

Submission to the Australian Consumer Law Review

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Introduction

It is argued in this submission that the *Competition and Consumer Act 2010* (Cth) and *Australian Consumer Law* should be amended to:

1. Ensure that the “use evidential immunity” otherwise afforded by s 68(3)(b) of the *ASIC Act 2001* (Cth) does not apply to disqualification proceedings conducted under s 86E of the *Competition and Consumer Act 2010* (Cth) or s 248 of the *Australian Consumer Law*;
2. Establish a statutory compensation fund so that victims of the contraventions of the *Australian Consumer Law* may recover compensation where the contravener is bankrupt, in liquidation or has absconded from the jurisdiction; and
3. Give private litigants standing to apply for director disqualification orders.

1. Penalty privilege and “use evidential immunity” under the ASIC Act – regulatory overlap - Director disqualification proceedings under s 86E of the Competition and Consumer Act 2010 (Cth) and s 248 of the Australian Consumer Law -

Regulatory Problem

In some cases, there may be an overlap between the regulatory responsibilities and functions of the Australian Securities and Investments Commission (ASIC) and the ACCC/Office of Fair Trading (as occurred, for example, in *ACCC v Fisher & Paykel Customer Services Pty Ltd* [2014] FCA 1393 – as discussed below). In such a case, ASIC may release the examinee’s record of examination (obtained from an oral examination under s 19 of the *ASIC Act 2001* (Cth)) to the ACCC/Office of Fair Trading (pursuant to s 127 of the *ASIC Act 2001* (Cth)). In this context, s 68 of the *ASIC Act 2001* (Cth) provides that the examinee cannot refuse to provide information that exposes that examinee to a penalty (including a penalty by way of a disqualification order). However, 68(3) of the *ASIC Act 2001* (Cth) affords the examinee “use evidential immunity” in subsequent penalty proceedings in exchange for the abrogation of the penalty privilege. Section 1349 of the *Corporations Act 2001* (Cth) abrogates the “use evidential immunity”, otherwise afforded by s 68(3) of the *ASIC Act 2001* (Cth), in disqualification proceedings under the *Corporations Act 2001* (Cth) or the *ASIC Act 2001* (Cth). “Use evidential immunity” is explained in the discussion below.

However, the “use evidential immunity” afforded by s 68(3) of the *ASIC Act 2001* (Cth) would still apply to disqualification proceedings conducted by the ACCC/Office of Fair Trading under s 86E of the *Competition and Consumer Act 2010* (Cth) or s 248 of the *Australian Consumer Law*. This is because s 1349 of the *Corporations Act 2001* (Cth) only

abrogates “use evidential immunity”, otherwise afforded by s 68(3) of the *ASIC Act 2001* (Cth), in disqualification proceedings under the *Corporations Act 2001* (Cth) or the *ASIC Act 2001* (Cth). Section 1349 does not abrogate the “use evidential immunity” afforded by s 68(3) of the *ASIC Act 2001* (Cth) in disqualification proceedings conducted under s 86E of the *Competition and Consumer Act 2010* (Cth) or s 248 of the *Australian Consumer Law*. This means that crucial evidence in ASIC’s record of examination that exposes the examinee/defendant to a disqualification order is not admissible in the disqualification proceedings conducted under s 86E of the *Competition and Consumer Act 2010* (Cth) or under s 248 of the *Australian Consumer Law*.

Section 86F of the Competition and Consumer Act 2010 (Cth) and s 249 of the Australian Consumer Law – Abrogation of penalty privilege and no statutory evidential immunity

Section 86F of the *Competition and Consumer Act 2010* (Cth) and s 249 of the *Australian Consumer Law* provide that a person cannot refuse to give information or produce a document on the ground that compliance would expose that person to a penalty by way of a disqualification order under that legislation. Those provisions do not afford the person any “evidential immunity” in disqualification proceedings under that legislation in exchange for abrogating the penalty privilege. Accordingly, all of the information provided by the person under compulsion (also see: s 155(7) of the *Competition and Consumer Act 2010* (Cth) and s 71 and s 90(5) of the *Fair Trading Act 1989* (Qld)) is admissible against that person in subsequent disqualification proceedings under s 86E of the *Competition and Consumer Act 2010* (Cth) or s 248 of the *Australian Consumer Law*. The absence of any statutory evidential immunity under these provisions increases the prospect of a successful regulatory outcome in the form of a disqualification order being imposed by the court.

However, as noted above, where ASIC releases its record of examination (conducted under s 19 of the *ASIC Act*) to the ACCC/Office of Fair Trading in cases involving a regulatory overlap, there is no provision in the *Competition and Consumer Act 2010* (Cth) or the *Australian Consumer Law* that prevents the “use evidential immunity”, afforded by s 68(3) of the *ASIC Act 2001* (Cth), from operating in “penalty proceedings” including disqualification proceedings under s 86E of the *Competition and Consumer Act 2010* (Cth) or s 248 of the *Australian Consumer Law* (or pecuniary penalty proceedings under s 224 of the *Australian Consumer Law*).

Penalty privilege at common law

At common law, the penalty privilege provides that a person cannot be compelled to disclose evidence that may expose that person to a penalty. Defendants in proceedings (whether or not those proceedings are for the recovery of a pecuniary penalty) should not be ordered to disclose information or produce documents which may assist in establishing their liability to a penalty.¹ The penalty privilege prevents a defendant from being compelled to provide information that may have the tendency to expose that defendant directly or indirectly to the

¹ *Refrigerated Express Lines (A/asia) Pty Ltd v Australian Meat and Livestock Corporation* (1979) 42 FLR 204 at 207-208 (Deane J); *Australian Securities and Investments Commission v ABC Fund Managers Ltd* [2001] VSC 92 at [4] (Warren J). See also Middleton T, “ASIC Corporate Investigations and Hearings” (Thomson Reuters, subscription service, 2016) at Chapter 14.

penalties sought by the regulator.² The penalty privilege ensures that the onus is on the regulator to prove its case in penalty proceedings.³ Penalty proceedings include proceedings for banning orders, disqualification orders and proceedings involving the suspension or cancellation of Australian financial services licences and credit licences.

DISQUALIFICATION ORDERS – PENALTY PRIVILEGE AND EVIDENTIAL IMMUNITY under the ASIC Act and the Corporations Act

Section 68 of the *ASIC Act 2001* (Cth) modifies the operation of the penalty privilege in the context of ASIC's investigation and enforcement powers. Section 68(1) provides that it is not a reasonable excuse for a person to refuse to comply with ASIC's investigative requirements to give information, sign a record or produce a book on the grounds of the privilege against self-incrimination or the penalty privilege. Where persons are the subjects of ASIC's oral examination under s 19 of the *ASIC Act*, ss 68(2) and (3) of the *ASIC Act* afford examinees "use evidential immunity" (in relation to their statements and in relation to the fact that they have signed their records of examination) in subsequent penalty or criminal proceedings provided they claim the privilege against self-incrimination or the penalty privilege before making a statement that might tend to incriminate them in such proceedings.

Use evidential immunity

"Use evidential immunity" means that the examinee's oral answers at the s 19 examination cannot be used as evidence against that examinee in subsequent penalty or criminal proceedings.⁶ "Use evidential immunity" has been described as "partial compensation" to persons who are compelled by statute to incriminate themselves.⁷ The "use evidential immunity" afforded by s 68(3) and s 76(1)(a) of the *ASIC Act 2001* (Cth) is only afforded to the examinee and it does not apply to the admissibility of the evidence against any other person.⁸ The self-incriminating statement is admissible against the examinee in any administrative (non-judicial) or civil proceedings not being proceedings for the imposition of a penalty.⁹ It is implicit from s 68(3) that a person cannot claim any "use evidential

² *MacDonald v Australian Securities and Investments Commission* [2007] NSWCA 304 at [66], [71]; *Anderson v Australian Securities and Investments Commission* (2012) 91 ACSR 452; [2012] QCA 301 at [18].

³ *Trade Practices Commission v Abbco Iceworks Pty Ltd* (1994) 52 FCR 96 at 102; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543; [2002] HCA 49 at [31]; *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129; [2004] HCA 42 at [24]; *Australian Securities and Investments Commission v Managed Investments Ltd (No 3)* [2012] QSC 74 at [8]; *Le Roi Homestyle Cookies Pty Ltd (in liq) v Gemmell* [2013] VSC 452 at [8].

⁴ *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129; [2004] HCA 42 at [26], [29], [31], [37], citing *Police Service Board v Morris* (1985) 156 CLR 397; *Essendon Football Club v Chief Executive Officer of the Australian Sports Anti-Doping Authority* (2014) 227 FCR 1; [2014] FCA 1019 at [281]; *Legal Services Commissioner v Spaulding (Legal Practice)* [2015] VCAT 292 at [11].

⁵ See generally *Re Australian Property Custodian Holdings Ltd (in liq) (No 3)* (2013) 275 FLR 327; [2013] VSC 154 at [120]-[121].

⁶ See generally the *Witness Immunity Act 1970* (US); *Ganin v Crime Commission (NSW)* (1993) 32 NSWLR 423 at 432-433 (Kirby P); *Smith v The Queen* (2007) 35 WAR 201; [2007] WASCA 163 at [58].

⁷ *R v Seller*; *R v McCarthy* [2012] NSWSC 934 at [185]-[187], [203] and the authorities cited therein; *X7 v Australian Crime Commission* (2013) 248 CLR 92; [2013] HCA 29 at [28].

⁸ See also *Smith v The Queen* (2007) 35 WAR 201; [2007] WASCA 163 at [75].

⁹ *Australian Securities and Investments Commission v PFS Business Development Group Pty Ltd* [2006] VSC 192 at [80].

immunity” or “derivative use evidential immunity” in penalty or criminal proceedings in relation to the contents of compulsorily produced books.

Rich v Australian Securities and Investments Commission – punitive versus protective nature of disqualification proceedings

Prior to the High Court’s decision in *Rich v Australian Securities and Investments Commission*,¹⁰ the predominant view in the case law was that banning or disqualification proceedings were more like civil proceedings because they were preventative or protective, rather than penal or punitive, in nature.¹¹ This meant that where an examinee claimed the penalty privilege before answering a question at ASIC’s oral examination, those answers would be admissible (that is, not excluded by the “use evidential immunity” contained in ss 68(3)(b) and 76(1)(a) of the *ASIC Act 2001* (Cth)) against that examinee in ASIC’s subsequent administrative hearings or court proceedings in which a banning order or disqualification order was sought.

In *Rich v Australian Securities and Investments Commission* the majority of the High Court held that civil penalty proceedings for a director’s disqualification order under s 206C of the *Corporations Act 2001* were proceedings that exposed a person to a penalty and therefore attracted the operation of the penalty privilege. According to the High Court, the term “penalty” is not restricted to monetary penalties imposed by statute as a punishment and includes a wider concept of penalty such as penal payments in contractual disputes, the forfeiture of property interests and loss of office or exposure to dismissal from employment. The High Court noted that the disqualification order under s 206C of the *Corporations Act 2001* is sought by ASIC (a public regulator) on the ground of a demonstrated contravention of the law. The order causes the person, who is the subject of the order, to forfeit any office held in a corporation and imposes a disability on that person for the duration of the order.¹³ Despite any protective element of such an order, the consequence of the order is a penalty.

The High Court’s decision in *Rich v Australian Securities and Investments Commission* meant that where the examinee claimed the penalty privilege at ASIC’s oral examination, the oral evidence given by that examinee at that examination which exposed that examinee to the risk of either the court making a disqualification order (under s 206C or s 206E of the *Corporations Act 2001* or s 12GLD of the *ASIC Act*) or ASIC making an administrative director’s disqualification order or banning order (under ss 206F and 920A respectively of the *Corporations Act 2001*) was protected by the “use evidential immunity” contained in ss 68(3)(b) and 76(1)(a) of the *ASIC Act*. That oral evidence would therefore be inadmissible against that examinee in any of those subsequent proceedings for banning or disqualification orders.

From ASIC’s public interest perspective, the decision in *Rich v Australian Securities and Investments Commission*, when coupled with the resulting “use evidential immunity”, created an absurd situation where, in the course of giving evidence at ASIC’s oral examination, a suspect (examinee) may give oral evidence which may be crucial in subsequent banning or

¹⁰ See also *Australian Securities and Investments Commission Act 2001* (Cth), s 76(1)(a); *AWB Ltd v Australian Securities and Investments Commission* (2008) 216 FCR 577; [2008] FCA 1877 at [40].

¹¹ *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129; [2004] HCA 42.

¹² *Australian Securities Commission v Kippe* (1996) 67 FCR 499 at 506-507; *Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80; [2002] NSWSC 483 at [56]; *Adler v Australian Securities and Investments Commission* (2003) 179 FLR 1; [2003] NSWCA 131 at [658]-[659]; *Australian Securities and Investments Commission v Rich* (2003) 45 ACSR 305; [2003] NSWSC 328 at [38].

¹³ *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129; [2004] HCA 42 at [26], [29], [31], [37], citing *Police Service Board v Morris* (1985) 156 CLR 397; *Essendon Football Club v Chief Executive Officer of the Australian Sports Anti-Doping Authority* (2014) 227 FCR 1; [2014] FCA 1019 at [281].

disqualification proceedings but which could not be used by ASIC in those subsequent proceedings. Such a situation would lead to injustice, to the law being seen as operating to the advantage of the suspect/wrongdoer and to the law being seen in a very poor light by the investing public and creditors.

Section 1349 of the Corporations Act 2001

In view of the potential problems outlined above, parliament enacted s 1349 of the *Corporations Act 2001*, which commenced operation on 31 December 2007. Section 1349(1) and (3) of the *Corporations Act 2001* provide that a person is not entitled to refuse to comply with a requirement to answer a question or give information, or to produce a book or any other thing, or to do any act whatever, on the ground that those requirements might tend to make that person liable to a penalty by way of a banning order or a disqualification order or a specified range of other licence cancellation or suspension orders. Section 1349 applies to all requirements to provide information made in the context of civil or criminal proceedings and to administrative proceedings before a tribunal (including ASIC) that arise out of the ASIC Act or the *Corporations Act 2001*. Section 1349 also applies to all requirements to provide information in the context of ASIC's investigative powers under the ASIC Act.

Section 1349(4) provides that the “use evidential immunity” afforded by s 68(3)(b) of the *ASIC Act 2001* (Cth) is not available in proceedings for “disqualification under Part 2D.6.” This would include directors’ disqualification proceedings conducted before a court pursuant to ss 206C, 206D and 206E of the *Corporations Act 2001* and ASIC’s administrative director’s disqualification hearings conducted under s 206F of the *Corporations Act 2001*. The court’s power to make a disqualification order under s 12GLD of the ASIC Act, and ASIC’s administrative power to make a banning order under s 920A of the *Corporations Act 2001*, are also listed in s 1349(4). Accordingly, where examinees claim the penalty privilege before they make self-incriminating statements at ASIC's oral examination, conducted under s 19 of the ASIC Act, that may expose them to a penalty by way of a banning order or disqualification order under the provisions described above, those self-incriminating statements are admissible against them in those banning or disqualification proceedings as those proceedings are specifically listed in s 1349(4).

Section 1349(4) does not prevent the examinee from claiming the “use evidential immunity”, afforded by s 68(3)(b) of the *ASIC Act 2001* (Cth), in disqualification proceedings under s 86E of the *Competition and Consumer Act 2010* (Cth) or s 248 of the *Australian Consumer Law* (or pecuniary penalty proceedings under s 224 of the *Australian Consumer Law*).

Regulatory overlap between the ASIC Act 2001 (Cth), the Competition and Consumer Act 2010 (Cth) and the Australian Consumer Law

There are many areas of possible regulatory overlap between ASIC and the ACCC (and the Office of Fair Trading) in which these regulators may share investigative information. ASIC's broad power under s 13(1) of the ASIC Act to investigate suspected contraventions of Commonwealth law or a law of a State or Territory may include a suspected contravention of the *Competition and Consumer Act 2010* (Cth) and the *Australian Consumer Law* provided the contravention concerns the management or affairs of a corporation or involves fraud or dishonesty and relates to a corporation. Both the ASIC Act and the *Australian Consumer Law* contain identical laws that prohibit a range of unfair practices including misleading or

¹⁴ Argued by analogy from the views of Mr Kerr (Member for Denison), Australia Commonwealth, *Parliamentary Debates*, House of Representatives, 1992, vol HR 4, 1376.

deceptive conduct and unconscionable conduct.¹⁵ The regulatory overlap in this latter case is probably eliminated or reduced because ASIC's investigative and enforcement powers relate to the financial services industry only.¹⁶ However, in some cases the courts have erroneously concluded that the relevant transactions did not involve financial services and have mistakenly applied the former *Trade Practices Act 1974* (Cth) (now the *Australian Consumer Law* – Sch 2 of the *Competition and Consumer Act 2010*), rather than the ASIC Act.¹⁷

In some cases, the courts have questioned why “the public, their lawyers and the courts must waste their time turning up and construing which of these statutes applies to the particular circumstance.” The court has also asked why it has to “waste its time wading through this legislative porridge to work out which one or ones of these provisions apply even though it is likely that the end result will be the same?”¹⁸

The case law indicates that causes of action relating to misleading and deceptive conduct may be based upon “a tangled legislative weave” involving s 18 of the *Australian Consumer Law*,¹⁹ s 1041E or s 1041H of the *Corporations Act 2001* and s 12DA of the *ASIC Act 2001* (Cth). For example, in *Australian Competition and Consumer Commission v Fisher & Paykel Customer Services Pty Ltd*,²⁰ Wigney J indicated that Fisher & Paykel's extended warranty offer in respect of goods manufactured by it constituted misleading or deceptive conduct (and may contravene s 18 and s 29(1)(l) and (m) of the *Australian Consumer Law*) because consumers may already be protected by the non-excludable consumer guarantee of “acceptable quality” (under ss 54, 64 and 259 of the *Australian Consumer Law*). This statutory protection meant that consumers would not have to pay for repair costs in relation to goods (incurred after a period of two years from the date of purchase) even if they did not purchase the extended warranty.

However, Wigney J decided²¹ that the *ASIC Act 2001* (Cth), rather than the *Australian Consumer Law*, applied to this situation. Wigney J concluded that Fisher & Paykel's extended warranty offer was a “financial product” (as defined in s 12BAA(1) and (5) of the ASIC Act) because it was a facility through which consumers managed financial risk relating to the future possible defects in the goods they purchased. Wigney J also held that issuing such a “financial product” constitutes “dealing in a financial product” and therefore constitutes providing a “financial service” under s 12BAB(1)(b), (7)(b) and (8) of the *ASIC Act 2001*

¹⁵ *Australian Securities and Investments Commission v Accounts Control Management Services Pty Ltd* [2012] FCA 1164 at [7], [8], [329]-[333]; *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486; [2012] HCA 39.

¹⁶ See s 51AF of the former *Trade Practices Act 1974* (Cth) (now of *Competition and Consumer Act 2010* (Cth), s 131A(1)); and the definition of “services” in *Australian Securities and Investments Commission Act 2001* (Cth), ss 12BA(1), 12BAB. See also *Australian Securities and Investments Commission v Accounts Control Management Services Pty Ltd* [2012] FCA 1164 at [7], [8], [329]-[333].

¹⁷ *Quikfund (Aust) Pty Ltd v Prosperity Group International Pty Ltd (in liq)* (2013) 209 FCR 368; [2013] FCAFC 5 at [114], [127].

¹⁸ *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* [2012] FCA 1028 at [948] per Rares J cited in E Klotz, *Misleading or deceptive conduct in the provision of financial services: an empirical and theoretical critique of the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth)* (2015) 33 C&SLJ 451 at 468-469.

¹⁹ *Guglielman v Trescowthick* [2004] FCA 326 at [35]; *Australian Competition and Consumer Commission v Fisher & Paykel Customer Services Pty Ltd* [2014] FCA 1393 at [24], [25], [26], [30].

²⁰ *Australian Competition and Consumer Commission v Fisher & Paykel Customer Services Pty Ltd* [2014] FCA 1393 at [16]-[23].

²¹ *Australian Competition and Consumer Commission v Fisher & Paykel Customer Services Pty Ltd* [2014] FCA 1393 at [24], [25], [26], [30].

(Cth). According to Wigney J, Fisher & Paykel's extended warranty offer in respect of goods manufactured by it constituted both misleading or deceptive conduct in breach of s 12DA of the *ASIC Act 2001* (Cth), and a false or misleading representation about the need for services (the extended warranty) in breach of s 12DB of the *ASIC Act 2001* (Cth), as customers were already protected by the consumer guarantees contained in the *Australian Consumer Law*. In *ACCC v Fisher & Paykel Customer Services Pty Ltd*, ASIC delegated (pursuant to s 102 of the *ASIC Act*) power to the ACCC to enforce the *ASIC Act 2001* (Cth).

ASIC – release of record of examination to ACCC/Office of Fair Trading in cases of regulatory overlap – evidential immunity

Where the defendant's conduct involves contraventions of a number of regulatory laws, and therefore falls within the overlapping jurisdictions of a number of regulators, ASIC may release investigative information (pursuant to s 127 of the *ASIC Act*) to the ACCC/Office of Fair Trading, including the examinee's/defendant's record of examination (obtained as a result of an oral examination conducted under s 19 of the *ASIC Act 2001* (Cth)).

The examinee/defendant may be afforded "use evidential immunity" by s 68(3)(b) of the *ASIC Act 2001* (Cth), in relation to the self-incriminating statements contained in that record of examination that expose that examinee/defendant to a penalty by way of a disqualification order under s 86E of the *Competition and Consumer Act 2010* (Cth) or s 248 of the *Australian Consumer Law*. This is because s 1349 of the *Corporations Act 2001* only provides that the "use evidential immunity", otherwise afforded by s 68(3)(b) of the *ASIC Act*, cannot be claimed in disqualification proceedings under the *ASIC Act 2001* (Cth), or the *Corporations Act 2001* (Cth).

Section 1349 of the *Corporations Act 2001* (Cth), the *Competition and Consumer Act 2010* (Cth) and the *Australian Consumer Law* are deficient because they do not prevent the "use evidential immunity", afforded by s 68(3)(b) of the *ASIC Act 2001* (Cth), from being claimed in disqualification proceedings under s 86E of the *Competition and Consumer Act 2010* (Cth) or s 248 of the *Australian Consumer Law*.

Law reform

If examinees/defendants are afforded the protection of "use evidential immunity" (in the circumstances described above) in proceedings for disqualification orders, this will create a significant obstacle for the ACCC or the Office of Fair Trading in achieving successful regulatory outcomes because crucial evidence that exposes those examinees/defendants to such orders is not admissible in those proceedings.

The regulatory laws must be reformed so that the regulators and the regulated population are governed by one set of standards that are applied consistently to common regulatory problems, such as those relating to the operation of the penalty privilege and the availability or otherwise of "evidential immunity" in disqualification proceedings. This would ensure that the regulatory outcomes under each of those laws are consistent in cases involving similar contravening conduct.

Section 1349 of the *Corporations Act 2001* (Cth), the *Competition and Consumer Act 2010* (Cth) and the *Australian Consumer Law* should be amended to expressly provide that any evidential immunity, otherwise afforded to the examinee by s 68(3)(b) of the *ASIC Act 2001* (Cth), does not apply to disqualification proceedings conducted under s 86E of the *Competition and Consumer Act 2010* (Cth) or s 248 of the *Australian Consumer Law*. This suggestion is also consistent with the objects of the *Regulatory Powers (Standard Provisions)*

Act 2014 (Cth) “which aims to reduce complexity in Commonwealth legislation by reducing its volume and increasing the consistency and coherence of laws across the statute book.”²² The case law also emphasises the importance of reducing inconsistencies in the law to enhance the integrity, continuity and fairness of the decisions made.²³ This suggested reform would achieve the “goal of a more consistent, standardised regulatory environment.”²⁴

2. Statutory Compensation Fund

Regulatory problem

There is no statutory compensation fund under the *Australian Consumer Law* to compensate the victims of a contravention of that law in cases where the contravener is bankrupt or insolvent or has absconded from the jurisdiction. It is incongruous that the s 237(1)(b) of the *Australian Consumer Law* gives the regulator the power to commence a representative action to assist impecunious plaintiffs/victims (who do not have sufficient resources to commence their own legal proceedings), but does not give plaintiffs/victims, who can afford to commence proceedings, the right to recover compensation where defendants are bankrupt or insolvent or have absconded from the jurisdiction.

By contrast, s 82 of the *Agents Financial Administration Act 2014* (Qld) does contain such a statutory compensation fund. Where, for example, a person purchases a motor vehicle from a licenced dealer, that person may claim against this statutory compensation fund in the circumstances listed in s 82 such as where the dealer breaches the title guarantee under s 96 of the *Motor Dealers and Chattel Auctioneers Act 2014* (Qld).

It is incongruous that where a consumer purchases other goods (not including a motor vehicle), and there is a breach of the title guarantee in s 51 of the *Australian Consumer Law*, that consumer cannot recover against any statutory compensation fund where the supplier of those other goods (not being a motor vehicle) is bankrupt or insolvent or has absconded from the jurisdiction.

Examples of Ad Hoc compensation funds established as a result of the Government’s “knee jerk” response to corporate collapses

The Federal Government paid \$640 million to assist the victims of the HIH collapse.²⁵ It indicated that the legislation authorising the payment in the HIH case was not “about setting a precedent for the rescue of corporate financial services collapses; rather it is quite rightly dealing with and responding to exceptional circumstances”.²⁶ The Federal Government

²² Explanatory Memorandum, *Regulatory Powers (Standard Provisions) Bill 2013* (Cth) p 3, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4912.

²³ *Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 640-641; *Lofthouse v Australian Securities and Investments Commission* [2004] AATA 327 at [64]-[65]; *Power v Australian Securities and Investments Commission* [2005] AATA 338 at [39]; *Australian Timeshare and Holiday Ownership Council Ltd v Australian Securities and Investments Commission* (2008) 47 AAR 103 at [280]; *JTMJ v Australian Securities and Investments Commission* [2010] AATA 350 at [234].

²⁴ Parliament of Australia, *Regulatory Powers (Standard Provisions) Bill 2014* (Cth), “Overview of the Bill”, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1314a/14bd073.

²⁵ See the *Appropriation (HIH Assistance) Act 2001* (Cth).

²⁶ Hockey J, Minister for Financial Services and Regulation, Second Reading Speech, *Appropriation (HIH Assistance) Bill 2001* (Cth) (21 June 2001), cited by Fran Bailey MP, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p?page=0;query=Id%3A%22cha>

provided \$55 million in compensation to the victims of fraud who lost their superannuation funds as the result of the collapse of Trio Capital Ltd. According to the Federal Government, investors in funds regulated by APRA should be compensated by the government when they lose their investments as the result of fraud or malfeasance by superannuation trustees. It also indicated that the compensation would be recovered by way of a levy imposed on regulated superannuation funds under the *Superannuation (Financial Assistance Funding) Levy Act 1993* (Cth).²⁷ Given the recent collapses of Storm Financial Ltd, Trio Capital Ltd and Banksia Securities Ltd (to name but a few), it is suggested the Federal Government and State Governments should adopt a more principled and uniform approach to the use of public funds to compensate the victims of corporate collapses, particularly where those collapses involve a failure on the part of the regulator.

United States Approach

In the United States, the Securities and Exchange Commission (SEC) has power under s 308 of the *Sarbanes-Oxley Act 2002* (US) (the “fair fund provision”) to pay civil pecuniary penalties obtained against defendants (which would otherwise be paid into government consolidated revenue)²⁸ and “disgorgement funds” to the investors who have been defrauded by those defendants. This provision is based on the regulatory objective of the SEC to take care of innocent investors.²⁹ The Australian legislation could be amended to authorise the payment of civil pecuniary penalties into a fund based on the United States “fair fund provision”.³⁰ In recent Australian corporate collapses, the courts have imposed many pecuniary penalties, but none of those penalties were used to compensate the victims of those collapses. Under the current law, the Federal Government is the beneficiary or the recipient of the pecuniary penalties. Arguably, it should be held accountable for regulatory failures³¹ and, from a public policy perspective, it should pay the pecuniary penalties to those victims.

Law reform

It is suggested that a statutory compensation fund be established under the *Australian Consumer Law* to protect consumers where the defendant/contravener is bankrupt or insolvent or has absconded from the jurisdiction. This fund should be based on the approach adopted in the United States. This fund would be partly comprised of the civil pecuniary penalties imposed under s 224 of the *Australian Consumer Law*. The reform should also adopt the approach in s 82 of the *Agents Financial Administration Act 2014* (Qld) to ensure that consumers are protected (by a statutory compensation fund) in relation to specified

[mber%2Fhansardr%2F2001-06-21%2F0021%22;rec=0;resCount=Default](#) viewed 8 May 2013.

²⁷ Assistant Treasurer and Minister for Financial Services and Superannuation, Hon Bill Shorten MP, *Media Release* (13 April 2011), cited in *R v Richard* [2011] NSWSC 866 at [69].

²⁸ *Securities Exchange Act 1934* (US), s 21 C.3 i.

²⁹ Australian Law Reform Commission, *The Purposes of Penalties* (31 October 2002) at [3.95], http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/alrc/publications/reports/95/03.The_Purposes_of_Penalties.html?query=alrc%20and%20the%20and%20purposes%20and%20of%20and%20penalties viewed 15 March 2005.

³⁰ However, s 81 of the *Commonwealth of Australia Constitution Act 1900* (UK) requires all moneys raised by the Executive Government to be paid into the Consolidated Revenue Fund. The constitutional issues would have to be carefully considered when drafting the relevant legislation.

³¹ See *HIH Royal Commission Final Report* (April 2003) at [8.3], [8.5.1], Recommendation 20 and [8.5.7], <http://www.hihroyalcom.gov.au/finalreport/Chapter%208.HTML> viewed 8 May 2013; and *Financial System Inquiry 1997, Final Report* (Stan Wallis, Chair) (Australian Government Publishing Service, Canberra, 1997) p 177, cited in *HIH Royal Commission Final Report* at [8.5.1].

serious contraventions of the *Australian Consumer Law* including breaches relating to the guarantee of title (under s 51 of the *Australian Consumer Law*) in relation to other goods (not involving motor vehicles).

3. Applicant for Directors' Disqualification Orders

Regulatory problem

Only the regulators can apply for a director's disqualification order under s 86E of the *Competition and Consumer Act 2010* (Cth) or s 248 of the *Australian Consumer Law*. Private litigants have no standing to apply to the court for such orders.

Private litigants (including the victims of a contravention of the *Australian Consumer Law*) should be given the power to apply to the court for a director's disqualification order. This approach not only promotes the private interests of private litigants but also achieves public interest regulatory objectives by ensuring that the laws are enforced while shifting some of the enforcement costs to the private sector. This also means that the regulators' limited budgets can be applied to other investigative and enforcement matters.

United Kingdom

In the United Kingdom, s 16(2) of the *Company Directors Disqualification Act 1986* provides that the Secretary of State, the official receiver, the liquidator, or any past or present member or creditor of the corporation, in relation to which the defendant is alleged to have committed an offence or other default, may apply to the court for a disqualification order. Her Majesty's Revenue and Customs has regularly used its standing as a creditor of the corporation (in relation to unpaid tax debts) to seek the disqualification of directors under this provision.

Benchmarks of effective regulation – Accountability

According to Baldwin and Cave,³² an effective regulatory regime is one that ensures "accountability." Accountability is linked to public confidence in the effectiveness, integrity and legitimacy of the regulatory regime. Directors should be accountable to investors and creditors and consumers/victims for the way they exercise their powers and discretions. This means that directors should ensure that they, and the corporation, satisfy high standards of financial management and comply with the law including the *Australian Consumer Law*.

Where a corporation has contravened the *Australian Consumer Law* and subsequently goes into liquidation, the consumer/victim may be left without a remedy (and is simply an unsecured creditor in the liquidation process). In the context of insolvent trading, the directors may be ordered to pay compensation to the corporation, its creditors or the liquidator under ss 588J or 588M of the *Corporations Act 2001* (Cth). Such compensation orders may provide some accountability to the ultimate victims of the directors' contraventions including the investors and creditors and consumers/victims who have suffered loss. In some cases directors may be regarded as an accessory to the corporation's contravention of the *Australian Consumer Law* and those directors may be liable to pay compensation to the consumer or victim. For example, the compensation order under s 236 of the *Australian Consumer Law* extends to civil accessories or persons "involved in the contravention." This will include directors where they have "actual knowledge of the essential facts" that constitute the corporation's contravention of the *Australian Consumer Law*.³³

However, such compensation orders do not punish directors nor do they protect the public, including consumers/victims, from future breaches of duty by those persons. In addition,

³² Baldwin and Cave, Baldwin R and Cave M, *Understanding Regulation: Theory, Strategy and Practice* (Oxford University Press, 1999), pp 76, 77.

³³ *Yorke v Lucas* [1985] HCA 65; (1985) 158 CLR 661 at 670.

where the director cannot afford to pay a compensation order, there is no accountability to the consumers/victims unless the regulator, such as ASIC, the ACCC or the Office of Fair Trading, elect to commence civil penalty disqualification proceedings or criminal proceedings. In some cases, unsecured creditors, who have liquidated claims against the directors, may commence bankruptcy proceedings against those directors pursuant to s 44 of the *Bankruptcy Act 1966* (Cth). Section 206B(3) of the *Corporations Act 2001* provides that directors are automatically disqualified from managing corporations if they become bankrupt. Bankruptcy may only result in the director being disqualified for up to three years (the usual duration of bankruptcy under s 149 of the *Bankruptcy Act 1966* (Cth)). However, in some cases, the nature of the director's contraventions and the size of the losses incurred may indicate that a lengthier period of disqualification should be imposed by the court. In such cases, investors, creditors, consumers and victims should have the power to apply to the court for disqualification orders to vindicate their rights where they have incurred losses as a result of the director's conduct and to protect them from future breaches of duty particularly where the regulator, for budgetary or other policy reasons, elects not to commence disqualification proceedings or criminal proceedings.

Government's regulatory philosophy - regulatory laws are enforced by both private litigants and the regulators

The federal government's philosophy is that the regulatory laws should be enforced by both private litigants and the regulators. For example, the directors' duties in ss 180-183 of the *Corporations Act 2001* are enforced by ASIC. Only ASIC can apply to the court for a disqualification order under s 206C or a civil pecuniary penalty order under s 1317G of the *Corporations Act 2001* in relation to a contravention of these statutory duties.³⁴ The corporation may apply to the court for a compensation order in relation to a breach of these statutory duties.³⁵ In addition, private litigation for a breach of the director's, officer's or employee's co-extensive common law and fiduciary duties is preserved by a number of provisions in the *Corporations Act 2001*.³⁶ There are also a range of civil remedies in the ASIC Act,³⁷ the *Corporations Act 2001*³⁸ and the *Australian Consumer Law*³⁹ that can be sought by private litigants. ASIC has described private litigation as a major part of the enforcement weaponry available to it.⁴⁰ ASIC believes that the private plaintiff is best able to assess the costs and benefits of litigation.⁴¹

The federal government's philosophy is also reflected in 25(1) of the *ASIC Act 2001* (Cth). Section 25(1) provides that ASIC may give a copy of the examinee's record of examination (obtained from an examination conducted under s 19 of the ASIC Act), together with a copy of any related book, to the lawyer of a private litigant provided there is a connection between

³⁴ See *Corporations Act 2001* (Cth), s 1317J(1); *Morley v Australian Securities and Investments Commission* (2010) 247 FLR 140; [2010] NSWCA 331 at [723]; *Shafron v Australian Securities and Investments Commission* [2012] NSWCA 255 at [2]; *Lifeplan Australia Friendly Society Ltd v Woff* [2013] FCA 613 at [31], [37], [38].

³⁵ See *Corporations Act 2001* (Cth), ss 1317J(2), 1317H.

³⁶ See, eg, *Corporations Act 2001* (Cth), ss 179, 185, 230, 961M(8); *Re Auzhair Supplies Pty Ltd (in liq)* (2013) 272 FLR 304; [2013] NSWSC 1 at [76], [79]-[80].

³⁷ *Australian Securities and Investments Commission Act 2001* (Cth), ss 12GD, 12GF.

³⁸ See, eg, *Corporations Act 2001* (Cth), ss 232, 461, 462, 588J, 588M, 1324.

³⁹ See, eg, *Australian Consumer Law*, ss 232, 236, 243, 263, 271.

⁴⁰ Hartnell A, *Regulatory Enforcement by the ASC: an Interrelationship of Strategies*, paper delivered at Australian Institute of Criminology Conference, March 1992) ASC Digest 1992 (Reports and Speeches 38 at 43-47); Kluver J, *ASC Investigations and Enforcement: Issues and Initiatives* (1992) 15(1) UNSWLJ 31 at 54.

⁴¹ Australian Securities Commission, *Australian Securities Commission Policy on Intervention*, Policy Statement 4 (June 1991), cited in Richardson D, "Section 50 of the Australian Securities Commission Act 1989: White Knight or White Elephant?" (1994) 12 C&SLJ 418 at 422.

the private litigation and the matter under investigation.⁴² In cases involving regulatory overlap (see for example: *ACCC v Fisher & Paykel Customer Services Pty Ltd*) that record of examination and related books may also be relevant to establishing contraventions of the *Australian Consumer Law*. Such private litigation promotes the regulator's public interest regulatory objectives because it ensures that the laws are enforced. It also shifts the costs of litigation from the regulator to the private litigant thus "freeing up" the regulator's limited resources for other investigation and enforcement matters. There are also equivalent provisions to s 25(1) of the *ASIC Act 2001* (Cth), that can be used to assist private litigants, in s 111 of the *Retirement Savings Accounts Act 1997* (Cth) (which can be utilised by ASIC or APRA) and s 281 of the *Superannuation Industry (Supervision) Act 1993* (Cth) (which can be utilised by ASIC, APRA and the ATO).

Law Reform

In view of the above considerations, it is argued that private litigants, such as the liquidator and receiver, shareholders/members/ creditors of the corporation and consumers/victims of contraventions of the *Australian Consumer Law* should be given standing to apply to the court for a director's disqualification order. This suggested reform is consistent with the benchmarks of "effective regulation" and existing government policy concerning the enforcement of the regulatory laws by both private litigants and the regulators. This would also promote the public interest regulatory objectives that underpin a disqualification order (including promoting the protection of the public and promoting personal and general deterrence as well as ensuring punishment). The imposition of such a punitive order would still be subject to the safeguards of the judicial process.

In addition, there is no provision in the *Competition and Consumer Act 2010* (Cth) or the *Australian Consumer Law* that is equivalent to s 25(1) of the *ASIC Act 2001* (Cth). Consideration should also be given to amending the *Competition and Consumer Act 2010* (Cth) and the *Australian Consumer Law* by including a provision that is equivalent to s 25(1) of the *ASIC Act 2001* (Cth).

⁴² See generally *Gray v Australian Securities and Investments Commission* (2002) 122 FCR 12; [2002] FCA 745 at [6]; *Australian Securities and Investments Commission v Whitlam* (2002) 42 ACSR 515; [2002] NSWSC 718 at [27].