

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates

2014 - 2015

Department/Agency: ACNC

Question: SBT 4296

Topic: Enforcement of the ACNC

Reference: Hansard page no. 120-121 - 22 October 2014

Senator: Edwards, Sean

Question:

CHAIR: Do you recall during the ACNC's appearance before the inquiry in May, Assistant Commissioner Baird, that you took issue with the testimony of Mr Peter Hersh of Logicca Chartered Accounts on the issue of the powers of an independent auditor?

Mr Baird: I recall a discussion about the ASIC powers being switched off and the ACNC powers being switched on in relation to some reporting matters. I do not recall the particular auditing question, but I certainly recall the discussion that ASIC is now responsible for the incorporation of companies limited by guarantee and their winding up and that other matters between those two points are dealt with by reporting to the ACNC.

CHAIR: He put in a supplementary submission to the committee where he argued that despite the superficial similarities between section 60 of the ACNC Act and sections 310 and 312 of the Corporations Act, the ACNC Act did not have the teeth of the Corporations Act to enforce compliance with the law on the following grounds—and I will go through them very quickly. If you want me to repeat them, I will. Section 310 gives an auditor right of access to any organisations' financial records and it requires the provision of information, explanations of other assistance for the purpose of auditor review. Section 312 of the Corporations Act is a requirement of the officers of accompanied to assist the auditor and provide information to the auditor with the failure to comply an offence of strict liability under 6.1 of the Criminal Code. Section 310 sets out the powers of the auditor to obtain information. By contrast, section 60 of the ACNC Act contains reporting requirements that impose a duty of disclosure on the company, writ large rather than on the individual officer. Failure to comply with section 60 of the ACNC Act is not defined as a criminal offence. By contrast, section 60 of the ACNC Act is not a criminal offence and disclosure requirements as stipulated by the Corporations Act defined an entities' books as including registers, records of information, financial reports or records, however compiled, and documents. And (a); a register and (b); any other record of information and (c); financial reports or financial records however compiled, recorded or stored, and (d); a document. So no similar definition appears in the ACNC Act. In essence, Mr Hersh is saying that while the requirements of section 60 of the ACNC Act might be superficially similar to sections 310 and 312 of the Corporations Act, in point of fact the ACNC lacks the teeth of the Corporations Act to enforce compliance with the law. How do you respond to Mr Hersh's critique of your argument?

Mr Baird: The ACNC did put in a supplementary submission on that question. It does involve matters of professional judgement and legal interpretation, and I would prefer to take that on notice and provide a thorough answer.

CHAIR: That is your right.

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Answer:

Sections 310 and 312 of the Corporations Act impose an obligation upon directors to provide information to an auditor, and imposes criminal sanctions where this does not occur (it is a strict liability offence).

In contrast, the ACNC Act imposes an obligation on the charity to provide information to an auditor.

In both cases, there is an obligation to provide an auditor with the information that the auditor requires for the audit or review.

Although the obligation under the ACNC Act is upon the company, and not the directors, the directors are responsible for ensuring that a company complies with its legal obligations. If a director wilfully refused to provide information to the auditor which the company is legally obligated to provide, that director would very likely be in breach of their fiduciary duties to the company. Consequently, it is incorrect to assert that simply because the obligation is not expressed as being upon the director, the director has no responsibility for ensuring that the obligation is complied with.

Further, where a director refuses to provide necessary information to an auditor or acts inappropriately, the ACNC has various enforcement options open to it. This includes, in appropriate circumstances, suspending or removing the director from that role, or, in extreme circumstances, revoking the charity status of the company (if this occurred, the director would be subject to the more prescriptive obligations under the Corporation Act).

Finally, the ACNC notes that it runs regular forums with professional advisors to charities (including lawyers, auditors and their professional associations), and in these forums, no advisor has raised a concern about the differences between the above provisions.