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The Treasury
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Dear Sir or Madam,

SUBMISSION: re Insolvency Law Reform Bill 2013

I refer to your invitation for interested parties to make written submissions in relation to the abovementioned Bill.

I am a Chartered Accountant and registered liquidator who has worked in the insolvency profession for 30 years.

My particular interest in this Bill is in the section headed "Statement of reports of affairs etc", schedule 2, part 2, to do with proposed section 206BB, "Automatic disqualification – failure to give report etc to external administrator". In the Explanatory Document this subject is discussed in chapter 3, paragraphs 1.48 to 1.50.

That interest comes through having carried out extensive research into the Report as to Affairs (RATA) and into the ASIC's prosecution of directors. I have recently published two substantial papers on the subject. [1]

In this submission I want to draw attention to what may be an oversight by Treasury and the ASIC in not including reference to section 475(2) of the Corporations Act as a reporting requirement in proposed subsection 206BB(2)(a).

This proposed subsection refers to section 475(1). In my view it should also refer to section 475(2).

Section 475(1) does not contain a provision enabling or authorising an official liquidator to issue a notice of demand for a RATA. Therefore, in practice – and in keeping with the needs of the ASIC's prosecutorial role used as part of its Liquidator Assistance Program – official liquidators issue a demand for a RATA under section 475(2).

In the interests of procedural fairness and of producing good evidence of an offence, the practice has been for a notice of demand to be issued by the liquidator under section 475(2)

and, where no RATA is submitted, for the liquidator to supply the ASIC with a sworn affidavit or statement reciting the steps taken and the events (if any) that subsequently occurred. This evidence may then be used by the ASIC should it decide to bring a summary prosecution action against the director.

It appears to me that if section 475(2) is not included as a "reporting requirement" in proposed subsection 206BB(2)(a), then the failure of a director to supply a RATA that has been demanded under section 475(2) might not qualify as grounds for the director's automatic disqualification.

If so, that would constitute a significant weakness in the proposed law.

Thank you for providing the opportunity to comment on the Bill.

Yours faithfully

A handwritten signature in dark ink, appearing to read "Peter J Keenan". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Peter J Keenan

ⁱ [1] In June 2012 I published, through the Insolvency Practitioners Association of Australia, a paper titled "An appraisal of the report as to affairs: a survey of the views of official liquidators". This is available at http://www.law.unimelb.edu.au/files/dmfile/The_RATA_-_research_paper_-_Keenan_-_2012_-_IPA_TTS1.pdf A shorter version was published in the June 2012 edition of the IPAA's Australian Insolvency Journal. The other paper - titled "Convictions for summary insolvency offences committed by company directors" - was published in February 2013 by the Australian Institute of Criminology. It is available at <http://www.aic.gov.au/publications/current%20series/rip/21-40/rip30.html> I also made a submission concerning the RATA in February 2012 in response to Treasury's "Proposals Paper: A modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia. December 2011."