

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Additional Estimates 14 – 15 February 2007

Question: aet128 (ASIC)

Topic: Disqualification of Directors

Hansard Page: E82 - 83

Senator WONG asked:

I have a question in relation to disqualification of directors pursuant to 206D, which is the section that enables you to apply to a court in circumstances where someone has been an officer of two or more corporations that have failed.

Mr Cooper—Yes.

Senator WONG—Some complaints about the operation of this section and the extent to which it was effective and acted upon was an issue raised in the insolvency inquiry that the parliamentary joint committee undertook a couple of years ago. I do not want to name the particular person involved, but I have certainly been approached by some people who have identified a particular director of a cleaning company who has been associated with two or three failed companies with a significant number of entitlements owed to employees and also to other creditors. I understand the investigation into this individual is still active within ASIC. Can you clarify for us what guidelines, procedures and protocols are associated with ASIC's investigation of the matter and its determination on whether or not it seeks to apply to disqualify under 206D(1)(a), which is the two corporations or more provision.

Mr Cooper—That is a pretty specific and detailed question, so I will have to take that on notice. I will point out that that is not our only banning avenue. In fact, in the 2006 year we banned some 40 directors for a total of 144 years specifically in that area. I will certainly take that question on notice.

Senator WONG—Are you able to provide us with an indication of which guidelines, policies, criteria et cetera you associate with your decision-making with your discretion under sections 206D and 206F?

Mr Cooper—We would be delighted to cooperate as fully as we could there. I will say, though, that if that disclosure gives people who might be habitual participants in that a free kick because they know all of our procedures, what we look at and what we do not look at, then I would be not so keen on that.

Senator WONG—There is always the option in those circumstances for you to seek to have that evidence provided in camera to the committee.

Mr Cooper—Sure. I am not prefacing that it is necessarily—

Senator WONG—I think that is a reasonable proposition.

Mr Cooper—I am not saying that the guide would necessarily be like that. I am just cautioning that that could be an issue for us. I will take both limbs of that question on notice.

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Additional Estimates 14 – 15 February 2007

CHAIR—We do not have the ability to do that in estimates, I gather.

Senator WONG—No. We would have to do it through the statutory committee.

CHAIR—Yes.

Senator WONG—The chair raising a very good point, Mr Cooper, which is that, if you sought to give that evidence in camera, I would probably have to ask the question in the statutory oversight context.

Mr Cooper—All right. Let us have a look at what materials we have and we will see whether it is an issue.

QON

Senator WONG—Some complaints about the operation of this section and the extent to which it was effective and acted upon was an issue raised in the insolvency inquiry that the parliamentary joint committee undertook a couple of years ago. I do not want to name the particular person involved, but I have certainly been approached by some people who have identified a particular director of a cleaning company who has been associated with two or three failed companies with a significant number of entitlements owed to employees and also to other creditors. I understand the investigation into this individual is still active within ASIC. Can you clarify for us what guidelines, procedures and protocols are associated with ASIC's investigation of the matter and its determination on whether or not it seeks to apply to disqualify under 206D(1)(a), which is the two corporations or more provision.

Answer:

Generally, ASIC considers this provision in cases where there has been serious misconduct by an officer who has been an officer of 2 or more corporations when they have failed, and the conduct does not fall within other specific provisions that address officer misconduct, for example directors duties where s206C or s206E may apply. Generally, where the conduct is of a less serious nature, or s206D(1)(b) cannot be satisfied, s206F may be used.

As canvassed before the Committee, and in keeping with ASIC's general policy, we are unable to disclose publicly details relevant to specific investigations. However, the criteria ASIC generally considers in deciding whether and what regulatory action to take includes available evidence, potential remedies, and regulatory impact and priorities.

The (unidentified) investigation referred to by Senator Wong would be subjected to the same investigation and decision-making processes as are generally applied.

Senator WONG—Are you able to provide us with an indication of which guidelines, policies, criteria et cetera you associate with your decision-making with your discretion under sections 206D and 206F?

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Additional Estimates 14 – 15 February 2007

Answer:

ASIC has no discretion in respect to section 206D disqualifications as these applications are made to the Court and any decision on disqualification is a Court based remedy within the Court's discretion. However, a disqualification under section 206F of the Corporations Act is an administrative remedy and, as such, duly appointed ASIC delegates exercise discretion when forming a view about whether directors should be banned and, if so, the length of any banning. Section 206F itself sets out the criteria to be considered. The question of whether ASIC pursues an action for disqualification under section 206D or 206F will depend on the type of conduct, its seriousness, the available evidence and the regulatory impact of taking a particular action. There are a number of provisions contained in establishing the causal connections between the collapse and the conduct of the person in question, as required under section 206D(1)(b).

ASIC routinely disqualifies persons from managing corporations, under the provisions of section 206F. As reported in a recent ASIC Media Release (07-05), during 2006 ASIC banned 40 directors for a total of 144 years, and further section 206F bannings have been undertaken since then. In addition, ASIC currently has underway approximately 70 banning actions pursuant to section 206F. This enforcement activity has been supported by the Assetless Administration Fund, which enables ASIC to fund liquidators for more rigorous investigations and reports to ASIC in respect of phoenix activity and breaches of directors duties. ASIC has also made a number of successful applications for the disqualification of directors by the Court for lengthy periods under sections 206C and 206E of the Corporations Act.