

## **Senate Standing Committee on Education and Employment**

### **QUESTIONS ON NOTICE Additional Estimates 2015 - 2016**

#### **Outcome 2 - Workplace Relations and Economic Strategy**

**Department of Employment Question No. EMSQ16-000247**

**Senator McKenzie provided in writing.**

#### **Question**

##### **Fair Entitlements Guarantee - s596AB of the Corporations Act**

1. What the effect of section 596AB of the Corporations Act in relation to such arrangements?
2. Who has standing to prosecute alleged breaches of section 596AB?
3. When FEG monies have been paid out, does the Department have standing to bring a prosecution under s596AB to recover those monies from the directors of the company?
4. How many referrals for prosecution have been made by the Department to ASIC, in relation to potential breaches of section 596AB of the Corporations Act?
5. Does ASIC have a litigation fund that can be used for prosecuting breaches of s 596AB of the Corporations Act?
6. Has this fund ever been used to pursue suspected breaches relating to employee entitlements?
7. Are you aware of whether ASIC has commenced any proceedings alleging a breach of s 596AB?
8. How many of these prosecutions have been successful resulting in a conviction and recovery of funds?

#### **Answer**

##### *Answer to question 1:*

The effect of section 596AB of the *Corporations Act 2001* (the Corporations Act) is that a person must not enter into a relevant agreement or a transaction with the intention of, or with intentions that include the intention of:

- (a) preventing the recovery of the entitlements of employees of a company; or
- (b) significantly reducing the amount of the entitlements of employees of a company that can be recovered.

A 'relevant agreement' is a defined term under the Corporations Act and includes an agreement, arrangement or understanding:

- whether formal or informal or partly formal and partly informal; and
- whether written or oral or partly written and partly oral; and
- whether or not having legal or equitable force and whether or not based on legal or equitable rights.

A person who breaches this provision may be liable for a civil or criminal penalty.

*Answer to question 2:*

Generally, it is a liquidator who will bring a civil action under section 596AC for a breach of section 596AB. An employee of the company can also sue under section 596AC in limited circumstances:

1. With the liquidator's written consent (section 596AF).
2. Upon giving notice to the liquidator and subject to further conditions being met (sections 596AG and 596AH).

If the liquidator has taken other action under the Corporations Act in relation to the contravention of section 596AB, an employee may also be prevented from suing (see section 596AI).

In respect of an offence under section 596AB, decisions on whether to commence or discontinue criminal proceedings lie with the Commonwealth Director of Public Prosecutions.

*Answer to question 3:*

The department will ordinarily have the necessary right of subrogation so as to stand in the shoes of employees to bring proceedings to recover employee entitlements including in some circumstances suing under section 596AC in relation to alleged breaches of section 596AB. The department may alternatively choose to fund a liquidator to bring the civil action under section 596AC.

In respect of an offence under section 596AB, decisions on whether to commence or discontinue criminal proceedings lie with the Commonwealth Director of Public Prosecutions.

*Answer to question 4:*

The department does not make referrals for prosecution to ASIC. The department makes referrals to ASIC for investigation of whether or not breaches of the Corporations Act 2001 have occurred.

Matters are referred to ASIC for investigation where any concerns relating to corporate behaviour arise in FEG matters. Since January 2014, the department has referred 16 matters to ASIC for investigation, some of which included concerns about phoenixing.

*Answer to question 5:*

This question should be directed to ASIC.

*Answer to question 6:*

This question should be directed to ASIC.

*Answer to question 7:*

This question should be directed to ASIC.

*Answer to question 8:*

There have been no convictions recorded under section 596AB.