PITCHER PARTNERS
ACCOUNTANTS AUDITORS & ADVISORS

Level 6
161 Collins Street
Melbourne
Victoria 3000

Postal Address:
GPO Box 5193 AA
Melbourne Vic 3001
Australia

Tel: 03 9289 9999
Fax: 03 9289 9977

DX Address:
DX 501 Melbourne

www.pitcher.com.au
partners@pitcher.com.au

AN INDEPENDENT MEMBER OF BAKER TILLY
INTERNATIONAL - OFFICES THROUGHOUT THE WORLD

D B RANKIN
G E WALSH
T J BENFOLD
C J TATTERSON
P T RILEY
M W PRINGLE
G M RAMBALDI
D A KNOWLES
F J ZAHRA
M C HAY
S SCHONBERG
S DAHN
A R YEO

T A JONAS
S P CATLIN
G E BLASHKI
A R FITZPATRICK
I D STEWART
R RIGONI
R CUMMINGS
D A THOMSON
M J LANGHAMMER
J BRAZZALE
V A ARNETT
M D NORTHEAST
P A JOSE

Ref: ARY:ak

16 June 2004

Submission No: 102

Mrs Bronwyn Bishop
Chairperson
House of Representatives Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Madam

SUBMISSION ON THE EXPOSURE DRAFT LEGISLATION AND EXPLANATORY MEMORANDUM FOR THE BANKRUPTCY LEGISLATION AMENDMENT (ANTI-AVOIDANCE AND OTHER MEASURES) BILL 2004

We have pleasure in providing the following submission in relation to the operation of the Bankruptcy Act, and particularly the specific matters raised in the Bankruptcy Legislation Amendment (Anti-avoidance and Other Measures) Bill 2004 ("BLAAOM").

A combination of all of the matters outlined in our submission would represent a far more targeted and equitable approach to remedying the problems identified.

Both authors would be pleased to provide any assistance required in explaining issues raised in this submission or in answering questions from the Committee. Both authors would also be pleased to accept any invitations extended to them to assist the Committee in its deliberations by attending any hearings convened by the Committee.

Yours faithfully
PITCHER PARTNERS

A R YEO
Partner

G M RAMBALDI
Partner

I.54451.1

TABLE OF CONTENTS

1. ABOUT PITCHER PARTNERS

1.1 The firm

Pitcher Partners is an accounting firm with a long standing commitment to providing personal service and quality advice to privately owned middle market businesses. Pitcher Partners is an affiliation of independent accounting practices operating from Melbourne, Sydney, Brisbane and Perth. The Melbourne office consists of 26 partners and approximately 350 staff, making it the fifth largest accounting practice in Melbourne.

1.2 Insolvency services

The Melbourne and Perth offices of Pitcher Partners each contain divisions of approximately 25 to 30 insolvency professionals. We therefore represent significant insolvency practices in Melbourne and Perth. Both personal and corporate insolvency services are provided.

1.3 Position of conflict

- As Trustees in Bankruptcy we are the practitioners who the government is trying to assist in accessing assets in bankrupt estates through the BLAAOM. We are therefore also the practitioners who are likely to benefit from the Bill's introduction. Indeed, there would be a significant financial benefit to most Trustees in Bankruptcy (and Insolvency Lawyers through increased litigation) if this Bill was to be implemented without amendment through the additional "assets" that might be recoverable and divisible amongst the creditors of an individuals bankrupt estate. The government will benefit from the fact that an 8% realisation charge is levied upon gross realisations in a bankrupt estate.
- As a professional services firm however Pitcher Partners is also the pre-eminent accounting firm in Australia catering for the middle market. That market comprises predominantly small and medium sized business owners. As the government continues to acknowledge, these businesses represent the "economic backbone" of the Australian economy. The proposed amendments threaten our clients and their businesses and therefore the country's economic prosperity.
- Finally, as a series of independent accounting partnerships, Pitcher Partners operate in the same litigious and potentially risky environment that our clients do. Although the authors of this submission are partners of Pitcher Partners we are also Trustees in Bankruptcy. The authors will therefore be the persons who would ultimately wield these new legislative weapons. We, the authors, acknowledge that given the nature of our work it is also possible that

these provisions could be used against us at some stage in the event of catastrophe and eventual personal insolvency.

Whilst we have been open about our position of conflict (both positive and negative) we do not believe that this should in any way detract from our submissions. Indeed, we believe that the nature of the work which we perform, both in a pure insolvency context, and on behalf of our clients in a non insolvency context, puts us in an ideal position to comment on the implications of the proposed amendments.

2. ABOUT THE WRITERS OF THE SUBMISSION

2.1 Gess Rambaldi

Gess Rambaldi has in excess of 20 years experience in the insolvency industry, and heads the Business Recovery and Insolvency Services division of Pitcher Partners in Melbourne. Gess is also:

- A Registered Liquidator
- An Official Liquidator of the Supreme Court of Victoria
- A Registered Trustee in Bankruptcy
- An Affiliate member of the Institute of Chartered Accountants in Australia
- A Fellow of CPA Australia
- A Member of the Insolvency Practitioners Association of Australia

2.2 Andrew Yeo

Andrew is a partner in the Melbourne Pitcher Partners partnership. Other key features include:

- Approximately 13 years experience in the insolvency industry, including significant exposure to personal insolvency and the Bankruptcy Act
- A Registered Liquidator
- A Registered Trustee in Bankruptcy
- Chairman, Public Practice Committee of CPA Australia
- An Affiliate member of the Institute of Chartered Accountants in Australia
- A Fellow of CPA Australia
- Chairman, Insolvency & Reconstruction discussion group for CPA Australia

3. EXECUTIVE SUMMARY

- The vast majority of all personal insolvencies are not planned or an abuse of the system. The vast majority of bankruptcies occur because of genuine socio-economic circumstances and a lack of sufficient business acumen. Many insolvencies also occur through no fault of the party involved. The vast majority of "innocent" bankrupts and their families will be unnecessarily and inappropriately penalised.
- In the majority of cases the present Bankruptcy Legislation is sufficient in providing weapons for Trustees in Bankruptcy to recover assets for creditors of the estate.
- We acknowledge the need to stamp out at an early stage, "rorts" occurring in relation to Financial Agreements under the Family Law Act and welcome the proposed changes in this area.
- We recognise the need for the Bankruptcy Act to be able, in circumstances where tax and other liabilities are incurred without any reasonable prospect of payment, to provide Trustees in Bankruptcy with weapons to effectively and at minimal expense recover assets disposed of by a bankrupt prior to bankruptcy. This will include assets held by spouses or other related entities.
- We contend that most professionals and business owners operate in a litigious environment and it is not possible for them to remove all risks no matter how much of a "model citizen" they may be.
- The proposed amendments to the Bankruptcy Act go far beyond what is required to address the problems previously identified by the Committee.
- The proposed amendments to the Act, if incorporated in their present form and in their entirety, would act as a significant disincentive to a huge number of Australian business owners and professionals from continuing in business. The proposed amendments would also have the effect of discouraging younger professionals or business people from assuming the risk that follows from being a partner in professional practice or business owner in small business. The proposed amendments would have a dramatic negative effect on the Australian economy.
- The Act should not retrospectively and without time limit, be used to recover assets held by a spouse or other related entity where such transfers have occurred within a reasonable period prior to bankruptcy and at a time when the debtor was solvent and had no reasonable expectation of significant liability.
- The amendments should be designed to catch circumstances where debtors transfer assets at a time of insolvency or with a significant threat of imminent litigation which would reasonably be expected to result in insolvency, or at a

time when they have failed to lodge relevant tax returns and have a reasonable expectation of future liabilities.

- The amendments will create financial and emotional insecurity to thousands of Australian families whose "breadwinners" had engaged in prudent and legal asset protection strategies.
- The amendments will penalise those Australian families who have incurred tax imposts (such as Capital Gains Tax or Stamp Duty on asset transfers) or elected not to avail themselves of tax relief in an effort to engage in legal asset protection strategies.

4. BREADTH OF THIS SUBMISSION

The Bankruptcy Legislation Amendment (Anti-avoidance and Other Measures) Bill 2004 contains five separate schedules.

4.1 Interaction of the Family Law Act and the Bankruptcy Act

We agree that there presently exists an ability to use the provisions of the Family Law Act to overcome the legitimate purposes of the Bankruptcy Act.

We welcome the majority of the changes set out in Schedules 2, 4 and 5 of the Exposure Draft. We can however caution the proposal to grant originating jurisdiction in bankruptcy matters to the Family Court.

4.2 Amendments relating to income contributions

We do not make any submissions in relation to the proposed amendments outlined in Schedule 3 of the Exposure Draft.

4.3 Our submission

The balance of this submission relates to the proposed amendments set out Schedule 1 of the exposure draft.

5. GOVERNMENT JUSTIFICATION FOR PROPOSED AMENDMENTS

From various media releases and other public statements made by the Attorney General, the Honourable Philip Ruddock, it would appear that the proposed amendments have their genesis in a desire to stamp out the practice of high income individuals using bankruptcy laws to deliberately and in a premeditated fashion avoid their taxation and other obligations. The most widely reported incidents of such conduct concerns a small group of predominantly New South Wales barristers. It is our experience however that such conduct is not solely limited to barristers.

We consider however that the proposed amendments go significantly further than is necessary to counteract such actions and unnecessarily prejudice the previously stable property rights of hundreds of thousands of Australians.

On 14 May 2004, in announcing the proposed amendments, the Attorney General made certain statements, explaining the need for the proposed amendments, and justifying their implementation. We wish to deal with each of these separately. Some of these points are also dealt with in further detail later in our submission.

5.1 Balance between debtor and creditor rights

The Attorney General identified the need to strike a balance between the rights of debtors and creditors. In explaining that balance he identified the need to provide sanctions to deter those who flout bankruptcy laws, and to remove any perception of bankruptcy being an "easy way out".

We agree with all of these propositions. We agree that for a very small minority of individuals, the Bankruptcy Act represents a means of systematically and intentionally flouting creditor claims. We agree that bankruptcy laws should continue to be reinforced and strengthened to crack down on such actions. Indeed, the Bankruptcy Act presently contains various provisions, including criminal consequences, that are already available to deter such actions.

While the proposed amendments set out in BLAAOM would further strengthen the Bankruptcy Act in this regard, and act as a significant further deterrent to some, we consider that the negative consequences outweigh the positive. Further, the same benefits can be achieved in a more effective manner, without using a "sledgehammmer to crack a walnut".

5.2 The use of professional indemnity insurance

The Attorney General advocated that professional indemnity insurance was the way in which professionals could and should avoid possible liability and therefore bankruptcy.

With all due respect, we consider such a proposition to be simplistic. Our reasons are contained below:

- Some professionals (particularly in smaller professional practices), no matter what premium they are prepared to pay, will not be able to purchase sufficient professional indemnity insurance to give them adequate cover.

  In the public accounting profession for instance it is possible for small administrative errors by junior staff members (such as failing to tick relevant family trust elections) to result in tens of millions of

dollars of potential liability. For many accounting practices such liabilities are in excess of any professional indemnity insurance policy that they could ever purchase, let alone afford.

- Insurance premium costs will increase because of the inevitable increase in demand for cover.
- Notwithstanding the limit of any cover, professional indemnity policies do not provide an absolute (or even close to absolute) level of cover.

  It is common knowledge within the accounting profession for example, that we are paying a lot more for premiums and getting a lot less coverage.

  Exclusion clauses are often significant and have become broader over the last two years following the professional indemnity insurance crisis.

- It is our experience that it is not unusual for insurers to allege a lack of disclosure on the part of the insured.

  In some cases there is little or no justification for such allegations. In others, there is, but this only goes to highlight the precarious liability minefield, and the tricky rules and systems within which many professionals and small business owners operate.

  One slip by them (or their partners) and they may find themselves bankrupt.

- Insurance companies do occasionally themselves become insolvent and incapable of meeting liability claims. The recent example of HIH is illustrative.
- Should the amendments be accepted it would be expected that premiums would become even more unaffordable because of the increase in demand by practitioners, and because of the expected increase in litigation caused by the knowledge that claims against such individuals could result in bankruptcy and therefore access to an accumulation of wealth not currently available in bankruptcy.

5.3 Stifling of risk

The Attorney General indicated that he recognised the argument that the proposed amendments may be seen as stifling risk taking, but stated this was no reason for "passing risk" on to creditors.

Our comments in relation to the potential damage to the economy that could be caused by these provisions are set out extensively in this submission. We consider that the detrimental effect outweighs any other potential benefit that will be gained.

Moreover, the proposed amendments have the effect of adjusting property rights of third parties such as spouses to force them to indemnify the actions of the debtor. In many cases the spouse or other third party have had no involvement in any of the debtor's business activities. It is our view that this creates a far greater mischief than the problems that the BLAAOM seeks to fix.

6. ECONOMIC CONCERNS WITH PROPOSED LEGISLATION

We have identified the following economic concerns in relation to the proposed legislation:

6.1 Loss of business owners and professionals

If the Bankruptcy Act does not allow business owners or professionals a reasonable degree of comfort in protecting themselves from potential liabilities (as distinct from transferring assets at a time of insolvency or imminent litigation leading to insolvency), then there is a real risk of losing large numbers of these people who would not be willing to expose the entire assets of their family.

Business owners and professionals alike today operate in a very litigious and risky environment. Examples include medical negligence claims and director's duties under the Corporations Act, Occupational Health and Safety legislation, and the Trade Practices Act. In respect of personal exposure for directors of companies, a recent text noted that in New South Wales alone there were 52 pieces of legislation under which directors could become personally liable for what would otherwise be liabilities of the company.

Further, in a partnership context, liability extends not only to the actions of the effected individual, but also to their partners – both within Australia and outside. This introduces further complications associated with the various liability exposures that may exist in each of the partnership countries. The recent Arthur Anderson example is illustrative.

The recent medical indemnity crisis, and the resultant resignations and retirements is illustrative of the possible effects of the implementation of this draft legislation. We consider that the magnitude of such effect would be far greater in this instance compared to the experience two years ago.

6.2 Forcing business overseas

The proposed amendments threaten to force many business owners or professionals to move overseas.

Alternatively, individuals may choose to move assets overseas in an effort to minimise the risk of their realisation in the event of bankruptcy. While the Australian Bankruptcy Act has operation over those assets, we have had significant experience in the realisation of assets in foreign jurisdictions and submit that even with adequate resources such assets can be difficult to realise for a Trustee in Bankruptcy.

6.3 Uncertainty

The BLAAOM would create significant uncertainty in the lives of hundreds of thousands of Australians.

In addition to the uncertainty which this creates on the human level, it threatens to significantly stifle business confidence and therefore economic growth.

6.4 Taxation consequences

From a taxation law point of view, the ability to set aside transactions which were entered into legitimately many years ago will create significant and unintended adverse tax consequences.

6.5 Disincentive to savings and investment

We submit that the BLAAOM would have a significant negative effect on saving and investment. Confronted with such a far reaching regime as is proposed, many individuals may elect to "live for today", rather than run the risk and uncertainty of the family "nest-egg" being invaded in the future.

7. TECHNICAL AND OPERATIONAL CONCERNS WITH PROPOSED LEGISLATION

We have identified the following technical and operational concerns in relation to the proposed legislation:

7.1 Concept of "creditors"

The BLAAOM introduces the concept of a "tainted purpose". The bankrupt will be deemed to have had a tainted purpose where the Trustee in Bankruptcy alleges such in a proceeding. A tainted purpose occurs when the bankrupt transfers property with the main purpose of ensuring that the property does not become available to meet creditors' claims in a bankrupt estate.

The BLAAOM proposes to catch transactions where an individual transfers assets from his or her own name as a matter of precaution, even where the individual has no liabilities at that time. In other words, the purpose of the transfer was to avoid a claim against family assets arising from liabilities not yet in existence, or even contemplated. The

ability to transfer or gift assets and property in the manner indicated has been common, prudent and acceptable practice under Australia laws for generations.

The BLAAOM should only seek to attack circumstances where a debtor entered into such transactions at a time of insolvency or of "deemed insolvency" (see suggested alternatives below).

7.2 Requirement to keep records

The proposed amendments allow a Trustee to attack "tainted property" without any substantial limit on the timeframe at which the "tainting" may have occurred. This may require the Trustee to attempt to access financial and other records, twenty, thirty or forty years prior. There is however no equivalent requirement on individuals to retain records for such a period of time. This will create significant practical difficulties for a Trustee in Bankruptcy and other persons or entities in defending such claims.

7.3 Impact upon financial institutions taking security over assets

The position of a financial institution that takes security over assets ("secured creditors") is also likely to be effected. Currently bankruptcy law protects by statute the rights of secured creditors (Sub Section 58(5) of the Bankruptcy Act 1966) who have taken security over property of the bankrupt. That protection can be upset where it is shown that the secured creditor did not come to a transaction with "clean hands". This would be an extreme situation, for example, if it is shown that the secured creditor was a party to a fraud being committed upon the bankrupt's creditors.

While this is not immediately apparent from the proposed legislation, it is our submission that the proposed amendments would reduce the current protection provided to secured creditors. Particularly, it is not uncommon for financial institutions to be informed as to the reasons why properties or assets are held in a spouse's name, rather than a business owner or professional, or that the purpose of the proposed transaction is asset protection. A transaction entered into for asset protection is a transaction which is entered into with a "tainted purpose" because the main purpose of the transaction is to prevent property from being divisible (Section 139AFA). It is not uncommon in an asset protection transaction for the secured creditor to have knowledge of the reason for the transfer of the asset or property. A secured creditor will often be required to advance monies on the security of the transferred (and potentially "tainted") property.

This appears to represent a real and significant concern for secured creditors. The Explanatory Memorandum makes no reference to this

possibility and it is only reasonable in the circumstances that secured creditors be made aware of this possibility and be given an opportunity to comment.

7.4 Inheritances under wills

The effect of the proposed amendments catches not just income of the individual debtor (as is the expressed intention of the BLAAOM) but also potentially any inheritances that have been received by the individual at any time prior to bankruptcy.

Current bankruptcy law will not make an inheritance divisible amongst a debtor's creditors where those inheritances were received by the bankrupt at some stage five years before the commencement of bankruptcy in the event that the debtor was insolvent or two years prior to the commencement of bankruptcy in the event that the debtor was not insolvent at the time. The proposed changes will mean that an inheritance which is gifted to a related entity at any time prior to bankruptcy may be attacked.

This result appears to be a result which is not explained in the Explanatory Memorandum to the BLAAOM.

7.5 What part of a "tainted asset" will be available to a Trustee in Bankruptcy?

The proposed amendments provide little guidance as to what part of a "tainted asset" might be available to a Trustee in Bankruptcy.

The BLAAOM makes reference to a list of eight relevant factors for the Court to consider. These factors include the bankrupt's (or any other party's) financial or non-financial contribution to the asset. Without any further guidelines this sets the Court a very difficult task, and also leaves many families in a precarious and uncertain position. The payment of a single mortgage payment by a bankrupt for instance creates a "tainted" asset, but what proportion of the asset could a non-bankrupt spouse expect to lose in such a scenario?

The problem is further exacerbated given the problems associated with the likely lack of accurate records. As identified previously it cannot be expected that individuals have retained records regarding transactions which occurred 20, 30 or 40 years ago. Further guidelines need to be provided to the Courts if such provisions are to be retained.

7.6 Transfers at full value

The proposed legislation purports to catch as tainted property certain transfers of assets at full market value where the transfer occurs within ten years before the date of bankruptcy. This provisions has the effect

of capturing capital gains made on property, even where full market value has been paid for the transfer.

There is no merit to allowing Trustees in Bankruptcy to attack transactions where they have occurred at full market value. In such market value transactions, the purchaser has assumed the "downside risk" of a fall in value of the asset when purchasing it, and should not be penalised by losing any potential gain made in the period. In addition, the ability to attack a transaction which his carried out at full market value is contrary to all previous insolvency concepts and protections afforded to such transactions.

7.7 Reverse onus of proof is unrealistic and unreasonable

The proposed amendments contain provisions that allow a Trustee in Bankruptcy in proceedings to allege that there was a "tainted purpose". In those circumstances, there is deemed to be a tainted purpose, unless the recipient can disprove the presumption that the bankrupt had such a tainted purpose.

The Trustee in Bankruptcy may be alleging a tainted purpose in relation to the transfer of property that occurred 30 or more years ago. In these circumstances, it is unrealistic and unreasonable to expect the recipient to be able to have any reasonable prospect of disproving such a presumption.

7.8 Retrospectivity

The proposed amendments will effect people who have validly structured their affairs, at a time when they had no knowledge of insolvency, with a clear conscience that they were acting clearly within the realms of the law that existed at the time.

The BLAAOM proposes to retrospectively adjust those presently legally valid property rights.

The government has expressed its desire to avoid introducing retrospective legislation in other areas. It is our submission that the concerns which are the target of the BLAAOM do not warrant the introduction of such retrospective legislation.

7.9 Tax consequences

The proposed amendments, if used to retrospectively adjust property rights in place for many years may also simultaneously create significant tax consequences for the bankrupt or current owner of the property.

The Exposure Draft and Explanatory Memorandum makes no reference to these issues, or how they are proposed to be dealt with.

7.10 Constitutional issues

We query whether the adjustment of property rights in the manner foreshadowed in the BLAAOM is constitutional. The provisions would appear to represent seizure of property without due compensation as is required under the Commonwealth Constitution.

8. SUGGESTED ALTERNATIVES AND RECOMMENDATIONS

8.1 Riffle approach not shotgun approach required

It is our view that some further "tightening" of the bankruptcy legislation is warranted. We are of the view that the proposed amendments set out under the BLAAOM are unnecessarily broad in their effect. The legislation will "shoot down" too many innocent and unintended Australians. It threatens to shoot down the system that has encouraged the creation of wealth and entrepreneurial risk taking.

The intention of the legislative amendments should be to further assist Trustees in Bankruptcy in recovering assets from individuals who abuse bankruptcy laws by transferring assets or income at a time of insolvency, or at a time when significant liabilities (such as tax liabilities) are anticipated.

8.1.1 Deemed insolvency

Asset protection and wealth creation is currently built around bankruptcy laws which set out rules as to the timeframe and circumstances by which transactions entered into by individuals are protected from being overturned. There are three basic rules that apply in the area of asset protection.

2 year + solvent rule

In essence any transfers or gifting of property for a period which is within 2 years from the "commencement" of bankruptcy is void as against a Trustee in Bankruptcy in the event that the transaction is for less than market value. Such transactions will be void whether or not the individual was insolvent at the time of the transaction.

5 year + insolvent rule

A transaction entered into within 5 years from the "commencement" of bankruptcy is void as against a Trustee in Bankruptcy if it can be shown that the individual was insolvent at the time of the transaction.

Unlimited time + insolvent rule

Finally a transaction is void as against a Trustee in Bankruptcy if the transaction is entered into at any time prior to bankruptcy if the Trustee in Bankruptcy shows that:

- The property would probably have become part of the bankrupt estate; and
- The bankrupt's main purpose in making the transfer was either:
  - To prevent the transferred property from becoming divisible amongst his or her creditors ("prevention"); or
  - To hinder or delay the process of making property available for division amongst his or her creditors ("hindrance").

It should be noted that the transferor's main purpose is said to be prevention or hindrance if the transferor was, or was about to become, insolvent at the time of transfer.

The Australian business community is given further guidelines in understanding the timeframe, by virtue of the fact that bankruptcy laws operate to "commence" a bankruptcy (for the purposes of setting aside transactions entered into) at a date earlier than the date the individual becomes a bankrupt by virtue of acceptance of their own petition or the acceptance of a petition made by a creditor of the bankrupt. Under bankruptcy law the "commencement" of bankruptcy is deemed to have taken place upon the creation of the first available "act of bankruptcy" within six months from the date of the petition for an individuals bankruptcy. The "acts of bankruptcy" are defined within the Bankruptcy Act (Section 40) and are in effect a public notification of the fact that an individual is presumed to be insolvent. The most common act of bankruptcy is the failure of an individual to meet the terms of a bankruptcy notice which typically requires the individual to, amongst other things, pay a judgement debt within 21 days from the service of the notice on the individual. The act of bankruptcy is said to have been committed upon the expiry of the bankruptcy notice.

Many of the problems associated with recovery of assets and property by a Trustee in Bankruptcy revolve around two sets of circumstances:

- Property or assets have been transferred between the period of 2 and 5 years from the commencement of bankruptcy and there is difficulty in establishing whether or not the individual was "insolvent" at the time of transfer; or
- An individual transfers property and assets greater than 5 years from the commencement of bankruptcy and the Trustee in Bankruptcy is unable to show that could reasonably be inferred from all the circumstances that the bankrupt was insolvent or was about to become insolvent at the time.

8.1.2 Special act of bankruptcy

As one solution, we recommend that the problems identified by the committee could be overcome by the creation of a "Special act of bankruptcy". The Special act of bankruptcy would occur where specified taxation obligations, such as the lodgement of an income tax return or the non-payment of an income tax assessment, is not complied with.

The Special act of bankruptcy, while not being able to be relied on to seek an order for bankruptcy, could however be relied on for asset recovery purposes in an eventual bankruptcy. The effect of the Special act of bankruptcy would be to "commence" the bankruptcy at a time well before the bankruptcy would otherwise be deemed to have commenced.

The Special act of bankruptcy would therefore allow for an extension of the time period by which property is able to be recovered. Unlike other acts of bankruptcy, a Trustee in Bankruptcy would be able to rely on such a special act of bankruptcy for the purposes of recovering assets (including income used to purchase assets in another person or entities name) within a relevant time prior to that special act of bankruptcy.

By way of illustration, if a bankrupt was to have gone for ten years prior to bankruptcy without lodging a tax return, then the failure to lodge tax returns would create an act of bankruptcy on the earliest of those non-lodgement dates, and the Trustee would be able to recover assets or income within a predetermined period prior to that date. The failure to lodge tax returns would extend the period by which the recovery provisions under Section 120 operate to

an eventual Trustee in Bankruptcy, in this example, to 12 and 15 years respectively.

8.1.3 Further extension and clarification of Section 121

Much of the existing concerns revolve around the practical difficulties associated with the operation of the current Section 121 of the Bankruptcy Act. Particularly, cases often revolve around the intention of the parties at the time of the transfer.

A further amendment would be to create a presumption of insolvency for the purposes of Section 121, if a transfer of property or diversion of income occurred at a time when there was non compliance with various income tax requirements, such as the lodgement of an income tax return, or the payment of income tax assessments.

These extended recovery provisions or creations of a reverse onus could be rectified by the subsequent lodgement of the tax return and payment of any relevant taxation liability for the period. So the relevant question would be the earliest non-lodged and paid tax return.

8.2 Other avenues

Simultaneous efforts should be made in the following areas:

8.2.1 Role of professional bodies

Professions should be encouraged to seek to strike off individuals who intentionally set about to ignore their taxation obligations, and use bankruptcy as a shield; and

8.2.2 ATO Resources

Further resources should be allocated to the ATO to allow them to continue to crack down on non-lodging and non-paying taxpayers.