

Meltzer Mason Heath

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UPDATE + NEWS + REVIEW

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Winter is nature's way of saying "Up yours" - Robert Byrne

Let us love winter, for it is the spring of genius—Pietro Arentino

To shorten winter, borrow some money due in spring—W J Vogel

In other words, up winter, go to Fiji, and pay for it in spring!

Submission to the Commerce Select Committee, 25 May 2006

Jeff Meltzer

Amendments to the Companies Act 1993 have been promised for a number of years. Earlier this year the draft Insolvency Law Reform Bill was released as part of these amendments. Public submissions were called for, and Meltzer Mason Heath prepared a submission which Jeff presented to the Commerce Select Committee on 25 May.

The focus of the submission made to the Select Committee is that company directors should be personally liable for the payment of PAYE and GST if their company goes into liquidation or receivership, or on the issue of a 10 day notice by IRD.

The Commerce Select Committee is chaired by National's Katherine Rich and comprises nine MP's. All members of the Committee had a good grasp of the issues and each asked questions relating to the submission.

The main thrust of the submission relates to director's personal liability for PAYE and GST and the limitation of IRD's preferential status in an insolvency administration.

Under the Companies Act 1993 directors are not liable personally for PAYE or GST, nor interest or penalties on unpaid sums. (There is provision for personal liability for PAYE contained in the Income Tax Act but this was seldom used by the IRD. However, we are noticing that personal liability is being imposed more frequently.)

Companies have become de facto tax collectors. However the system is poor for ensuring PAYE and GST taxes are paid in a timely manner. IRD is slow to follow up unpaid sums but still ranks as a preferential creditor for those sums in a liquidation or receivership.

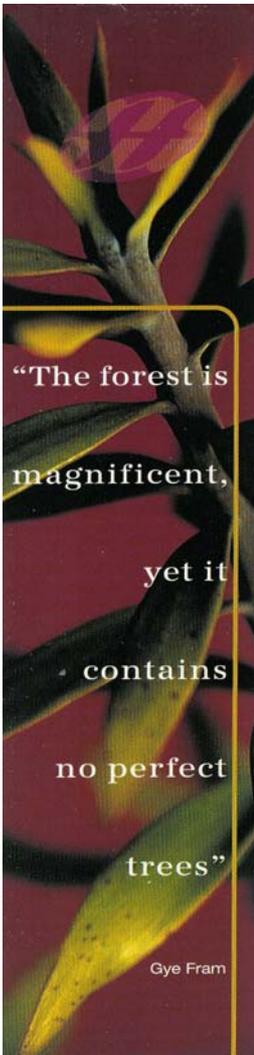
It is too easy for directors to use unpaid PAYE and GST as cash flow funding for their business.

Parliament has deemed that companies be the collector of PAYE and GST taxes. Directors are responsible for ensuring that the company(ies) of which they are directors adhere to statute and regulatory requirements. Any breach of this responsibility should be a personal liability of the director. It is our submission that a new clause should be drafted accordingly.

It is our further submission that there be a change to subclause (5) of the new Schedule 7 to the Companies Act 1993 (see section 485 of the Insolvency Law Reform Bill) limiting IRD's preferential status to two periods outstanding with the balance of unpaid PAYE and GST ranking equally with unsecured creditors.

Our third and final submission relates to a director's right of subrogation. A new clause should be drafted that any payments made by directors under their personal guarantee are deemed to rank after the claims of unsecured creditors.

We will continue to comment upon aspects of the Bill in future newsletters.



For further information contact:

Meltzer Mason Heath
Level 5
345 Queen Street
PO Box 6302
Wellesley Street
AUCKLAND

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

Email: info@mmh.co.nz

www.mmh.co.nz

Personal Property Securities—Basics

Arron Heath

The Personal Property Securities Act (“PPSA”) has now been in force for some years. We are still encountering suppliers who seem unaware of the Act’s provisions and the registration regime. The general principles underlying the PPSA are:

The PPSA deals with the use of property (“collateral”) to secure the performance of an obligation. A security agreement is signed by the person giving the security (“the debtor”) giving a security interest. The obligation is thus related to the collateral (“attachment”).

The person with the security then perfects it by registering a description of the collateral (“financing statement”) on the Personal Property Securities Register (“PPSR”). The PPSR is only accessible through the internet, at www.ppsr.govt.nz.

Perfection takes precedence over non-perfection. In the case of perfected interests over the same collateral the first to register takes precedence.

The IRD and its Powers Against Directors

Karen Mason and Mike Lamacraft

The IRD has always had the ability to pursue directors for unpaid PAYE and, in some circumstances, GST but in the past this power has only been exercised on few occasions. Since the beginning of 2006 we have noticed a more proactive approach by the IRD in considering directors’ liability upon the insolvency of a company. We also note that the IRD are issuing warning letters to directors of companies not in liquidation where PAYE or GST payments are overdue. Where a director is advised that the IRD is appointing a case officer to deal with their company then this should be a wake up call to directors.

We are also aware that, in some instances, the IRD are having directors sign personal guarantees for the debt owed.

Another action that the IRD have been using this year is the Section 17 (of the Income Tax Act) notice, whereby they can demand the records of the company from the Liquidators. They have used this action on both solvent and insolvent liquidations. We sought Court directions on the application of Section 17 as against Section 256 of the Companies Act, and the Court ruled that if the purpose was bona fide in each case, then Section 17 would trump Section 256.

In practical terms, this means that the IRD have the ability to remove all records of the company to gain information for an action against the director, should there be one.

Our recommendation is that where possible, you do not allow your clients to let PAYE and GST debts escalate to an unmanageable sum, but to look at a scheme with the IRD earlier, or if it simply can’t be repaid, liquidate the company sooner rather than later. These early actions will help in mitigating the personal exposure of your clients.

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, Rachel Mason & Trish McLennan.

