

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Additional Estimates 2012

15 – 17 February 2012

Question: AET 55 - 56
Topic: Businesses in Receivership
Hansard Page: Written

Senator WILLIAMS asked:

55. When a secured financier appoints a receiver or administrator, he usually relies on a report about the business in question. That report therefore has significant impact on the future of that company. Is that report available to the company, to ASIC and to the creditors as part of the administration report?
- If yes, why is it not done as a matter of course?
 - If no, why is its publication in the first creditors report not mandatory?
56. If the report is confidential, why does ASIC allow it to remain confidential when it clearly can have impacts on many people besides those who have seen it and has the potential to disadvantage other creditors more than the secured creditors?
- Does not such secrecy have the capacity to hide unconscionable conduct such as collusion between the report writer and the secured creditor, particularly if the report writer then receives the job of administrator or receiver?

Answer

55. The type of report alluded to is usually referred to as an "Investigating Accountants Report" or "Business Review Report" ("the report") and is usually commissioned by a secured creditor or the relevant company at the secured creditor's request. A secured creditor's right to appoint an investigating accountant generally arises out of contract; for example, the terms of a registered mortgage debenture. Therefore, the report is a private document.

The report can be made available to the company, if the secured creditor permits. This might occur on occasions so that facts and circumstances can be agreed between the parties.

It would be unusual for a privately commissioned report to be provided to third parties. There is no statutory requirement for a secured creditor to provide the report to creditors or to ASIC. ASIC could compel a report's production as part of an investigation.

56. ASIC has no power to compel a secured creditor to publish a privately commissioned report.

It is not uncommon or unlawful for the writer of a report to be appointed at a later date as receiver if the receiver is not precluded from acting by section 418 of the Corporations Act 2001. Such appointments are private and generally arise out of contract. ASIC has no power to direct a secured creditor as to who it appoints.

A receiver or secured creditor who acts other than in accordance with the law is, however, subject to civil and criminal action.