

Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs.

Bill: Bankruptcy Legislation Amendment (Anti-avoidance and Other Measures) Bill 2004 (“*BLAB*”)

Party: International Women’s Insolvency and Reconstruction Committee Australian Network (Qld) Inc. (“*IWIRC*”)

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BT: *Spencer Gould*

1. Introduction

1.1 *IWIRC* is an association whose objects include promoting the involvement of women in insolvency related professions and to provide a forum to address insolvency policy concerns.

1.2 *IWIRC*’s membership comprises professionals at:-

- 1.2.1 Insolvency Accounting Firms;
- 1.2.2 Legal Firms;
- 1.2.3 Banks; and
- 1.2.4 Government Departments.

1.3 *IWIRC* welcomes the ongoing review of the bankruptcy laws within Australia by the Federal Government (“*government*”)

1.4 Whilst recognising the need to ensure that the bankruptcy laws in Australia are fair and balance the rights of all stake holders in the bankruptcy process including creditors, debtors and regulators, *IWIRC* believes that some of the present *BLAB* proposals may:-

- 1.4.1 Have unintended consequences by increasing the burden of greater duties and responsibilities of insolvency professionals;
- 1.4.2 Potentially cause an increase in litigation with the associated burden on litigants and the Courts.

1.5 *IWIRC* supports the objects of the *BLAB*, particularly with respect to “people who have deliberately and knowingly set about to avoid being

able to contribute to their legal obligations by using bankruptcy and putting their assets beyond the reach of creditors”.¹

2. Submission

- 2.1 IWIRC does not wish to enter into the political debate with respect to the merits of the proposed legislation. Rather, IWIRC wishes to comment on the impact of the BLAB changes to the way bankrupt estates are administered and the role and duties of trustees under the BLAB.
- 2.2 Trustees in bankruptcy owe a primary duty to creditors to recover and distribute amongst them the available property of the bankrupt according to the priorities set out in the *Bankruptcy Act*.
- 2.3 IWIRC believes that rather than introducing what is essentially a new regime, the objects which the government is seeking to achieve with the BLAB, can be accomplished by making changes to the existing *Bankruptcy Act* and also where appropriate, the *Income Tax Assessment Act*.
- 2.4 IWIRC believes that changes to the *Bankruptcy Act* which will assist bankruptcy trustees in carrying out their functions (as opposed to the introduction of the BLAB in its present form) include:-
 - 2.4.1 widening the definition of “*transfer*” to include orders of the Family Court such as maintenance and property orders made under the *Family Law Act* or alternatively, to implement specific provisions to allow trustees to set aside such arrangements when they are clearly entered into to put assets out of reach of creditors.
 - 2.4.2 amending section 121 of the existing *Bankruptcy Act* to make it easier for trustees to pursue third parties for the recovery of property where the bankrupt is either receiving a “benefit” or is in a “position of influence” with respect to the third party and that property. This would have the effect of allowing the trustee to “claw back” both property which had been transferred by the bankrupt and also property which had never “legally” been owned by the bankrupt but where the bankrupt had contributed income or other monetary benefits towards and had an equitable interest in same.
 - 2.4.3 providing for a regime of federal court judges and magistrates specialising in bankruptcy matters equipped to deal with questions relating to antecedent transactions quickly and efficiently with a minimum of cost to the bankruptcy trustee, creditors, third parties and other stakeholders. IWIRC is

¹ The Honourable Attorney General Phillip Ruddock in the Australian Financial Review, 12 June 2004

concerned to see the present system overhauled to allow for a greater role in deeming provisions such as those detailed in the present section 139ZQ of the *Bankruptcy Act*.

- 2.4.4 IWIRC also believes that the definition of “consideration” and/or “market value” should be amended to catch the *Cook v Benson* scenario and cut off the avenue of insolvent individuals making large contributions to superannuation funds shortly prior to becoming bankrupt with no recourse to the bankruptcy trustee for recovery on behalf of creditors.
 - 2.4.5 IWIRC also believes that a single Federal Magistrate and/or Federal Court Judge should be appointed in each state to deal with bankruptcy issues when they arise whilst family law proceedings are on foot. This will achieve prompt and consistent decisions in this area.
- 2.5 Given that the present bankruptcy regime has been effective since 1966, most of the *Bankruptcy Act* provisions have been considered by the courts in one form or another. The introduction of such wide ranging reforms as proposed by the BLAB may well have the unintended side effect of leading to a large increase in litigation as parties seek to have the courts rule on the meanings of the various new BLAB provisions and generally test the new provisions. This will result in an increase in costs to parties including creditors as well as a greater workload for the court than would otherwise occur as a result of an amendment to the present provisions of the *Bankruptcy Act* as detailed in 2.4, above.

3. Conclusion

- 3.1 Whilst IWIRC generally supports the philosophy and objects of BLAB, it is of the opinion that these objects can be achieved better and more costs effectively through amendments to the existing provisions contained in the *Bankruptcy Act* as opposed to a completely new regime being implemented.
- 3.2 IWIRC is more than willing to discuss these issues further if required.

These Submissions were prepared by:

President – Kate Barnet, Bentleys MRI, ph 32229688

Secretary – Neesha Pierce, Hopgood Ganim Lawyers, ph 07 30240324

Committee Member - Shane Roberts, McInnes Wilson Lawyers, ph 07 3237 0605