

# Meltzer Mason Heath

## IN SOLV

### UPDATE + NEWS + REVIEW

June 2005

*We are half way through 2005 and it is shaping up to be a very busy year with an increasing number of insolvency assignments.*

*Jeff and I received excellent feedback from our presentation on the PPSR at the National Public Conference held in Rotorua in April. The presentation was aimed at your role when advising your clients as to their protection for the supply of goods. We would be pleased to discuss any matter raised at the conference or in this newsletter. Please give us a call. Karen*

#### Insolvency and Trusts

*Lloyd Hayward*

In recent times we have considered the issue of insolvency and trusts, corporate trustees and trading trusts in particular. Some of you may be familiar with the paper Jeff Meltzer has presented on this topic.

We are now beginning to see insolvent trusts and trustees being referred to us.

Trustees and directors of corporate trustees must always be aware that they are not immune from the risks that arise from insolvency. Reckless trading will be investigated by a liquidator appointed to a corporate trustee. The directors of the corporate trustee are just as exposed as if the company was trading in its own right and they must always consider their obligations under the Companies Act 1993. If you are a director of a corporate trustee review your position.

In the context of an accounting firm offering corporate trustee services, again the risk can be serious. Your trustee company may act as trustee for a number of trusts. How much control of these trusts is exercised by the trustees? How confident are you that the trust entities your trustee company acts for are solvent?

If you have any concerns regarding solvency and trusts please call us to discuss these.

#### Creditors' Compromises

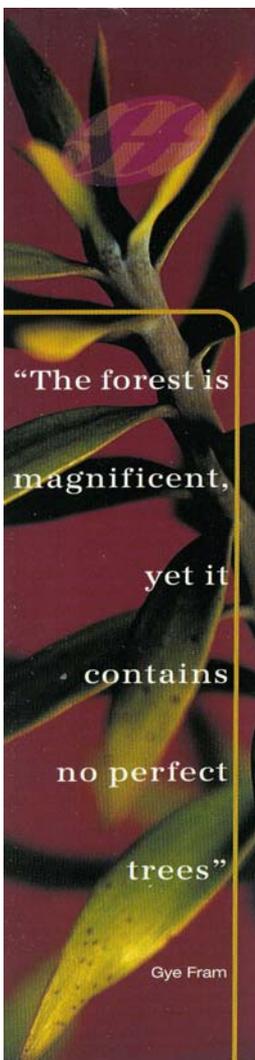
*Lloyd Hayward*

Practitioners may not appreciate the benefits offered by Part XIV of the Companies Act 1993 – Compromises with creditors. Part XIV allows an insolvent company to put a proposal to its creditors that can vary the existing payment obligations the company has. Proposals can offer any number of options; however, usually they include a deferral of payment obligations. Others have offered a fixed return to creditors (i.e. a part payment in return for forgiveness of the balance).

The obvious benefit to the company is the ability to continue trading, avoid liquidation, restructure if necessary and a return to profitability.

Part XIV lays down strict criteria for approval by creditors of a compromise. A creditors meeting is required at which 75% by value and 50% by number of creditors affected by the compromise and voting on the compromise proposal must approve the compromise. Postal voting is allowed. Once approved by the creditors the compromise is binding on all creditors receiving notice of the proposed compromise and creditors are prevented from instituting liquidation proceedings during the life of the compromise, if the compromise terms are met.

If any of your clients have solvency issues please call us to discuss the compromise option. Do it now before it is too late and liquidation is the only option.



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## Personal Property Security Act ("PPSA")

Mike Lamacraft

Can charges be registered following the liquidation of a company?

This question has not been tested under the PPSA.

Registration is one means of perfecting a security interest available to secured creditors. If a secured creditor fails to carry out registration in a timely manner then it is that creditor's own fault if a later executed charge is registered on the PPSR ahead of the creditor's. A creditor who does not register immediately does so at their own risk.

Under the previous legislation any unregistered charges became void at liquidation. No similar provision has been maintained under the PPSA.

There is nothing contained in the legislation which should prevent registration of a charge following liquidation.

If a charge is perfected, what is the impact on the priority arrangements between secured creditors?  
Generally, priority between charges is governed as follows:

1. Registered General Security Agreements and Specific Security Agreements (by date of registration).
2. Unregistered charges (by date of execution).

In practical terms if your client supplies goods to a party and relies only on their basic terms of trade (i.e. retention of title with no PPSR registration) then a creditor who has registered a General Security Agreement will have priority over the assets supplied by your client to the extent that those assets are required to repay the secured debt.

It is important to remember that under the PPSA title is irrelevant when it comes to determining priorities in relation to third parties. What is relevant is which parties have security interests and which of those interests have priority.

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## Enduring Power of Attorney

Arron Heath

What can be done to ensure management of your affairs if you are incapacitated through illness or accident?

Under the Protection of Personal and Property Rights Act 1998 an application can be made to the Family Court for the appointment of a Property Manager and/or Welfare Guardian. This process can be costly and time consuming.

An alternative is to grant an Enduring Power of Attorney.

A Property Enduring Power of Attorney allows someone to be appointed, either an individual or a corporate trustee, to manage property assets for an incapacitated person. The grantor can determine when the property enduring power of attorney comes into effect, what property it relates to and what conditions, if any, are attached to the appointment.

The Personal Care and Welfare Enduring Power of Attorney allows for an individual to be appointed to be responsible for non property matters. This power of attorney only comes into effect if the grantor becomes incapacitated.

A family member, accountant, lawyer or other adviser could be granted a power of attorney.

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Between the professional staff at Meltzer Mason Heath there is over 95 years insolvency experience. This means that any problems or uncertainties facing your clients will 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 & Rachel Mason.**



This provides general information only and is not intended to constitute legal advice. Specialist legal and/or professional advice should always be sought in relation to any particular circumstances.