Meltzer Mason Heath

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UPDATE + NEWS + REVIEW

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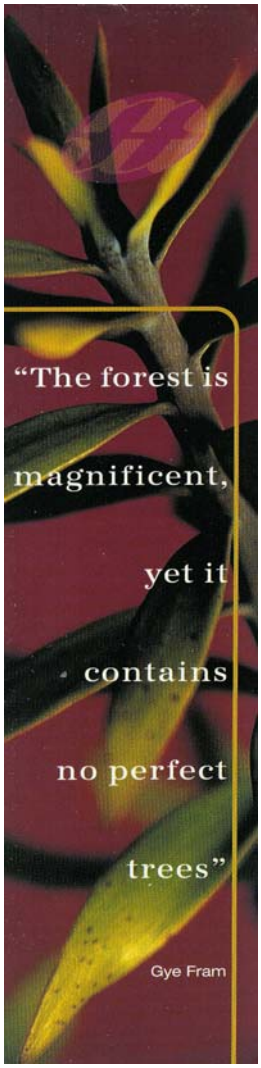

We wish you all a Happy New Year and hope that you had a good break and have taken advantage of the little bit of summer so far!

It looks like we could be in for an interesting year in the "liquidations world" with the introduction of the insolvency law reforms being operational this year. We will be holding seminars and giving regular updates so that you and your clients are aware of the changes to the legislation.

Insolvency Law Reform

Arron Heath

The insolvency law reforms were passed by Parliament on 26 October 2006. It is expected that the legislation will be operational mid 2007.

The reforms encompassed changes to bankruptcy law, and the Companies Act 1993 liquidation provisions. Also, New Zealand has now adopted the model law on cross-border insolvency from the United Nations Commission in International Trade Law.

The Insolvency Act 2006 replaces the 1967 Act relating to personal bankruptcy, introduces simplified procedures and modernises the law. A notable new feature of the legislation is the "no asset procedure". To qualify for this procedure the debtor must have debts between $1,000 to $40,000 and must not have been bankrupt previously or subject to the procedure. When the debtor is subject to the procedure there is a moratorium on his/her debts and in most cases the debtor will be discharged at the end of 12 months (with his/her debts being cancelled) rather than the 3 year bankruptcy period. The procedure is basically a one-off reprieve for the small-time debtor who has got out of his or her financial depth.

The Companies Amendment Act 2006 contains the new corporate insolvency legislation. The main new feature is the introduction of a Voluntary Administration ("VA") regime based closely on the Australian model.

VA enables company directors, a secured creditor or the Court (upon the application of a creditor or liquidator) to appoint an administrator if the company is insolvent or likely to become insolvent. There is a moratorium in place during the administration with creditors being unable to enforce remedies against the company for non-payment. Secured creditors retain some restricted enforcement rights including the ability to appoint a receiver, but the Court may limit the receiver's powers.

Generally, the aim of the VA legislation is to prevent secured creditors from taking recovery action during the development of a rehabilitation plan for an economically viable company with the intent that the creditors of a failed company will receive a more measured distribution of assets because secured creditors are prevented from competing to place the company into receivership.

The VA regime has seen widespread use in Australia but we believe this is partially due to the fact that, unlike in New Zealand, shareholders in Australia are unable to place a company into liquidation without first convening a meeting of creditors.

It remains to be seen how successful the VA regime will prove to be in New Zealand. We believe that the matter of funding for the administration may prove a difficulty and the fact that the IRD has retained its statutory preference (for PAYE and GST) may handicap successful company arrangements. We note that the majority of Australian administrations have resulted in liquidations.

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Some Other Corporate Insolvency Changes

Arron Heath

Restriction on Appointment of Liquidator by Shareholders

A new section has been inserted in the Companies Act 1993 which restricts the ability of a company to go into voluntary liquidation once an application has been made to the Court for the appointment of a liquidator. The new section provides that voluntary liquidation (by the shareholders) is not an option after an application to the Court has been filed unless a liquidator is appointed by the shareholders within 10 working days of the application being served on the company. The petitioning creditor will be able to apply to the Court to review the appointment of the voluntary liquidator.

Shareholders therefore will be unable to wait until immediately prior to the Court hearing date before appointing their own liquidator. We recommend that directors or shareholders of companies with expired statutory demands that may well form the basis of an application to the Court for appointment of a liquidator, refer the matter as soon as possible to their accountant for advice.

Phoenix Companies

A phoenix company is a company that is known by the name of a company that has been placed in liquidation ("the failed company"). The new Companies Act sections place a restraint on the director of a failed company (there are no restrictions on a phoenix company per se). That person must not be a director (nor take part in the management etc) of a company that is a phoenix company in relation to the failed company for 5 years after the liquidation of the failed company.

Although the sections provide exceptions, breach of the restriction could result in:

- The director being guilty of a criminal offence, with a maximum penalty of 5 years imprisonment or a fine of $200,000;
- The director being personally liable for all or part of the debts of the phoenix company.

A Cautionary Note for Directors

Mike Lamacraft

We have recently been involved with two insolvencies where directors have been banned. Key reasons for the Registrar's determination in these cases were:

1. Retention of Crown funds (i.e. a large debt owed to the IRD).
2. Excessive drawings.
3. Reckless trading (i.e. continuing to trade when the director ought to have known the company could not meet its obligations.)

The message is that directors are responsible for the proper management of a company.

We would also note that the IRD will itself report directors to the National Enforcement Unit in appropriate cases.

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, Robina Bhola & Trish McLennan.

This newsletter 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.