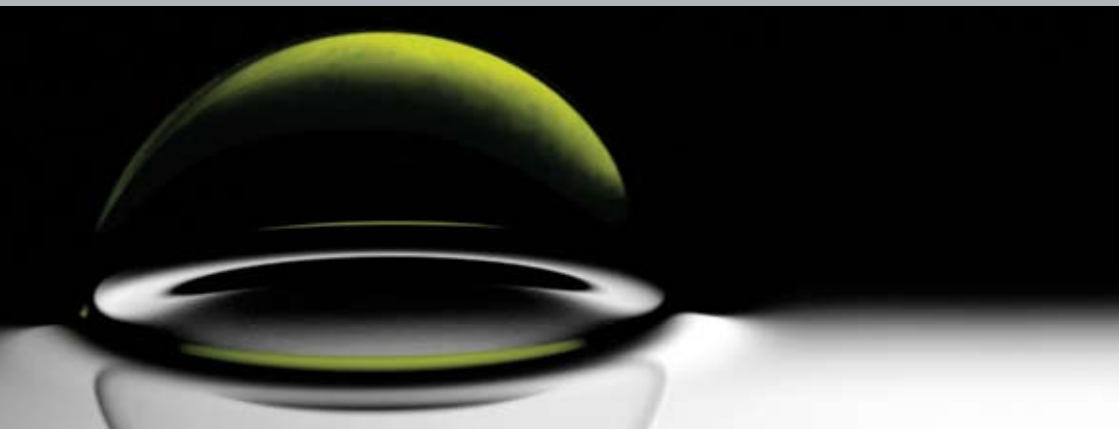


CLAYTON UTZ

Restructuring & Insolvency
Company receivers and managers



Types of appointment

Typically, a company receiver and manager is appointed out of court by a secured creditor under the powers contained in a charge or mortgage. It is the terms of the charge or mortgage, supplemented by the general law, that regulate the nature and scope of the appointment.

A company receiver and manager may also be appointed by the court. The court will appoint a receiver and manager under its own legislation where it is “just or convenient” to do so. A receiver and manager may also be appointed by the court under the Corporations Act 2001 in oppression cases or where the court considers it necessary or desirable to do so to protect the interests of persons to whom the company is, or may become, liable to pay money. A court appointed receiver and manager is an officer of the court. It is the terms of the orders of the court that govern the nature and scope of that appointment.

The balance of this brochure concentrates on the more common type of appointment – the out of court or private appointment. Technically, although a person appointed solely as a receiver rather than a receiver and manager would not have power of management, in this brochure, when referring to a receiver we include a receiver and manager.

Privately appointed receivers and managers

The receiver and manager as agent of the company

The privately appointed receiver is appointed by the secured creditor for the purpose of recovering the debt due to it from the proceeds of the secured property.

While appointed by the secured creditor, the receiver is the agent of the debtor company and, by definition under the Corporations Act 2001, an officer of that company.

The appointment

It is essential that the charge or mortgage be prepared carefully to ensure that in the event of default the secured creditor can make the appropriate appointment. To this end, thought needs to be given to the scope of events which may constitute defaults.

Further, unless the security documentation expressly allows a joint appointment, then it is only possible to appoint a single receiver. Similarly, if it is intended that the receiver have the power to manage the company's property (ie. be a receiver and manager) then the security documentation must make this clear.

Before making any appointment, the secured creditor and the proposed appointee must consider whether the charge or mortgage can be challenged.

Possible grounds of challenge include:

- a failure to lodge the charge with the Australian Securities and Investments Commission within 45 days of its creation. If the debtor company is wound up or an administrator is appointed to it within six months of the date of lodgement, the charge is void as against the liquidator or administrator
- the charge or mortgage is a voidable disposition; eg. it could be an unfair preference or an uncommercial transaction if a liquidator is appointed to the debtor company within the relevant statutory period.

If a challenge were successful, the receiver might be liable for trespass (and the appointor may be liable under the indemnity it grants the receiver) even where he acted in good faith.

Powers

The powers of a receiver are derived from the charge or mortgage under which the appointment was made and the Corporations Act 2001. They usually include power to:

- enter into possession and take control of the property charged
- lease or sell the property charged
- initiate legal proceedings
- carry on the business of the company
- make contracts and execute documents on behalf of the company.

As with events of default, it is important to ensure that the powers are wide enough for the purposes of the security.

Duties

A receiver must operate within a framework of duties. These duties, which flow from the general law and the Corporations Act 2001, include:

- to comply strictly with the terms of the appointment
- to exercise his powers bona fide
- to act honestly in the exercise of his powers and the discharge of the duties of his office
- to exercise the degree of care and diligence that a reasonable person in a like position would exercise; and
- most importantly, in exercising a power of sale, to take all reasonable care to sell the property of the debtor company for not less than its market value or, if it has no market value, the best price reasonably obtainable in the circumstances.

Indemnity and liability

Usually, a receiver will insist on a comprehensive indemnity from his appointor at the time of the appointment, in respect of all liabilities incurred in the course of his acting as receiver. A receiver might be sued personally in relation to his conduct during the course of the receivership. Accordingly, he will require not only to be paid his fees and be reimbursed for the costs incurred in recovering and selling the charged assets, but also to be indemnified for any other liability arising out of the appointment.

A receiver will not be personally liable for contracts made before the appointment unless the receiver “adopts” the contract. Further, a receiver will be personally liable for debts incurred by him in the course of the receivership, for services rendered, goods purchased or property hired, leased, used or occupied. Again, the indemnity will usually cover these liabilities.

While most securities allow the secured creditor to charge back to the debtor company all costs associated with the enforcement of the security, including the costs of the receiver, such a provision is only as good as the value of the charged assets. Where there is a shortfall, the appointor will bear the burden of these costs.

Receivership and liquidation

A receivership can run its course in conjunction with a liquidation. The responsibilities of the receiver are to the secured creditor with respect to the charged assets.

The liquidator's primary responsibility is to the unsecured creditors. The liquidator is appointed to dispose of the assets not subject to the charge and deregister the company.

However, once a liquidator is appointed, the receiver ceases to be the agent of the company. Moreover, a receiver is not entitled to continue to carry on the business of the company without the consent of the liquidator or the approval of the court.

Once the receiver has discharged the debt due under the charge or mortgage, the receiver is required to pay any surplus to the liquidator and retire.

Receivership and voluntary administration

Voluntary administration may erode the secured creditor's rights of enforcement.

A secured creditor with security over the whole or substantially the whole of the company's property will retain its rights of enforcement notwithstanding the administration, provided within thirteen business days of being notified of the administrator's appointment, it enforces the charge in relation to all property of the company subject to the charge. If the secured creditor does not take that step, then it will not be able, without the written consent of the administrator or the leave of the court, to enforce its security during the period of the administration.

This moratorium against enforcement during the period of administration, applies with even more force to secured creditors with security over less than substantially the whole of the company's property, unless the secured creditor took steps to enforce its charge or mortgage prior to the appointment of the administrator. Even then, the administrator may be able to apply to the court and obtain an order restricting the powers of the secured creditor.

Restructuring & Insolvency group publications

The Restructuring & Insolvency group of Clayton Utz has prepared a series of brochures that provide an outline of the operation of relevant areas of law.

The complete set of brochures in the series comprises:

- Deed of company arrangement
- Company receivers and managers
- Third party guarantees
- Retention of title clauses
- Voluntary administration
- Liquidation
- Provisional liquidation
- Enforcing security rights

Treatment of the topic addressed in each brochure though comprehensive is not exhaustive. Moreover, a proper understanding of any particular situation demands an integrated approach. Clayton Utz is available to give advice over the whole range of issues relating to corporate restructuring and insolvency, including the position of secured and unsecured creditors, and the practical issues relating to enforcement of securities and debt recovery, structuring and restructuring transactions and litigation.

Copies of this brochure and the others referred to can be obtained free of charge from the Restructuring & Insolvency group of Clayton Utz.

Sydney
Level 34
No. 1 O'Connell Street
Sydney NSW 2000
T +61 2 9353 4000
F +61 2 8220 6700

Melbourne
Level 18
333 Collins Street
Melbourne VIC 3000
T +61 3 9286 6000
F +61 3 9629 8488

Brisbane
Level 28
Riparian Plaza
71 Eagle Street
Brisbane QLD 4000
T +61 7 3292 7000
F +61 7 3221 9669

Perth
Level 27
QV1 Building
250 St. George's Terrace
Perth WA 6000
T +61 8 9426 8000
F +61 8 9481 3095

Canberra
Level 8
Canberra House
40 Marcus Clarke Street
Canberra ACT 2601
T +61 2 6279 4000
F +61 2 6279 4099

Darwin
17–19 Lindsay Street
Darwin NT 0800
T +61 8 8943 2555
F +61 8 8943 2500

www.claytonutz.com
Persons listed may not be admitted
in all states. This document is
intended to provide general
information. The contents do not
constitute legal advice and should
not be relied upon as such.
© Clayton Utz 2008