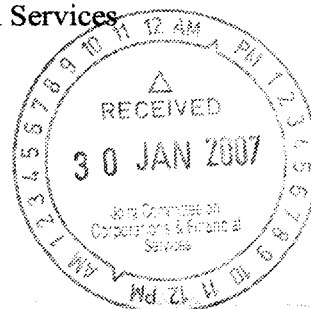




25 January 2007

Mr D Sullivan
Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
P O Box 6100
Parliament House
CANBERRA ACT 2600



Dear Mr Sullivan

**Inquiry into the Exposure Draft of the Corporations Act Amendment
(Insolvency) Bill 2007 and related draft regulations**

Thank you for your letter of 14 December 2006 inviting a submission from the ANAO to the above Inquiry.

To the extent that the exposure drafts of the Bill and regulations reflect the Government's policy intent in relation to corporations law, we do not have any comment to make.

However, in your letter, you refer to the Committee's June 2004 report *Corporate Insolvency Laws: a Stocktake*. As the Committee will be aware, that report contained the following recommendation:

Recommendation 39 *The Committee requests that the ANAO conduct a performance audit of ASIC's processes in receiving and investigating statutory reports*

The audit requested by the Committee has now been completed and was tabled on 24 January 2007. I have enclosed a copy of the report and would be pleased to provide further copies for Committee members if you wish (contact the Audit Manager, Julian Mallett on 6203 7384).

There are only two aspects of the draft Corporations Amendment (Insolvency) Bill which are relevant to the audit. The first is that during the course of the audit, we identified that there was a 'drafting slip' in section 533 which had gone uncorrected for some years. We drew this to ASIC's attention and I note that the exposure draft of the Bill includes a provision to correct this error (in Schedule 5 – Miscellaneous).

The other matter relates to ASIC's use of its power under section 206F to disqualify persons from managing corporations. At paragraph 3.60, the audit report notes that ASIC's use of this power has declined markedly over time. In terms of assisting ASIC to make greater use of its disqualification power, I note that Schedule 2 of the exposure draft of the Bill contains a provision to explicitly state that disqualifications

under Part 2D.6 (which includes both sections 206E and 206F) are not to be taken to be by way of a penalty. This would appear to be a response to a 2004 High Court decision (*Rich v Australian Securities and Investments Commission* ([2004] HCA 42)) in which the Court found that a disqualification under section 206E (which is a disqualification by a Court rather than by ASIC) was penal, rather than protective, in nature. Consequently, the court held that common law privileges prevented ASIC obtaining discovery of documents in both judicial and administrative proceedings.

Should you wish to discuss any aspect of this letter, please feel free to contact the Executive Director responsible for the audit report, Brian Boyd, on 6203 7672.

Yours sincerely



Ian McPhee