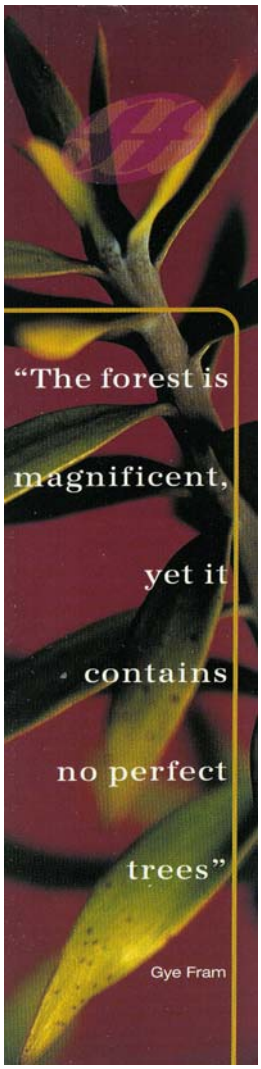
# Meltzer Mason Heath

# IN SOLV

## UPDATE + NEWS + REVIEW

December 2005


*It is hard to believe that 2005 is drawing to an end and Christmas is upon us again. It has been an interesting year, influenced predominantly by the election, talk of tax cuts, the general downturn in the economy and reduced confidence in the market place—particularly retail. We are anticipating 2006 to be a challenge for a lot of small businesses.*

*As many of you are aware, Rachel has assisted and managed many liquidations over her six years at Meltzer Mason Heath. We are now pleased to advise that Rachel is taking on appointments as Liquidator for many of the solvent liquidations that she now undertakes.*

## Personal Property Securities Register

*Mike Lamacraft*

Jeff and Arron were recently appointed Receivers of a flooring retail company. The issue of registration of security interests on the Personal Property Securities Register was again a hot topic.

Quite simply those suppliers who had registered property were able to retrieve their goods held by the company at the time of appointment. Suppliers with no registration missed out.

This same case highlighted the benefit of using your credit card to pay for goods where delivery is not at the time of payment. Customers who had paid by credit card but who did not receive their goods due to the receivership were in many cases able to request the credit card company to reverse the charges. Customers who paid by cash just rank as unsecured creditors with little or no prospect of recovery.

## Tax-Free Distributions / "Short Form Liquidations"

*Karen Mason*

This very interesting topic is back in the arena with a public ruling made by the IRD (BR Pub 05/14). This ruling has divided the opinions of professionals and many are not committing to an opinion at all.

As Insolvency Specialists, we struggle to define "short form liquidations" as they do not form part of insolvency law. BR Pub 05/14 is a ruling only and not law, and has yet to be proven.

In short, Section OB1 of the Income Tax Act suggests (in terms of the ruling) the possibility that distributions can be made tax free in the course of a Section 318(1)(d) Companies Act 1993 removal process.

We do not agree with this situation, particularly where there are large capital distributions. Our advice has always been and will continue to be cautious, and we consider it better to pay no tax at all in a formal liquidation situation, rather than risk having a decision made subsequently against your client and then tax charged.

Of course, a company struck off is more easily reinstated by a creditor than one that has been liquidated.

We will endeavour in the New Year to seek further clarification on this topic to alleviate some of the confusion for all of us.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## Personal Property Securities

*Arron Heath*

We continue to receive queries and comments on the Personal Property Securities Act and the accompanying Register.

Section 40(3) of the Act extends the concept of attachment to include the delivery of goods pursuant to a reservation of title agreement, commercial consignment or lease. Obviously, the creditors under such transactions would be reluctant to supply without some special protection (because their rights would be downgraded to a security interest from ownership).

The Act includes a provision to protect such creditors and sections 73 to 77 establish a super-priority for the special class of security interests called purchase money security interests (PMSI's). The general rule is that holders of a perfected PMSI will be promoted over all other security interests.

Section 75 says that a supplier has 10 working days from the date of attachment of its security interest in which to perfect PMSI's for inventory, intangibles and any other form of collateral. A supplier wishing to have a PMSI in inventory must perfect by filing before supplying (the Act saying that the interest must be perfected no later than the purchaser obtaining possession of the collateral).

For other types of collateral, excluding inventory, section 73 says that, as long as the holder of a PMSI perfects its security within 10 working days of the purchaser obtaining possession of the collateral, that holder will have better priority than any non-PMSI in that collateral.

We have also received questions about the length of time a financing statement stays registered. Financing statements do not stay registered forever. When registering financing statements suppliers are given the option of stating how long the registration is for. But, section 154 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.

So, how does a secured creditor maintain its priority? This is accomplished by the supplier registering a financing change statement. This must be done while the first registration is still effective (section 154(1)). This renewed period is for a further five years or until the nominated period in the financing statement expires. Further renewals can be filed as each five year period expires.

The Act does not include any ability to extend the time for renewal. A secured party who does not renew before expiry of the applicable term would have to re-file a financing statement. This would result in the supplier losing the initial filing date as their priority date and having the date of the later refiling as the priority date. The potential consequences of non-renewal are so disastrous for suppliers that they will have to closely monitor their security positions and register financing change statements as the initial registration expiry date draws near.

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## Company v Personal Funds

*Rachel Mason*

During the course of many solvent liquidations, we often hear shareholders talking about "my money" in relation to company funds, and the apparent treatment of company funds as an extension of personal funds. It is important for shareholders to remember that the company is a separate entity from themselves and that capital and revenue reserves belong to the company—a shareholder only becomes entitled to those funds upon the declaration of a pre-liquidation, taxable, dividend, or upon distribution in a liquidation. As always, tax-free funds in a solvent liquidation can be distributed almost immediately upon the appointment of a liquidator.

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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, Rachel Mason & Trish McLennan.**

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.