the public and market are afforded a measure of protection from those who, as identified in *Murdaca* , bring about the failure of corporations either through incompetence or dishonesty or a combination of the two: at [32] .

Australian Communications And Media Authority v Today FM (Sydney) Pty Ltd [2015] HCA 7 (04 March 2015) (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ)

58. The characterisation of the Authority's enforcement power under s 143 does not depend upon whether the Authority is acting on the breach of the condition that the licensee will comply with program standards under cl 8(1)(b) or the condition that the licensee not use the broadcasting service in the commission of a relevant offence under cl 8(1)(g) . The finding that Today FM's broadcasting service was used in the commission of an offence does not resolve a controversy respecting pre-existing rights or obligations [95] . It is a step in the determination of breach of the cl 8(1)(g) licence condition [96] and is the foundation for the Authority to institute civil penalty proceedings in the Federal Court of Australia or to take administrative enforcement measures, including imposing further conditions on Today FM's licence [97] , accepting an enforceable undertaking [98] , issuing a remedial direction [99] , or suspending or cancelling Today FM's licence [100] .

via

[96] *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* (1987) 163 CLR 140 at 149 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ; *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 at 361 [28] per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ; *Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381 at 386 [16] per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ, 395 [46] per Kirby J ; [2007] HCA 24 ; *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 576 [90], 578-579 [96] per Hayne J, 594-595 [160] per Crennan and Kiefel JJ.

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Leslie John May and Australian Securities and Investments Commission [2013] AATA 180 (28 March 2013) (Deputy President P E Hack SC)

4. In *Murdaca v Australian Securities and Investments Commission* [2] the Full Court described the operation of s 206F of the *Corporations Act* in this way,

> *Our reasons for these conclusions may be shortly stated as follows:*
>
> *(a) Subsection (1) of s 206F comprises, in ascending order of importance:*
>
> *(i) A trigger mechanism (the conditions, filters or gateway) embodied in subs (1)(a) (stage 1);*
>
> *(ii) A procedural fairness requirement (the giving of a show cause notice and an opportunity to be heard): subs (1)(b) (stage 2); and*
>
> *(iii) A merits decision captured in the requirement that ASIC be satisfied that disqualification is justified: subs (1)(c) read with s 206F(2) (stage 3).*
>
> *(b) ASIC's power to disqualify a person from the management of corporations must be exercised for the purposes for which it was granted. Those purposes are the protection of all those persons who deal with corporations from the consequences of the actions of those corporate officeholders who, either through incompetence or dishonesty or a combination of the two, bring about the failure of corporations and thus cause loss to others (Rich v Australian Securities and Investments Commission (2004) 220 CLR 129 at [47]-[50] and the maintenance of professional management standards in the public interest (Visnic v Australian Securities and Investments Commission (2007) 231 CLR 381 at [11] and [26]).*
>
> *(c) Section 206F does not give reports prepared by liquidators pursuant to s 533 of the Act any particular status or weight. ASIC may approach the exercise of its power of disqualification under s 206F(1)(c) in any way it thinks fit, subject to complying with s 206F(1) and (2) and subject to respecting and applying the principles referred to in subparagraph (b) above.*
>
> *(d) Subsection (2) of s 206F informs the exercise of the power given to ASIC by subs (1)(c). Subparagraph (a) of subs (2) lays down a mandatory requirement to which regard must be had and subpara (b) sets out matters to which regard may be had. ASIC is not obliged to have regard to the s 533 report or reports which triggered the disqualification process when*

considering whether disqualification is justified. No doubt it may do so in an appropriate case but it is not obliged to do so. Rather, it is authorised and empowered to make a decision on the merits as to whether disqualification is justified. It would make no sense at all if it were also required to involve itself in a merits-based decision in relation to the correctness of the relevant s 533 report or reports at stage 1 of the process.

In the event that reliance is placed upon the s 533 report or reports at stage 3 of the process, ASIC will be called upon to assess the worth of that report or those reports at that stage in order to decide whether disqualification is justified.

(e) Section 206F is an alternative to Court action by ASIC. It is meant to be a quick and cheap alternative to Court action. However, it cannot be utilised just because ASIC feels that it would like to take action against a particular individual. Certain preconditions for action must be satisfied. But, in the end, the merits consideration by ASIC is intended to take place only once in the process--not at two stages. In a sense, the preconditions provided for in subparas (a) and (b) of s 206F(1) are jurisdictional requirements which must be satisfied before ASIC' s power to disqualify under s 206F is enlivened.

(f) ...

Thompson And Australian Securities And Investments Commission [2010] AATA 1063 (23 December 2010) (Deputy President P E Hack SC)

30. In *Murdaca v Australian Securities and investments Commission* [2] the Full Court described the operation of s 206F in this way:

[101] ...

(a) Subsection (1) of s 206F comprises, in ascending order of importance:

(i) A trigger mechanism (the conditions, filters or gateway) embodied in subs (1)(a) (stage 1);

(ii) A procedural fairness requirement (the giving of a show cause notice and an opportunity to be heard): subs (1)(b) (stage 2); and

(iii) A merits decision captured in the requirement that ASIC be satisfied that disqualification is justified: subs (1)(c) read with s 206F(2) (stage 3).

(b) ASIC's power to disqualify a person from the management of corporations must be exercised for the purposes for which it was granted. Those purposes are the protection of all those persons who deal with corporations from the consequences of the actions of those corporate officeholders who, either through incompetence or dishonesty or a combination of the

two, bring about the failure of corporations and thus cause loss to others (*Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at [47]-[50]) and the maintenance of professional management standards in the public interest (*Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381 at [11] and [26]).

(c) Section 206F does not give reports prepared by liquidators pursuant to s 533 of the Act any particular status or weight. ASIC may approach the exercise of its power of disqualification under s 206F(1)(c) in any way it thinks fit, subject to complying with s 206F(1) and (2) and subject to respecting and applying the principles referred to in subparagraph (b) above.

(d) Subsection (2) of s 206F informs the exercise of the power given to ASIC by subs (1)(c) . Subparagraph (a) of subs (2) lays down a mandatory requirement to which regard must be had and subpara (b) sets out matters to which regard may be had. ASIC is not obliged to have regard to the s 533 report or reports which triggered the disqualification process when considering whether disqualification is justified. No doubt it may do so in an appropriate case but it is not obliged to do so. Rather, it is authorised and empowered to make a decision on the merits as to whether disqualification is justified. It would make no sense at all if it were also required to involve itself in a merits-based decision in relation to the correctness of the relevant s 533 report or reports at stage 1 of the process.

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(e) Section 206F is an alternative to Court action by ASIC. It is meant to be a quick and cheap alternative to Court action. However, it cannot be utilised just because ASIC feels that it would like to take action against a particular individual. Certain preconditions for action must be satisfied. But, in the end, the merits consideration by ASIC is intended to take place only once in the process — not at two stages. In a sense, the preconditions provided for in subparas (a) and (b) of s 206F(1) are jurisdictional requirements which must be satisfied before ASIC's power to disqualify under s 206F is enlivened.

(f) To interpret s 206F as the appellant has contended would lead to endless challenges during the s 206F disqualification process directed to the validity of the relevant s 533 reports and would be likely to render s 206F unworkable."

TEDESCO v Director Of Public Prosecutions [2010] SASC 336 (06 December 2010) (Judgment of the Honourable Justice White)

Director of Public Prosecutions v George (2008) 102 SASR 246; *Director of Public Prosecutions (Cth) v Chan* (2001) 183 ALR 575; *Direct of Public Prosecutions (Cth) v Chan* (2001) 52 NSWLR 56; *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969)121 CLR 342; *DPP v Sienczewski* [2010] SASC 16; *O'Sulli van v Farrer* (1989) 168 CLR 210; *Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381 ; *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423; *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 56 FCR 50; *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473; *Taylor v Attorney-General* (1991) 55 SASR 462, applied.

TEDESCO v Director Of Public Prosecutions [2010] SASC 336 (06 December 2010) (Judgment of the Honourable Justice White)

58. It is not possible to identify all the various matters which may bear upon the public interest for the purposes of s 76(1)(c) . The concept of "the public interest" is a wide one, and generally involves a discretionary value judgment following consideration of a range of matters. Mason CJ, Brennan, Dawson and Gaudron JJ spoke in *O'Sullivan v Farrer* of the undefined nature of the public interest: [11]

> [T]he expression "in the public interest", when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only "in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view". [12]
>
> (Citation omitted)

Kirby J gave a paraphrase of this passage in *Visnic v Australian Securities and Investments Commission* [13] when he said:

> The use of such expressions ["in the public interest"] in legislation may direct the attention of the court to a "discretionary value judgment to be made by reference to undefined factual matters" but with boundaries that can be fixed by reference to the objects that the legislature is taken to have had in view. [14]

Thus the matters to which a court may have regard will usually be confined only by the scope and purpose of the relevant legislation.

via

[13] [2007] HCA 24 ; (2007) 231 CLR 381 .

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Thus the matters to which a court may have regard will usually be confined only by the scope and purpose of the relevant legislation.

via

[14] Ibid at [36] ; 391.

Culley v Australian Securities and Investments Commission [2010] FCAFC 43 (19 May 2010) (Ryan, Mansfield and McKerracher JJ)

Visnic v Australian Securities and Investments Commission (2007) 231 CLR 381
Water Board v Moustakas

Culley v Australian Securities and Investments Commission [2010] FCAFC 43 (19 May 2010) (Ryan, Mansfield and McKerracher JJ)

32. The section reflects on the one hand, the interest of the public in the existence of a facility for removing from the pool of managers those who are, or have been, officers of two or more corporations which have been wound up for inability to pay their debts. As a result, the public and the market are afforded a measure of protection from those who, as was said in *M urdaca* (supra), at 143 ;

> either through incompetence or dishonesty or a combination of the two, bring about the failure of corporations and thus cause loss to others (*Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at [47]-[50]).

In the same passage, their Honours discerned in s 206F a concern with "the maintenance of professional management standards in the public interest (*Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381 at [11] and [26])."

JTMJ v Australian Securities and Investments Commission [2010] AATA 350 (11 May 2010)

252. The matters to which we must have regard in considering whether or not to make a banning order have been the subject of some judicial consideration.
Dr Hughes, a Member of the Tribunal, and I considered these in *Re Howarth and Australian Securities and Investments Commission.* [234] Although a lengthy passage,
I include it to explain why I continue to hold the view that the authorities establish that a banning order should only be imposed for protective, and not punitive, purposes:

"152. If we were to have regard to the licensing framework established by Part 7.6 of the Corporations Act without reference to judicial authorities, it would seem to us that the purpose of a banning order is to ensure that members of the public are protected from those who do not meet the standards of behaviour or otherwise expected of a person engaged in the provision of financial services. There is nothing on the face of Part 7.6 generally or of ss 920A and 920B in particular that suggests that the purpose of imposing a banning order is intended to be punitive. There are separate provisions in the Corporations Act creating criminal offences and yet others providing for civil consequences, such as pecuniary penalties, for the breach of certain provisions of the financial services law.[235] There seems to be a clear separation in the Corporations Act of the regulatory provisions relating to suspension or cancellation of AFSLs, those relating to the imposition of banning orders and those relating to the creation of offences and the criminal and civil consequences of breaching them.

153. It might be thought that this proposition would be contrary to the High Court's conclusion in Rich v Australian Securities and Investments Commission [236] when it overruled the judgment of the Full Court of the Federal Court in Australian Securities Commission v Kippe. *[237] The issue that faced the Full Court and its conclusion were summarised by Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ in Rich :*

> '... *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 . Secti on 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 ... 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. ..." *[238]*

154. The case of Rich itself involved an application by ASIC to the Supreme Court of New South Wales for orders of discovery against Mr Rich and another. Mr Rich claimed that he should not be required to give discovery because the proceedings exposed him to a penalty in the form of declarations of contravention, compensation orders and disqualification orders so that the privilege against penalties and forfeiture applied. Referring to a disqualification order, the majority, Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ, with whom McHugh J agreed on these aspects, said:

> ' If a disqualification order is made, the person against whom the order is made ceases to be a director, or a secretary of a company, ... unless given permission under ss 206F or 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 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 ...is exposure to penalty, exposure to a disqualification order is exposure to a penalty.' *[239]*

155. The majority did not go on to consider the basis on which the discretion to make a disqualification order should be made. They referred to authorities in which it had been said that its purpose was to protect the public rather than to punish but immediately distinguished that line of authorities from the issue that they had to decide. The issue they had to decide was:

> '... 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 be achieved by their making. Rather, attention must be focused upon the nature of the orders that are sought.' [240]

156. On our understanding, the majority gave no consideration at all to the factors that are to be taken into account when making disqualification orders. It appears from their judgment that they had no need to do so. Kirby J, who was in dissent, did not need to do so and expressly said so:

> '... 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) ... [*Re HIH Insurance Ltd (in prov liq)* (2002) 42 ACSR 80 at 97-9 [56] per Santow J] was not argued or considered in this appeal. Principle and fair procedures require that this court reserve its position upon them.' [241]

157. McHugh J, however, did go on to consider them even though he agreed with the majority on the issues they had addressed. He said:

> '... I think that the factors that the courts take into account when ordering 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.' *[242]*

158. Later in his reasons, McHugh J went on to analyse 15 propositions that Santow J derived from previous authorities regarding a court's powers under ss 260C and 260E to disqualify a person from managing corporations. Santow J had done that in Re HIH Insurance Ltd (in prov liq) [243] *and McHugh J described his judgment as the leading authority on the reasons for a court's exercising its powers under ss 206C and 206E of the* Corporations Act *to order the disqualification of a person from managing corporations. His Honour categorised some of Santow J's propositions as relating to the protection of the public, others as relating to deterrence and yet others as relating to mitigating factors.*

159. McHugh J also analysed principles stated in other cases concerned with disqualification orders in the same way. In particular, he referred with approval to the judgment of the Victorian Court of Appeal in Elliott v Australian Securities and Investments Commission [244] *when it said:*

> '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.' *[245]*

160. His Honour concluded:

> '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.' [246]

161. Having analysed the judgments of both the majority and of McHugh J, we find, regrettably, that our understanding of the majority judgment in Rich *does not accord with the analysis of it by Senior Member Penglis in* Re Dollas-Ford and Australian Securities and Investments Commission [247] *when he said:*

> ' The proper basis for the exercise of a discretion to impose a banning order was considered by the High Court of Australia in *Rich v Australian Securities and Investments Commission* .... The High Court rejected the proposition stated in *Aus tralian Securities and Investments [sic] Commission v Kippe* ... the purpose of banning orders is solely to protect the public rather than to punish.' *[248]*

162. We note that Finkelstein J reached the same conclusion as Senior Member Penglis in Australia n Securities and Investments Commission v Vizard [249] *when he considered the pecuniary penalty that should be imposed as well as whether a disqualification order should be made. His Honour said:*

> ' It could hardly be denied that, as a rule, directors of publicly listed companies are sensitive to risk. The few that may be tempted to gain prestige, wealth and security by illegal means can be dissuaded from that course if the risk of detection and serious punishment is too great. Although the civil penalties are not substantial when compared with the possible gains from corporate crime, other penalties may act as a better deterrent.
>
> > This is where the possibility of disqualification from office can play an important function. It may be accepted that the principal object to be achieved by a disqualification order is protective: protection of the company and its shareholders against the likelihood of repetition of the offending conduct. The mistake is to treat this as the sole purpose of a disqualification order. That error has now been exposed. In *Rich v Australian Securities and Investments Commission (2004) 209 ALR 271; 50 ACSR 242 ; [2004] HCA 42 the High Court made it clear that a disqualification order can be imposed not only to protect the company's shareholders against further abuse, but also by way of punishment and, importantly, for general deterrence. I am confident the fear of losing both their position from business life, as well as their good reputation, will be an effective deterrent in the case of many a director who is contemplating a dishonest course for gain. Few corporate crimes are spontaneous. There is always time to consider the consequences. The risk of a long period of disqualification, for example so long that it will keep the director forever out of public corporate life, may well tip the scales .'* *[250]*

163. Any disagreement we might have with a judgment of the Federal Court is, when all is said and done, irrelevant if what is said in that judgment is not obiter dicta *and if there is no relevant conflicting authority from a superior court. McHugh J's judgment accorded with the statements made in these two cases but not so the majority's. The majority were at pains to distinguish between*

an enquiry that was relevant to the resolution of the issue it had to decide – the nature of the orders sought – and an issue it did not have to decide – why an order might be made and the purposes it might achieve.

164. The judgment of Finkelstein J places us in a very difficult position as we are bound by judgments of superior courts. In trying to resolve our dilemma, we note that what McHugh J said in Rich and Australian Securities and Investments Commission *is* obiter dicta*. What Finkelstein J said in* Australian Securities and Investments Commission v Vizard *is not necessarily so but it is not consistent with conclusions reached on the same or analogous issues in other superior courts. We will begin by referring to passages from judgments to which McHugh J referred in* Rich and Australian Securities and Investments Commission.

165. After analysing passages from the judgment of Bryson J in Re One.Tel Ltd (in liq); Australian Securities and Investment Commission v Rich [251] *when ordering that persons were disqualified from holding office as company officers, McHugh J concluded:*

> ‘ 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 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 $100m 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.
>
> > 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... 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.
> >
> > 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 *Austra lian Securities and Investments Commission v Plymin (No 2)*...[(2003) 21 ACLC 1237] and *Elliott*...[(2004) 205 ALR 594 ; 48 ACSR 621] and Gzell J in the New South Wales Supreme Court i*n Australian Securities and Investments Commission v Whitlam (No 2)*...[(2002) 42 ACSR 515] 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 cooperation with relevant authorities, including the Australian Securities and Investments Commission and external administrators... 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.' [252]

166. The case of Australian Securities Commission v Donovan *,[253] to which McHugh referred in this passage required Cooper J to consider s 1317EA(3)(a) of the* Corporations Law *giving the Court power to make an order prohibiting persons whom it has declared to have contravened certain provisions in certain ways, from managing a corporation. Cooper J described s 1317EA(3)(a) as "*... a protective provision designed to protect the public and to prevent a corporate structure being used by individuals in a manner which is contrary to proper commercial standards." *[254] He cited* Re Tasmanian Spastics Association; ASC v Nandan *,[255] which had considered the same section as well as* Nicholas v Corporate Affairs Commission *,[256] which had considered s 562A(3) of the* Companies (Victoria) Code*. Cooper J concluded:*

'Because the power under s 1317EA(3)(a) is predominantly protective, it is relevant to have regard to the officer's prior corporate conduct, to the present activities of the officer, to the likelihood that the officer will repeat or engage in conduct of the type which constituted the contravention of s232(4) which gives rise to the application, including whether or not the officer shows contrition or accepts responsibility for his or her conduct, and the extent to which the officer benefited from the conduct personally or tried to conceal it.' [257]

167. Contrary to the earlier passage to which we have referred, Cooper J described the power in this passage as ' **predominantly** protective*' (emphasis added). That modification followed his reference to the cases of* Re Civica Investments Ltd [258] *and* Cullen v Corporate Affairs Commission. [259] In each, consideration was given to whether the relevant power to disqualify should be exercised for the maximum period or for something less. In Re Civica Investments Ltd*, Nourse J considered a power to disqualify that was limited to a five year period. He said that the court should:*

'... what the court has to do is to impose such a period of disqualification, if any, as it thinks appropriate, bearing in mind the upper limit of the power and disregarding its further power to give leave to act in the future notwithstanding the disqualification. Speaking for myself, I certainly would not think it right to impose the maximum period of disqualification irrespective of the degree of blame and then leave it to the person concerned to come back and seek leave to act in the future.

Secondly, the fact that the five year period is a maximum must, on general principles, mean that the longer periods of disqualification are to be reserved for cases where the defaults and conduct of the person in question have been of a serious nature, for example, where defaults have been made for some dishonest purpose, or wilfully and deliberately, or where they have been many in number and have not been substantially alleviated by remedial action and convincing assurances that they will not recur in the future.' [260]

168. Cooper J also referred to this passage from the judgment of Young J in Cullen v Corporate Affairs Commission (NSW)*. Young J was considering an appeal from a notice that the Corporation Affairs Commission (NSW)(CAC) had given Mr Cullen prohibiting him from being in any way concerned in or taking part in the management of a corporation. The CAC had issued the notice under s 562A(3) of the* Companies (NSW) Code *which, at the relevant time, permitted it to impose a prohibition for a period not exceeding five years. It was in that context that Young J said:*

' The next question is for what period should that disqualification be. There is not much authority on this point. In *Re Civica Investments Ltd* (1983) BCLC 456, Nourse J held that the maximum period of disqualification should be reserved for defaults of a serious nature such as dishonesty or a large number of defaults

not substantially alleviated by appropriate remedial action and/or convincing assurances that they would not recur. As far as I know that case has never been departed from although I must confess I do not know of any other cases in the reports that deal with this point.

> The present case was not the worst case. The delegate did not find, nor did the liquidator find, any fraud or dishonesty. The case was one of, there *[sic]*, inefficiency, or as the learned delegate put it, bungling. The director did not take appropriate action quickly enough to minimise loss. That he intermingled the affairs of different corporate entities, that he did not fully understand the obligations of a director and, most importantly, did not pay over group tax.
>
> The learned delegate said that unless there were strongly persuasive circumstances which would warrant a reduction of five years he should not reduce it. He said this notwithstanding the submission of counsel for the Corporate Affairs Commission that on the facts before him it was not the worst case. Learned counsel says that he does not adhere to that submission before me because further facts have come out which make the case more serious than the evidence before the delegate suggested.
>
> It seems to me, with respect, the learned delegate overlooked the words of Nourse J and took the view that five years' disqualification was the norm. I am of the view that I should follow the view of Nourse J. This is not the worst case, but on the other hand it is not a trivial case and I think in all the circumstances, especially as this is one of the first cases where this sort of conduct has come under consideration for disqualification, that disqualification for two years from today would be appropriate. I have taken into account the fact in fixing this period that de facto the director has not been involved in being a director of a company since last May.' *[261]*

169. It is important to note that both Re Civica Investments Ltd *and* Cullen v Corporate Affairs Commission (NSW) *concerned provisions that permitted the disqualification periods to be no more than five years. That was a feature recognised by Cooper J in* Australian Securities Commission v Donovan *when he surmised that a maximum of that length must mean that the longer periods of default must, on general principles, be reserved for the cases where the person's defaults and conduct has been more serious. That can be read as introducing an element of punishment but, when read in the context of a maximum period, need not necessarily be read in that way at all.*

170. Any notion that punishment is relevant in the imposition of a period of disqualification was dispelled by the Full Court of the Federal Court in Kamha v Australian Prudential Regulation Authority, [262] which was decided after Rich*. It said:*

> '73 While punishment of a criminal offence is the exercise of judicial power, the imposition of disciplinary penalties does not necessarily entail the exercise of judicial power: *Police Service Board v Morris & Martin* [1985] HCA 9; (1985) 156 CLR 397 at 403 and 407 . Disciplinary jurisdiction is significantly protective and does not involve a punitive element in the nature of the punishment of a criminal offence. Jurisdiction in disciplinary matters is exercised to protect the public, not to punish the person disciplined. The object of protection of the public also includes deterring others who might be tempted to fall short of the relevant standards of conduct.' *[263]*

171. More recently, in 2007, in Australian Securities and Investments Commission v Forge *,[264] White J of the Supreme Court of New South Wales considered whether to make a disqualification order against Mr Forge for a greater or lesser period or to accept an enforceable undertaking. Earlier in his reasons, his Honour had quoted the passage from McHugh J's judgment that the factors of retribution, deterrence, reformation, contrition and protection of the public are also central to determining whether an order for disqualification should be made under the* Corporations Act *and, if so, the appropriate period of disqualification.* [265] *White J also referred to the fact that McHugh J had cited with approval the observations of Bryson J in* Re One.Tel Limited (in liq); Australian Securities and Investments Commission v Rich *that only limited guidance can be obtained from other decisions with respect to disqualification orders and the period for disqualification. That is so because each decision is related to its own facts and the circumstances of each defendant are special and vary greatly.* [266]

172. Somewhat in contrast to these passages, when White J came to consider whether an enforceable undertaking should be accepted in lieu of a disqualification order, White J said:

> ' The proffered undertaking is in narrower terms than a banning order. A banning order would prohibit Mr Forge from managing a corporation. That expression is defined by s 91A of the Corporations Law . It extends to the person being in any way (whether directly or indirectly) concerned in or taking part in the management of a corporation. However, I understood that the proffered undertakings were intended to extend to managing a corporation in this sense, as well as being a director of a corporation. It was submitted for Mr Forge that the proffered undertaking would fully protect the public. Indeed, unless a disqualification order were made for life, it was said that the public would have greater protection by the acceptance of such an undertaking than it would if a disqualification order were made. That is because the undertaking is proffered as a perpetual undertaking.
>
> > I do not accept this submission. A disqualification order is protective of the public for the period of disqualification against misconduct by the person disqualified. However, that is not its only purpose. The object of general deterrence is also of great importance. That object is served by the public disapproval of the impugned conduct being marked not only by a declaration that the conduct has contravened the Act, but by an order for disqualification of the contravener from managing a corporation either for a fixed period or for life. The shame or embarrassment which accompanies such an order is not designed as punishment, although it might have that effect, but serves as a general deterrent to others who might be tempted to breach their duties as directors or officers of a company. In my view, the objective of general deterrence would not be sufficiently served by the acceptance of the proffered undertaking.' [267]

173. This passage clearly excludes punishment as a factor in the imposition of a banning order even though it notes that punishment may be an effect of its imposition. White J had referred to McHugh J' judgment but appears not to have read it in the way that led him to reach the conclusion reached by Finkelstein J in Australian Securities and Investments Commission v Vizard.

174. The conclusion reached by White J is also consistent with earlier authorities. We refer, for example, to Story v National Companies and Securities Commission *,[268] in which Young J (in Eq) considered s 60 of the* Securities Industry (New South Wales) Code. *That section provided that the then National Corporations and Securities Commission (NCSC) could revoke the licence held by a dealer in certain circumstances. One of those circumstances arose where the NCSC had reason to believe that the dealer had not performed the duties of the holder of such a licence. One of the*

grounds on which the NCSC could revoke a licence was that the person was not performing his or her duties efficiently, honestly and fairly.

175. Among other matters, Young J considered whether the dealer's licence should have been revoked. In doing so, he said that a finding that a dealer had been inefficient was not necessarily sufficient to justify a conclusion that his or her licence should be revoked. He considered what matters should be taken into account when he said:

> 'On the matter as to whether revocation should follow an opinion of inefficiency, various matters have to be weighed. One of these is the public interest that people should be permitted to follow a trade or profession which they are qualified to follow. Another is that the public expect those who fall short of minimum standards to be removed from the profession, at least until such time as the regulatory body can be assured that they are able to perform their functions efficiently. A third consideration is that the step of revocation is purely for the public benefit and is not punitive.' [269]

176. Although not part of the ratio decidendi *of the case, the Full Court of the Federal Court maintained that theme in* Australian Securities Commission v Kippe and Another. [270] *They said in relation to a banning order made under s 829 of the* Corporations Law *as in force at the time against a dealer's representative:*

> 'The immediate and direct legal effect intended by a banning order is not to impose a penalty or punishment on the person concerned, but to be preventive in that it removes a perceived threat to the public interest and to public confidence in the securities and futures industry by removing that person from participation therein.' [271]

A similar theme is found in the judgment of *Emmett, Allsop and Graham JJ in Kamha v Australian Prudential Regulation Authority* [272] *when they said:*

> '73 While punishment of a criminal offence is the exercise of judicial power, the imposition of disciplinary penalties does not necessarily entail the exercise of judicial power (*Police Service Board v Morris & Martin* [1985] HCA 9; (1985) 156 CLR 397 at 403 and 407). Disciplinary jurisdiction is significantly protective and does not involve a punitive element in the nature of the punishment of a criminal offence. Jurisdiction in disciplinary matters is exercised to protect the public, not to punish the person disciplined. The object of protection of the public also includes deterring others who might be tempted to fall short of the relevant standards of conduct." [273]

177. This approach is consistent with the approach taken by superior courts in relation to statutory powers to regulate other professional, business and other activities that affect members of the public. The judgement of the New South Wales Court of Appeal in New South Wales Bar Association v Hamman [274] *provides an example. The court considered disciplinary proceedings against a legal practitioner and said*:

> "... Disciplinary proceedings against a legal practitioner are concerned with the protection of the public (*Wentworth v New South Wales Bar Association* (1992) 176 CLR 239 at 250-251). The object is not to punish the practitioner but to protect the public and to maintain proper standards in the legal profession. ..." [275]

178. Authorities such as New South Wales Bar Association v Evatt [276] *and* Hardcastle v Commissioner of Police [277] *acknowledge that, in achieving the objects of public protection and the maintenance of proper professional standards, an order made in disciplinary proceedings may involve great deprivation for the person who is the subject of that order. Despite that, the object of the order is not to punish or to extract retribution.*

179. Intentionally committing a wrong-doing is not the only reason to cancel or suspend a person's right to engage in his or her chosen profession. As Kirby P said in Pillai v Messiter [No.2]: [278]

> "... The public needs to be protected from delinquents and wrong-doers within professions. It also needs to be protected from seriously incompetent professional people who are ignorant of basic rules or indifferent as to rudimentary professional requirements. Such people should be removed from the register or from the relevant roll of practitioners, at least until they can demonstrate that their disqualifying imperfections have been removed. ...". [279]

180. The weight of authority in the Federal and Supreme Courts to whose judgments we have referred seems to be to the effect that a disqualification order, and so a banning order, is made on the basis of what will protect the public. It is not made on the basis of what will punish the person concerned even though punishment or the imposition of a penalty may be the practical outcome of the making of an order. Deterrence is also a relevant concern. Deterrence may relate both to the person concerned and to others engaged or potentially engaged in the finance. If imposed, it is relevant in the case of the individual in that it protects the public from that person's being involved in the industry. Whether imposed or not, the possibility that an order might be made is itself a deterrent both to an individual and to all of those engaged in that industry. As was said in Re Donald and Australian Securities and Investments Commission *,[280] the Tribunal said:*

> "116. The imposition of a banning order against a dealers representative certainly achieves, in respect of at least one member of that profession, the second aspect of public protection for the period in respect of which it is imposed. That is, it ensures that the public can be certain that a particular person, who has been found to have breached a statutory standard applicable to him or her, is no longer entrusted with dealing in shares. At the same time, it informs both other dealers representatives and members of the general public that the behaviour is neither acceptable nor tolerated.
>
> 117. Whether it achieves the first aspect of public protection is more debateable. A period of prohibition may, rather like a retreat or a period of contemplation, lead a person to reflect upon his or her behaviour and to come to an understanding of why that behaviour has been regarded as inappropriate by others and, if it is necessary to do so, to take steps to improve his or her knowledge of what is an appropriate manner of behaviour. On the other hand, a period of prohibition may not result in such reflection or lead to a person's coming to any greater understanding than he or she had when it was imposed." [281]

via

[263] (2005) 88 ALD 620; [2005] FCAFC 248 at 637-638 ; [73] and for a similar approach see the more recent judgments of the High Court in *Alabarran v Members of the Companies and Auditors Liquidators Disciplinary Board* (2007) 234 ALR 618 at 623-624 per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ and 641 per Kirby J and *Visnic v Australian Securities and Investments Commission* (2007) 234 ALR 413 at 416-417 per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ and 418-419 per Kirby J

Scott v Australian Securities and Investments Commission [2010] FCA 424 (30 April 2010) (Middleton J)

4. The operation of section 206F has been explained by the Full Court of the Federal Court in *Murdaca v Australian Securities and Investments Commission* (2009) 178 FCR 119. In paragraph 101 of that decision the Court set out a number of propositions summarising the operation of the provision:

[101] Our reasons for these conclusions may be shortly stated as follows:

(a) Subsection (1) of s 206F comprises, in ascending order of importance:

(i) A trigger mechanism (the conditions, filters or gateway) embodied in subs (1)(a) (stage 1);

(ii) A procedural fairness requirement (the giving of a show cause notice and an opportunity to be heard): subs (1)(b) (stage 2); and

(iii) A merits decision captured in the requirement that ASIC be satisfied that disqualification is justified: subs (1)(c) read with s 206F(2) (stage 3).

*(b) ASIC's power to disqualify a person from the management of corporations must be exercised for the purposes for which it was granted. Those purposes are the protection of all those persons who deal with corporations from the consequences of the actions of those corporate officeholders who, either through incompetence or dishonesty or a combination of the two, bring about the failure of corporations and thus cause loss to others (*Rich v Australian Securities and Investments Commission *(2004) 220 CLR 129 ; 209 ALR 271 ; 50 ACSR 242 ; [2004] HCA 42 at [47]–[50]) and the maintenance of professional management standards in the public interest (*Visni c v Australian Securities and Investments Commission (2007) 231 CLR 381 *; 234 ALR 413 ; [2007] HCA 24 at [11] and [26]).*

(c) Section 206F does not give reports prepared by liquidators pursuant to s 533 of the Act any particular status or weight. ASIC may approach the exercise of its power of disqualification under s 206F(1)(c) in any way it thinks fit, subject to complying with s 206F(1) and (2) and subject to respecting and applying the principles referred to in subpara (b) above.

(d) Subsection (2) of s 206F informs the exercise of the power given to ASIC by subs (1)(c). Subparagraph (a) of subs (2) lays down a mandatory requirement to which regard must be had and subpara (b) sets out matters to which regard may be had. ASIC is not obliged to have regard to the s 533 report or reports which triggered the disqualification process when considering whether disqualification is justified. No doubt it may do so in an appropriate case but it is not obliged to do so. Rather, it is authorised and empowered to make a decision on the merits as to whether disqualification is justified. It would make no sense at all if it were also required to involve itself in a merits-based decision in relation to the correctness of the relevant s 533 report or reports at stage 1 of the process.

In the event that reliance is placed upon the s 533 report or reports at stage 3 of the process, ASIC will be called upon to assess the worth of that report or those reports at that stage in order to decide whether disqualification is justified.

(e) Section 206F is an alternative to court action by ASIC. It is meant to be a quick and cheap alternative to court action.

However, it cannot be utilised just because ASIC feels that it would like to take action against a particular individual. Certain preconditions for action must be satisfied. But, in the end, the merits consideration by ASIC is intended to take place only once in the process — not at two stages. In a sense, the preconditions provided for in subparas (a) and (b) of s 206F(1) are jurisdictional requirements which must be satisfied before ASIC' s power to disqualify under s 206F is enlivened.

(f) To interpret s 206F as the appellant has contended would lead to endless challenges during the s 206F disqualificatio n process directed to the validity of the relevant s 533 reports and would be likely to render s 206F unworkable.

Whittaker v Child Support Registrar [2010] FCA 43 (05 February 2010) (Lindgren J)

321. Eighth, the fact that the making of a DPO may have a punitive or deleterious effect in the sense of inflicting hardship or detriment, does not make it an exercise of judicial power: *Kam ha v Australian Prudential Regulation Authority* (2005) 147 FCR 516 (special leave to appeal to the High Court was refused: see [2006] HCATrans 420). In that case a Full Court of this Court held that the power given to the Australian Prudential Regulation Authority (APRA) to disqualify a person from acting as a director or senior manager of a general insurer, or holder of certain other positions, if satisfied that the person was not a fit and proper person was not a judicial power. For similar cases, see *Albarran; Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381 .

Murdaca v Australian Securities and Investments Commission [2009] FCAFC 92 (10 August 2009) (North, Kenny and Foster JJ)

Visnic v Australian Securities and Investments Commission (2007) 231 CLR 381 cited

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(ii) A procedural fairness requirement (the giving of a show cause notice and an opportunity to be heard): subs (1)(b) (stage 2); and

(iii) A merits decision captured in the requirement that ASIC be satisfied that disqualification is justified: subs (1)(c) read with s 206F (2) (stage 3).

(b) ASIC's power to disqualify a person from the management of corporations must be exercised for the purposes for which it was granted. Those purposes are the protection of all those persons who deal with corporations from the consequences of the actions of those corporate officeholders who, either through incompetence or dishonesty or a combination of the two, bring about the failure of corporations and thus cause loss to others (*Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at [47]–[50] (151–155) and the maintenance of professional management standards in the public interest (*V isnic v Australian Securities and Investments Commission* (2007) 231 CLR 381 at [11] (p 385) and [26] (p 388)).

(c) Section 206F does not give reports prepared by liquidators pursuant to s 533 of the Act any particular status or weight. ASIC may approach the exercise of its power of disqualification under s 206F(1)(c) in any way it thinks fit, subject to complying with s 206F(1) and s 206F(2) and subject to respecting and applying the principles referred to in subpar (b) above.

(d) Subsection (2) of s 206F informs the exercise of the power given to ASIC by subs (1)(c). Subparagraph (a) of subs (2) lays down a mandatory requirement to which regard must be had and subpar (b) sets out matters to which regard may be had. ASIC is not obliged to have regard to the s 533 report or reports which triggered the disqualification process when considering whether disqualification is justified. No doubt it may do so in an appropriate case but it is not obliged to do so. Rather, it is authorised and empowered to make a decision on the merits as to whether disqualification is justified. It would make no sense at all if it were also required to involve itself in a merits-based decision in relation to the correctness of the relevant s 533 report or reports at stage 1 of the process.

In the event that reliance is placed upon the s 533 report or reports at stage 3 of the process, ASIC will be called upon to assess the worth of that report or those reports at that stage in order to decide whether disqualification is justified.

(e) Section 206F is an alternative to Court action by ASIC. It is meant to be a quick and cheap alternative to Court action. However, it cannot be utilised just because ASIC feels that it would like to take action against a particular individual. Certain preconditions for action must be satisfied. But, in the end, the merits consideration by ASIC is intended to take place only once in the process—not at two stages. In a sense, the preconditions provided for in subpars (a) and (b) of s 206F(1) are jurisdictional requirements which must be satisfied before ASIC's power to disqualify under s 206F is enlivened.

(f) To interpret s 206F as the appellant has contended would lead to endless challenges during the s 206F disqualification process directed to the validity of the relevant s 533 reports and would be likely to render s 206F unworkable.

Australian Securities and Investments Commission v Murdaca [2008] FCA 1399 (16 September 2008) (Gordon J)

9. I should note that it is now settled that ASIC does not exercise the judicial power of the Commonwealth when it acts under s 206F : *Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381 .

Re Howarth and Australian Securities and Investments Commission [2008] AATA 278 (08 April 2008)
Visnic v Australian Securities and Investments Commission (2007) 234 ALR 413
WA Pines Pty Ltd v Bannerman

Re Howarth and Australian Securities and Investments Commission [2008] AATA 278 (08 April 2008)

170. Any notion that punishment is relevant in the imposition of a period of disqualification was dispelled by the Full Court of the Federal Court in *Kamha v Australian Prudential Regulation Authority,* [199] which was decided after *Rich* . It said:

73 While punishment of a criminal offence is the exercise of judicial power, the imposition of disciplinary penalties does not necessarily entail the exercise of judicial power: Police Service Board v Morris & Martin *[1985] HCA 9; (1985) 156 CLR 397 at 403 and 407 . Disciplinary jurisdiction is significantly protective and does not involve a punitive element in the nature of the punishment of a*

criminal offence. Jurisdiction in disciplinary matters is exercised to protect the public, not to punish the person disciplined. The object of protection of the public also includes deterring others who might be tempted to fall short of the relevant standards of conduct." [200]

via

[200] (2005) 88 ALD 620; [2005] FCAFC 248 at 637-638 ; [73] and for a similar approach see the more recent judgments of the High Court in *Alabarran v Members of the Companies and Auditors Liquidators Disciplinary Board* (2007) 234 ALR 618 at 623-624 per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ and 641 per Kirby J and *Visnic v Australian Securities and Investments Commission* (2007) 234 ALR 413 at 416-417 per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ and 418-419 per Kirby J

Attorney-General (Cth) v Alinta Ltd [2008] HCA 2 (31 January 2008) (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ)

20. The majority were right to exhibit vigilance against any erosion by the legislature or the Executive of access by what they described as "private parties" to the independent courts, as envisaged by the Constitution [22] . Protection of the right of access to courts, and thus to judicial officers independent from the other branches of government, is an essential policy which the constitutional separation of powers is designed to safeguard [23] . However irksome it may sometimes be to the other branches to be obliged to have disputes over legal rights resolved through external and impartial determination by the courts, that is an essential role of the courts required under the Constitution .

via

[22] *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 607 per Deane J; *Visnic v Australian Securities and Investments Commission* (2007) 81 ALJR 1175 at 1183-1184 [45] ; 234 ALR 413 at 423 ; *Albarra n v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 81 ALJR 1155 at 1166-1168 [59]-[68]; 234 ALR 618 at 631-633 .

Attorney-General (Cth) v Alinta Ltd [2008] HCA 2 (31 January 2008) (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ)

34. The foregoing explanation of events brings me back to the substantive issue in the appeal as it is now reconstituted. In a number of cases [33] , some of which were decided after the Full Court's orders in these proceedings [34] , this Court has explained the approach to be taken to questions of invalidity in matters such as the present. I adhere to what I said in *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* [35] :

> "Evaluating the criteria for the presence of 'the judicial power of the Commonwealth' cannot be undertaken in a vacuum, divorced from considerations of constitutional principle and policy. It is necessary to have some conception of the 'functions' of courts which particular criteria may suggest to be exclusive, or non-exclusive, to such bodies."

via

[34] *Visnic* (2007) 81 ALJR 1175 ; 234 ALR 413 and *Albarran* (2007) 81 ALJR 1155; 234 ALR 618.

Johnson Controls Australia Pty Ltd v Alliance Group Building Services Pty Ltd [2007] NSWDC 277 (12 September 2007) (Knox SC DCJ)

353 The law in relation to repudiation has recently been considered by the Court of Appeal in Sanpine Pty Ltd v Koompahtoo Local Aboriginal Land Council and anor NSWCA 291 - special leave granted [2007] HCA 24 April, 2007 – and in particular the nature of repudiatory conduct, when reasonable inferences can be drawn as to when a contracting party is prepared to carry out his part of the contract only if and when is suits him and when there can be termination by acceptance of a repudiation. Other relevant principles were set out by Young J in Majik Markets Pty Ltd v S&M Motor Repairs Pty Ltd (1987) 10 NSWLR 49 at 54 lines C to D. Here it seems to me that the referee applied all the relevant and appropriate principles to the totality of the course of conduct of these parties.

Conclusion : repudiation

Thomas v Mowbray [2007] HCA 33 (02 August 2007) (Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ)

339. *The chameleon doctrine*: The Commonwealth then relied, as it usually does in this connection, on the "chameleon doctrine" to sustain the validity of Div 104 of the Code . With this "doctrine" the Court has fashioned a rod for its own back. The "doctrine" has recently been the subject of re-examination [441] . Gaudron J expounded the conventional explanation in her reasons in *Re Dingjan; Ex parte Wagner* [442] :

> "[S]ome powers are essentially judicial so that they can be conferred by the Commonwealth only on courts named or designated in Ch III of the Constitution [443] , while others take their character from the tribunal in which they are reposed and the way in which they are to be exercised and, thus, may be conferred on courts or other tribunals as the Parliament chooses [444] ."

via

[441] See *Albarran* (2007) 81 ALJR 1155; 234 ALR 618; *Visnic v Australian Securities and Investments Commission* (2007) 81 ALJR 1175; 234 ALR 413 .

Thomas v Mowbray [2007] HCA 33 (02 August 2007) (Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ)

343. The foregoing is not to deny the established authority that the nature of the body in which a function is reposed may assist in determining the "judicial character" of that function [451] . However, necessarily, this fact cannot eliminate the judicial duty to characterise the function. The most that the "chameleon doctrine" provides is one way of resolving a *doubt* about the essential nature of the function [452] . In *R v Spicer; Ex parte Australian Builders' Labourers' Federation* [453] , Kitto J explained why this was the correct approach:

> "[S]ometimes a grant of power not insusceptible of a judicial exercise is to be understood as a grant of judicial power because the recipient of the grant is judicial. But it by no means follows that whenever a power which has some similarity to an acknowledged judicial power is given to a judicial person or body there is a grant of judicial power. The reason for concluding in some such cases that the judicial character of the repository imparts a judicial character to the power is simply that the former provides a ground for an inference, which in those cases there is nothing or not enough in other considerations to preclude, that the power is intended and required to be exercised in accordance with the methods and with a strict adherence to the standards which characterise judicial activities. That is not a necessary inference, however, in every case of this kind."

via

[452] *Albarran* (2007) 81 ALJR 1155 at 1168 [70]; 234 ALR 618 at 634 ; *Visnic* (2007) 81 ALJR 1175 at 1183-1184 [45] ; 234 ALR 413 at 423 .

White v Director of Military Prosecutions [2007] HCA 29 (19 June 2007) (Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ)

125. As to *logic*, it is circular to reason that, because the character of the power committed to a body can vary in accordance with the body exercising the power [167] , the power committed to service tribunals could therefore be other than "the judicial power of the Commonwealth". That is the very question presented in these proceedings for this Court's decision. Surely, the so-called "chameleon" doctrine has not so far debased our adherence to logic that the mere choice by the Federal Parliament to vest a power in a named tribunal conclusively avoids the limitations stated in s 71 of the Constitution [168] .

via

[168] cf Ratnapala, *Australian Constitutional Law: Foundations and Theory*, 2nd ed (2007) at 136-137; *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* [2007] HCA 23 at [70] ; *Visnic v Australian Securities and Investments Commission* [2007] HCA 24 at [41]-[42] .