

Senate Economics Legislation Committee
ANSWERS TO QUESTIONS ON NOTICE
Treasury Portfolio
Budget Estimates 29, 30 & 31 May 2007

Question: bet 49 (ASIC)

Topic: State Entities

Hansard Page: E71

Senator SHERRY asked:

I am pleased that you have acknowledged that there is an extensive role for ASIC in respect to trustees and their duties and obligations, but it is not a total role, is it?

Mr D'Aloisio—It would be a secondary one.

Senator SHERRY—My understanding is that there is a role in terms of state entities in this area?

Mr D'Aloisio—I would have to take that on notice. From memory I think there is but I would not be able to help you very much with the details.

ANSWER:

My understanding is that there is a role in terms of state entities in this area?

Yes, there is a role for state entities. Most debenture trustees qualify as trustees by virtue of being recognized under State trustee and probate legislation to carry out their traditional business of managing deceased estates and trusts, and being an attorney.

Approval of trustees

Generally before a company can issue debentures, it must enter into a trust deed and appoint a trustee under the Corporations Act. The Corporations Act (section 283AC) 'pre-approves' the following as trustees:

- a. Public Trustees;
- b. body corporates authorised to take a grant of probate of the will or letters of administration of the estate of a deceased person;
[Note: these two categories are governed by State law]
- c. life insurance companies;
- d. ADIs; and
- e. sufficiently capitalised subsidiaries of the above.

This means that trustees for debenture holders can qualify as such if they are recognized as a trustee under State law. It does not mean that the States are responsible for regulating the role of such entities as trustees for debenture holders.

The Corporations Act also allows ASIC to approve a body corporate as a trustee. We have not published a policy on who we would approve as a trustee; but have in most cases applied the following requirements in approving debenture trustees:

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates 29, 30 & 31 May 2007

- a. the debenture trustee must hold \$250,000 in surplus liquid funds per offering either directly or via bank guarantee;
- b. the debenture trustee must have professional indemnity insurance to the value (including interest payable) of the debentures on issue from time to time; and
- c. the debenture trustee must meet the general criteria detailed in superseded PS 89 *Trustees and representatives – approval for prescribed interest schemes*, relating to character, ability and resources, independence and accountability.

We receive few applications for approval of a body corporate as a trustee. We have received only five in the last 2 years.

Role and duties of a trustee

The Corporations Act requires the trust deed to impose certain duties on the trustee. They include:

- a. exercising reasonable diligence to ascertain whether the property of the borrowing company will be enough to repay borrowings when due;
- b. exercising reasonable diligence to ascertain whether the borrowing company has breached any of its obligations as the issuer of the debentures (under the terms of the debentures, the trust deed or Chapter 2L of the Act);
- c. bringing to ASIC's attention any failure by the borrowing company to meet its reporting obligations;
- d. doing everything in its power to ensure that the borrower remedies any breach known to the trustee of any term of the debentures, the trust deed or Ch 2L of the Act, unless the breach will not materially prejudice debenture holders' interests or any security for the debentures; and
- e. apply to the Court for an order under Ch 2L if the borrower requests it do so.

Under the trust deed, the trustee holds the following in trust for the benefit of the debenture holders:

- a. the right to enforce the borrower's duty to repay;
- b. security for repayment; and
- c. the right to enforce any other duties the borrower has under the debentures, the trust deed or Ch 2L of the Act (s283AB).

What other duties the trustee performs depends on what the particular trust deed provides. This is a commercial matter between the trustee and the debenture issuer.

Powers of ASIC

As well as the power to approve a body corporate as a trustee, ASIC has exemption and modification powers in relation to Chapter 2L, and can apply to the court for specific orders, including:

- a. staying proceedings against the borrower;

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates 29, 30 & 31 May 2007

- b. restraining the borrower from paying money to debenture holders;
- c. enforceability of security for debentures;
- d. appointment of a receiver;
- e. restricting advertising or borrowing by the borrower; and
- f. any other order the court considers appropriate to protect the interest of existing or prospective debenture holders : s283HB.