

**Senate Standing Committee on Economics**

**ANSWERS TO QUESTIONS ON NOTICE**

**Treasury Portfolio**

Supplementary Budget Estimates

17 October – 18 October 2012

**Question:** SBT 31

**Topic:** Section 420A of the Corporations Act

**Hansard Page:** pg 127, Thursday 18 October 2012

**Senator WILLIAMS asked:**

**Senator WILLIAMS:** ... How long have you been working for ASIC?

**Ms Gibson:** Five years.

**Senator WILLIAMS:** In your time of five years, do you know if you have ever pursued anyone under section 420A?

**Ms Gibson:** I do not recollect at the moment.

**Senator WILLIAMS:** Anyone from ASIC?

**Mr Medcraft:** I think probably the best thing is to take notice and come back to you with a precise answer.

**Senator WILLIAMS:** I just thought if you had pursued someone there would have been talk around your organisation. Take on notice the question of whether anyone has ever being pursued under section 420A.

**Answer:**

Section 420A of the *Corporations Act 2001* is designed to codify the common law duty a receiver (appointed by a mortgagee) owes to a mortgagor regarding the power of sale of relevant mortgaged property. The section enables parties such as the receiver, and the company (mortgagor) to understand the scope of the receiver's duty regarding the sale of mortgaged property.

The section is not an offence provision so there is no statutory penalty for a breach under the Act. The primary remedies available for a breach of the section are the general law remedies of set-off and an account (which is the difference in value of the property if it had been sold without breaching the section). The availability of remedies to aggrieved parties, (for example, a mortgagor or guarantor), are to be tested by reference to the duty imposed under the section.

Notwithstanding, ASIC has standing to inquire into the conduct of Receivers and Managers, and other Controllers pursuant to section 423 of the Act.

ASIC has conducted investigations in respect of three separate confidential matters which included a review of a possible non compliance with the section. Insufficient evidence was found to warrant continued investigation in each of these matters.

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| Project start date | Investigation No.         | Date finalised   |
|--------------------|---------------------------|------------------|
| 7 May 2004         | ENF2004/10588             | 21 May 2004      |
| 6 April 2004       | ENF2004/6667              | 3 September 2004 |
| 9 May 2002         | ENF2002/7520 <sup>1</sup> | 26 November 2011 |

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<sup>1</sup> This matter was reviewed again with separate Investigation No. ENF2010/27061