

## Senate Standing Committee on Economics

### ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

31 May – 2 June 2011

Question No: BET 10

Topic: Complaints about liquidators

Hansard Page: Written

Senator Williams asked:

1. How many complaints about liquidators are you now getting on a monthly or even yearly basis from the public?

Answer:

ASIC receives approximately 14,000 complaints and enquiries a year across all areas of ASIC's remit. A relatively minor proportion (averaging 3%) of all complaints received relate to insolvency practitioner conduct.

ASIC formally assesses complaints to determine whether breaches of the legislation may have occurred.

Insolvency impacts a diverse group of stakeholders: employees, secured and unsecured creditors and directors and shareholders. Many stakeholders have minimal if any experience with corporate insolvency and their rights and obligations. Complaints about director conduct of companies in external administration are often accompanied by complaints against the appointed insolvency practitioner.

ASIC devotes considerable resources to providing information and assisting complainants, which includes an element of educating complainants about the external administration process. ASIC has issued 12 information sheets providing general guidance to assist stakeholders which are available on our website.

## Complaints volume trend statistics about insolvency practitioners

	2006-07	2007-08	2008-09	2009-10	2010-11 To Dec	Total/ Average %
Total complaints and enquiries finalised	11,455	12,514	14,543	14,002	7,779	60,293
Total insolvency appointments	11,966	12,524	15,567	14,056	7,357	61,470
Total complaints and enquiries against insolvency practitioners	406	352	633	520	234	2,155
Total complaints and enquiries against insolvency practitioners excluding duplicates	344	317	438	467	218	1,784
% insolvency practitioners complaints and enquiries of total complaints and enquiries	3.5%	2.8%	4.4%	3.7%	3.0%	3.6%
% insolvency practitioner complaints and enquiries of total appointments	3.4%	2.8%	4.1%	3.7%	3.2%	3.5%

## Outcomes of complaints/inquiries against insolvency practitioners 2006-07 to 2009-10 statistics

Outcomes summary (subject to referral to specialists)	No	%
Provided assistance to resolve the complaint or enquiry	570	32.0%
Insufficient evidence was identified to support the alleged breach	586	32.8%
No breach of the Corporations Act identified	282	15.8%
Referred to a specialist team within ASIC for further review	129	7.2%
Referred to investigation	11	0.6%
Referred to assist existing investigation or other surveillance	28	1.6%
Action otherwise precluded	148	8.3%
Assessments in progress	30	1.7%
Total	1,784	100.0%

2. What is the substance of those complaints e.g. overcharging?

Answer:

The vast majority of insolvency practitioner complaints and enquiries relate to procedural issues, such as communication between creditors and practitioners, creditors' meetings, administration process delays, commercial decisions or other less serious contraventions of the Act. These types of complaints are often resolved through improved communication between creditors and practitioners or by ASIC assisting creditors with information about the process of external administration. Relatively few complaints are substantiated and relate to more serious contraventions such as lack of independence/conflicts of interest, excessive remuneration, fraud and "illegal phoenix" facilitation. Those complaints are referred to specialist ASIC teams for surveillance, investigation or deterrence action.

3. Is ASIC still sending generic responses that infuriate people, or are you now taking the time and courtesy to actually speak to people about their complaints?

Answer:

ASIC is reforming its contact procedures to ensure more personal interaction, including telephone contact in relation to each report of misconduct. ASIC is committed to confirming its position in writing to ensure clarity of ASIC's views in relation to a matter. We do not seek to infuriate those who have reported misconduct to ASIC but assist where possible and educate where necessary. Sometimes, for the reasons set out below in Question 5, we cannot provide the detail that we would like to.

4. What is the timeline between when a complaint is received and when it is actually addressed?

Answer:

As per ASIC's annual report, ASIC seeks to finalise the assessment of 70% of reports of misconduct to it within 28 days. For insolvency practitioner misconduct, this may often take a small time longer (around 30 days on average) due to the nature of the complaints. In relation to when they are actually addressed (which is assumed to mean when is the report of misconduct prosecuted or further considered by specialist ASIC teams), this will depend on the nature of the issues raised, if evidence is available, amongst other factors.

5. Is the complainant kept in the loop during the investigations?

Answer:

As mentioned by ASIC's Chairman at the last Senate Estimates (and publicly since), ASIC is reviewing Regulatory Guide 47 to consider what it can and will say to the public. In respect of "keeping complainants in the loop", a number of matters encapsulate ASIC's position and the restrictions upon it when keeping persons who have reported misconduct up to date:

- *Regulatory Guide 47 – Public comment* (available on the ASIC's website) outlines ASIC's position in relation to making public comments. The relevant sections have been detailed below.
- ASIC is restricted from releasing information on a number of grounds, including: legal restrictions under the *Corporations Act 2001 (Cth)* (Corporations Act) and *Australian Securities & Investments Commission Act (Cth)* (ASIC Act); and some policy and pragmatic restrictions. Each of these has been outlined in detail below.

#### Policy restrictions

- Policy matters arise in maintaining the confidentiality that ASIC puts on complaints it receives from the public and in-confidence material received from other parties. Without maintaining this confidentiality, releasing too much information would impair the full and frank reporting of misconduct or provision of material to ASIC from concerned and involved parties. Public interest policy issues are also to be taken into account here (as covered in RG 47), and ASIC may make the decision that public comment is within the public interest (see ASIC's public information regarding its activities in relation to Storm).
- Further, certainly in the case of listed entities, if made public that ASIC is reviewing, discussing, considering or merely conversing with a company, this can have an effect on share prices, where possibly no wrong doing is alleged or at issue. In addition, where ASIC and some external parties do appreciate the difference between liaison, discussion, fact finding, surveillance and investigation, the public often doesn't appreciate these nuances, which can lead to misunderstanding, misinterpretation or mistakes as to what should or should not be read into a matter. For example, often some of ASIC's activities are characterised as "an investigation by ASIC", although ASIC may not have commenced a formal investigation (under s.13 of the ASIC Act) and may only be conducting a routine review of industry conduct. These misunderstandings can lead to unintended, unwarranted or undesirable effects and may give rise to complaints about unnecessary wounding or impairment of commercial reputations and financial impacts. ASIC deals with such claims from those who are subject to prosecution and the focus of media releases by ASIC, but also from parties (quite understandably) concerned to protect their reputation.

#### Pragmatic restrictions

- Declaring what ASIC is doing may impede a review or investigation by, amongst other things, eliminating an element of surprise (often necessary in investigations). Also, by confirming ASIC's review or investigation, a complainant or affected party may use this information to its advantage over others (for example in the circumstances of impending corporate collapse or investors seeking to exit illegal schemes etc - "squeaky wheel syndrome"). Often complainants to ASIC are seeking to exact some revenge or consequence on a related party, director, competitor or employer. Indeed, what the complainant seeks (and often the target of the complaint reciprocates in kind) is a pressure to be brought upon the other party for commercial or financial reasons.

6. I put it to you that because liquidators are registered but not licensed, Mr Paul Pattison could have resisted your attempts to seek orders, and in fact could have kept practising while he took legal action. However, if the liquidator was licensed as recommended by the Senate inquiry, that license could be suspended even though he could still go to the courts. In other words, the alleged problems would have continued for years, just as in the Stuart Ariff case?

Answer:

An application was made to the court under section 536 on 7 February 2011 and the court made orders on 28 February 2011. The effect of which means Mr Pattison can no longer practice as a liquidator unless he attends to the matters in the court order.

In June 2011, the Australian Government issued an Options Paper canvassing options for improving the regulation of both the personal and corporate insolvency professions.

The Paper discusses features of the current regulatory framework and seeks views on a number of issues including the registration and monitoring of insolvency practitioners and what should be the appropriate standards of entry into the profession.

7. The Government has sat on its hands on the Senate report, but isn't this a compelling case for reform of the insolvency industry as recommended by the Senate inquiry, including licensing?

Answer:

The Options Paper released by the Government in June 2011 considers the areas for reform identified by the Senate Committee and seeks public comment to inform and help Government respond to the recommendations of the Senate committee's report. One of the areas canvassed is the registration of liquidators.

8. It is intriguing that ASIC would move against a liquidator in Melbourne following concerns about his capacity to adequately and properly carry out his duties, yet ITSA cannot seem to take action against the same person as a bankruptcy trustee. It hardly gives people confidence in the system. Would you like to see uniform laws in this regard?

Answer:

ITSA has recently made an announcement concerning Mr Pattison's registration as a trustee.

As to uniform law, we note that an important stated objective of the Options Paper issued by the Government in June 2011 is to seek input from interested parties to determine whether it is appropriate that an aligned set of provisions be adopted for both the corporate and personal insolvency regimes to inform the development of future reforms that will ensure the maintenance of public confidence in the insolvency regime.