

Senate Education and Employment Legislation Committee

WEDNESDAY 25 SEPTEMBER 2019

Attorney General's Department

Question No. 1

Senator Urquhart asked the following question at the hearing on Wednesday 25 September 2019:

Your submission refers to the royal commission's observations about 'the insufficiency of the current regulatory framework in relation to the disqualification of registered organisations' officers from office'. The royal commission complained that a person against whom a civil penalty has been imposed for a contravention of the statutory duties could not be disqualified under the disqualification provisions that then applied. Is it not correct that subsequent reform has now addressed this gap perceived by the royal commission with the introduction of section 307A?

The response to the honourable Senators' question is as follows:

The Royal Commission relevantly noted that a key defect of the current disqualification regime is that 'officers of organisations who repeatedly contravene civil penalty provisions of the FW Act, the FW(RO) Act and court orders made in relation to such provisions, are still entitled to hold office within an organisation.'¹

Section 307A of the *Fair Work (Registered Organisations) Act 2009* (RO Act) does not fully address the concerns raised by Commissioner Heydon, since that disqualification power does not extend to contraventions of the *Fair Work Act 2009* (Fair Work Act).

Recommendation 38 of the Royal Commission was that the Federal Court should be permitted to make an order disqualifying a person from holding office within a registered organisation or branch if the person has or has been found to have contravened a civil remedy provision of the Fair Work Act, or a civil penalty provision of the RO Act or the *Work Health and Safety Act 2011* and the Court is satisfied that the disqualification is justified. Schedule 1 of the Bill gives effect to this recommendation in full.

¹ Royal Commission into Trade Union Governance and Corruption, *Final Report* (2015), Vol 5, p 229 – 230.

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Question No. 2

Senator Pratt asked the following question at the hearing on Wednesday 25 September 2019:

Do you accept that under the Corporations Act the minister doesn't have standing to wind a company up or to bring an application for the company to be placed under administration?

The response to the honourable Senators' question is as follows:

The Minister does not have standing to wind a company up or to bring an application for a company to be placed into administration.

Under current section 28 of the *Fair Work (Registered Organisations) Act 2009* (RO Act), the Minister has automatic standing to make an application for cancellation of an organisation's registration. This has been a long-standing feature of the legislation, having been inserted into the then *Conciliation and Arbitration Act 1904* in 1977. This position is preserved under section 28 of the *Fair Work (Registered Organisations) (Ensuring Integrity) Bill 2019* (the Bill). Also preserved in the Bill is the position that only the Court can make a determination about cancellation of an organisation's registration.

In relation to administration, existing section 323 of the RO Act provides standing to an organisation itself, a member of the organisation or a person with sufficient interest. The issue of the Minister's standing in terms of having a sufficient interest was considered but not resolved in *Brown v Health Services Union* [2012] FCA 644 per Flick J at [51]. The Bill addresses this uncertainty by providing the Minister with automatic standing.

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Question No. 3

Senator Pratt asked the following question at the hearing on Wednesday 25 September 2019:

Your answer at the time, as to whether there are provisions in the Corporations Act where the minister can make an application in respect of a breach of Corporations Law, was that there is 'power in relation to the ACCC for the minister to issue directions in relation to particular matters'. I'll draw you to section 329FA of the ROC act, which gives the same power to the minister in respect of the ROC. Do you accept that in neither case does this power extend to the minister being able to direct the regulator to initiate legal proceedings?

The response to the honourable Senators' question is as follows:

Consistent with the evidence given by the Department at the Canberra hearing on 12 September 2019, a relevant Minister can give directions to the ROC. However, the scope and nature of the ministerial direction depends on the specific regulator and statutory context.

Section 29 of the *Australian Competition and Consumer Act 2010* provides that the Minister may give the ACCC directions connected with the performance of its functions or the exercise of its powers. The ACCC must comply with a direction (s 29(1B)). The power of direction is subject to the following exceptions (s 29(1A)) relating to:

- Part IIIA, IV, VII, VIIA, X, XIB or XIC; or
- Division 3 of Part XI in relation to individual cases.

Part VI (Enforcement and remedies) is not included in this list of exceptions. There is no requirement in section 29 that such directions be of a general nature only.

Section 14 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) provides that, where the Minister considers it is in the public interest in respect of its jurisdiction for particular matters, he or she may, by writing, direct ASIC to investigate that matter. Those matters include in relation to:

- an alleged or suspected contravention of certain corporations legislation;
- an alleged or suspected contravention of a law of the Commonwealth, State or Territory where that contravention concerns the management or affairs of a body corporate or involves fraud or dishonesty and relates to a body corporate.

ASIC is required to comply with this direction (s 14(3) of the ASIC Act).

Section 329FA of the *Fair Work (Registered Organisations) Act 2009* (RO Act) provides that the Minister can, by legislative instrument, give written directions to the ROC about the performance of the Commissioner's functions. However, any direction must be of a general nature only (s 329FA(2) of the RO Act).

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Question No. 4

Senator Davey asked the following question at the hearing on Wednesday 25 September 2019:

We keep getting told that there's no equivalent under corporations law and that there's no way of disqualifying managers under the Corporations Act, but is it the case that there are circumstances whereby those managing corporations can be disqualified from their position by the regulator without any court action, so it's a decision by the regulator rather than a court?

The response to the honourable Senators' question is as follows:

The *Corporations Act 2001* provides the Australian Securities and Investments Commission (ASIC) with the power to disqualify a person from managing corporations for up to 5 years if:

- in the previous 7 years the person has been an officer of 2 or more corporations and 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 about the corporation's inability to pay its debts (s 206F(1)); or
- in relation to two or more corporations, in the previous 7 years:
 - the person has been an officer a corporation and while the person was an officer or within 12 months after the person ceased to be an officer, the corporation was wound up; and
 - there was an advance to pay employee entitlements under the Fair Entitlements Guarantee (FEG) scheme and the Commonwealth has or is likely to receive no return or a minimal return on its FEG advance; and
 - ASIC has reason to believe that in the 7-year period there was a corporate contravention either by that person or by the corporation which the person failed to take reasonable steps to prevent while an officer of the corporation (s 206GAA)

and ASIC is satisfied that the disqualification is justified.

ASIC also has powers to cancel an Australian financial services licence (ss 915B and 915C of the Corporations Act), and to make an order banning someone from providing financial services on specified grounds (s 920A of the Corporations Act).