

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Additional Estimates 14 – 15 February 2007

Question: aet120

Topic: Liabilities of Directors Duties

Hansard Page: E60

Senator MURRAY asked:

Is there any consequent potential legal liability later on if, for example, this high debt exposure and an exogenous shock coincided to cause bankruptcy? Could shareholders who lost their money sue both the directors and ASIC for not attending to the directors' duties as understood under the law? Is there any contingent liability that might extend to ASIC?

Mr D'Aloisio—I would have to take that on notice. I do not think there would be. There is not an obligation on ASIC to ensure that companies are not negligent in the way that they run their affairs. I am a new commissioner, but that would be quite a concept. I want to take that on notice and have a look at, because—

Senator SHERRY—It might cause you concern to have become a commissioner if that happened.

Mr D'Aloisio—Company directors do carry that obligation in relation to their directors' duties—due diligence and so on. They definitely carry it. I was not seeking to shirk it in that sense. But coming back to the question: is there a possibility that the directors in this case may be in breach of their duties looked at in hindsight in two or three years time? There must be, but that is a matter for the shareholders at the time. That is a matter for the company and ASIC at that point in time. It is not an issue on which we would act today.

Answer:

Whether the shareholders of a company have any right of action against the directors of their company for any alleged breach of directors' duties will depend upon all the facts and circumstances of the case. It is something which could only be assessed with the benefit of specific legal advice. For example, there could be no successful action for alleged breach of the directors' duty of care and diligence if the directors can establish the "business judgment" defence set out in s.180(2) of the *Corporations Act 2001*.

For its part, ASIC has the statutory protection provided by s.246 of the *Australian Securities and Investments Commission Act 2001*, and so it cannot be liable for damages for any act done or omitted in good faith in the performance or purported performance of its functions or the exercise or purported exercise of its powers.