



ASIC
Australian Securities &
Investments Commission

Committee	Parliamentary Joint Committee on Corporations and Financial Services
Inquiry	Oversight of ASIC, the Takeovers Panel and the Corporations Legislation
Question No.	038
Topic	PwC – Ability to disqualify AR and director on fit and proper grounds
Reference	Spoken, 20 October 2023, Hansard page 55
Committee member	Senator Pocock

Question

Senator BARBARA POCOCK: Can I ask about one more person first? I am quoting once again from the documentation of the eight people who left PwC in the middle of the year, for similar reasons to Mr Konidaris and so on: 'Richard Gregg has been given notice of PwC Australia's findings against him, and a process has started under the Partnership Agreement to remove him from the partnership.' Based on this information and other information out there, have you done any analysis or investigation in relation to Mr Gregg?

Ms Court: I have the same answer as in relation to the other matters; I suspect the team has, but I don't have that information in front of me now.

CHAIR: Mr Savundra, what can you add?

Mr Savundra: We will take the question on notice, as you have suggested, and respond in writing. At a very general level—it is complicated—the fit-and-proper person test applies to licence conduct; whereas being a director of a corporation doesn't necessarily involve licence conduct, whether that is credit licence or financial service licence. If I am a director of a mining company I may not be involved in use of a financial services licence or use of a credit licence. The banning for directors can be done in a number of ways. Again, we will provide you with a comprehensive list. ASIC does have the ability to ban but it is limited. It is usually where a director has been a director of two or more companies that have become insolvent and then we look at issues around that director's capability or appropriateness to continue to be a director. Another one is that a director becomes bankrupt, or the alternative is that there is a breach of director's duties, where the court bans the director. If we take, for example, those partners that were not a registered liquidator, a registered company auditor or an authorised rep, but they were merely a director of a PwC company—and it might have been a PwC service company, which doesn't involve licence conduct—then the ability for us to ban someone on the basis that they are not a fit-and-proper person isn't available. As Deputy Chair Court said, we are hampered in our ability to investigate; or in our ability to compel production of documents where someone who is not a fit-and-proper person may not have contravened a law that we administer. If we park for a moment the Australian Federal Police investigation, the ability for us to access the full suite of our investigative powers is limited because we don't have the necessary jurisdictional hook.

Senator BARBARA POCOCK: I look forward to the detail of that. I note the report in the *Financial Review* in the middle of the year which said you were looking at 160 people. It would be useful to this committee to know where you land on that.

Answer

Banning an individual from providing financial services or from carrying on a financial services business

Under section 920A of the Corporations Act, ASIC is able to ban individuals who are AFS licensees, or the authorised representatives of AFS licensees, from providing financial services or from carrying on a financial services business, on the grounds that they are no longer a fit and proper person to provide financial services.

Specifically, 920A(1)(d) provides that ASIC may make a banning orders against a person if:

ASIC has reason to believe that the person is not a fit and proper person to:

- (i) *provide one or more financial services; or*
- (ii) *perform one or more functions as an officer of an entity that carries on a financial services business; or*
- (iii) *control an entity that carries on a financial services business.*

Section 913BB sets out the matters to which ASIC must have regard in determining whether a person is a fit and proper person for the purposes of deciding whether to make a banning order under section 920A. These include:

- whether the person held an AFS Licence or Australian Credit Licence that has ever been suspended or cancelled has ever been suspended or cancelled;
- whether the person has ever been disqualified from managing corporations;
- whether the person has ever been an insolvent under administration;
- whether the person has ever been linked to a refusal or failure to give effect to a determination made by the Australian Financial Complaints Authority;
- whether, in the last 10 years, the person has been convicted of an offence;
- any other matter ASIC considers relevant.

Relevantly, while a determination made by the Tax Practitioners Board (**TPB**) is not a matter for which ASIC must have regard in considering the fit and proper person test, subsection 913BB(2)(k) requires ASIC to have regard to “*any other matter ASIC considers relevant*”. A determination by the TPB that an individual has not acted honestly and with integrity (as was the case with Mr Peter Collins) is therefore a matter that an ASIC Delegate may consider relevant when considering whether a person is fit and proper.

ASIC’s power to disqualify a person from managing corporations

There is no specific provision in the Corporations Act for ASIC to disqualify a person from managing corporations on the grounds that they are no longer a fit and proper person.

Under section 206F of the Corporations Act however, ASIC may disqualify a person from managing corporations for up to 5 years if, within 7 years immediately before ASIC gives the person a Notice to Demonstrate (giving the person the opportunity to be heard on the question why they should not be disqualified from managing a corporation):

- (a) the person was an officer of two or more companies; and
- (b) while the person was an officer (or within 12 months of ceasing to be an officer) of those corporations:
 - (i) each of the corporations was wound up; and
 - (ii) a liquidator lodged a report with ASIC under s533(1) of the Corporations Act that each of the corporations may be unable to pay its unsecured creditors more than 50 cents in the dollar.

In determining whether a disqualification is justified, ASIC must have regard as to whether the two or more failed corporations were related to one another, and may also have regard to the persons’ conduct, whether the disqualification is in the public interest and any other matters ASIC consider appropriate.

Automatic disqualification from managing corporations

Pursuant to s206B of the Corporations Act, a person will be automatically disqualified from managing a corporation for a period of time where the person is:

- (a) convicted of certain offences referred to in s206B(1); or
- (b) made bankrupt or they execute a personal insolvency agreement under bankruptcy legislation (s206B(3) and (4)); or
- (c) disqualified, under an order made by a court of a foreign jurisdiction that is in force, from being a director, or being concerned in the management, of a foreign company (s206B(6)).