

Octaviar – practical solutions

Note

The following represents our views in relation to key issues generated by the decision of the Qld Supreme Court in ***Re Octaviar Ltd; Re Octaviar Administration Pty Ltd*** [2009] QSC 37 (6 March 2009). This table has been prepared jointly by Allens Arthur Robinson and Mallesons Stephen Jaques in consultation with John Sheahan SC.

This is a basic and general guide only, designed to assist in understanding the impact of the decision and to offer possible solutions (mainly from the perspective of protecting a chargee's interests). It is not intended to be definitive advice. Each situation needs to be carefully examined and specific legal advice taken.

Stamp duty may be a significant factor in any solution. Much will depend on the drafting of the documents involved. There will be many situations that are not addressed by this table. Particular issues may arise where charges are held by security trustees and new beneficiaries are added, or where charges secure the obligations of named debtors and new debtors are added.

This table assumes that Octaviar was correctly decided and will be followed, unless and until it is overturned on appeal or by legislation.

Part 1: History – what to do with existing securities where there have been variations which increase the amount secured but the 45 day period may have run.

Situation	Possible solutions	Remarks
<p>1. Pure all moneys charge (no reference to any facility documentation, whether specific or by designation, nor collateral agreement to restrict its operation to a limited class of documents), where subsequent increases in amounts (including under further documents) are secured. The charge has been registered and a certificate of registration issued under s272(3).</p>	<p>Rely on the charge, and on the certificate of registration. No action required.</p>	<p>The reasoning in Octaviar does not appear to have an impact on pure all moneys charges.</p> <p>Section 272(4) gives the certificate of registration "conclusive evidence" status as to matters going to registration (other than in respect of the 45 day lodgment period).</p>

<p>2. Charge is not all moneys but secures facility agreements and/or other documents specifically referred to, which were in existence at the time the charge was executed. The charge has been registered and a certificate of registration issued under s272(3).</p>	<p>Rely on the charge, and on the certificate of registration. No action required.</p>	<p>Section 272(4) gives the certificate of registration "conclusive evidence" status (see above).</p>
<p>3. Charge is not all moneys but secures facility agreements and/or other documents specifically referred to, which were signed at or after execution of charge. The charge has been registered and a certificate of registration issued under s272(3).</p>	<p>Rely on the charge, and on the certificate of registration issued. No action required.</p>	<p>Even if the facility agreement and/or other documents are executed after the charge, there is no "variation". The prospective liability was already secured by the charge. This argument is only safely available for later documents which are described in the charge with a high degree of specificity so that they can be said to have been expressly contemplated by the chargor.</p> <p>As to whether those other documents ought to have been lodged with the charge at the outset, s272(4) gives the certificate of registration "conclusive evidence" status (see Part 1.1 above).</p>
<p>4. Same charge as in Part 1.3 but the facility agreement and/or other document is subsequently amended to increase the principal amount, interest rate, fee or other amount payable.</p>	<p>This is a variation that needs to be registered. If you are now outside the 45 days, consider:</p> <ul style="list-style-type: none"> ▪ approaching the court for extension and lodging a Form 311B for the variation together with the amending document (s) (giving publicity issues); ▪ lodging a Form 311B for the variation together with the amending document (giving publicity issues) without approaching the court for extension; ▪ taking a new charge (subject to preference, priority, valuable consideration, corporate benefit and stamp duty concerns). This charge could be "all moneys" or, if that is not feasible, in "Transaction Documents" style but adopting the "designation letter" mechanism described in Part 2.2 below, (or list all the then existing documents expressly, giving publicity issues); or ▪ preparing a "compendium deed" (subject to stamp duty concerns) as described in Part 1.5 below. 	<p>Approach to court may not succeed - there is no track record yet of courts' position on such applications post-Octaviar.</p> <p>The 45 day period may run from initial date of amendment agreement (because that is when the "prospective liability" was increased), not when amendments take effect (eg if effective date/time was subject to conditions precedent).</p> <p>All of the solutions, except, possibly, going to court, have a 6 month exposure of some type as follows:</p> <ul style="list-style-type: none"> ▪ For variations, the main exposure is to the chargor entering liquidation or voluntary administration within 6 months, whether or not it was insolvent at the time of registration: s266(3). ▪ New charges have a lesser risk and are therefore preferable (if other concerns are dealt with), because they do not suffer the s266(3) penalty, but they would be at risk where they are a voidable unfair preference, that is, broadly, if the chargor was insolvent at the time of the new charge, and the chargee isn't able to avail itself of defences and the chargor goes into liquidation or voluntary administration within 6 months.

<p>5. Charge secures “Transaction Documents”. Transaction Documents are to be designated or agreed. The charge has been registered but there have been unregistered designations which have increased the debt or liabilities secured by the charge.</p>	<p>The designations are variations that need to have been registered. If you are now outside the 45 days, consider:</p> <ul style="list-style-type: none"> ▪ approaching the court for extension, and lodging Form 311Bs for the variations accompanied by the documents containing the designation (which may be the full facility agreements etc, which brings publicity issues); ▪ lodging Form 311Bs for the variations accompanied by the documents containing the designation (which may be the full facility agreements etc, which brings publicity issues) but without approaching the court for extension; ▪ taking a new charge (subject to preference, priority, valuable consideration, corporate benefit and stamp duty concerns). This charge could be “all moneys” or, if that is not feasible, in “Transaction Documents” style adopting the “designation letter” mechanism described in Part 2.2 below, (or listing all the then existing documents expressly, giving publicity issues); ▪ preparing a “compendium deed” (subject to stamp duty concerns) which contains a further secured obligation (say an “Octaviar” fee) and expressly lists and confirms all previous amendments and designations, specifying the dates and where possible, the amounts or a description of the increase, of each and lodge that document with a single Form 311B, which itself sets out all the dates of all the amendments, and get a certificate under section 272(3). 	<p>As above. The only benefit and objective of the “compendium deed” is to avoid lodging sensitive documents (it does not seek to, and does not, “cure” the 6 month risk in s266(3) in relation to the historical variations). It relies on the fact that for variations there is no equivalent to s263(5) and is assisted by ASIC accepting the Form 311B and issuing a certificate. The certificate is likely to be conclusive as to the particulars of the variation that are registered (sections 272(4); 268(2) and 265(14)). A certificate could be challenged if there was fraud. Care needs to be taken that no step could be said to be misleading and deceptive conduct such as would ground an action by an affected party.</p>
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<p>6. Charge secures "all facility agreements [or similar] entered into between the chargor and the chargee from time to time". The charge has been registered but there are new facility agreements which have increased the debt or liabilities secured by the charge.</p>	<p>Each facility agreement is a variation that needs to have been registered. See the above entry.</p>	<p>As above. A generic or class description of the liability like this is not sufficiently specific to take advantage safely of the argument that it was already secured by the charge such that the later execution of documents did not increase the liabilities secured by the charge.</p>
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Part 2: The brave new world of the future – what to do in the future (in order of preference)

Situation	Possible solutions	Remarks
<p>1. Pure all moneys charge (no reference to any facility documentation, and there is no collateral agreement to restrict its operation to a limited class of documents).</p>	<p>Initially lodge Form 309 with copy of charge only, even if facility agreements or other secured documents are in existence. Obtain a certificate of registration under s272(3). No further action required.</p>	<p>A pure all moneys charge may not be suitable, for example with syndicated deals, or where there are multiple lenders. It may not be suitable where a negative pledge restricts purpose of permitted security and what may be secured by it.</p>
<p>2. Charge not in all moneys form but it secures "Transaction Documents". None are actually specified in the charge, but rather all Transaction Documents are to be designated or agreed. When a facility agreement or other document is to be included, it is executed, and then subsequently a short document (say, a "designation letter") is signed designating the facility agreement or other document to be a "Transaction Document".</p>	<p>Initially lodge Form 309 with copy of charge only. Obtain a certificate of registration under s272(3). Later designations will be variations in the Octaviar sense and need to be registered, but there is no need to register the facility agreement or other document - the variation is constituted by the designation letter and only it need be lodged. Lodge a Form 311B accompanied by a copy of the designation letter only and try to obtain a certificate under s 272 (see 1.5 above).</p>	<p>Take care that the facility agreement or other substantive document does not itself create the linkage before the designation letter is signed. The facility agreement or other substantive document must be, in effect, "invisible" to the charge and unsecured by it unless and until the designation letter is executed. Care must be taken in preparing the Form 311B to describe the increased liability properly.</p> <p>Note that this designation method may be used in relation to pre-existing documents to be secured by the charge.</p>



<p>3. All moneys charge as per Part 2.1, but it allows liabilities to be excluded by agreement. Following execution of the charge, the parties then execute a short agreement, which confirms that various classes of liability are not included, or that all liabilities except a narrow class are excluded.</p>	<p>Initially lodge Form 309 with copy of charge only. Obtain a certificate of registration under s272(3). As above, there is no need to register either the agreement excluding liability or the later documents which are not excluded by the carve-out.</p>	<p>The agreement excluding liability from the security, while a variation, is not an "increase" in debts or liabilities secured and so is not registrable. Depending on the drafting of the carve-out, subsequent inclusions and/or amendments may need registration as variations which increase the debt or liabilities secured by the charge.</p>
<p>4. Charge secures "Transaction Documents". Transaction Documents is defined as a combination of:</p> <p>(a) specifically identified and described documents (eg a facility agreement, ISDA Master Agreement or similar) to be executed after execution of charge; and</p> <p>(b) any other document designated or agreed via a designation letter or other short document (the form of which is scheduled).</p>	<p>Lodge Form 309 with copy of charge but not other documents. Obtain a certificate of registration under s272(3).</p> <p>For designations under (b), the variation constituted by the designation needs to be registered, but there is no need to register the substantive document. The Form 311B is accompanied by a copy of the designation letter only. Note, if there are pre-existing documents to be secured by the charge, they can be dealt with by designation.</p>	<p>There is no "variation" when the specifically identified documents are executed even if executed after the charge. The prospective liability was already secured by the charge. This argument is only available for later documents which are described in the charge with a high degree of specificity so that they can be said to have been expressly contemplated by the chargor.</p> <p>If one of the identified documents is an ISDA Master Agreement, the description should specifically refer to the ISDA Master Agreement to be executed between the parties, and refer generally to all transactions and confirmations under it, so that they are all contemplated by the charge at execution.</p> <p>For later designations, as mentioned above, take care the substantive document does not itself create the linkage, and in preparing the Form 311B.</p>
<p>5. Charge secures facility agreements or other documents specifically identified and described, which are signed after execution of charge.</p>	<p>Lodge Form 309 with copy of charge but not the other documents. Obtain a certificate of registration under s272(3).</p>	<p>There is no "variation" when the specifically identified documents are executed even if executed after the charge. The prospective liability was already secured by the charge. This argument is only available for later documents which are described in the charge with a high degree of specificity so that they can be said to have been expressly contemplated by the chargor. For ISDA Master Agreements, see the previous entry.</p>