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### Variation of Charges - *Octaviar* Overturned on Appeal

#### Summary

Unless there is a variation in the terms of the charge, then the lodgement requirements of s 268(2) *Corporations Act 2001* are not triggered even if there is an increase in the liability secured by the charge. However, an application to appeal to the High Court could be lodged.

#### Facts

In *Re Octaviar Ltd (No. 7)* [2009] QSC 037, 18 September 2009, a registered fixed and floating charge secured Octaviar's guarantee of a loan from Fortress to an Octaviar subsidiary. Octaviar charged all of its present and future property for the payment of the "Secured Money" which was defined as all monies that are, or may in future become, due under a "Transaction Document". "Transaction Document" was defined as including a document which the parties agreed is a Transaction Document.

Subsequent to registration of the charge, the parties agreed that a guarantee by Octaviar for another loan ("**YVE Guarantee**") was a Transaction Document ("**Agreement**"). Administrators were then appointed to Octaviar.

The Supreme Court of Queensland held that the Agreement was a variation of the terms of the charge as the charge now secured a new obligation, increasing the liabilities secured by it. As no notice of variation was lodged with ASIC, the charge was void to the extent it would secure the liability of Octaviar under the YVE Guarantee as against the administrator.

After this judgment, there was concern that an ASIC notification would have to be lodged every time a chargor incurred a liability to the chargee which did not exist at the time of registration of the charge. Receivers were also concerned about the validity of their appointments under charges which may have been void in light of this decision.

#### Court of Appeal

The Court of Appeal found that the Agreement was not a variation of the charge, and no new charge was created. The Agreement was merely the application of an existing contractual arrangement which allowed the parties to designate the YVE Guarantee as a Transaction Document. The terms of the charge remained unchanged after the Agreement.



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Section 268(2) *Corporations Act 2001* requires a company to lodge a notice with ASIC within 45 days after a “variation in the terms of the charge” which increases the amount of the liabilities secured by the charge. The Court of Appeal held that this section is directed at changes in the terms of the charge, and not at changes to the amount of liabilities secured in accordance with those terms.

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