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| Bankruptcy Submission No:121 |
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BY: *Jillian Gould*

The Secretary
Jillian Gould Office
The Standing Committee on Legal and Constitutional Affairs
Parliament House
Canberra ACT 2600

Dear Sir or Madam,

BANKRUPTCY LEGISLATION AMENDMENT (ANTI-AVOIDANCE AND OTHER MEASURES) BILL 2004 EXPOSURE DRAFT.

I submit the following matters in regard the proposed legislation.

1. Section 139AFA says that the premise of 'tainted purpose' applies persons who are about to become insolvent. It would be difficult to infer tainted purpose unless a person was entering a transaction that obviously was going to make him or her insolvent. If it could not be shown that a bankrupt had a tainted purpose then a tainted asset would not exist. The provisions of Part VI Division 4A may therefore become largely ineffective.
2. Bankrupts might be able to avoid the provisions of Part VI Division 4A by acquiring accountant reports showing that they are solvent at the time they transfer assets. A report showing the bankrupt's assets were greater than his liabilities would appear to prove that a bankrupt did not have a tainted purpose at the time he transferred an asset.
3. Where a bankrupt made a series of payments before he was insolvent and these were, for instance towards a property that was held by his spouse, as long as the bankrupt stopped paying towards the loan before it could be concluded that he was about to become insolvent that asset would escape the provisions of Part VI Division 4A. These provisions might penalise existing bankrupts who could not have been aware of this Exposure Draft at the time they made their transactions and yet enable people to set up future transactions in a way that puts assets outside the reach of their creditors.
4. Sections 139AI(1)(c), 139AJ(1)(b), 139AK(1)(d) and 139AM(1)(e) prescribe that a bankrupt must have received a benefit after the date of acquisition of the asset and before the end of bankruptcy for a tainted asset to exist. It would appear that a bankrupt could arrange for an entity other than him/her self to hold shares and as long as no profits are distributed to the bankrupt these assets would escape the tainted property provisions.

5. Section 139AFB says that transactions at full market value in the period that commenced 10 years prior to the date of bankruptcy are not exempt from being tainted assets. This vulnerability on full value transactions appears to be contrary to common law contract principles.
6. There are no transitional provisions built into the Exposure Draft to deal with assets of an existing bankrupt that a bankruptcy trustee has settled pursuant to the existing sections 120, 121, of Part VI Division 4A of the act. A trustee may be able to go back and claim more for these assets if it is possible to do under the tainted asset provisions.
7. If the intention of the legislation is, to make assets vest in the trustee that were transferred prior to the bankrupt's insolvency, the ramifications may be that it will become uneconomic for people to conduct business. This could stifle economic activity lead to an emergence of large corporate entities across most industries.
8. There are not sufficient safeguards to protect innocent people falling into bankruptcy through clauses in contracts that they had not been aware of or understood. Personal guarantees should be in similar form to real estate contracts with a cooling off period, clear headings and wording and a requirement that guarantors are given an opportunity to seek legal advice prior to signing. The Part VI Division 4A amendments will increase the stakes for innocent people duped into bankruptcy.

I consider the Bankruptcy Legislation Amendment (Anti-Avoidance And Other Measures) Bill 2004 Exposure Draft to be ambiguous and potentially inequitable. I suggest that alternative approaches to tax avoidance through bankruptcy be investigated and that if none are feasible substantial re-drafting will be necessary to make the existing Exposure Draft effective, fair and equitable.

Yours faithfully,



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