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Update Summary

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COMPANY RECEIVERS AND ADMINISTRATORS

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CRA update 1 of 2025

The author has significantly reviewed and amended the work. Matters of particular interest are referred to below.

The right to appoint receivers and managers

Even a purchaser's potential equitable interest cannot defeat a mortgagee's entitlement to enforce its legal interest as registered mortgagee, including its right to appoint a receiver and manager under an express clause in the mortgage: *Parwan Investments Pty Ltd v Hooper* [2024] VSCA 86.

Further, an appointment of a receiver and manager by the assignee of the underlying secured debt will be invalid if the assignment of the debt was not completed at the time of the purported appointment: *Harris & Lewin Pty Ltd (in liq) v Harris & Lewin Agents Pty Ltd* (1975-76) CLC 40-216. See [2.10].

Events justifying payments of principal

A secured debt that is not extinguished by a deed of company arrangement can justify the appointment of receivers and managers: *Specialised Welding Australia Pty Ltd v Disselkoen* [2024] FCA 1184. See [3.10].

Conflicts of interest

Receivers may not be appointed as liquidators of the company where they claim to be substantial creditors of the company: *ASIC v A One Multi Services Pty Ltd (No 3)* [2024] FCA 1209. See [4.40].

Secured property

Funds held in the administrators' account established under s 65-5 of Corps Act 2001, Sch 2 are not necessarily secured property under the control of receivers and managers appointed under a General Security Agreement. It depends on the construction of phrases such as "relating to", "in respect of" and "arising from" in the definition of "Secured Property" in the General Security Agreement. See [5.20].

The form of the demand

A contractual requirement that a demand be "correctly executed" does not require the notice of demand to be executed as a deed. Electronic notice is also addressed. See [6.240].

Fixing a later time for lodgment under Corps Act 2001, s 588FM

PPSA 2009, s 267 prevents an extension being granted under Corps Act 2001, s 588FM if the security interest was not registered before the external administration of the grantor. See [7.3000].

Effect of PPS reforms on extensions of time

If an insolvency-related event occurs in relation to a company, para 588FL(2)(b) fixes a time by which a PPSA security interest granted by the company must be registered under PPSA 2009, failing which the security interest may rest in the company. See [7.3070].

Transaction must also be an insolvent transaction

In *Hayes v Sinadinos* [2024] FCA 885, the making of significant unexplained payments to directors or the incurring of large liabilities were not sufficient in themselves to infer actual insolvency of a company. However, there is a presumption of insolvency arising from the failure to maintain books and records as required by Corps Act 2001, s 286. See [7.5030].

The nature of garnishee proceedings

A first mortgagee of home units is entitled under its security to the benefit of rental income at least from the time its receiver was appointed. A garnishor is not entitled to this rental income because the first mortgage has a priority interest in it: *Atidote Pty Ltd t/as Harcourts, the Property People, Sydney* v *Najjar* [2024] NSWSC 206A. See [8.3110].

Effect of prior mortgages

Where receivers wish to exercise a power of sale over property that is subject to a higher ranking security interest, they should make an application for an order for sale under Corps Act 2001, s 420B, rather than rely on the more general power of sale in s 420: *Matthews v Capital Choice Australia Pty Ltd* [2024] QSC 236. See [10.2330].

General rule relating to pre-receivership contracts

In general, receivers have no obligation to bring about the company's performance of obligations under an existing contract with third parties. But in some cases, it might not be a proper exercise of a receiver's powers to ignore existing contractual obligations and thereby jeopardise the company's goodwill: *Bluewaters Power 1 Pty Ltd v Donnelly* [2024] FCA 596. See [11.1970].

The meaning of "wages" and "superannuation contributions"

From 1 January 2025, the *Fair Work Act 2009* (Cth) made it a criminal offence to deliberately underpay workers. Maximum financial penalties range from more than \$1.6M for individuals to \$8M for companies. Deliberate breaches of the wage theft laws can be punished by sentences of up to 10 years imprisonment. But this offence will not apply to honest mistakes. See [11.4850].

Section 1323 of the Corporations Act 2001 (Cth)

Where the court appoints receivers under Corps Act 2001, s 1323, it can make an order restricting the travel of a person who is central to the investigation being carried out under the Act: See eg *ASIC v ALAMMC Developments Pty Ltd (No 1)* [2024] FCA 1275.

Further, on an application by ASIC the court can make an order under s 447A removing administrators appointed by the directors of a company and replacing them with receivers and managers appointed by the court under Corps Act 2001, s 1323, where such an appointment is warranted by the interests of creditors and the public interest: *ASIC v Keystone Asset Management Ltd (recs and mgrs apptd) (admins apptd) (No 2)* [2024] FCA 1040. See [19.2110].

Appointments without security

A liquidator may be appointed as a receiver without security of a company acting as a bare trustee: *Re Golden Prosperity Pty Ltd (in liq)* [2024] VSC 177. See [20.1830].

When and how remuneration can be claimed

There should be a statement of account reflecting in appropriate itemised form details of the work done, the identity of the persons who did the work, the time taken for doing the work, and the remuneration claimed. It should itemise the expenses incurred by the receiver and manager by voucher proof with sufficient detail to enable the court to determine whether the disbursements were reasonably incurred. It should be verified by affidavit: *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96, applied in *Palmer v Palmer* [2024] QCA 263. See [25.110].

Basis of calculation

Despite the criticism of time costing in many decisions, the position in Australia is that a time-based calculation may be appropriate in fixing remuneration on the evidence before the court: *Sanderson v Sakr* (2017) 93 NSWLR 459; [2017] NSWCA 38. See [25.160].

Source of remuneration

The court may order that the receivers are entitled to remuneration out of trust funds that have been paid into court: *Segal v Sharma (No 2)* [2024] NSWSC 1062. See [25.310].