

# Meltzer Mason Heath

## IN SOLV

### UPDATE + NEWS + REVIEW

May 2008

*"A smile is a little curve that sets a lot of things straight"*

#### Section 241AA Companies Act 1993 Shareholders' Ability to Appoint a Liquidator Restricted

Mike Lamacraft

No apologies for repeating the advice given in our November 2007 Newsletter.

Shareholders lose the ability to appoint a liquidator ten working days after service on the company by the petitioning creditor of the application to place the company into liquidation. Before expiry of the ten days, shareholders retain the ability to appoint their own liquidator; however, the appointment can be reviewed by the Court upon the application of the petitioning creditor.

Clients receiving statutory demands need to ensure they are dealt with promptly as an unsatisfied/expired statutory demand is evidence of "inability to pay debts" and may lead to liquidation proceedings being issued.

It will therefore be important for shareholders and directors of companies who have been served with either a statutory demand or liquidation proceedings to seek professional advice immediately.

#### Section 387 Companies Act 1993 Service of Documents on Companies in Legal Proceedings

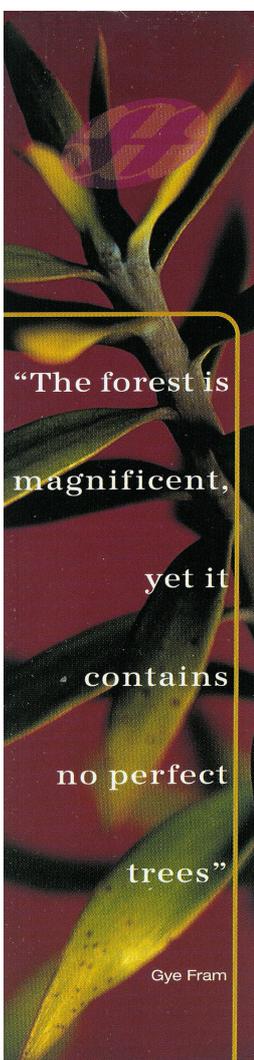
Mike Lamacraft

With reference to the above advice regarding service of an application to place a company into liquidation, directors and shareholders should be mindful that the petitioner must serve proceedings as required by statute.

S387 sets out the only methods by which a document in legal proceedings may be served on a company in New Zealand. These methods are:

- a) By delivery to a person named as a director of the company on the New Zealand register; or
- b) By delivery to an employee of the company at the company's head office or principal place of business; or
- c) By leaving it at the company's registered office or address for service; or
- d) By serving it in accordance with any directions as to service given by the court having jurisdiction in the proceedings; or
- e) In accordance with an agreement made with the company; or
- f) By serving it at an address for service given in accordance with the rules of the court having jurisdiction in the proceedings or by such means as a solicitor has, in accordance with those rules, stated that the solicitor will accept service.

Any service effected by some other means will be invalid and of no effect, for example to a Chartered Accountant's office where that is not the registered office or address for service.



"The forest is  
magnificent,  
yet it  
contains  
no perfect  
trees"

Gye Fram

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## Companies Act 1993 Amendments

Arron Heath

### *Voidable Transactions—Single Transaction/Running Account*

The Companies Amendment Act 2006 introduced a new voidable transaction section—292(4B) Single Transaction. The section provides that, in certain cases, a series of transactions must be treated as a single transaction.

The common example is a running account maintained between supplier and customer, where from time to time the supplier supplies goods and the customer makes payments on account.

The effect of the new section is that while one of the payments taken in isolation may meet the test of voidability, it is possible that the series of transactions of which it is a part do not, because overall the supplier may not receive more than the supplier would otherwise have received in the customer's liquidation.

Interestingly, the new section refers to a transaction being “an integral part of a continuing business relationship (for example a running account)...”. Continuing business relationship is a term borrowed from the Australian legislation and replaces the ordinary course of business exception.

#### How Does This Work?

The test focuses on the business relationship between supplier and customer over a certain period of time. Taking the difference between the opening balance at the start of the relationship and the closing balance at the end comprises the “single transaction”. If there is a decrease in indebtedness (and the other voidable transaction criteria are satisfied) it is possible that the transaction would be voidable by a liquidator. The voidable amount is the amount by which the indebtedness has been reduced over the period.

As the new legislation has adopted an Australian concept, Australian case law may assist in applying the new section's provisions. It seems clear from the Australian cases that if the purpose of the payment by the customer is to induce the supplier to provide further goods or services as well as to discharge an existing indebtedness, the payment will not be a preference unless the payment exceeds the value of the goods or services acquired. The Courts will look at the ultimate effect of the transaction.

But, in the real world, how will the following be determined:

- What constitutes a “continuing business relationship”?
- When does the relationship begin and end?
- Does knowledge of insolvency affect the position?
- Can the liquidator select the opening date for the “single transaction” period?

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## Assetless Companies and Funding For Liquidators

Arron Heath

Jeff Meltzer, Lloyd Hayward and Arron Heath are acting as Liquidators of 21 Blue Chip associated companies, including Blue Chip New Zealand Limited. The liquidations are mainly assetless and have highlighted the issues involved where statutory management (and the indemnity provided by central government to statutory managers) is not appropriate and there are no funding avenues, with the exception of the Liquidation Surplus Account, available to private sector liquidators to undertake investigations to pursue recovery actions for the benefit of creditors.

Money held in the Liquidation Surplus Account is to be used primarily for payment of the costs of proceedings in a liquidation after the commencement of the liquidation, legal or other expert advice or the costs of any expert witness. Although the Law Commission has previously (1989) recommended the establishment of an assetless company fund to deal with the problems of companies left with little or no assets, to date that recommendation has not been accepted.

Under such circumstances and where it is not possible or realistic for creditors to provide funding, it is not surprising that recoveries for the benefit of creditors can be minimal.

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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, Zané Gouws & Trish McLennan.**

