

NEWSLETTER

Legal Up-Date

November 2006

THE INSOLVENCY TRUSTEE'S SHARP AND POWERFUL CLAW

Recent amendments to bankruptcy legislation ensure that the Trustee of a bankrupt person's estate is better able to recover property for the benefit of creditors.

Recovery from Third Parties

A Trustee is now able to recover loss to the bankrupt estate resulting from money owing to the bankrupt being diverted away to a third party during the period leading up to bankruptcy. The result is that, if, with the intention of defeating creditors, you sell your family home but direct the purchaser to pay the proceeds of sale to a third party, the Trustee can now take action against that third party to recover the sale proceeds paid to that third party **UNLESS** the third party provided market value consideration (in money or other terms) in respect of the money they received **AND** the third party can establish that they had no knowledge of your intention to defeat creditors. (S121A of the *Bankruptcy Act 1966* (the "Act")).

Claw-Back Period

The time period in which a Trustee can recover 'undervalued transactions' (S121 of the Act) in cases involving the transfer of property to a related entity for less than market value, has been extended from two years to four years prior to the commencement of bankruptcy. A 'related entity' includes parents, children, relatives, trustees and beneficiaries of trusts as well as business partners related to the bankrupt or his/her spouse.

Rebuttable Presumption

In both the case of undervalued transactions (S120) and transfers to defeat creditors (S121), there is now a rebuttable presumption of insolvency if at the time of insolvency the transferor of property had not kept such books, accounts and records as are "usual and proper in relation to the business carried on by the transferor and as sufficiently disclose the transferor's business transactions and financial position" **OR** if the transferor has kept such records but destroyed them.

Less Protection afforded by S121(4)

In its prior form, S121(4) protected an individual to whom a bankrupt's property had been transferred if the individual could establish that they did not know why the transfer was made. The amendment ensures that the protection is not available unless the individual to whom property was transferred "could not reasonably have inferred" that the transferor's main purpose was to defeat creditors.

Recovery of Property from Spouse (or other Natural Person)

The provisions contained in Division 4 of Part VI of the Act are perhaps the most significant of the reforms in arming the Trustee with a weapon to be used in recovering property of a bankrupt from a natural person (such as a spouse) in circumstances where:

- during the examinable period (referring to the period in which an examination into a bankrupt's affairs can be conducted and ranging from two years to five years prior to bankruptcy) the person acquired an estate in property as a direct or indirect result of financial contributions made by the bankrupt during that period; and
- the bankrupt used or derived (whether directly or indirectly) a benefit from the property during the examinable period; and
- the person still holds an estate in the property.

By way of example, as a result of this amendment, where the family home is in the bankrupt spouse's name alone but the bankrupt is living in the home and paying all outgoings in the four years prior to bankruptcy, the Trustee may be able to claim the family home or the bankrupt's "equity" in the family house.

Conclusion

The amendments mean that it will be difficult to implement strategies to protect property in the event of a person's insolvency unless the strategies have been carefully put into effect at a point in time well before bankruptcy is even threatened.

TRADE MARKS – PROTECTING YOUR BUSINESS

Why a Trade Mark?

Trade Marks are symbols associated with your business which distinguish your business from your competitors. They can include a word, letter, phrase, number, sound, scent, colour, brand, heading, the shape of an object, an aspect of packaging or any combination of these. Trade Marks indicate a distinct quality or reputation associated with goods or services and can be valuable intangible assets particularly given the importance of distinct and consistent marketing. The real purposes of a Trade Mark is to create an association in the minds of consumers between the product or service on the one hand, and its source or manufacturer on the other, even though the name of the source might not be known.

Searching the Trade Mark Register

The brand you select must not be likely to deceive or cause confusion in a consumer's mind. It is therefore imperative that a search of the Trade Mark Register and of the market place be conducted before a decision is made to proceed with any brand development. Similarly, if you are planning to use the Trade Mark on the Internet or overseas, you should consider searching the relevant overseas market.

Registration

Registration of a Trade Mark is not compulsory but is highly advisable because registration confers the following benefits:

- grants the owner a monopoly of rights to exclusively use, license or sell the Trade Mark within Australia for the relevant goods and services;
- helps to protect the reputation and goodwill of businesses developed;
- as an intangible commercial asset it can provide companies with financial leverage;
- can stop other traders, and deter new business competitors from using the same or a similar Trade Mark in relation to the relevant goods and services for which it is registered;
- can last indefinitely (as long as it continues to be used and is renewed every 10 years);
- can create a key marketing tool as the public will identify distinct quality and image for the goods and services;
- confers legal rights on the owner with respect to the use of the Trade Mark where, by contrast, mere registration of a business name, company name or domain name does not, in itself, confer legal rights.

Method of Registration

In order to register a Trade Mark, you must lodge your application with the Trade Marks Office at IP Australia. The application must:

1. include a representation (a copy) of the Trade Mark; and
2. specify the class of goods and services for which the Mark is to be registered.

If your Trade Mark is not registered (or while your application is being processed), you can place "TM" beside the name until registration is granted. This claims your use of the Mark. After registration, you can use the symbol "®" to indicate that you have the exclusive right to use the Trade Mark. There is considerable advantage to be gained in registering the Trade Mark. Although there are avenues to protect goodwill (such as Section 52 of the Trade Practices Act and the common law action for passing off) these can only achieve a result through litigation which is always risky and costly.

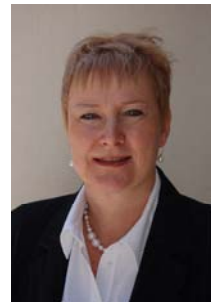
Matters to be cautious of:

1. Registration of your Trade Mark can be lost if it is not used in good faith for a continuous period of three years or if it becomes descriptive or generic (hence the need to choose something distinctive) or if the renewal fees are not paid every 10 years or if registration is cancelled.

2. To be registrable, your Trade Mark must be capable of distinguishing your goods and services from those of any other trader.
3. Common surnames on their own will be very difficult to register.
4. Descriptive words and phrases on their own will be very difficult to register (for example "Glace" to describe ice cream).
5. Geographical references or place names on their own will be very difficult to register.
6. Only registration of a Trade Mark can give you the exclusive right to use the Marks for goods and services for which it is registered.
7. If an unauthorised person or company uses a registered Trade Mark on goods and services identical or similar to those covered by a Trade Mark registration, then the registered Trade Mark owner will be entitled to sue the unauthorised user for infringing the Trade Mark.
8. A Trade Mark registration alone does not grant the right to use the Trade Mark as a business name. Australian State laws cover the compulsory registration of a business name.

INTRODUCING GISELA WEISLEHNER:

We are pleased to announce that Gisela Weislehner joined the firm in September as a solicitor with qualifications both in Australia and in Germany. Gisela worked as in-house counsel for a leading German health insurance company in Berlin from 1986 to 1989 and then conducted her own legal practice in Düsseldorf, Germany for some 10 years prior to migrating to Australia in 2002.



Gisela's work at Schweizer Kobras principally concerns commercial, contract and estate matters and migration though she also specialises in German law and private international law (conflict of laws).

We are delighted to welcome Gisela on board. Please do not hesitate to contact her if you have any queries concerning commercial, contract or estate matters, German law or private international law.

Languages: English and German.

YOUR FEEDBACK

If you have any comments about this newsletter, suggestions for improvement or would like to see any particular areas of law which interests you covered, please drop us a line at:

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