Chapter 6

Receivers and investigative accountants

6.1 This chapter discusses the evidence received by the committee about receivers and investigative accountants and their role in relation to loans. After summarising the issues raised by submitters, the current arrangements for receivers and investigative accountants are then discussed.

Issues raised by submitters

6.2 Submitters to the inquiry raised a number issues and allegations relating to receivers and investigative accountants including:

- use of single organisations for investigative accountant and receivership processes;[1]
- receivers selling properties and assets under value;[2]
- receivers not considering or taking up sale options put forward by borrowers;[3]
- the level of receiver's fees;[4]
- harm to businesses caused by receivers lacking relevant experience or poorly administering businesses;[5]
- lack of information provided to borrowers by receivers;[6] and
- lack of effective dispute resolution for the above issues.

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1 Department of Agriculture, *Submission 43,* p. 7; Directors of Gippsland Secured Investments Ltd, *Submission 53,* p. 4; Mr Ross Waraker, *Committee Hansard,* 13 November 2015, p. 33.

2 Name withheld, *Submission 5,* p. 12; Mr & Mrs Randles, *Submission 8,* p. 14; Mr Colin Power, *Submission 12,* p. 6; Mr Tony Rigg, *Submission 15,* p. 8; Name withheld, *Submission 21,* p. 2; Kelgon Development Corporation Pty Ltd, *Submission 24,* p. 4; Mr Michael Sanderson, *Submission 28,* p. 11; Mr Yves El Khoury, *Submission 71,* p. 3; Dr Evan Jones, *Submission 83,* p. 5; The Provincial Finance Group, *Submission 88,* p. 3; Allied Hospitality Ltd, *Submission 89,* p. 2; Mr Milton Wilde, *Submission 97,* p. 1; Mr Trevor Eriksson, *Submission 101,* p. 4; Mr Vittorio Cavasini, *Submission 103,* p. 4.

3 Name withheld, *Submission 21,* p. 2; Name withheld, *Submission 26,* p. 4; Dr Evan Jones, *Submission 83,* p. 5.

4 Ms Deborah Perrin *Submission 30,* p. 2; Mr Bill Ringrose, *Submission 31,* p. 4; Directors of Gippsland Secured Investments Ltd, *Submission 53,* p. 4; Mr John Dahlsen, *Submission 87,* p. 2; The Provincial Finance Group, *Submission 88,* p. 4; Mr Milton Wilde, *Submission 97,* p. 1; Mr Trevor Eriksson, *Submission 101,* p. 1.

5 Mr Joshua Hunt, *Submission 27,* p. 4; Mr Colin Power, *Submission 12,* p. 6; Mr Robert Barr, *Submission 78,* pp 4–6; Mr Don Turner, *Submission 71,* p. 1; Mr Vittorio Cavasinni, *Committee Hansard,* 18 November 2011, p. 1.

6 Legal Aid Queensland, *Submission 55,* p. 7; Mr Peter McNamee, *Submission 107,* p. 10.

6.3 The committee wishes to acknowledge the many accounts it has received from people who have been subject to receivership and suffered dire financial consequences as a result. The circumstances being faced by people in those situations goes beyond pure financial hardship and creates many other stressors. Those impacts occur even if a receiver does their job in a highly professional and empathetic way. However the committee has heard accounts in which receivers have not behaved in a professional manner, which compounds the impacts on individuals and their families. Multiple allegations were raised with the committee about potentially illegal or unethical practices, with no dispute resolution mechanism available for borrowers' disputes to be heard.

Examples of some of the concerns raised by submitters

6.4 This section provides examples of some of the issues raised by submitters. During the inquiry, the committee heard about some of the difficulties faced by clients of an accountancy practice in Queensland:

- Repossessed properties have caretakers appointed when clients are evicted. The fees for these caretakers often run between $200 and $300 per day which is paid by the receivers, and ultimately comes from any residual proceeds should the property be sold.
- Calculations done by this office with negotiation with some insolvency practitioners generally has shown that a standard receiver's fee from a property sale will run at approximately $500,000 for a 6 month period.
- There is no provision for the landholder to remain on their properties, have the caretaking fee be applied against their debts, or pay them for that work.
- We have had a number of receiver's sales in the Central West. These sales generally have seen prices between 40 and 50% below normal market sales. There are a number of reasons for this with a major one being a lack of understanding of local markets by the receivers or their agents and a resistance to engage suitably qualified locals.
- …the potential for multiple forced sales when the current drought breaks is a very real threat. Changes must be made to how this process is carried out or there will be a very real risk of a general property market collapse. This would therefore have a potential for significant other properties to be deemed in default from a LVR position.[7]

6.5 One witness expressed concerns about the lack of information from his bank on the role and cost of an investigative accountant:

> …we had no understanding of what it was that the bank wanted us to do or who this person was. There were difficulties in his engagement, with costs to the tune of $15,000 a month and no outline whatsoever of what he was

7 Mr Bill Ringrose, *Submission 31*, p. 4.

> going to do that would bring any solid results or milestones to work towards.[8]

6.6 Submitters also raised concerns about properties being sold for much less than they were valued. In some case the properties were soon sold again for prices substantially higher than the price achieved by receivers. The committee also heard of cases in which existing contracts for the sale of units may not have been pursued appropriately.[9]

6.7 Section 420A of the Corporations Act requires a receiver to take reasonable care to sell a property for market value or the best price reasonably obtainable under the circumstances.[10] The committee heard that there are concerns that this provision of the Corporations Act is not being met in some circumstances. A submitter informed the committee of his view on section 420A based his experience:

> It needs to be strengthened, with greater accountability placed on the receiver to ensure that the market value in compliance with section 420A is not justified by an auction process alone. Put a few ads in the paper and put it up for auction. At an auction on a receiver's sale, generally, people expect to get it cheap.
>
> By this time, we had had a valuation for the St George Bank and we had one for the ANZ bank earlier. The NAB used another valuer, so we had three valuations, plus two previously from Bankwest. Both came up to about $11 million; they sold the properties for $4½ million.
>
> What I am saying here is that you could not justify a 45 per cent sale when the valuation is only four months old.[11]

Complaints received by ASIC regarding receivers

6.8 ASIC informed the committee that it receives and assesses reports of misconduct about receivers. ASIC can consider the conduct of receivers appointed under a security instrument by a secured lender, including a receiver's conduct in relation to the sale of any secured asset. However, ASIC (and the courts) generally do not intervene in a receiver's commercial decision making under their appointment.[12]

6.9 ASIC indicated that in the five years from 1 July 2010 it had received 45 reports of alleged misconduct from borrowers about receivers appointed by banks or non-bank financial institutions.[13] ASIC's inquiries into these matters identified common concerns in the reports of misconduct:

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8 Mr Vittorio Cavasinni, *Committee Hansard,* 18 November 2011, p. 1.

9 Mr Vittorio Cavasinni, *Committee Hansard,* 18 November 2011, pp 6–7; Mr Chris Evanian, *Committee Hansard,* 18 November 2011, pp 26–27.

10 *Corporations Act 2001,* section 420A.

11 Mr Trevor Eriksson, *Committee Hansard,* 13 November 2015, pp 59–61.

12 ASIC, *Submission 45,* p. 13.

13 ASIC, *Submission 45,* p. 13.

- the validity and timing of the default and the receiver's appointment;
- the level of receiver's fees and their accountability for fees;
- receivers not providing updates to borrowers;
- secured properties being sold through open processes, such as by invitation, tender, or auction;
- receivers taking advice from independent, third party, real estate agents and property valuers regarding the sale process and sale price of the property;
- allegations that property valuers were conflicted, though further inquiry by ASIC did not indicate any corresponding misconduct by the receiver with respect to this allegation;
- decisions on the sale process being taken by the receivers in consultation with the secured creditors;
- concerns that the receivers sold the secured property for less than market value, or sold the property to a third party who then on-sold the property for a higher value; and
- allegations that receivers would not accept offers for the secured property from parties connected with the debtor, which they believe resulted in the receiver accepting lower offers from unrelated third parties.[14]

6.10 ASIC conducted further inquiries into five of the above matters and subsequently determined not to pursue regulatory action against the receiver. ASIC informed the committee that its inquiries did not reveal sufficient grounds to pursue the receiver for a breach of their statutory duties or to consider further disciplinary action. ASIC did not identify systemic concerns about any particular receiver in these matters, and ASIC's assessment and inquiries could not substantiate breaches of section 420A of the Corporations Act which warranted further regulatory action.[15]

Views of industry bodies and banks

6.11 This section discusses the views put forward by industry bodies and banks regarding issues about receivers.

6.12 The Australian Restructuring Insolvency and Turnaround Association (ARITA) submitted that it considers that the law imposes high standards in relation to the sale of property by receivers under section 420A of the Corporations Act. ARITA also informed the committee about the history of this provision:

> By way of background, the history of the section is that the duty of receivers under Australian case law was based in negligence only. The 1988 Harmer Report considered that this was not adequate and that there should be a specific obligation imposed to secure the best price in the circumstances of the sale. Thus section 420A was introduced. The purpose

14 ASIC, *Submission 45*, pp 14–15.

15 ASIC, *Submission 45*, p. 15.

> behind the introduction of section 420A was stated in the Explanatory Memorandum to the relevant Bill: "It is sometimes said of receivers that they are prepared to sell property at a price less than the best obtainable, so long as it is sufficient to cover the debt of the charge holder who appointed them. Proposed s420A makes it clear, that in selling company property, a controller must take all reasonable care to sell the property for the best price that is reasonably obtainable having regard to the circumstances existing when the property is sold."[16]

6.13 ARITA indicated that it was not aware of concerns about the operation of that section, but noted concerns had been raised by the Productivity Commission in its inquiry into business set-up, transfer and closure. ARITA also informed the committee that in court challenges by borrowers under section 420A, the courts have generally upheld the conduct of the receiver. Complaints to ARITA about receiver sales are generally dismissed on the basis that the established process to ensure market value is obtained was followed.[17]

6.14 ARITA indicated that section 420A has been in operation for over 20 years and that it was not aware of any issues about the standard that section 420A imposes. ARITA argued that section 420A been the subject of a number of decisions from the courts in relation to the process of obtaining market value:

> Many of these cases raise complex and difficult issues. However as a general statement, the history of court decisions has supported the receiver in relation to their compliance with the section. In other words, challenges to section 420A sale are generally unsuccessful. A receiver is also subject to other controls and responsibilities under Part 5.2 and elsewhere in the Act. They are officers of the company and are therefore subject to the significant duties of care and diligence, good faith, and other duties under s 180-184 of the Act.[18]

6.15 The ABA informed the committee that it considers that receivers are appointed by a bank to take control of the assets under the bank's security after all other options for workout, or a voluntary recovery have been exhausted. The ABA suggested that:

- The appointment of receivers may be necessary where early action is needed to protect the bank's position, if a voluntary administrator has been appointed, or liquidator has been appointed by court order;
- receivership is the least preferred option as it tends to incur additional costs and may result in a lower net return; and
- receiverships often arise where both the customer and the bank may incur a loss, so it is clearly in the bank's interests to ensure that property is sold at

16 ARITA, *Submission 38,* p. 6.

17 ARITA, *Submission 38,* p. 1.

18 ARITA, *Submission 38,* p. 6.

market value and that the receiver's and other costs are as reasonable as possible.[19]

6.16 ANZ submitted its view, noting that the right of a lender/mortgagee to exercise a power of sale or appoint a receiver is usually provided by the loan and security (e.g. mortgage or charge) document. ANZ indicated that lenders' rights are also conferred by property legislation (e.g. *s77* of the *Transfer of Land Act (Vic)*, *s109* of the *Conveyancing Act (NSW)*) and in respect of receivers, the *Corporations Act 2001*.[20]

6.17 NAB cited similar provisions in its submission:

> Where NAB, or a Receiver/Controller appointed by NAB, exercises a power of sale there are strict legal obligations which they each are required to comply with. Where property is owned by a company, NAB, or a Receiver/Controller appointed by NAB, (under section 420A of the Corporations Act) is required to take all reasonable care to sell that property for not less than its market value, or otherwise (where there is no market value), to sell the property at the best price reasonably obtainable, having regard to the circumstances existing when the property is sold.[21]

6.18 The ANZ informed the committee that:

> To be clear, receivers have no role in the valuation of security. We do not needlessly appoint receivers. Such action is costly and distressing for all parties. As at March 2015, 116 commercial customers, or less than one 10th of one per cent of our 140,000 commercial customer base were in some form of ANZ enforced administration. However, it is important to note that the appointment of a receiver can be essential in arresting losses and erosion of equity, protecting suppliers—in other words, unsecured creditors—and protecting directors from trading while insolvent.[22]

Post-GFC banking inquiry

6.19 The Senate Economics References Committee inquiry into the post-GFC banking sector made a number of recommendations for improving banking practices relating to the enforcement of security interests and the conduct of receivers. These recommendations included that:

- a secured party be prevented from appointing a receiver unless the 14 day period specified in the notice of demand has expired and, if the secured party is a member of Financial Ombudsman Service (FOS), advising the borrower that they may apply to FOS to determine a dispute, if any, between the borrower and the secured lender;

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19 Australian Bankers Association, *Submission 46*, p. 10.

20 ANZ, *Submission 49*, p. 10.

21 NAB, *Submission 50*, p. 11.

22 Mr Graham Hodges, Deputy Group Chief Executive Officer, ANZ, *Committee Hansard*, 13 November 2015, p. 64.

- receivers be required to cooperate with all requests from the Financial Ombudsman Service (FOS) that relate to a dispute between the bank and the borrower that FOS is considering;
- receivers be required to cooperate with any reasonable requests for information made by the borrower that would assist the borrower secure refinance;
- the secured party regularly inform the borrower about the costs and fees associated with the receivership and take reasonable care to ensure that those costs and expenses are reasonable; and
- the receiver demonstrate to the borrower that they have considered all unconditional offers when exercising the power of sale.[23]

Receiver appointments

6.20 This section summarises requirements relating to the appointment of receivers, including the requirement for receivers to satisfy themselves that the appointment is appropriate.

6.21 There are a number of formalities imposed on the appointer and the receiver.

- a person cannot be appointed as a receiver unless they are a registered liquidator;
- a person may be restricted from accepting an appointment if the appointment might create a lack of independence;
- the appointer must file notice of the appointment of the receiver with ASIC within 7 days and the receiver must do so within 14 days;
- the receiver must also serve notice of the appointment on the company as soon as practicable; and
- the receiver is not obliged to inform creditors of the appointment.[24]

6.22 ASIC informed the committee that before accepting appointment as receiver and entering into possession or taking control of a company's property, the receiver should satisfy themselves that:

- the security interest under which they are being appointed is valid and properly registered;
- an event of default within the terms of the security document has occurred;
- the requirements of the security document as conditions precedent to the appointment (including the making of a demand for the secured money and providing reasonable notice to the company of the intention to terminate the loan facility) have been strictly complied with; and

23 Senate Economics Reference Committee, *Inquiry into the post-GFC banking sector*, November 2012, pp xxvii - xxviii.

24 ASIC, *Submission 45*, p. 26.

- other relevant statutory requirements have been complied with.[25]

6.23 ASIC suggested that a prudent receiver would not accept appointment as a receiver on the basis of a monetary or other default except with clear evidence that the default has occurred. If an appointment is based solely on a non-monetary default (e.g. a loan-to-value ratio default), a prudent receiver would generally make further inquiries into the client's loan history before accepting the appointment.[26]

Receiver remuneration

6.24 ASIC informed the committee that remuneration of a receiver is supervised by the courts. ASIC argued that when courts assess the reasonableness of a receiver's remuneration they should have regard to proportionality—that is, the reasonableness of remuneration compared to the benefits realised. Recent court decisions have considered the issue of proportionality. ASIC informed the committee that:

> In Australian Securities and Investments Commission v Letten (No 23) [2014] FCA 985, Justice Gordon was required to determine among other things, the reasonableness of receivers' remuneration claimed in relation to work undertaken in the adjudication of investors' claims. One factor her Honour relied on in applying a 20% discount (on top of a voluntary 10% reduction) to the remuneration to be allowed, was that the claimed remuneration 'appeared large' ($4 million) when compared to the amount anticipated to be made available for distribution to the investors ($10 million). On appeal, ASIC made submissions concerning the issue of proportionality. This matter has been appealed, and we await the decision of the Full Court of the Federal Court.[27]

6.25 ASIC submitted that the concept of 'proportionality' is not expressly dealt with under the Corporations Act. However, the list of matters for a court to consider in assessing the reasonableness of a receiver's remuneration include the time properly taken in completing work, the necessity of the work, the complexity of the work performed by the receiver and the value and nature of the property dealt with by the receiver.[28]

6.26 ASIC informed the committee that subject to the terms of the agreement, the company will usually bear the cost of the receiver's remuneration and the receiver will draw their remuneration during the course of the receivership by submitting an account for their remuneration to the secured party (generally, those costs will then be added to the company's outstanding debt). The secured creditor will normally scrutinise the account and approve it for payment. Commonly, the receiver will secure an indemnity for remuneration and expenses from the secured party. The secured party has a significant degree of influence over the level of remuneration of the

25 ASIC, *Submission 45,* p. 26.

26 ASIC, *Submission 45,* p. 26–27.

27 ASIC, *Submission 45,* p. 29.

28 ASIC, *Submission 45,* p. 29.

receiver, due to the direct nature of the appointment. In some situations, this position can result in the receiver charging less than their standard hourly rates.[29]

6.27 ASIC also informed the committee that the Corporations Act provides for a review process regarding the remuneration payable to receivers. The court retains wide powers to set and vary the remuneration of receivers. Applications to fix or vary a receiver's remuneration may be made in certain circumstances by ASIC, a liquidator, voluntary administrator or deed administrator of the company. The 2007 reforms to the Corporations Act introduced amendments that require the court, when reviewing or setting a receiver's remuneration, to have regard to whether the remuneration is reasonable, taking into account various matters, including whether the work performed was reasonably necessary.[30]

6.28 ASIC also noted that often in receiverships, the secured party may suffer a significant deficit on the recovery of the debt owed by the company. If there are insufficient assets, the secured party pays the receiver's remuneration out of their own funds.[31]

6.29 The Commonwealth Bank noted that in many cases the costs of the receiver's remuneration is borne by the bank because the borrower does not have sufficient financial resources or assets:

> It is in a financial institution's interest to monitor and minimise all costs of receiverships, including the fees charged by receivers and managers, in part because it is common for the bank to suffer a shortfall on loans where a receiver is appointed. In such instances, some if not all of the cost is borne by the bank itself. As a result, the costs of the receivership, including fees, are reported to the bank and discussed regularly with the receiver. Of the seven customer matters named above where a receiver was appointed, Commonwealth Bank or Bankwest wrote off amounts owed in all cases. At least some, if not all, of the receiver's costs were borne by the bank and its shareholders, not the customer. We have also reviewed 36 submissions to the Parliamentary Joint Committee which relate to customers of Bankwest. Of those 36 customers, a receiver was appointed to 28. Of those 28, Commonwealth Bank wrote off amounts owed in 25 instances. Therefore in more than 80 per cent of cases, some if not all of the cost of the receivership was ultimately borne by the bank and its shareholders rather than the customer.[32]

29 ASIC, *Submission 45*, p. 43.

30 ASIC, *Submission 45*, p. 44.

31 ASIC, *Submission 45*, p. 44.

32 Commonwealth Bank of Australia, *Answers to questions on notice, taken on 1 December 2015, received on 18 February 2016.*

Recent reforms

6.30 This section summarises the reforms recently introduced by the Insolvency Law Reform Bill 2015[33] which amended the Corporations Act, the ASIC Act and the *Bankruptcy Act 1966* (Bankruptcy Act) to create common rules that:

- remove some costs and are designed to increase efficiency in insolvency administrations;
- align the registration and disciplinary frameworks that apply to registered liquidators and registered trustees;
- align a range of specific rules relating to the handling of personal bankruptcies and corporate external administrations;
- enhance communication and transparency between stakeholders;
- promote market competition on price and quality;
- improve the powers available to the corporate regulator to regulate the corporate insolvency market and the ability for both regulators to communicate in relation to insolvency practitioners operating in both the personal and corporate insolvency markets; and
- improve overall confidence in the professionalism and competence of insolvency practitioners.[34]

6.31 The Insolvency Law Reform Bill implemented new rules regarding the remuneration of receivers, so that creditors may set a receiver's remuneration through a remuneration determination. Where there is no determination the receiver will be able to receive a reasonable amount for the work conducted up to $5000 (exclusive of GST and indexed). In addition the new rules ensure that receivers must not:

- employ a related entity, unless certain requirements are met; or
- purchase any assets of the estate; or
- get any other benefits or profits from the administration of the estate.[35]

6.32 As discussed at the beginning of this chapter, a common concern raised during the inquiry is poor access to information from receivers in some cases. The Insolvency Law Reform Bill 2015 has enabled the following rules to be implemented, so that receivers must:

- give annual reports of the administration of the estate (called annual administrative returns) to the Inspector-General; and
- keep books of meetings and other affairs of the estate; and
- allow those books to be audited if required to do so; and

33 The bill was passed and received assent on 29 February 2016.

34 Insolvency Law Reform Bill 2015, *Explanatory Memorandum*, p. 3.

35 Insolvency Law Reform Bill 2015, division 60, p. 48.

- allow access to those books by creditors; and
- give creditors and others requested information, documents and reports relating to the administration;[36]

6.33 In the case of a receiver of a regulated debtor's estate, she or he must have regard to directions given to the receiver by the creditors of the estate but is not obliged to comply with those directions.[37]

6.34 The Insolvency Law Reform Bill 2015 put in place new requirements for disputes relating to the conduct of receivers including provisions for reviews by the courts, the Inspector-General and creditors:

> The Court may inquire into the administration of a regulated debtor's estate either on its own initiative or on the application of the Inspector-General or a person with a financial interest in the administration of the regulated debtor's estate.
>
> The Court has wide powers to make orders, including orders replacing the trustee or dealing with losses resulting from a breach of duty by the trustee.
>
> The Inspector-General may review a decision of the trustee of a regulated debtor's estate to withdraw funds from the estate for payment for the trustee's remuneration.
>
> The Insolvency Practice Rules may set the powers and duties of the Inspector-General in conducting such a review and may deal with issues relating to the review process.
>
> The creditors of a regulated debtor's estate may remove the trustee of the estate and appoint another. However, the trustee may apply to the Court to be reappointed.[38]

6.35 The Inspector-General may review the remuneration of receivers on their own initiative or following application by the regulated debtor or a creditor.[39]

Section 420A

6.36 The ineffectiveness of section 420A of the Corporations Act was a significant issue for many submitters and witnesses who had concerns about properties being sold below value.

6.37 Borrowers are often unable to make use of section 420A to pursue complaints against a receiver, because the borrower has lost control of their financial assets and therefore cannot fund a legal case.

6.38 ASIC informed the committee that the Corporations Act imposes certain requirements on receivers when exercising the power of sale, including that they take

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36 Insolvency Law Reform Bill 2015, division 70, p. 63.

37 Insolvency Law Reform Bill 2015, division 85, p. 91.

38 Insolvency Law Reform Bill 2015, division 90, pp 91–92.

39 Insolvency Law Reform Bill 2015, division 90, p. 96.

reasonable care to sell the property for not less than market value. This obligation is not breached simply because market value (where it exists) or the best price reasonably obtainable is not achieved, but where the receiver has not taken all reasonable care.[40]

> The dominant view is that s420A does not confer a right to damages or any other remedy. Section 420A is not an offence or civil penalty provision. ASIC can take action against the receiver for a breach of s420A, under s423 for failing to observe a requirement under the Corporations Act or for a breach of the receivers duties as an 'officer' under the Corporations Act. ASIC will assess the circumstances of each case in light of the statutory requirements and relevant case law.[41]

6.39 The Consumer Credit Legal Service (WA) noted that while there is no consumer equivalent to section 420A of the Corporations Act good industry practice requires that a financial services provider must exercise reasonable care to sell a property for its market value or best possible price. The accepted industry practice for the sale of a property at auction requires:

- A minimum marketing period of four weeks, including suitable advertising in local and national newspapers, and reputable online real estate websites;
- An independent sworn valuation and a market appraisal prior to the setting of an adequate reserve;
- General maintenance of the property; and
- The property to be sold in a timely manner. However, a mortgagee is not required to delay the sale of a property if there are concerns about market fluctuations.[42]

6.40 ANZ suggested that the committee might consider whether a formal ASIC approved EDR process should be established in relation to insolvency practitioners.[43] However, ANZ also made the following observations:

> …there are examples of where 420A cases have been taken to court and liquidators have been accused of not selling at the right price…there have been one or two occasions when…the customer has been compensated. But there are very few that really go through…That could be just because of an imbalance to get those things before the courts, but overall our view would be that it generally works quite well and it is in the interests of both the

40 ASIC, *Submission 45*, p. 31.

41 ASIC, *Submission 45*, p. 32.

42 CCLSWA Inc., *Submission 56*, pp 8–9; See also FOS approach to mortgagee sales, http://www.fos.org.au/custom/files/docs/fos-approach-mortgagee-sales.pdf, (accessed 29 March 2016).

43 Mr Graham Hodges, Deputy Group Executive Officer, ANZ, *Committee Hansard*, 13 November 2016, p. 65.

> bank and the customer to get the most for any value when you are being sold up.[44]

6.41 The FOS informed the committee that in relation to the appointment of receivers there is a small but growing trend amongst some financial services providers to appoint receivers over residential properties mortgaged by individuals who guarantee business loans. FOS noted that as a receiver acts as an agent for the borrower, even though appointed by the lender, this has the potential to reduce avenues for address when there is a concern about, for example, the under-sale of a property.[45]

6.42 FOS expanded further on this issue, suggesting the receivers in such circumstances may need to be subject to an external dispute resolution scheme:

> Say, for example, that the receiver undersold the property and you wanted to complain about that—and we do deal with those sorts of complaints—we could not consider it because the receiver is not part of the Financial Ombudsman Service scheme. That is my concern.[46]

> As I said, this could be a state matter, so maybe this is not the right place to raise it. But it seems to me that what receivers in those circumstances are doing is acting as an agent for the bank or acting as an agent for the mortgagee, and that should be recognised as such so that if a person wishes to lodge a complaint about whatever it is they are or are not doing they can still have redress through our service by lodging a complaint against the bank, because the bank is responsible for its agents.[47]

Committee view

6.43 The committee welcomes the new provisions relating to remuneration of receivers, including maximum default remuneration, capacity for creditors to set remuneration and powers for the Inspector-General to review the remuneration of receivers. The committee also welcomes the new rules relating to the independence of receivers and the sharing of information with creditors and borrowers.

6.44 However, the committee remains concerned that there is no clearly established requirement for receivers to be part of an industry-wide independent external dispute resolution scheme supported by internal dispute resolution procedures. While disputes can be heard by a court, this inquiry concluded in chapter 4 that court processes are often inaccessible to borrowers who have lost control of their financial resources due the appointment of a receiver. While ASIC is able to

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44 Mr Graham Hodges, Deputy Group Chief Executive Officer, ANZ, *Committee Hansard*, 13 November 2015, p. 72.

45 Mr Philip Field, Lead Ombudsman, Banking and Finance, Financial Ombudsman Service Australia, *Committee Hansard*, 16 October 2015, p. 8.

46 Mr Philip Field, Lead Ombudsman, Banking and Finance, Financial Ombudsman Service Australia, *Committee Hansard*, 16 October 2015, p. 10.

47 Mr Philip Field, Lead Ombudsman, Banking and Finance, Financial Ombudsman Service Australia, *Committee Hansard*, 16 October 2015, p. 10.

review practices of receivers under the new insolvency laws, ASIC has clearly stated on many occasions that it only has resources to pursue selected matters that are in the wider public interest.

Investigative accountants subsequently appointed as receivers

6.45 A number of submitters raised concerns about the practice of single companies being appointed as the investigative accountant and then subsequently as the receiver. This was perceived by some submitters as creating a conflict of interest.

6.46 ASIC informed the committee that prior to exercising its contractual rights to appoint a receiver, a secured party would ordinarily assess its security position. In the first instance, a secured party might engage the prospective receiver as an 'investigating accountant' prior to a formal appointment as external administrator. The investigating accountant would then assess the debtor's financial circumstances and the options available to the secured party. However, a person does not necessarily need to be a registered liquidator to act as an investigating accountant. The investigating accountant's report will not usually recommend a specific course of action but provide information to enable the secured party to decide future steps. An insolvency practitioner conducting such an investigation on behalf of the secured party owes a duty to the secured party to protect the interests of that party, even if the company pays for the cost of the investigation.[48]

6.47 The committee was advised that the Corporations Act[49] does not prohibit an insolvency practitioner who has acted as investigating accountant from subsequently accepting an appointment as a receiver or liquidator of the company. However, the insolvency practitioner must have regard to how their investigating accountant's report may affect their independence or the perception of their independence. If appointed, the court may remove them if there is an actual or distinct possibility of a conflict of interest.[50]

6.48 NAB informed the committee of its view, suggesting that it would be common practice in Australia that the person who does the initial investigation becomes the receiver. NAB argued that the person who has done the investigation has a fair degree of familiarity with the business; they understand its operations, its people and what it is doing. It therefore makes it easier for the receiver to step into a strange business and take it on, as well as avoiding additional costs.[51]

> We have investigating accountants do reviews on somewhere between two-thirds and three-quarters of the files that we look after. As we said, only about 15 per cent of them end up in formal insolvency. We see that the

48 ASIC, *Submission 45,* pp 25–26.

49 Sections 418, 448C and 532.

50 ASIC, *Submission 45,* p. 25.

51 Mr Geoff Green, Head of Strategic Business Services, National Australia Bank, *Committee Hansard,* 18 November 2015, p. 13.

> majority are helped to stay out of insolvency, but, yes, some go the other way.[52]

6.49 ASIC suggested that to address concerns that receivers may act without regard to the debtor's or guarantor's interests, consideration could be given to law reform to require a receiver to prepare and serve on the company a declaration of relevant relationships or a declaration of indemnities that discloses:

- the nature and extent of their relationship with the secured party;
- the services provided concerning the company prior to the appointment; and
- details of any indemnity provided.[53]

6.50 ASIC noted that insolvency practitioners are not required to complete a declaration of relevant relationships or indemnities when they are appointed. Although an investigating accountant's report may not specifically recommend a formal insolvency appointment, it is possible that other private representations may be made in favour of such an appointment. ASIC made the following suggestion to the committee:

> To address concerns that the insolvency practitioner may act without regard to the debtor's or guarantor's interests, consideration could be given to law reform to require a receiver to prepare and serve on the company a Declaration of Relevant Relationships or a Declaration of Indemnities that discloses:
>
> (a) the nature and extent of their relationship with the secured party;
>
> (b) the services provided concerning the company prior to the appointment; and
>
> (c) details of any indemnity provided.[54]

6.51 The committee questioned the Commonwealth Bank on its use of investigative accountants to examine whether the appointment of an investigative accountant automatically leads to a receivership. In response the Commonwealth Bank noted that:

> We have performed this task for the 95 cases referred to in our letter to the Committee of 16 December 2015. These 95 cases consist of: 36 Bankwest customers who have provided a submission or appeared before the Parliamentary Joint Committee in relation to this inquiry and 59 additional customers specified in the Ernst & Young Expert Determination Report dated 7 July 2009.
>
> Of these cases, investigative accountants were appointed in 37 of the 95 matters (12 out of 36 submitters to the inquiry, 25 out of 59 Ernst & Young cases).[55]

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52 Mr Geoff Green, Head of Strategic Business Services, National Australia Bank, *Committee Hansard,* 18 November 2015, p. 13.

53 ASIC, *Submission 45,* p. 29.

54 ASIC, *Submission 45,* p. 29.

> We asked four of the largest investigative accountants and receivers (Ferrier Hodgson, Korda Mentha, Grant Thornton and McGrath Nicol) to provide data for the last two to three years. For each case where they were engaged as an investigative account, we asked them to identify how often they were subsequently engaged as a receiver for that business.[56]
>
> Of the 67 cases where the investigating accountant did not become the receiver (87 per cent of cases), we advise that:
>
> - 40 remain existing customers, 25 are managed by Group Credit Structuring;
> - 13 repaid their facilities through asset sales;
> - 9 refinanced their facilities with another lender;
> - 2 were placed into liquidation;
> - 2 entered into voluntary administration; and
> - 1 went into bankruptcy.[57]

Committee view

6.52 The committee notes the information from the Commonwealth Bank that the appointment of an investigative accountant does not inevitably lead to the appointment of a receiver from the same company. The committee also notes requirements that now exist under the new insolvency laws regarding the independence of receivers.

6.53 However, the committee remains concerned that use of the same company for both the investigative accountant role and the receiver role does create the potential for perceived or actual conflicts of interest. The committee suggests that it may be possible for banks intending to appoint a receiver to inform the borrower of the proposed receiver, and to provide the borrower with the opportunity to request an alternative receiver if the borrower is concerned that a conflict of interest may arise.

6.54 The committee heard arguments by banks that using the same company saves the borrower money. However the committee notes that if the investigative accountant's report and files on the case are appropriately thorough, a different company should be able to quickly understand the state of the business with minimal additional costs.

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55 Commonwealth Bank of Australia, *Answers to questions on notice*, taken on 2 December 2015, received on 5 February 2016.

56 Commonwealth Bank of Australia, *Answers to questions on notice*, taken on 2 December 2015, received on 5 February 2016.

57 Commonwealth Bank of Australia, *Answers to questions on notice*, taken on 9 March 2016, received on 31 March 2016.

Recommendation 9

6.55 The committee recommends that if an authorised deposit taking institution is intending to appoint a receiver:

- **a. that is from the same company that was engaged as an investigative accountant, the borrower should be given an opportunity to request an alternate company if the borrower is concerned about a conflict of interest;**
- **b. in addition to the requirement to sell assets for fair market value under section 420A of the *Corporations Act 2001*, receivers should be required to sell a business as a going concern where possible—if this will result in a higher return—rather than separately selling the assets within the business; and**
- **c. that receivers or similar entity selling assets under section 420A be required to take every reasonable step to ensure those assets are sold at or as close to listed market value as possible under the following conditions:**
    - **a. proof of marketing through but not limited to mainstream media, catalogues and online;**
    - **b. in cases with no monetary default, marketing periods consistent with Prudential Standard APS 220;**
    - **c. in the case where monetary defaults have occurred, the marketing period can be reduced below the APS 220 standard where a shorter marketing period can be demonstrated to be in the borrower's best interest; and**
    - **d. that a strong penalty regime for breach of section 420A be administered by the Australian Securities and Investments Commission.**

6.56 Another common concern put to the committee was that borrowers were not always provided with access to the reports of investigative accountants. The committee considers that providing the investigative accountant's report to borrowers is unlikely to cause significant additional costs to banks. The committee has therefore recommended in chapter 2 that banks be required to provide copies to borrowers of both the instructions to investigative accountants and the reports by investigative accountants.

Recommendation 10

6.57 The committee recommends that the Parliamentary Joint Committee on Corporations and Financial Services conduct an inquiry to examine the remuneration of insolvency practitioners.