

Meltzer Mason Heath

IN SOLV

UPDATE + NEWS + REVIEW

August 2007

"Winter is on my head, but eternal spring is in my heart."

Victor Hugo

Winter is almost over—with its 'weather bombs' and all. Our move to City Road went without a hitch and we are now well settled in and tackling the Insolvency Law changes which look certain to be in effect by the year end.

Time to Reregister on the Personal Property Securities Register ("PPSR")

Arron Heath

We referred to this matter in our December 2005 issue. As discussed then, financing statements do not stay registered forever and section 154 of the Personal Property Securities Act ("PPSA") states that the registration of a financing statement becomes ineffective at the expiry of the indicated term or five years after initial registration, whichever occurs first.

The PPSR commenced operation on 1 May 2002. Between 1 May 2002 and 31 October 2002 there was a transitional period where prior security interests (i.e. those interests created before 1 May 2002 and registered on one of the registers replaced by the PPSR) were deemed to be perfected by the PPSA. This meant that their priority dates were preserved as if they were already registered in the PPSR and registering prior security interests in the PPSR during the transitional period allowed them to retain their original registration date as their priority date.

As most registrations in the PPSR are probably for the default five year period it is likely that a large number of registrations will expire over the coming months.

In order to maintain priority, registration must be done while the first registration is still effective (section 154). Reregistration is accomplished by the secured party registering a financing charge statement. The renewal period is for a further five years or until the nominated period in the financing statement expires.

A secured party who does not reregister before expiry of the applicable initial term would have to register a new financing statement. This would result in the secured party losing the initial registration date as their priority date, which would result in potential disastrous consequences for suppliers.

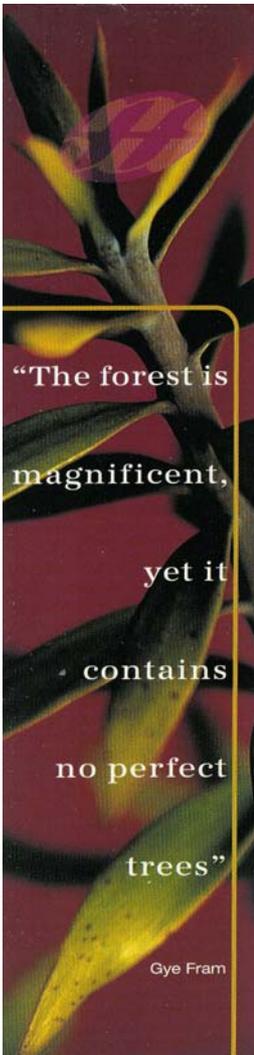
Secured parties need to ensure that their PPSR registrations are renewed prior to expiry of the initial registration date.

Securing Shareholder Advances and Other Matters

Mike Lamcraft

In previous issues we have highlighted how important it is for shareholders to take security over the company's assets when making a loan to their company. No apologies for reiterating this as we continue to see shareholders who lose their investment. It is imperative that accounting and legal advice is sought to ensure the security interest is properly and effectively put in place, prior to advancing funds to the company.

When forming a company shareholders should ensure that a shareholders' agreement is professionally drafted and executed (see below). Quite often shareholders "fall out", and without an agreement, matters can become unpleasant and costly for all concerned.



For further information contact:

Meltzer Mason Heath
Level 16
7 City Road
PO Box 6302
Wellesley Street
AUCKLAND 1141

Ph: (09) 357 6150
Fax: (09) 357 6152

Email: info@mmh.co.nz

www.mmh.co.nz

Recently we have dealt with the liquidations of companies that were purchased anything from three years to one year before the failure. A common denominator in these cases is the fact that little or no due diligence was undertaken by or on behalf of the eventual purchasers of the businesses. Taking advantage of an experienced professional's advice at the outset would in many cases have either prevented the purchase, reduced the price paid or would have ensured that valuable and enforceable warranties were obtained.

Shareholders' Agreement

Arron Heath

A Shareholders' Agreement should be established where there is more than one shareholder, especially where the shareholders are family members. The Agreement will provide a mechanism for resolving disputes between shareholders and may also include:

- Dividend payment policy
- Management and control of the company
- Shareholder's rules and responsibilities
- Procedure for exiting the company

Where shareholders have an equal stake in the company "deadlock" situations can sometimes arise, whereby the company is prevented from making decisions. A Shareholders' Agreement can include provisions to prevent deadlocks occurring.

Solicitors have standard forms of Shareholder Agreements which can be amended to suit particular circumstances.

Insolvency Law Reform Update

Arron Heath

During July 2007, Cabinet agreed to draft the necessary regulations to bring into effect the Insolvency Act 2006 and the Companies Amendment Act 2006. The regulations are currently being drafted.

The Ministry of Economic Development anticipates that the Companies Amendment Act will come into effect around October/November 2007 and the Insolvency Act sometime in December 2007.

New Offence for Directors

Arron Heath

The Companies Amendment Act 2006 introduces a new offence for directors by adding the following Subsection to the existing Companies Act 1993 Section 380 (Carrying on Business Fraudulently):

"Every director of a company commits an offence and is liable on conviction to the penalties set out in Section 373(4) [imprisonment for a term not exceeding 5 years or a fine not exceeding \$200,000], who, with intent to defraud a creditor or creditors of the company, does any thing that causes material loss to any creditor."

This is yet another example of potential increased personal liability for directors.

Between the professional staff at Meltzer Mason Heath there is over 100 years insolvency experience. This means that any problems or uncertainties facing your clients are likely to have been seen by us before. Please call us, and as always we will offer you and/or your clients a free one hour consultation.

Jeff Meltzer, Karen Mason, Arron Heath, Mike Lamacraft, Lloyd Hayward & Trish McLennan.

