PO Box 618
GLEBE NSW 2037

19 July 2004

Committee Secretary
House of Representatives Standing Committee on
Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600
AUSTRALIA

Fax: 02 6277 4773

Email: laca.reps@aph.gov.au

***Inquiry into the* Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004**

I am a Chartered Accountant, a Certified Practicing Accountant, a member of the Insolvency Practitioners Association of Australia and a Registered Trustee. I practise in the areas of personal and corporate insolvency. I make this submission in my personal capacity. My submission reflects my personal opinions and position regarding the Draft Legislation known as the *Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004*.

My submission has been prompted by my review of the submissions received to date by the Committee and my review of the Committee Hansard of the public hearings held on 5 July 2004 and 6 July 2004 in Canberra. The proposed legislation is being attacked as a heavy handed knee jerk response to the complaints of the Australian Taxation Office regarding the conduct of a small group of Sydney Barristers. I do not agree with these criticisms. In my opinion the Draft Legislation seeks to address a long standing criticism of Bankruptcy Law.

In my capacity as a trustee I welcome the amendments as they will substantially increase the recoverability of assets in bankrupt estates.

My submission draws heavily upon on an article authored by me titled "Accessing the Family Jewels: Legislative Efforts to Provide Creditors with Access to the Assets of Discretionary Trusts" published in the Insolvency Law Journal in December 2000. I respectfully recommend this article to members of the Committee.

Yours faithfully

DAVID J KERR

Submission

Inquiry into the Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004

By

David John Kerr
Registered Trustee

Table of Contents

Introduction

As a trustee I welcome the proposed amendments contained in Schedule 1 of the *Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004* ("the Draft Legislation") and consider that its adoption will address a long standing criticism of Bankruptcy Law.

A criticism of the fairness of the Bankruptcy Act

The Draft Legislation seeks to address a long standing and legitimate criticism of Bankruptcy Law in Australia. That criticism is that the well advised can and do during their bankruptcy retain the use of property and maintain the lifestyle enjoyed by them prior to the commencement of their bankruptcy. The property and the lifestyle have in most cases been funded by the bankrupt prior to his or her bankruptcy. Legal asset protection strategies adopted by the bankrupt ensure that the assets remain beyond the reach of the bankrupt's creditors. The asset protection strategies include but are not limited to the transfer of assets to family members for little or no consideration, the diversion of personal exertion income and other income the entitlement to which arises as a result of the bankrupt's employment or conduct of his or her profession and the use of trusts to divert income. These asset protection strategies are in my opinion supported and are given legitimacy by our income tax laws. Just as you can reduce your income tax liability if you are well advised, so can you reduce the impact of bankruptcy on your lifestyle if you are well advised.

> "These debtors have the ability to pay their debts but instead fund a lifestyle made possible only through the non-payment of debts and the build up of assets in the names of related parties. Some offending debtors divert income and assets to other parties in a manner designed to thwart the capacity of the bankruptcy trustee to realise their value for the benefit of creditors. In such cases the return to creditors in a bankruptcy more often reflects the bankrupt's ability to structure their affairs in a certain way rather than their substantive or real wealth."[1]

Many professionals when commencing to practice and business people when commencing their businesses routinely divest themselves of assets in order minimise the risk of loss to their families from the commercial venture. The decision is generally based not on existing creditor claims, as there are few if any, but future creditor claims.

Many professionals and or business people are able to divert income earned as a result of their involvement with their practices or businesses using trusts and other entities to related entities or persons who use this income to acquire property which the professional or business person uses or enjoys the benefits of.

These asset protection strategies are legal. The Government has indicated that it no longer considers asset protection to be a legitimate activity from a Bankruptcy perspective.

> "The amendments proposed by this Bill represent a fundamental shift away from the perceived legitimacy of these arrangements. Although the arrangements may continue to be legitimate for other purposes, the Government does not believe that these assets should remain protected where creditors' claims cannot be met from assets held in the bankrupt's name whilst the bankrupt continues to enjoy a lifestyle effectively funded by his or her own means. The bankruptcy system should not be the means by which a person can protect his

---

[1] Explanatory Memorandum to the Exposure Draft *Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004* (Cth), para 11.

or her wealth from business failure whilst creditors bear all the risk associated with that failure."[2]

The Draft Legislation if enacted may in my opinion impact on the utility of these arrangements. How much impact the Draft Legislation will have will ultimately be determined by the Court's interpretation of the provisions.

The existing Division 4A

Division 4A of the *Bankruptcy Act* 1966 (the Act) sought to remedy the perceived deficiency in the law.

The catalyst for these provisions was the report of the Costigan Royal Commission. The existing Div 4A was incorporated into the Act in 1987 with a view to addressing the following problem:

> "Frequently the bankrupt will have extensive assets at his or her disposal, notwithstanding the fact that he or she is a bankrupt. Commonly, the property will be made available to the bankrupt by a company, a trust, a partnership or some other person, which, although having independent existence in law, is in fact the alter ego of the bankrupt. The entity acts in effect at the dictation of the bankrupt. The asset position or wealth of the entity has come about because of the physical or mental exertion of the bankrupt. The bankrupt may or may not have owned the property which the entity owns."[3]

The arrangements targeted by the division divert the fruits of an individual's commercial endeavours to a third party. The explanatory memorandum provides the following example of the type of arrangement targeted by the division:

> "A common manifestation of this is a person who provides personal services of one kind or another. The person will establish a private company to carry on the business which will then employ the person at a nominal, or less than market, income. A discretionary trust will be established and the profits derived by the company (generated by the personal services of the person) will be diverted to the trust which will then acquire assets which are made available to the person.
>
> Upon the person becoming bankrupt he or she will appear to be a wage earner, to be insolvent as a result of a serious deficiency between assets and liabilities, whilst still enjoying the trappings of wealth through having access to property of the trust."[4]

The provisions enable the trustee to apply to the court for orders in respect of the net worth or assets of an entity controlled by the bankrupt. The tests a trustee must satisfy, to obtain the orders provided for by the Act, are numerous. The trustee must prove that during the examinable period (up to four years before the commencement of the bankruptcy), the bankrupt supplied personal services to, for or on behalf of the entity when the bankrupt controlled the entity in relation to the supply of those services. The trustee must then establish that the bankrupt was either not paid, or paid an inadequate amount, in respect of the services provided. The entity must have acquired property as a direct or indirect result of the bankrupt's services and the bankrupt must have used or derived a benefit from the property during the examinable period when the bankrupt controlled the entity in relation to the property. Alternatively, the entity's net worth increased as a result of the provision of those services by the bankrupt.[5]

---

[2] Explanatory Memorandum to the Exposure Draft *Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004* (Cth), para 16.

[3] Explanatory Memorandum to the Bankruptcy Amendment Bill 1987 (Cth), para 305.

[4] Ibid, paras 309-310.

[5] *Bankruptcy Act* 1966 (Cth), ss 139A-139H.

The provisions have to date been used successfully on very few occasions.[6] In my opinion the lack of use of the provisions by trustees is indicative of the difficulties associated with satisfying all of the tests prescribed by the legislature. Div 4A has failed to achieve its objectives.

If the existing Div 4A were to be retained consideration must be given to either reducing the number of tests that must be satisfied by the trustee, or reversing the onus of proof in regard to the tests.

Amendments relating to tainted property and tainted money.

The Draft Legislation proposes to repeal the existing Div 4A and replace it with new provisions giving the trustee of bankrupt estate broader powers to enable the trustee to access property held in the name of third parties that the bankrupt has used or enjoyed a benefit from funded partly or fully by the bankrupt. The trustee must apply to the court for orders in relation to this property and the court is required to take in account certain prescribed matters in considering whether to make an order. Section 139AAA of the Draft Legislation provides a simplified outline of the Division.

- This Division enables the Court to make an order for the recovery of the whole or a part of tainted property, or tainted money, held by an entity other than the bankrupt.

- Tainted property is:

  (a) property wholly or partly funded by money paid to the entity by the bankrupt before the date of the bankruptcy, where the bankrupt had a tainted purpose in paying the money and the bankrupt used or derived a benefit from the property; or

  (b) property transferred to the entity by the bankrupt before the date of the bankruptcy, where the bankrupt had a tainted purpose in transferring the property, the transfer was not made for full value and the bankrupt used or derived a benefit from the property; or

  (c) property or money held by the entity as a result of personal services supplied by the bankrupt to or for or on behalf of the entity, where the bankrupt did not receive arm's length remuneration for those services and (in the case of property) the bankrupt used or derived a benefit from the property; or

  (d) property or money held by the entity as a result of a scheme entered into or carried out for a tainted purpose, where (in the case of property) the property was not acquired for full value and the bankrupt used or derived a benefit from the property.

- Tainted money is:

  (a) money paid to the entity by the bankrupt before the date of the bankruptcy, where the bankrupt had a tainted purpose in paying the money; or

[6] *Re Crawford; Ex parte Adcock v Tanalaw Pty Ltd* (unreported, Fed Ct of Aust, Drummond J, 10 December 1992); *Horne v Concore Australia Pty Ltd* (unreported, Fed Ct of Aust, North J, 6 June 1997).

> (b) money that represents the proceeds of the disposal of tainted property.
>
> - Each of the following is a tainted purpose:
>
>   (a) to prevent the property or money from becoming divisible among the bankrupt's creditors; or
>
>   (b) to hinder or delay the process of making the property or money available for division among the bankrupt's creditors.
>
> - In considering whether to make an order for the recovery of the whole or a part of tainted property or tainted money, the Court must have regard to various matters, including:
>
>   (a) the contribution (whether financial or non-financial) of the bankrupt and the entity; and
>
>   (b) in the case of property—the extent to which the bankrupt used or derived a benefit from the property.

Divi 4A was previously limited to situations were an entity acquired property in its name utilising funds obtained as a result of the personal exertion of the bankrupt for which the bankrupt was inadequately remunerated. The Draft Legislation maintains and strengthens the trustee's capacity to recover property acquired by an entity in its name utilising funds obtained as a result of the personal exertion of the bankrupt for which the bankrupt was inadequately remunerated. These changes will be welcomed by insolvency practitioners in their capacity as registered trustees.

The Draft Legislation also seeks to make available to the trustee for the benefit of creditors property or money transferred by a bankrupt to third parties for which market value consideration was not paid and the purpose of the transfer was to ensure that the funds or property would not be available to pay creditors. The provisions contained in the Draft Legislation appear to expand the reach of the trustee of a bankrupt estate beyond the time frames currently available under the provisions relating to undervalued transactions[7] and transfers to defeat creditors[8].

The Draft Legislation provides the trustee with the power to apply to the court for an Order relating to the tainted property or tainted money. The court may make a vesting order, or a sale order, or an ancillary order in regard to tainted property and a payment order in regard to tainted money. The Draft Legislation provides for orders to be obtained against the ultimate recipient of the tainted money or tainted property even if it has been transferred through one or more interposed entities.

Under the Draft Legislation a transfer of property will not be tainted property if it is an exempt full-value transfer of property. To be an exempt full-value transfer of property:

i) the transferee must have given consideration for the transfer that was at least as valuable as the market value of the property at the time of the transfer; and

ii) either

   (a) the transfer took place more than ten years before the date of bankruptcy; or

---

[7] *Bankruptcy Act* 1966 (Cth), s 120.
[8] *Bankruptcy Act* 1966 (Cth), s 121.

(b) the transferee did not know the bankrupt had a tainted purpose in transferring the property.

The proposed legislation provides that a bankrupt has a tainted purpose in making a payment of money or transferring property if:

i) the bankrupt's main purpose in making the payment or transferring the property was:

(a) to prevent the money or property from becoming divisible among the bankrupt's creditors;

(b) or to hinder or delay the process of making the money available for division among the bankrupt's creditors; or

ii) it can reasonably be inferred from all the circumstances that, at the time of the payment, the bankrupt was, or was about to become, insolvent.

The proposed tests defining a tainted purpose are not dissimilar to the existing test used in determining whether a transaction was a transfer to defeat creditors.

The court will play an important role in determining whether a tainted purpose exists at the time of the transfers or payments under examination. The court's interpretation of "main propose" will be critical to the utility of the proposed provisions. The necessity to demonstrate that the transfer was for the prescribed "main purpose" will in all likelihood impact on the utility of the provisions and will assist respondents in defeating applications by trustees for orders in relation to tainted property or tainted money.

Retrospectivity

The Draft Legislation is proposed to have retrospective application. I agree with the comments contained in the explanatory memorandum that the amendments would have no impact on returns to creditors for many years if the provisions do not have retrospective application.

Reversal of the onus of proof

The Draft Legislation proposes that the onus of proof is to be reversed in proceedings initiated by a trustee of a bankrupt estate[9]. The Harmer Inquiry identified that related parties are the most likely beneficiaries of the efforts of an insolvent to divest himself or herself of legal ownership of assets before the commencement of the bankruptcy. The Harmer Inquiry, accordingly, suggested that transactions with related persons should be treated with more circumspection.[10] The inquiry recommended that when a related person was involved in an antecedent transaction, there should be a presumption of intent, that is, the transaction was entered into to defeat or delay creditors. A related person would have to prove the transfer was not for defeating or delaying creditors. The Harmer Inquiry stated:

> "With the shifting of the onus in this way, there is more control over transactions which, while clothed with apparent legal respectability, are repugnant in a commercial sense."[11]

The Draft Legislation implements the recommendations of the Harmer Inquiry. In my opinion the recommendations of the Harmer Inquiry should also be applied to undervalued transactions[12] and transfers to defeat creditors[13].

---

[9] Exposure Draft *Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004* (Cth) ss 139AFA(4),(6).

[10] Australian Law Reform Commission, *General Insolvency Inquiry,* Report No 45, Vol 1 (1988), para 636.

[11] Ibid, para 684.

[12] *Bankruptcy Act* 1966 (Cth), s 120.

[13] Ibid,s 121.

The existing antecedent transaction provisions

Some submissions have suggested that the Draft Legislation should not be proceeded with as the existing antecedent provisions are adequate.

A transfer of property by a person who subsequently becomes bankrupt in the period commencing up to five years before the commencement of the bankruptcy and ending on the date of bankruptcy, may be void as against the trustee of the bankrupt estate. To be void, the transferor (that is, the bankrupt) must have received consideration of less than market value for the property transferred. The trustee must prove that the consideration was less than market value and that the transaction took place during the prescribed period.[14] If the transfer took place over two years before the commencement of the bankruptcy, the transfer will not be void if the transferee can prove that the transferor (that is, the bankrupt) was solvent at the time of the transfer.[15]

A transfer of property by a person who later becomes bankrupt may also be void as against the trustee of the bankrupt estate, as a transfer to defeat creditors. The trustee must prove first that the property would probably have formed part of the bankrupt's divisible property if it had not been transferred.[16] The trustee must further prove that the transfer was made with the main purpose of preventing the property from being available to creditors or to hinder or delay the process of making property available for division among creditors.[17] The trustee can demonstrate that the main purposes for the transfer were those described, if it can reasonably be inferred from all the circumstances that the transferor was or was about to become insolvent at the time of the transfer.[18] The transfer will not be void if the transferee can demonstrate three things: the consideration for the transfer was at least as valuable as the property's market value; the transferee was not aware of the transferor's main purpose for making the transfer; and the transferee was not aware of the insolvency or pending insolvency of the transferor.[19]

The existing antecedent transaction provisions make the transactions subject to the trustee's claim void against the trustee of the bankrupt estate if the trustee is successful in prosecuting his or her claim. The antecedent transaction provisions cannot be used if the property or money has moved through interposed entities to the ultimate holder of the money or property. The trustee's claim can only be made against the first recipient of the transfer of property or payment of money. Further the trustee bears the onus of proof in prosecuting these claims. The existing antecedent transaction provisions are not effective against the asset protection strategies targeted by the Draft Legislation.

Previous efforts to strengthen the antecedent transaction provisions

Other submissions have suggested that the Draft Legislation should not be proceeded with and that instead the existing antecedent transaction provisions should be strengthened. I respectfully suggest that the members of the Committee should keep in mind the fate of a previous effort to strengthen these provisions.

At the time of the introduction of the provisions relating to transfers at undervalue and transfers to defeat creditors it was proposed to incorporate a term "technically insolvent" into the Act. The change was intended to be of assistance to the trustee

14 *Bankruptcy Act* 1966, s 120(1).
15 Ibid, s 120(3).
16 Ibid, s 121(1)(a).
17 Ibid, s 121(1)(b).
18 Ibid, s 121(2).
19 Ibid, s 121(4).

seeking to set aside the transaction. A person was technically insolvent if the person's property and income were insufficient to meet the person's liabilities (including any secured liabilities and potential liabilities under a guarantee for another person).[20] This proposed change met fierce resistance from both the legal profession and the professional accounting bodies. These professionals took the high ground in arguing their opposition to the proposal. They argued that the new test would make it impossible for persons to conduct their affairs with any certainty. Further, they argued that the *Corporations Law* and the Act should adopt the same terminology. However, the most likely cause of their displeasure was self-interest.

The Legal and Constitutional Committee of the Senate were overwhelmed by the weight of the professions' opposition. The Committee recommended to the government that the Bankruptcy Legislation Amendment Bill 1995 be amended to incorporate the *Corporations Law* definitions of solvent and insolvent. The government accepted the Committee's recommendation.

The definitions of "solvent" and "insolvent" were incorporated into the *Corporations Law* in June 1992.[21] The definitions provide for the addition of "and payable" to the definition of "insolvency" which was formerly included in s 122 of the Act. Section 122 previously defined an "insolvent" as "a person who is unable to pay his debts as they become due from his own money". This definition was incorporated into the *Corporations Law* by s 565 of the *Corporations Law.*

The definition of the proposed term "technically insolvent" reflected decided case law concerning void settlements under the former s 120 of the Act. The beneficiary of a transfer of property from a bankrupt more than two years before the commencement of the bankruptcy, under the former s 120, was required to prove that the bankrupt was able to pay all his or her debts without the aid of the property transferred, or the money paid. Contingent liabilities were considered in making this determination.[22] This test was a balance sheet test: a person is insolvent if the person's liabilities exceed the person's assets. On the other hand, the test ultimately adopted by the legislature was the cash flow test: a person is insolvent when unable to pay his or her debts when they become due and payable.

The survival of the term "technically insolvent" would have strengthened the trustee's position. It was proposed that the recipient of an alleged undervalued transaction, or an alleged transfer to defeat creditors, would be required to demonstrate that the debtor was not technically insolvent at the time of the transaction.

With respect to undervalued transactions[23], the effect of its absence is described as follows. For a transfer of property within two years of the commencement of bankruptcy, insolvency is not an issue. If the transaction was at less than market value, the transaction is void. For a transfer of property occurring between two and five years before the commencement of the bankruptcy, it was intended that the recipient of the transfer had to prove that the debtor was not technically insolvent at the time of the transfer. A recipient can now use the cash flow test to demonstrate that the debtor (that is, bankrupt) was solvent when the property was transferred. Keay says the former voidable settlement provision required a recipient of a settlement of property that occurred between two and five years before the commencement of the bankruptcy to use the balance sheet test to demonstrate the solvency of the recipient.[24] The adoption of the cash flow test has in my opinion lowered the bar for beneficiaries of transfers of property between two and five years before the commencement of bankruptcy.

---

[20] Bankruptcy Legislation Amendment Bill 1995, s 6(1)(i).
[21] *Corporate Law Reform Act* 1992 (Cth).
[22] *Re Hyams; Official Receiver v Hyams* (1971) 19 FLR 232.
[23] *Bankruptcy Act* 1966, s 120.
[24] Keay, *Avoidance Provisions in Insolvency Law* (LBC Information Services, Sydney, 1997), p 207.

With respect to transfers to defeat creditors[25], the effect of the absence of the technical insolvency test can be described as follows. The balance sheet test was to apply instead of the cash flow test in establishing whether the recipient of the transfer was acting in good faith (that is, "could not reasonably have inferred that, at the time of transfer, the transferor was, or was about to become, technically insolvent"). It was also proposed that the balance sheet test would be used in establishing whether it could be inferred that the transferor's main purpose was to prevent the property from becoming divisible property, or to delay or hinder the process of making property available for division among the transferor's creditors. It was to be inferred that it was the transferor's main purpose if, at the time of the transfer the transferor was, or was about to become, technically insolvent (the balance sheet test) instead of insolvent (the cash flow test).

The Doctrine of Reputed Ownership

Efforts by the legislature to access property the bankrupt appears to own or enjoy the use and benefit of is nothing new. The following information is of historical interest when considering the Draft Legislation.

The doctrine of reputed ownership formed part of English bankruptcy law until its exclusion from the *Insolvency Act* 1986[26] and Australian Bankruptcy Law Until the enactment of the *Bankruptcy Act* 1966. Its origins lie in a law enacted in 1623.[27] The Act also provided for bankrupts upon conviction of fraudulently concealing property, or failing to deliver up property to the commissioner (trustee), to be set upon the pillory for two hours and to have one of their ears cut off. The Act found it necessary to seek to influence those who were responsible for applying the new law. Things have not changed. It provided that:

> "all and singular the aforesaid laws made against Bankrupts for relief of Creditors shall be in all things largely and beneficially construed and expounded for the aid help and relief of Creditors".[28]

The Order and Disposition Clause (reputed ownership clause) contained in this Act had its own preamble:

> "And for that it often falls out, that many persons before they become Bankrupts do convey their goods to other men upon good consideration; yet still do keep the same and are reputed the owners thereof and dispose the same as their own; Be it enacted, that if any person become Bankrupt and at such time as they shall so become bankrupt shall by the consent and permission of the true owner and proprietary have in their possession order and disposition any goods or chattels whereof they shall be the reputed owners and take upon them the sale, alteration or disposition as owners, the said Commissioners shall have the power to sell and dispose of the same for the benefit of Creditors."[29]

The doctrine in the Australia

Until the enactment of the *Bankruptcy Act* 1966, property divisible amongst creditors that vested in the bankrupt's trustee could include property owned by a third party. Section 91(iii) of the *Bankruptcy Act* 1924 stated:

> "The property of the bankrupt divisible amongst his creditors, and in this Act referred to as 'the property of the bankrupt', ... shall include — ...
> (iii) all goods being, at the commencement of the bankruptcy, in the possession, order,

[25] *Bankruptcy Act* 1966, s 121.

[26] The relevant provision in the English *Bankruptcy Act* 1914 was s 38(c), which said "property of the bankrupt includes all property being, at the commencement of the bankruptcy, in the possession, order and disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof".

[27] 21 Jac I c 19 (1623).

[28] Cited in Phillips, *A Treatise on Insolvency Law in Force in the Colony of Victoria; with an Historical Review of English Bankruptcy Legislation* (J C Stephens Printer, Melbourne, 1899), p 14.

[29] Ibid, pp 14-15.

> or disposition of the bankrupt, with the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof:
>
> Provided that things in action, other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this paragraph ..."

The doctrine of reputed ownership in the United Kingdom applied only to property in the possession of a person in their trade or business. The doctrine in the Australian context had no such limitation. According to Manning and Bohringer:

> "The doctrine of reputed ownership involves the taking of one man's goods to pay another man's debts, and hence the courts will not extend its operation beyond what the clear law compels or real justice requires."[30]

They also stated:

> "In order that property not belonging to the bankrupt should pass to his trustee in bankruptcy under the doctrine of reputed ownership, the following conditions must co-exist:
>
> (1) the property must consist of goods (exclusive of things in action other than trade debts);
>
> (2) the goods must have been in the bankrupt's possession, order or disposition at the commencement of bankruptcy;
>
> (3) the possession etc must be under such circumstances that he is the reputed owner of such goods; and
>
> (4) the possession etc, under such circumstances must be with the consent and permission of the owner."[31]

What happened to the doctrine?

The 1962 report of the Committee Appointed by the Attorney-General of the Commonwealth to Review the Bankruptcy Law of the Commonwealth (Clyne Committee) at para 153 recommended the omission of paragraph (iii) of s 91, stating:

> "This provision has been the subject of much difficulty and has caused much litigation. The Committee is of the opinion that the enormous expansion of hire-purchase business has made the provision obsolete. There is, in the opinion of the Committee, little, if any, danger now days of a creditor being induced to give credit on the assumption that goods in the debtor's possession are his own property. The Committee notes that the omission of this provision commended itself to the United Kingdom Committee."

Their recommendation was adopted by the government of the day and the result of the Committee's report was the *Bankruptcy Act* 1966 (the present Act).

The Harmer Inquiry also considered and rejected the reintroduction of the concept.

Conclusion

The existing Div 4A has not worked against the well advised bankrupt. The existing antecedent transaction provisions have not proved effective against the well advised bankrupt.

The Government has announced its intention to challenge the legitimacy of asset protection strategies upon bankruptcy. As a trustee I welcome the amendments as they will substantially increase the recoverability of assets in bankrupt estates.

---

[30] Manning and Bohringer, *McDonald, Henry & Meek's Australian Bankruptcy Law and Practice* (3rd ed, Law Book Co, Sydney, 1953), p 299.

[31] Ibid.