



Receiver and Manager Appointments

Both positions of receiver and manager within a company are generally appointed by a secured creditor through powers contained in a mortgage or loan.

A company receiver and manager is usually appointed by a secured creditor pursuant to the powers contained in a secured loan or mortgage. Regulation of the nature and scope of the appointment is contained in the terms of the secured loan or mortgage and is supplemented by common law.

Corporate receivership arises most often from the insolvency or near insolvency of a company. However, breaches of terms of the security documents that have nothing to do with insolvency of the company can also result in an appointment of a receiver.

It is not only the failure to meet obligations to the secured creditor that can constitute default pursuant to a debenture or secured loan, but it is the most prevalent. Other events which can cause the company to be in default include ceasing to carry on business, having an application to wind up filed against the company in court, or breaches of covenants such as failing to provide required financial information.

A company receiver and manager may also be appointed by the Court. Typically, a receiver and manager may be appointed by the Court pursuant to the Corporations Act 2001 (Cth) ("the Act") in cases where the Court considers it desirable or necessary to protect the interests of persons associated with the company.

A Court appointed receiver and manager is an officer of the Court. The nature and scope of the court appointment is governed by the specific orders of the Court.

There are some differences in scope between "Receiver" and "Receiver & Manager" appointments. In summary the definitions are as follows:

- Receiver - A person who receives rent or other income from an asset and may convert the asset into cash by sale but does not buy assets or generally manage the business.
- Receiver & Manager - As well as receiving income and paying expenses, can also buy or sell assets. Is responsible for managing the assets over which they have been appointed.

Before a secured creditor entertains the notion of appointing a receiver, they should consider a number of non-legal matters, such as:

- Are the business assets in jeopardy;
- Is the current board and management to be trusted;
- Is the current board and management capable of dealing with the matters that need to be addressed in order for the company to trade out of its difficulties;
- What are the alternatives to receivership. For example, workouts with an agreed asset sale programme; voluntary administration, or even liquidation.
- What are the costs of the receivership in terms of:
 - The receiver's costs, particularly if the receiver and manager trades on;
 - Legal fees;
 - Liabilities incurred by the receiver and manager whilst trading on including such matters as environmental risk;
 - Other agents.
- What should be the nature and scope of the indemnity offered to the receiver by the appointing creditor;
- Will the appointment of the receiver bring about events of default by the debtor company or group of companies such as the termination of leases and franchise agreements and the termination of contracts upon which the company's future depends. For example, there is little point in appointing a receiver to take control of the assets of a company if by doing so the principal asset, being a major contract, is terminated. Sometimes contracts contain provisions that indicate that the contract can be terminated if the company was to be placed into receivership;
- Does the receiver's staff have the particular skills necessary to conduct the business;
- Will the company's creditors' terms become harsher. Will there be a COD condition imposed upon the company by its creditors;
- What is the time frame within which the receiver plans to sell the assets;
- Is it necessary that the receiver be appointed to all assets of the company.