



3 May 2010

Mr John Hawkins
Secretary
Senate Economics Committee

Dear Mr Hawkins

INQUIRY INTO LIQUIDATORS AND ADMINISTRATIONS

I refer to the Senate Economics Committee's request for the Treasury to provide a further submission in relation to the regulation of receivers and the questions on notice asked of Treasury officers at the Public Hearing on 12 March 2010. The further submission is attached as well as answers to the questions on notice.

The contact officers at Treasury in relation to this matter are Daniel McAuliffe (...) and Andrew Hall (...)

Yours sincerely

(...)

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SENATE ECONOMICS COMMITTEE – INQUIRY INTO LIQUIDATORS AND ADMINISTRATORS

THE ROLE OF THE RECEIVER

The role of the receiver is usually to take possession of an asset a secured creditor has an interest in, and then use or dispose of that asset to maximise the return to the secured creditor.

A receiver of property may be a 'receiver and manager' if the receiver manages property.¹ Such a power is usually given under the terms of the receiver's appointment. The receiver and manager will usually have wide powers to deal with property and the affairs of the corporation concerned.

Power of Sale

The *Corporations Act 2001* (Corporations Act) requires receivers when exercising power of sale to take reasonable care to sell property at not less than market value or the best price that is reasonably obtainable, having regard to the circumstances existing at the time of sale.

This power of sale is subject to a receiver acting in accordance with their obligations owed as officers of the company. These provide that the receiver must exercise a reasonable degree of care and diligence; must act in good faith in the corporation's interests; for a proper purpose; and not make use of their position to gain an advantage. If they are in breach of their obligations, depending on the circumstances, a receiver could be subject to a civil penalty order or be criminally liable.²

A receiver will not have breached their obligations by merely failing to obtain either market value or the best price reasonably obtainable. Rather, the receiver will only be in breach if they fail to take reasonable care to sell the property for market value or the best price reasonably obtainable. Whether reasonable care is taken will depend on the facts of a particular case.³

LEGAL OBLIGATIONS

The statutory duties contained within the Corporations Act that apply to company officers, similarly apply to receivers as they fall within the definition of an 'officer'. Court appointed Receivers also possess obligations as officers of the Court. There is a large body of case law regarding their powers, potential liabilities and obligations.

A privately appointed receiver's duties will also be found in their instrument of appointment. These are subject to the provisions of the Corporations Act and any other applicable legislation.

Pt 5.2 of the Corporations Act sets out specific rules in relation to the duties of controllers which includes receivers, or receivers and managers of property.

¹ Section 90 of the Corporations Act

² Section 420A of the Corporations Act , sections 180 – 184 of the Corporations Act

³ *Florgale Uniforms Pty Ltd v NAB* (2004) 11 VR 54

REGISTRATION

A receiver must be a registered liquidator. The qualifications and work experience necessary to become eligible to be registered as a liquidator are detailed in our previous written submission.

REMUNERATION

In the first instance, the entitlement to remuneration of a receiver is determined by the instrument of appointment. The Court has the power to fix the remuneration of a receiver on the application of the Australian Securities and Investments Commission (ASIC), the company's administrator, the company's liquidator or the administrator under a deed of company arrangement. Disbursements of the receiver do not require court approval and can be paid out as funds are recovered.

INDEPENDENCE

Receivers are disqualified from acting if they fall into one of several listed categories of relationship with the company. These include being a director or auditor of the corporation.⁴ Otherwise, a receiver is under the same obligations as a liquidator to be independent as outlined in our earlier written submission.

DISCIPLINE

Supervision

Receivers are supervised by both ASIC and the Court.

Creditors and ASIC have rights to apply to the Court to restrain receivers from acting. In addition, any person can complain to the Court or ASIC regarding a receiver's conduct and the Court can take any action it thinks fit.⁵

Receivers, as they are liquidators, can be subject to proceedings brought by ASIC in the Companies Auditors and Liquidators Disciplinary board (CALDB), the processes of which we outlined in our earlier written submission.

Appointment and Removal

The most common appointment is a private corporate receivership, when a secured creditor who has a contractually obtained fixed or floating charge appoints a receiver when there has been a nominated default on a loan agreement.

In some circumstances a receiver may be appointed by the Court.

A company may apply to the Court to remove a receiver of their property if they are satisfied the receiver is guilty of misconduct.⁶

⁴ Subsection 418(1) of the Corporations Act

⁵ Section 1324 of the Corporations Act , Section 423 of the Corporations Act

⁶ Section 434A of the Corporations Act