COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

(Subcommittee)

Reference: Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004

THURSDAY, 22 JULY 2004

SYDNEY

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Thursday, 22 July 2004

Members: Mrs Bronwyn Bishop *(Chair)*, Mr Murphy *(Deputy Chair)*, Mr Cadman, Mr Kerr, Mr McClelland, Ms Panopoulos, Mr Sciacca, Mr Secker, Mr Somlyay and Dr Washer

Members in attendance: Mrs Bronwyn Bishop and Mr Murphy

Terms of reference for the inquiry:

To inquire into and report on:

The provisions of the draft Bill. Specifically, the Committee will consider whether these provisions adequately address the problems identified in the Taskforce Report, namely:

(a) high income earners using bankruptcy to avoid paying debts that they can afford to pay, while continuing to enjoy a lifestyle made possible through the build up of assets in the names of the third parties

(b) the uncertainty arising from the interaction between family law and bankruptcy

(c) the inadequacy of the current income contributions scheme in circumstances where a bankrupt chooses not to comply, and

(d) the use of financial agreements to defeat the claims of creditors.

WITNESSES

Subcommittee met at 9.02 a.m.

CHAIR—I declare open this hearing of the House of Representatives Standing Committee on Legal and Constitutional Affairs inquiry into the exposure draft of the Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004. To date the committee has received 180 submissions, the overwhelming majority of which have not been in favour of the proposal. I say 'majority' in the sense that, aside from submissions from the tax office, ITSA and the Attorney-General's Department, the committee has received only one submission that has been in support of the package as it has been presented. In addition, the committee took evidence over two days in Canberra earlier this month from a wide range of representatives of the legal profession, accountants, small business and the financial world.

It has become evident that while the task force proposed one solution, the evidence to the committee has shown that the situation changed with respect to the exposure draft that we are dealing with. A number of questions remain unanswered, and for this reason representatives of the Australian Taxation Office and Insolvency and Trustee Service Australia have been asked to reappear today. This morning we will also be hearing from the New South Wales Bar Association and from the firm Arnold Bloch Leibler.

[9.04 a.m.]

ALDERSON, Mr Karl John Richard, Acting Assistant Secretary, Office of Legal Services Coordination, Attorney-General's Department

DUGGAN, Mr Kym, Assistant Secretary, Family Law Branch, Attorney-General's Department

BERGMAN, Mr David, Adviser, Policy and Legislation, Insolvency and Trustee Service Australia

GALLAGHER, Mr Terry, Chief Executive and Inspector-General in Bankruptcy, Insolvency and Trustee Service Australia

CHAIR—I welcome Mr Terry Gallagher and Mr David Bergman from ITSA, and Mr Kym Duggan and Mr Karl Alderson from the Attorney-General's Department. As you are aware, when we last met you took some questions on notice and other things which we thought we might like to explore with you. You have provided us with some of those answers. Before we start questioning, is there anything any of you might like to add this morning?

Mr Gallagher—There are two things that I would like to say by way of introduction. The first is a response to some comments made about consultation, particularly from the Law Council. The second is some follow-up information in relation to section 120 and section 121 applications to that information we provided in the written answers to the questions on notice. In relation to the first point, at the last hearing the Law Council referred to a lack of consultation. I want to make three points in relation to that. Their concern was that they were not consulted in relation to the particular proposals that are now in the exposure draft. Our point there is that the proposals are very similar in principle to the proposals that are in the task force report in relation to the anti-avoidance. Even though they are not in exactly the same form, in the sense that task force recommendation 3 referred to a division of property in accordance with family law principles when a person goes bankrupt, in principle—

CHAIR—Can we pause there, because when we took evidence before it became quite apparent that the task force did not deal with the exposure draft and that the concept of tainted property, which is what all witnesses have had great difficulty with, was thought up by you and was not discussed by the task force. I think that is where the concern is.

Mr Gallagher—That is correct, but the tainted property provisions are nevertheless provisions that would enable a court to look through the affairs of the bankrupt and determine property interests on that basis.

CHAIR—In the interests of time, I do not think we will debate that point. Clearly, the 179 people who have given us submissions do not accept that.

Mr Gallagher—The other point I would like to make is that a discussion paper was issued in November 2002 following the task force report, and the Law Council did not respond to that

issues paper at all. The division 4A proposals—the tainted property proposals—were announced by the Attorney-General in December 2003. They were discussed at a bankruptcy consultative forum meeting in December 2003. They were also discussed at the drafting workshop in February 2004 and at the next consultative meeting in May 2004. I just make that point that it is not completely fair to say that they were not aware of the proposals or consulted on them.

CHAIR—At the risk of sounding a little harsh, that sounds a bit defensive, and it would not meet my definition of adequate consultation. We will not argue that point. We might just get on with it.

Mr Gallagher—In relation to the second point, in our response last time we provided information provided by the Federal Court on the number of applications that have been made, and I think we offered in that response to provide more detail on those if we were able to obtain it.

Mr Alderson—We will now table with the subcommittee a copy of a document which follows up and provides some additional information to that information provided in our earlier answer. It is a table that sets out the names of each of the cases we have been able to obtain from the Federal Court and the Federal Magistrates Court dealing with section 120 and section 121 applications and indicating in each case whether they have been successful. It essentially illustrates two things. One is that sections 120 and 121 are playing a role and do have a significant and successful role in the bankruptcy context, but that of course does not mean that there are not additional things that go beyond what sections 120 and 121 allow that are provided for under this bill. I table that document.

CHAIR—Does this document show whether there has been any increased use of the sections?

Mr Alderson—The document reveals the cases since the year 2000. I do not think it shows any particular trend in recent years in terms of the number of cases.

CHAIR—And it does not show what happened before 2000?

Mr Alderson—No. We have looked at each of the cases since 2000.

CHAIR—Without my adding up your successfuls and unsuccessfuls—

Mr Alderson—We have put a statistical analysis at the end of the total numbers.

CHAIR—The number of cases where the trustee succeeded was 26. That is 44.83 per cent. That is not a bad batting average. The number of cases where the trustee was partially successful was 5.17. The number of cases where the trustee was unsuccessful was 25.96. For cases where the outcome for the trustee was uncertain and it was decided on another issue it was 24.14 per cent.

Mr Alderson—I suppose the extra comment that we would make is that there would or may be a category of cases where a trustee decides that sections 120 and 121 are not open to them and do not pursue them, to which we would say that extra opportunities are provided under

schedule 1 of the bill to pursue those cases. But certainly I think your comments are fair on those statistics.

CHAIR—That is very useful. Thank you very much. In looking at the answers that you have provided us, I notice that there is a question which I think came from Mr Murphy—and he is probably very keen to have the answer. He asked you for the number of judges and magistrates who had failed to lodge their return on time—were outstanding. You have answered that there are 66 judges/magistrates with 78 returns outstanding as at 30 June and that, of those returns, 62 are for 2003 and 48 of those are subject to extension. Presumably, if they are subject to an extension, they are not late.

Mr Gallagher—I think you may be referring to responses provided by—

CHAIR—I beg your pardon; I take it back. This is from the tax office. The tax office can take that on notice when they appear before us. One of the questions I would like to pursue this morning, Mr Duggan, is with you. I do not think you got too much time last time. If you would, I would like you to speak a little bit about the way you see the Family Law Act parts of the exposure draft operating.

Mr Duggan—I would be pleased to do that. Essentially, the background to these provisions is that at the moment inconsistencies exist between family law and bankruptcy law. In, for example, the Law Council of Australia's submission to this committee, they talk about some of those issues, particularly the difficulties that have been brought up by the increasing use by courts of remedies inequity—things like constructive trusts and what have you—to give recognition of the non-financial contributions of spouses in circumstances such as we have at the moment. The use of those sorts of devices has led to uncertainties for both creditors and non-bankrupt spouses. Courts in various states have different views on these matters. Generally speaking, the bankruptcy system does not give recognition to the same extent that the family law system does to the non-financial contribution of the non-bankrupt spouse.

So schedule 2 is effectively trying to bring into the bankruptcy system a recognition of the non-financial contribution of the non-bankrupt spouse. As you are probably aware, at the moment when the Family Court approaches a property settlement decision the first job that it does is assess the property pool that is available for distribution. When it is doing that task it effectively removes from the property pool any debts that are owed by the parties, so effectively those debts do not get counted—they effectively have priority, if you like, over the non-financial contribution of the non-bankrupt spouse. So schedule 2 is designed to deal with that situation.

The other situation that schedule 2 deals with is the reverse of that—and that is where the bankruptcy trustee, standing in the shoes of the bankrupt spouse, is able to effectively allege a non-financial contribution from the bankrupt spouse to the non-bankrupt spouse's property. So it works both ways. But it is fair to say that the government's expectation is that these provisions will most likely operate in those circumstances where at the moment most non-bankrupt spouses have no recourse effectively because the bankrupt spouse has significant debts and all the matrimonial property has effectively gone. So it is in those circumstances that the government expects this schedule to operate most. So to some extent it is looking at almost the obverse of what some of the other provisions of the legislation are looking at which are primarily aimed, as you know, at the luxury living of some bankrupt spouses.

CHAIR—That really does relate to those points that I was raising when we were together earlier about what appears to be a conflict between public policy and who we are looking after. Certainly in this part we have had really very little complaint about the exposure draft. I think the only really major complaint was that a judge in the family law jurisdiction should be given jurisdiction to deal with certain parts of the bankruptcy law.

Mr Duggan—The Business Law Section of the Law Council thought that there should be a broader review of these sorts of provisions. It opposed the concept of what it calls a statutory carve-out. The government's position is that this has been a problem since 1975, since the legislation was brought into being. It has, in the government's view, brought about unsatisfactory outcomes both for non-bankrupt spouses and for creditors in situations where the system has been used to shield assets. The intention is, by using these provisions, to bring that more into sync. The difficulty is that these public policy areas interact whether we like it or not. It has to be regularised in a way that makes it more certain for all, and that is what the provisions are designed to do. As you say, as far as I am aware there has been virtually no criticism of the provisions, save and except the technical concerns the Family Law Section expressed about the provisions. We will of course consult with them about those technical concerns. But in terms of the concepts I think it is fair to say that there was little criticism made of these provisions.

CHAIR—I think there has been a recognition of that problem over a period of time and I think people have considered it and saw that the real complaint they had lay in the rest of the exposure draft.

Mr Duggan—That is certainly the way that we read the submissions. I do not know if there are any particular matters in relation to schedule 2 that you wanted to raise issues with. The exposure draft has been sent out and we have had so little comment on the technical details of those issues—the question about which court is the appropriate court is a matter which clearly exercised the government's mind. The government takes the view that the Family Court is the most experienced court for dealing with issues about non-financial contribution. If the committee were to make recommendations in relation to other courts dealing with these matters, the government would obviously give them serious consideration. However, as I pointed out at our last meeting, the Family Court is very adept these days at dealing with complex commercial matters because of the complexity, particularly in New South Wales, of some of the matters it deals with in property settlement proceedings.

Mr MURPHY—I would like to ask ITSA or the Attorney-General's Department a couple of specific questions about schedule 2. Can you address the following issues in relation to the amendments proposed in schedule 2. Specifically I will refer firstly to amendment (a), schedule 2, which provides that where bankruptcy occurs during the course of family law proceedings the rights of the bankrupt spouse are subrogated to the trustee in bankruptcy. Will the Family Court in every case continue to hear the proceedings or is there provision for the matter to be transferred to the Federal Court?

Mr Duggan—There is provision in the legislation and both courts have provisions for transfer in appropriate cases. It would still be a matter for the discretion of the court. It is our expectation, it is fair to say, that most of these matters will be dealt with by the Family Court but there is provision for matters to be transferred to the Federal Court if the bulk of issues, for example, are matters that the Federal Court would normally be dealing with.

Mr MURPHY—Are there potential problems with allowing the Family Court to adjudicate on bankruptcy matters? A criticism that has been raised in submissions is that this situation would effectively give priority to the interests of the non-bankrupt spouse over those of creditors.

Mr Duggan—The government's view, as I explained to Madam Chair, is that the Family Court has particular expertise in dealing with these particular sorts of issues that at the moment the Federal Court does not have. That is not to say that the Federal Court could not obtain such expertise, but it does not deal with these matters at the moment, so the government's intention is that the court with the most expertise in the area will deal with these, and that is the Family Court. As I have indicated, there is the potential for the court to allow the Federal Court to deal with a matter if that is more appropriate and certainly it is an issue about which the government would be prepared to consider recommendations if the committee were so minded.

Mr MURPHY—If the proceedings were reheard in the Federal Court, would there be issues in relation to that court having to deal with often complex Family Court matters?

Mr Duggan—As I have indicated to you, there will be circumstances even today—and I have not got a case in front of me to present to you; I can perhaps obtain one—where the Federal Court does have to consider family law issues. I am certain that judges of the Federal Court would take the view that it is an area of the law they could get across quickly if they had to.

Mr MURPHY—The amendments provide that, where separation occurs after bankruptcy but prior to the property being finally dealt with by the trustee, the non-bankrupt spouse may seek to have his or her interest in the property recognised. The amendments provide that the Family Court will deal with this matter. Given this, aren't separated de facto couples effectively excluded from these provisions?

Mr Duggan—As the law is currently drafted, the answer to that is yes. By references of power from the states, the government, however, is moving to expand the coverage of the Family Law Act to include the property of de facto spouses.

CHAIR—How will that fit constitutionally?

Mr Duggan—It is only by reference. Two states have already passed legislation to allow that to happen. They are New South Wales and Queensland. Tasmania is about to introduce such legislation. Western Australia has introduced such legislation to deal with the superannuation interests of de facto spouses. Other states, as I am presently advised, are not going to make such references.

CHAIR—I have not seen the referring legislation. Does it refer also to same-sex couples?

Mr Duggan—The referring legislation does refer to same-sex couples. The Commonwealth government has made its position clear—it will not pick up such a reference. The referring legislation is effectively in two parts: one dealing with heterosexual couples and one dealing with same-sex couples. The Commonwealth has made it clear to the states that it will not pick up the reference in relation to same-sex couples, notwithstanding that some states may well refer the power.

Mr MURPHY—I would like to move on to some specific questions in relation to division 4A and schedules 3, 4 and 5 of the draft bill. I will ask any of the witnesses to reply to these questions. What are the deficiencies in the current division 4A of part 6 of the Bankruptcy Act?

Mr Gallagher—The current division 4A has, on the experience of practitioners, been difficult in the sense that, first of all, there have been very few actions. I think that only one or two have been used. The circumstances that have to be satisfied for a successful application under the current division 4A require a number of circumstances to, if you like, coincide. I will try and go through those as they are set out in the act. The bankrupt must have supplied personal services to the responded entity. The services have to have been provided during what is called an examinable period, which is up to four years before the bankruptcy. The personal services provided by the bankrupt need to have been provided when the bankrupt controlled the entity and the bankrupt received no remuneration or less than full market value remuneration for the services. Also, the entity has to have acquired the property as a direct result of the bankrupt's services during the examinable period and the bankrupt has to have used or derived a benefit from the property during the examinable period when the bankrupt controlled the entity and the entity still has an interest or owns the property. Those circumstances have been found hard to, if you like, coincide and therefore it has been difficult for applications to be made successfully.

Mr Bergman—Another point about that, of course, is that we are talking only about entities that are not natural persons, because you cannot control a natural person. So it does not deal with the situation where the bankrupt has effectively accumulated wealth in another person's name.

CHAIR—They always run the risk, of course, that the other person will run off with it, don't they?

Mr Bergman—Certainly.

Mr MURPHY—I put to you, having identified the deficiencies: how will the proposed new division 4A of part VI overcome them?

Mr Gallagher—The first most obvious factor is that the time period limitation is removed by the tainted property provisions—that is, if less than market value consideration is provided then there is no limitation in the provisions in the exposure draft of when the property was transferred, or even if it was never owned by the responded entity.

Mr MURPHY—Do you believe that the proposed provisions would assist in recovering tax debts from the likes of Alan Bond or Christopher Skase? If so, how?

Mr Gallagher—It is difficult to translate the provisions to specific cases. In relation to the Skase proposals, a number of the problems that were experienced related to the fact that you were dealing with overseas jurisdictions and having court orders that were made in Australia being applicable in overseas jurisdictions, and those problems will not necessarily be overcome by these provisions. By the same token, the ability to effectively look through the various corporate veils and structures that were set up and to penetrate them would, I think, be much easier with these provisions than was the case with the previous provisions. That is a valid generalisation to make because these people are well advised, as you know, and make the transfers or never have the property owned in their name, and that is essentially the difficulty

that was exposed in relation to the barristers' cases that led to the task force report. I hasten to say that I do not think it would be fair to say that it would overcome the jurisdictional problems that arose in the Skase case in particular.

CHAIR—Considerations of Skase and Bond are not really relevant to a consideration of the worth of the exposure draft.

Mr Gallagher—Those cases were not the driver of it, but I think they were both cases where the ability to distance assets from creditors was a practice that people have been aware of in relation to bankruptcy law for a long time.

CHAIR—What you are really saying is that people move their assets offshore and that it is very difficult for a trustee, in bankruptcy, to reach them.

Mr Gallagher—Without cooperative arrangements between countries, I think that is right. There are initiatives being taken in international fora, with UNCITRAL and others, for model laws and cross-border recognition arrangements, but they are not part of these proposals.

CHAIR—I do not think you could name a spectacular success in that area, could you?

Mr Gallagher—I cannot name any, but there are cases internationally—not necessarily ones from Australia. They are more, I think, in the corporate area. There have been some fairly large cases that are referred to from time to time where cooperation was able to be achieved either relying on formal bilateral arrangements between countries or courts giving recognition to orders from jurisdictions in other countries.

CHAIR—Or a lucky break, like the Offset Alpine Printing.

Mr MURPHY—Mr Gallagher, because we believe, like many others, that there are still many aspects of the proposed legislation which require further explanation and because of your attendance here again for a third time, do you think the proposed legislation, on reflection, could be more far reaching than has previously been stated? For example, do you think that the tax office now has wider powers under this legislation to deal with people such as Alan Bond and Christopher Skase?

Mr Gallagher—I will let the tax office answer in relation to their powers. The tax powers are certainly not expanded by this legislation. If you are talking about the ability of the tax office to use the provisions in this legislation to claw back assets—again, I think it is best to ask them—

Mr MURPHY—I am only asking your opinion.

Mr Gallagher—but I think it is fair to say that the answer is yes, because the provisions do go significantly further than is currently the case. Accessing property that has been held in the name of third-party entities for a long period has proven to be difficult and under current law it does not vest. So, in that sense, I think, yes.

Mr MURPHY—That is reflected in the fact that at last count—I think this is right, Madam Chair—there were 178 submissions that were very concerned with the retrospectivity and there

was only one in favour. Could we move on very briefly to schedule 3? Could I ask any of you to explain the reasons for the amendments proposed in schedule 3 of the draft bill providing for a supervised account regime?

Mr Bergman—These amendments, essentially, are to address difficulties that arise in some cases in collecting income contributions that have been assessed. They do not relate at all to a bankrupt's liability to pay contributions; they supplement provisions that already exist in the act to allow a bankruptcy trustee to collect those contributions. The provisions that are in the act at the moment allow the trustee to request the official receiver to issue a notice to recover the contributions either as a lump sum or periodically, typically from the bankrupt's salary or wages or from something like a bank account.

CHAIR—Is this an extension of section 139?

Mr Bergman—Yes, it is to provide equivalent provisions to section 139ZL of the act where the bankrupt is not actually receiving a regular income. As I say, it is only about collection of the contributions. You would expect that the trustee would use those provisions where the existing provisions about garnishee notices cannot apply or where the bankrupt is not paying those contributions voluntarily.

Mr MURPHY—Can anyone explain the reasons for the amendments proposed in schedules 4 and 5 of the draft bill, relating to financial agreements?

Mr Duggan—To some extent the amendments in schedule 4 in particular, and probably in schedule 5, were also motivated at least in part by the matter we discussed previously with the chair—the Jodee Rich matter—where it has become clear to government that there is a certain amount of ingenuity in using the binding financial agreement provisions of the Family Law Act for collateral purposes, effectively, and to in some cases—arguably—deny the rights of creditors. Schedule 4 removes a protection under the Bankruptcy Act from binding financial agreements. They will no longer have the protections afforded to what are called maintenance agreements under that provision and, therefore, the provisions of section 120 of the Bankruptcy Act will apply. Schedule 5, similarly, makes it clear that moving assets as a result of a binding financial agreement can simply be an act of bankruptcy in itself.

CHAIR—I see a problem here. Although it is obviously prompted by the Jodee Rich type situation, does the retrospectivity of this proposal mean that agreements which were seen as binding agreements will no longer be considered binding? That would be intolerable.

Mr Gallagher—The reference in the current legislation to not being able to claw back or undo arrangements made in a maintenance agreement is in divisions 120 and 121.

CHAIR—That is not the question I am asking. I want a specific answer to this question: does that mean, if that were passed into law, that all the binding financial agreements which people have entered into upon their divorces would be opened up and would be subject to section 120 retrospectively?

Mr Duggan—If there is a bankruptcy, that would be right.

CHAIR—Obviously. That is intolerable.

Mr Duggan—The provisions of section 120 have to be satisfied, of course.

CHAIR—Yes, but that means that you, as a recipient of anything under such an agreement, have to find the wherewithal to go and fight the case.

Mr Duggan—That is true. Yes, indeed.

CHAIR—That would be utterly intolerable.

Mr Duggan—It is a question of the balance—

CHAIR—Yes, but to make it prospective would cover the Jodee Riches of this world, wouldn't it?

Mr Duggan—No, because the financial agreement would have been entered into prior to the coming into force of this provision.

CHAIR—I am talking about the Jodee Riches of the future.

Mr Duggan—Indeed.

CHAIR—He did the right thing and pulled out, and we also got the injunction provisions, which I think were very significant.

Mr Duggan—That is true.

CHAIR—I just think that to open up every financial agreement that has been entered into by the thousands upon thousands of people who have been divorced since the enactment of the 1975 act would be reckless and a dereliction of government duty.

Mr Duggan—Can I just say to you, Chair, that this provision will in fact only impact upon binding financial agreements made under the amendments made in 2000. We are not talking about going back to 1975. The binding financial agreement provisions, as I say, were introduced by the government in a bill in 2000, and it is only since that time—

CHAIR—This is because they phased out the court sanctioning the agreements that were entered into before.

Mr Duggan—That is right.

Mr Bergman—I think it is also a help to remember that section 120 has got those time limits in it, so we would only be looking at financial agreements in the two-year period or up to five years where the person was insolvent at the time. I just wanted to clarify that point about the way that section 120 operates.

CHAIR—Yes, of course. Good point.

Mr MURPHY—Could I just get a final comment on the matter we discussed last time about the person who had the record number of bankruptcies—12? Do you believe that that person, or any of the others who have been bankrupt on a number of occasions, in the future would find it harder to file a debtors' petition and be made bankrupt?

Mr Bergman—Yes. It would be harder for their debtors' petition to be accepted because the official receiver now has the power to reject a debtors' petition if certain circumstances prevail. One of those circumstances is if the person is a repeat bankrupt. In that sense the answer is yes, but it does not necessarily mean that just because a person has been bankrupt several times their petition would be rejected. The other provisions that are set out in the act would still need to apply.

Mr MURPHY—Most reasonable people would think it was unbelievable that someone could go bankrupt that many times. I would like to ask you generally—and this is probably the last occasion before we finalise our report, because we are on a short deadline—whether any of you are having any second thoughts about the so-called draconian—

CHAIR—I do not really know that that is a fair question to ask people who are in the service of the government and carrying out the policy. I think they could say that they might be mindful of what the committee has to say, but I do not think you can ask them that question. I do not think it is fair.

Mr MURPHY—I will put it this way, Madam Chair, because I have been a public servant in years gone by and I am sure that the witnesses all do their jobs to the best of their abilities, particularly in relation to carrying out government policy. I would just like the witnesses to reflect on the fact that we have been bombarded by a number of interest groups in this inquiry who have made it quite plain to us that this legislation is very harsh and who are asking whether anything can be done to soften it. I say that against a background that no-one has strived harder than we in the federal parliament have to get information in relation to people who have used bankruptcy in family law to place assets out of reach of their creditors and get some appropriate response to it. I say again: we have been deluged with oral testimony and written submissions from a number of erudite people that suggest that this legislation is too harsh, that there could be unintended consequences and that innocent parties in years to come could have their lives seriously affected by some action taken in the future.

Mr Alderson—What we can say is that in tabling this bill as an exposure draft, rather than introducing a bill, and in proactively referring the bill to this committee the government has consciously taken the opportunity to avail itself of the consultation that this committee can do. As well as the consultations that occurred beforehand and the information we have about the problems with the bankruptcy system that exist, the submissions that have come to this committee and the committee's deliberations will provide important sources of information for further consideration of the proposals. The government had always intended to—and will—give careful thought to it. The number of submissions—180—has been mentioned a few times. They will provide a large store of information for consideration.

Mr MURPHY—The origins of why we are here today lie in the taxation commissioner's annual report of 2000-01 and specifically the revelations by the legal profession project, which exposed rorting by the barristers and was then widely publicised by Paul Barry. Whilst there has been considerable public reaction to those revelations, we are now trying to get it right so that we can genuinely deal with people who are engaging in tax avoidance. But we want to be satisfied that this exposure draft is okay. I am very doubtful that it is going to go through the parliament before the federal election—I do not know that; that is just my opinion. There is not much time, I believe, before the next federal election, and I want to ensure that we get it right. Do you have anything to add?

Mr Alderson—One comment I would make is about the fundamental objectives of this legislation. In addition to preventing people using bankruptcy to defeat the tax office and avoid payment of their tax, it is also preventing people from defeating other creditors and avoiding other creditors having access to funds that have been illegitimately put aside. I do not say that as a point of disagreement; it is a supplementary point about the mix of what the objectives are and how the issues that have been raised can be taken into account.

Mr MURPHY—My experience of gathering information in the federal parliament from the Attorney-General, the Assistant Treasurer and the Treasurer is that, in relation to the barristers, the only significant creditor they had when they went bankrupt was the Taxation Commissioner.

Mr Alderson—In the cases that were highlighted in 2000-01 that was certainly the focus. The subsequent deliberations in developing a model to address that highlighted a broader issue of principle in practice. What has been designed has been designed with that broader focus.

Mr MURPHY—I understand that.

CHAIR—But what we have ended up with is that the panel beater with his spouse and their house and their divorce and their business can also get captured. It does not target, in any way, the so-called high-income professional class of taxpayers that it set out to attack. In fact, it reaches everybody. You were talking about the fact—indeed it is a practice—that people will transfer assets into their spouse's name. I made the point that they risk losing it; the spouse may depart with the assets.

Mr MURPHY—You have got to make sure of whom you marry.

CHAIR—They are taking a risk in that transfer. Certainly it will be part of the marital property if the marriage breaks up anyway, and he might get some of it back. I am wondering, with the accent on this legislation being the promotion the interest of the creditors at the expense of spousal partners, whether or not spouses would be less likely to share their assets with their spouses if they felt that they were going to be attacked anyway. Is that a good and fair thing in our community when the spouse may not been in a position to make a financial contribution but makes a huge contribution in other ways to the family and the assets of that family?

Mr Bergman—Those sorts of considerations are taken into account. We would differ, taking account of provisions as drafted at the moment, from the view that these provisions are protecting the interests of creditors at the expense of the spouse or the family because—

CHAIR—Is that because you are a bloke and I am a woman?

Mr Bergman—No, that is because the provisions include specific reference to the contributions that have been made by the owner of the property, for example the spouse, in determining whether the property—and, if so, how much of it—should be available to creditors.

CHAIR—But the unfairness of that is that the spouse who has no financial wherewithal to acquire the asset with money equally does not have any money to go to the court to substantiate the contribution she has made. It is a catch-22. She is adversely affected, and I am sure she never got married—and the majority of them will be women in this position, not blokes—with the intention of seeing her spouse become a bankrupt and her ending up in poverty street and having her contribution counting for nought, and having no wherewithal to be able to fight for it.

Mr Bergman—That is a practical consideration that you have raised. I guess it is something that we have been aware of, in the course of developing this, that on balance has resulted in the provisions looking the way that they do.

CHAIR—Did you have any divorced people looking at these provisions?

Mr Bergman—We did not specifically ask for divorced people to look at them.

CHAIR—I am just asking.

Mr Bergman—No.

CHAIR—I am glad to know the service is so happily married. I do not have any more questions at this stage. I do thank you for your candid answers and willingness to discuss the issues and how they arose. We have said before that we certainly share the concern that you and the government have shown to prevent the abuse of existing law to defeat creditors. But, equally, I think we have exposed a whole lot of other areas which need to be considered. Thank you very much.

[9.52 a.m.]

FARR, Mr Gregory Douglas, Second Commissioner of Taxation, Australian Taxation Office

LIND, Ms Judith Helen, Assistant Commissioner, Serious Noncompliance, Australian Taxation Office

YONG, Mrs Megan Elizabeth, Assistant Commissioner, Operations, Australian Taxation Office

CHAIR—Welcome. Would you state for the record that you were giving evidence when we last met.

Mr Farr—Yes. This is a continuation of evidence from a previous committee hearing.

CHAIR—As you are continuing to give evidence and you were sworn in in the last hearing there will be no need to take the oath again. You have provided us with answers to previous questions, for which we are grateful. Would you like to make any opening comments?

Mr Farr—Yes, and I will be very brief. With regard to the answers that we provided to your questions on notice, at Mr Murphy's request we trawled through the *Hansard* to see what we should provide, and we have attempted to do that. Madam Chair, you mentioned the issue about judges and magistrates in the evidence from the Attorney-General's Department and ITSA. It was clear to me, when I re-read that answer that you were going from, that, although technically correct, it was probably not what the committee was asking, which was probably more 'How many are overdue?' as opposed to 'How many are outstanding?' I did send a supplementary answer to show how many were overdue rather than outstanding. It is a considerably lesser number.

I have also provided to the committee some legal advice regarding section 16. The form that we have given that to you in is also a minute from our general counsel within tax, pointing to relevant parts of opinions we have got from the Australian Government Solicitor and referring to opinions of the Solicitor-General. The actual advices cover a whole range of things and are quite voluminous, but if the committee wants a copy of the whole thing I am happy to provide it. I was trying to be of assistance by bringing out the relevant parts.

Finally, as I said in the previous hearing, we have been in contact with the barristers in particular—with the Bar Association—for some period of time. I think it is fair to say, for the committee's benefit, that the Bar Association have been extremely frustrated by our inability to provide them with information that would allow them to go about their job of addressing any issues that they see in that profession. They have asked us over a number of years to provide information regarding individual bankruptcies. Our advice is that we cannot do so, so it is a frustration on behalf of the association but also on the part of the tax office. We would like to do so. We have got legal views and we have begun to share some of those legal views, hopefully to

find a way that we will be able to do that, because it is, I think, in both our interests for that to occur.

I would just like say one further thing. It may not have been totally clear from reading the evidence in the *Hansard* that the tax office's primary concern in this whole matter is with people who set out to avoid tax through the use of the family law or bankruptcy provisions. These are the people who knowingly do that; they start off with that proposition and work towards it. The exposure draft bill is obviously broader than that and you have heard from Attorney-General's and ITSA on that, but from a tax office perspective that is our primary concern—that the task force appeared to identify a defect in the law that allowed that to occur.

CHAIR—Would Mrs Yong or Ms Lind like to say anything?

Mrs Yong—No.

Ms Lind—Not at this stage.

CHAIR—Thank you for that update on the outstanding returns. I have posed a question that I now put to you: of the 66 judges/magistrates who are involved, how many are judges and how many are magistrates?

Mr Farr—We do not have that break-up, I am afraid, and I am not sure that we can actually get that. We could possibly go through each individual case and get back to the committee on that, but we were not able to break that up from the system. If you would like that split we will certainly attempt to do that by going through it case by case.

Ms Lind—We will certainly be able to do that when we have completed our formal data-matching comparison with records that we are getting from the various state justice departments at the moment. That occupation code groups together judges, magistrates and, currently, coroners. I do not think we have the ability, just using that occupation code, to separate those out for you, but we certainly will once we have got that data. That is progressively coming through, so probably in the next month or two we will be able to separate the judges at various levels in the system.

CHAIR—Is it fair to say that the introduction of the tax reform laws of 2000, and GST and ABNs and BASs, has in fact flushed out a lot of the people who could get away with it before?

Mr Farr—Yes. That is quite true. We are now able to match people's BASs with their returns. We are going broader than that by matching BASs not only with returns but also with professional associations. So a combination of the additional information we are now getting under the new tax system, combined with our better matching ability, has certainly influenced our ability in this area.

CHAIR—In fact it is probably likely to preclude what happened with the barristers who did not pay any tax ever happening again, isn't it?

Mr Farr—It has certainly lessened the likelihood of it. As I think I said at the last hearing, there is always going to be the odd case which will be missed by our risk assessment processes,

but we are getting far better at looking at the systemic issues in particular industries or occupations.

CHAIR—The only way it could be missed is if somebody is not charging GST, and that would presumably be somebody who is not registered—somebody either earning less than $50,000 turnover a year or deliberately failing to register for GST.

Mr Farr—Yes, that is certainly one of the ways. In some cases when we look at things from one perspective it may just look like a very low risk for us. We may think that the person does not need to lodge a BAS because they are probably not going to pay, but when we actually look at the whole system and how it matches we may come to the conclusion that that is overall a risk for us. That is why sometimes we do not get it initially and we have to go back sometime into the future and get that.

CHAIR—It is not going to take 45 years this time, is it?

Mr Farr—No. Whichever way you look at it, that was—

CHAIR—'Unforgivable' is the word.

Mr Farr—Yes. There is no excuse.

CHAIR—I was interested in the part of the minute you received regarding the opinion of the Solicitor-General concerning the proposed compliance policy for Australian Taxation Office employees and contractors. If I recall correctly, I asked you how it could have been that the tax office contracted somebody to carry out work for them and, therefore, knew the contractor was being paid money as a professional, yet did not double check that that contractor was in fact paying tax.

Mr MURPHY—Clarrie Stevens.

CHAIR—Clarrie Stevens. Your answer to me was that you had had advice that section 16 of the tax act precluded that occurring. I think I expressed some scepticism about that. I had a look at the extracts from the Solicitor-General which relate, on my reading, to this proposed compliance policy. The only thing is that you do not tell me what the proposed compliance policy was. It seemed to take the form of a directive, pursuant to the Public Service Act, to require compliance officers to give information to human resources people within the Public Service. The opinion seems to be that the mistake in that policy was to make the directive under the Public Service Act rather than under the tax act itself, when it could have been a measure that was required in the pursuit of the administration of the tax act. That did not seem to me to be a huge hurdle to overcome. If that was his only complaint, you could then have thought about a way in which you could direct people to pass that information—by doing it pursuant to the tax act rather than the Public Service Act. You go on to look at the Privacy Act—which, I must say, we cannot review quickly enough. The unintended consequences of the Privacy Act are enough to fill volumes. In paragraph 70 you say:

Accordingly, a direction under ss 13(5) and 20 of the Public Service Act would not, in my opinion, have the effect that the use of personal information was 'required or authorised by or under law'.

So we had this interesting argument that a direction had to be lawful before it could opt out of the Privacy Act, yet it all seemed to hinge on the fact that the direction was under the Public Service Act and not under the tax act. Is that a fair summation?

Mr Farr—To go back to my previous evidence, what I actually said was that we were unable to use information collected under the taxation provisions to provide to our contracting people or our human resources people—it is the same principle—for the purposes of administering or running the tax office.

Mr MURPHY—To get this clear, at page 10 of the transcript on Monday, 5 July, in relation to my question about Clarrie Stevens—the chair got involved in that question too—you said:

The answer to that is that the Commissioner of Taxation is also the CEO of the tax office. In a sense they are different people. For the business of running the tax office, the commissioner is not entitled to use the information that he gathers under the relevant taxation laws. In that way he is no different.

Mr Farr—Yes. So he cannot use the information gathered under the tax laws to run the tax office as opposed to administering the tax act.

CHAIR—He is doing it under the tax act, and the directive is pursuant to the tax office for the carrying out of his responsibilities under that act.

Mr Farr—Yes, but I think the opinion also says that it would not be in the course of the duties of a tax officer to provide that information to a human resources person or to a contract person. That would make them contrary to section 16, which would then make it not lawful.

CHAIR—For the purposes of this discussion would you define for me a 'human resources or contract person'?

Mr Farr—A human resources person is one who looks at the employment of people and puts together their contracts of employment. Similarly, a contract person is a person who is contracting in someone under some contract of work. So they are people who fall into those areas.

CHAIR—It should not be beyond the wit of man to have a requirement that any person who is contracted should be prepared to sign a statement that their tax affairs are up to date—I will go to the question of the giving of permission in a minute—and to make it a requirement that you do not get the job unless you do give a statement.

Mr Farr—Essentially, that is what we do.

CHAIR—You do?

Mr Farr—Yes, we do.

CHAIR—You do now, but you did not do it previously.

Mr Farr—We have not always done it. I am not 100 per cent sure about when we started to do it, but we certainly do it now.

CHAIR—Once you have a statement, you would be entitled to check it.

Mr Farr—Not by reference to information collected under the tax act.

CHAIR—How is it that you say you cannot do that yet you can take a taxpayer's tax records regarding his income tax stream and his GST stream now and you, or the commissioner in his administration of the tax act, look at that as a whole entity and, where it is adjudged that the income tax is behind, transfer money out of the money paid for GST and set it off against the income tax and say, 'You are now behind in your GST,' and the relevant charges accrue? What is the difference between that as a piece of administration and requiring somebody to say, 'Have you put in your tax return, are you up to date,' and checking it? Can you explain that to me?

Mr Farr—Yes. I think they are two different things. You mentioned the offsetting of debts, and in both cases that you mentioned what it amounted to was a debt to the Commonwealth; they were just different aspects of a debt to the Commonwealth which were combined. We also have a running balance account provided for under the new tax system, which brings together certain aspects of that in one account. In the other case it was two different things: one was running the tax office and the other was administering the tax law. They are different aspects.

CHAIR—Not really, because the person whom you employed owed a debt to the Commonwealth. So he is still in the same category. It strikes me as a very spurious distinction.

Mr Farr—Could I also be clear that this is not our preferred position. We have advice from the Solicitor-General and we are obliged to follow that.

CHAIR—Just let me follow this through for a minute. The other way through would be to have a compliance officer do the hiring.

Mr Farr—That is true.

CHAIR—And that would then be ancillary to his task of compliance.

Mr Farr—Only if the hiring were for the purposes of the tax act, not for the purposes of running the tax office. Even if it were the same person, they would fall under different categories of duty.

CHAIR—This is sounding like very queer Chinese walls to me.

Mr Farr—It is unfortunately the way in which we have to work. Under section 16, you can divulge information if it is part of your duties. A compliance officer and a contract person have different duties. The contract person is not for the purposes of the tax act.

CHAIR—It seems to me that it is not beyond the wit of man to find a way out of this. If one thing that is required is a change to section 16 to allow an individual to give permission for this to occur—because there seems to be a grey area according to this opinion—that would overcome

the problem. If you did not employ anyone until such time as they provided their wherewithal and gave you permission to deal with it that would overcome the problem.

Mr Farr—That would certainly be a way around it. That would be a matter, obviously, for government on the advice of Treasury because it relates to the policy and legislation of the tax act.

CHAIR—I do not mind who does the advising and who does the accepting; it would be a good thing to do, wouldn't it?

Mr Farr—We would certainly support it, yes.

Mr MURPHY—Mr Farr, contrary to your advice from the Solicitor-General—and with great respect—my advice from the New South Wales Bar Association is that your belief that the commissioner is not entitled to gather that information for the business of running the tax office is a nonsense. That is my advice, and I believe that it would be in the interests of the tax office to talk with the Bar Association, because they want to be very helpful and constructive. I will come to that now. I want to refer to a letter dated 14 July that was written to me by Mr Philip Selth, the Executive Director of the New South Wales Bar Association. I believe that at the last hearing I gave you a copy of a letter that I received from Bret Walker SC, who was then the President of the New South Wales Bar Association, in relation to his interpretation of section 16.

Mr Farr—I do not believe you gave us a copy.

Mr MURPHY—I am sorry if you did not get a copy of that. I will make sure that the secretariat gives you a copy of that letter, because it is just useful to have another expert medical opinion. The Bar Association has visited me again since we last met, and I just want to place on record—and I will give you a copy of this letter—that:

The Association—

that is, the Bar Association—

is concerned that the evidence given by ATO officers to the parliamentary committee gave the impression that the Bar Association, knowing there was a problem, did nothing until publicity forced it to do something about these barristers, and that the ATO had worked closely with us in remedying the problem. Neither of these propositions is correct.

The Bar Association, in its letter to me, went on to say:

In none of the comments I have seen that seek to justify the proposed legislation where reference has been made to the 'bankrupt barrister' scandal has recognition been given to:—

and there are a number of descriptors here which I want to put on record—

- the numerous requests made by the Bar Association over a number of years (at meetings with the ATO and in writing) for specific information which is in the public domain about barristers who may be misusing the tax and bankruptcy laws and our repeated requests for an amendment to section 16;

- the fact that at no stage has the ATO ever given the Association information that would allow us to take action against barristers for misusing the tax and bankruptcy legislation. This is despite our request that the ATO lodge formal complaints about barristers so that we would be in a position to investigate;

- the fact that where the Association did come to know of problems with individual barristers concerning tax, we took action in the courts, e.g. the cases of Harrison and Hamman;

- that it was not until the Sydney Morning Herald articles (which drew on information given by the ATO to Paul Barry, but not to the Bar Association) that we knew of problems with specific barristers; and—

as I understand it, Mr Barry got his information from the commissioner's report of 2000-2001—

- that the amendments to the New South Wales Legal Profession Regulation 1994 and the Legal Profession Act 1987 to enable the Association to take action against certain barristers were driven by the Association working directly with the New South Wales Attorney General.

In his letter, inter alia, Mr Selth said:

I have prepared the attached chronology of the Association's dealings with the ATO over the last seven years concerning barristers and payment of income tax.

There is an exhaustive chronology dating from 29 October 1997—when the ATO regional commissioner of small business income wrote to the executive director, requesting a meeting to share the findings of some recent research into the compliance behaviour of the legal profession and to seek your association's ideas and views prior to commencing a group within this group—right up to a meeting on 20 July with Mr Greg Farr, Second Commissioner of Taxation, and Ms Lind, Assistant Commissioner, Serious Noncompliance. That chronology is some 16 pages long. Did that meeting go ahead, by the way?

Mr Farr—Yes, it did.

Mr MURPHY—I do not know what was said at that meeting, but I know what was said at the meeting I had with Mr Selth. I would like to table this and make sure you get a copy of it. I think the Bar Association feels that they were kept in the dark; that is their case. They responded appropriately when they became aware of the barrister scandal. I think they feel, from some of the media reports and the explanation given by the tax office, that the Bar Association was not doing anything. I have had the chance to read this and I have formed an opinion—and I am happy for you to respond to it at some time if you want to—that the Bar Association have done everything reasonable but have run into brick walls with the tax office. I say that with great respect. You both have different views about the secrecy provisions, but I think that needs to be clarified. I hope that, if it cannot be clarified, this committee will recommend that there be amendments to section 16. It is quite plainly a nonsense, because the work of the legal profession project was outstanding—and I give credit to your team for doing that.

When I was trying to gather information—which, I must admit, did put the taxation commissioner in bad odour on this matter—it certainly left a bad taste in my mouth to find that nothing was there the following year in the annual report. I appreciate your providing me with a specific answer to my question on notice about why the legal profession project got dropped off

the taxation commissioner's 2001-02 annual report. The information was provided at a budget estimates hearing on 3 June 2000—and I had not seen this. Mr Carmody said:

> The general explanation is that with annual reports there are certain things you are obliged to report on—we do those, and then we tend to report on a range of different issues each year according to the major issues we are confronting at the time. It was just that we had been through two cycles with that—we had given a fair indication and there were other issues that we sought to include in the report this time.

That was evidence given by Mr Michael Carmody. Whilst it is fair enough for him to make that point, I again want to put on record that I do not accept that the work of the legal profession project ought not to have been reported on in the following year. It was quite scandalous. I do not think this did the tax office and Mr Carmody any good. It made people think, 'What is going on in the tax office?' If my memory serves me correctly, something like one-third of members of the Bar Association were not up to date with their tax; there were 60 or 70 barristers under investigation. This was pretty sensational, because a reasonable person would expect members of the legal profession to be setting an example. I want to emphasise that point, because I do not want it to happen again. I thought the work done by the legal profession project was outstanding, and the commissioner deserves a gold star for it. I am pleased that Mr Barry, whether he fell upon it or it was brought to his attention, made this public, because a lot of good has come out of it since it was put in the public domain.

Mr Farr—The commissioner is aware of your concerns following the last hearing. With respect to the matters raised by the Bar Association: having not seen the letter I cannot respond in detail, but I would like the opportunity if time permits now to respond in some general terms.

Mr MURPHY—Yes, I would be happy for you to do that.

Mr Farr—The Bar Association made a number of points, and from my hearing of your reading I do not take any objection to any of those. The Bar Association have been very active in dealing with issues in the legal profession or to do with their members, and they are to be congratulated on that. As I mentioned in my opening statement, the meeting you referred to did occur and we are able to share some legal advice that we have. We are as frustrated at not being able to assist the Bar Association in their endeavours as they are at us not assisting them in their endeavours. If there is a way forward through the legal positions, we are both committed to that. As I said, we are able to share some information and hopefully that will lead us to being able to give them the information that they want to be able to deal with the issues. If I gave the committee the impression that it was the Bar Association that was inactive, I apologise for that. That was not my intention. There were certainly members of the profession who were inactive, but I did not mean that the Bar Association was inactive. It was not my intention to give that impression.

Mr MURPHY—It is very important to put that on the public record. When I went ballistic in federal parliament, I had Bret Walker and Philip Selth on my doorstep. They were very concerned about that. Subsequently, I had a more recent meeting with Mr Selth. I am sure they will appreciate that apology.

CHAIR—I have a question for you, staying with the question of the barristers. I know the profession finds that the barristers who behaved in this way brought it into bad odour. That was

very unfair to the vast majority of the profession, who pay their taxes properly and behave as upright citizens. Some of those barristers had in fact lodged tax returns and then failed to do so for a number of years. Isn't that the case?

Mr Farr—That is correct.

CHAIR—I am just wondering why you were unable to do anything about them—and we are not dealing with vast numbers of people—when you were able to with the man who was the then Treasurer of the country. Mr Cortese, who was the Deputy Commissioner of Taxation in the eighties, wrote to Mr Keating in the following terms:

The purpose of this letter is to draw your attention to the need for you to file your 1986 income tax return which is now outstanding.

As recently discussed your 1985 return is also well overdue.

I appreciate how busy you have been but I ask that you now give urgent attention to the filing of your returns, especially that for the 1985 year.

Should you wish, your return can be posted marked for attention: Ms Yvonne Ellis, Liaison Officer, Priority Control Section, GPO Box 3523, SYDNEY NSW 2000.

If you wish to deliver your return, you could contact Ms Ellis—

and two phone numbers are given—

or myself.

Your co-operation and early response would be appreciated.

Yours faithfully ...

The ATO for the financial year 1990-91 obtained 10,794 convictions for non-lodgment of returns. Can you explain to me how in 1990-91 you found 10,794 people who failed to lodge their returns and prosecuted them, how Mr Keating got a special letter and no prosecution and how the barristers were not even contacted or chased up at all? Does that not tell me there is bad administration?

Mr Farr—If we look at the barristers, we see that there was certainly the ability for the tax office to demand lodgment of those returns. You pointed to the case where we did not do so and where we missed. The primary mischief that we are addressing in the barristers' project is not one of not lodging returns—we have the ability to demand those—

CHAIR—But you did not do it.

Mr Farr—No, we did not, but there is the ability for the commissioner to do it. What we have actually found is that people—and in that case it was barristers—who had incurred a tax debt had set themselves up fully aware that they would be able to not pay tax through the use of the

bankruptcy. That was the mischief we were addressing there and that was what the task force was about.

CHAIR—Had you picked them up early, you would have avoided the other problem.

Mr Farr—If we were to have picked up those ones earlier, what would have happened in all likelihood is that we would have had a bankruptcy earlier, but we still would not have recovered money. In some of these cases they were multiple bankrupts.

CHAIR—Pardon me for saying so, but the fact that you allowed the process to continue for year upon year is laches and acquiescence.

Mr Farr—To be perfectly clear, as I said previously we should have been more active in gaining lodgment of those returns. There is no question about that. It is within our power to do that, and we are able to do it. In those particular cases, we did not do it as well as we would have liked. But the mischief there was that, even when the people were lodging returns, even when there was a debt, we were not recovering the tax payable.

CHAIR—It was only able to be done because going bankrupt gave no impediment to the barrister to be able to continue as a member of the bar. Once you took away his ability to continue to practise as a member of the bar, then the incentive to go bankrupt went out the window.

Mr Farr—I think that is true, and that is why the actions of the Bar Association have been so effective.

CHAIR—That is the essence of their complaint that Mr Murphy has brought up.

Mr Farr—Yes. As I said, I fully appreciate their complaint that they are frustrated that we are unable to provide them with the information to allow them to get on with doing the job they want to do. Unfortunately, our advice is that we cannot do that because it would be in breach of the secrecy provisions.

CHAIR—That is the advice that the barristers themselves reject.

Mr Farr—That is right.

CHAIR—You are relying on the Australian Government Solicitor, and they are people who are out there practising in the commercial workplace.

Mr Farr—Yes. We are trying to resolve that, and hopefully between the Bar Association and ourselves we will, because we both want this to happen. This is not adversarial in the sense that—

CHAIR—Did you ever go outside the Australian Government Solicitor and seek an advice?

Mr Farr—We have had advice from chief general counsel.

CHAIR—Have you ever gone outside that framework? One of the things that our government did when we came into office was allow agencies to go outside the use of the Australian Government Solicitor; he would have to compete on the basis of the advice. I have to tell you that, as a minister, I always went outside for my advice.

Mr Farr—We have advice from the Australian Government Solicitor, but we also—

CHAIR—But you have no other outside advice nor did you seek it.

Mr Farr—We have advice from the Solicitor-General.

CHAIR—You have never gone outside government circles to get advice.

Mr Farr—No, not that I am aware of.

CHAIR—You know that you have the ability to do that, don't you?

Mr Farr—Yes, we do.

CHAIR—But you have never chosen to do it.

Mr Farr—Ms Lind thinks we might have; I have not seen any of that advice.

CHAIR—It would be rather good if you could find it and we could see who provided it and what they had to say. I think that is quite important.

Mr Farr—Yes, it is, and it is important for us as well. I think the way forward is to actually work with the Bar Association and we might be able to find some way through this without requiring a legislative amendment to section 16.

CHAIR—If you can do that now, you could have done it years ago. Why hasn't it been done?

Mr Farr—We are not able to yet; we are still trying to. As I said, it is not that we do not want to do it; we do want to do it. It is in our interests to do it. It is in the Bar Association's interests for us to be able to do it. We are not resisting it.

CHAIR—We have unearthed an enormous problem. People have been trying to solve it; time has been passing, not in weeks, days or months but in years; and the response we get is a highly oppressive exposure draft of legislation which will not penalise just one category of people but impinge on the life of ordinary punters. In the meantime, I am terribly pleased that you are having a chat with the Bar Association!

Mr Farr—As I said, our concern with the draft legislation is a narrower one than those the Attorney-General and ITSA have. Our concern is only around the tax avoidance aspects of it.

CHAIR—But you are the reason that this has come about.

Mr Farr—No, we were part of the task force.

CHAIR—We have heard evidence that the reason this draft exposure came about is as a result of what happened with the barristers.

Mr Farr—I think you have also heard evidence from ITSA and the Attorney-General that, having identified the defect in that particular aspect of the law—

CHAIR—They said that, once it was drawn to their attention and they started to look at it, then they saw the loophole that could be used and they set about closing it. But this was all brought about by the fact that these barristers were using the bankruptcy provisions to avoid paying tax.

Mr Farr—That is certainly where the defect was identified, but I think the exposure draft legislation is broader than the concerns we identified during the task force period.

CHAIR—Can you confirm that you sought other advice?

Ms Lind—Yes, I can. Apparently, around 2001 we sought advice from counsel Payne and Robinson on the section 16 disclosure issue. That was referred by us to the Government Solicitor for review and consideration.

CHAIR—What did that advice say?

Ms Lind—I am not quite sure what the advice actually said.

Mr Farr—We can provide that to you, Madam Chair, if you wish.

CHAIR—Thank you. I would like to see that.

Mr MURPHY—Ms Lind and Mr Farr, thank you for providing some follow-up information on the questions that I asked last time. I would like to return to the question I asked in the House about whether any magistrates or judges had failed to lodge their tax returns. I was very interested in the information you gave me, which was far more useful than what had been given to me in relation to a number of questions. I do not know whether you have any input into the preparation of the answers to these questions to the Treasurer, but the answers I recently got to some of my questions were certainly like a red rag to a bull. They said quite specifically, 'Refer to the annual report.'

I will give you one example. When I asked, 'How many barristers, solicitors, judges and magistrates failed to lodge income tax returns for specific financial years?' the response that was prepared for the Treasurer was just: 'Refer to the Commissioner of Taxation's annual report 2002-03.' Of course, when you look at that you do not get that information at all. Can you enlighten me as to why I would get such a response? What you have provided to me here is far more useful to me and to those who are concerned about these issues—the public.

Mr Farr—I do not think it is for me to comment on answers provided by the Treasurer but I can say that, in respect of the particular issue that you raise, up until recently we were not able to

pull out the level of detail that we have now given you. It is a recent thing that we have been able to do.

Mr MURPHY—I was not asking you to do that, but of course any minister or Treasurer relies on his or her department to provide the information. If I had been given the response that you have just given me—or, for whatever reason, some explanation as to why the information could not be provided—then this would probably exercise my mind; I would understand why you could not provide it and then I would be thinking about what we could do to ensure that this information could be made available.

I have a number of questions still outstanding on the *Notice Paper* that refer to that sort of response—that is, directing me to refer to the annual report, which does not give me the sort of detailed information that, for example, was available in the 2000-01 annual report of the work of the legal profession project, which provided a lot of information. It is useless to spend months and months on this. When I started my campaign in the *Notice Paper*—and I think the first question was asked on 13 February 2002—it took a whole 12 months to get the response, yet it was a very simple question: 'What percentage of barristers and solicitors pay the top marginal rate of income tax?' All that sent me into a bit of a rage. It took 12 months to get that information.

I will move on to the latest response that you have given to me in relation to magistrates and judges. You have said in relation to their failing to lodge returns:

The ATO is currently in the process of ascertaining from State and Federal Justices Departments, current lists of judges and magistrates to match against ATO records. This process is—

not—if I can correct your reply—

expected to be completed until September this year.

However, previous analysis of income tax returns which have been identified as occupational code 1103 (judges, coroners and magistrates) showed a population of approximately 500 and the current lodgement status of that group is outlined below. Publicly available information suggests a current national population of judges and magistrates of approximately 720 indicating that there is a gap in income tax returns currently identified as occupation code 1103. The ATO will not be able to reconcile this difference until the above mentioned data matching process is completed.

I will certainly be interested to find out why there is this discrepancy or disparity.

Mr Farr—I assume, and I am only assuming, that it is because they are lodging under a different industry code. That is what we are attempting to resolve.

Mr MURPHY—I was going to suggest that, because I have learnt something about business industry codes since I asked these questions. I am a bit fascinated that there are judges and magistrates who are still behind in lodging their tax returns and I suppose specifically that, whilst 48 have been given extensions, there are still 14 in relation to the financial year ended 30 June 2003 who are still to lodge their returns. Can I get some insight into that? So we have got 14 who are behind with their most recent requirement to lodge a tax return and we have got

another 10 who have got to lodge one, I presume, for the previous year. Then there is one that goes back to 1997. Is that because that particular judge or magistrate is sick?

Ms Lind—I think it is important to remember that judges and magistrates are salary and wage earners and some of these returns actually might be refund cases. Also, with our statistics, although we may show that a particular year is outstanding, there may in fact not actually be a lodgment requirement if the person has not been employed as a judge in that year. So our statistics are showing that we have had a record of lodgment for that person for previous years, our statistics are showing there is a subsequent year that is still not lodged and it is really not until we actually follow it up on a case basis that we can actually ascertain whether there was a formal lodgment requirement or not. I think it is important to remember that a lot of these cases might well be refund cases as well. That is probably why they might not have already been subject to lodgment follow-up.

Mr MURPHY—Does that excuse them?

Mr Farr—It puts them into a different risk category, as far as we are concerned. Having said that, I think we are in the process of following up all of those cases now.

Mr MURPHY—I am heartened, anyhow, that according to tax office records none of this group is currently bankrupt. I just believe the public would be interested to know that they are up to date with their tax returns. Of all people, you would expect—like us, members of parliament—that they would be up to date with their tax returns. I am surprised that 10 of them are certainly behind with their previous tax returns.

Mr Farr—We will be following those up.

Mr MURPHY—I have a couple of other questions. What has the ATO done about recommendation 1 of the *Joint taskforce report on the use of bankruptcy and family law schemes to avoid payment of tax* of January 2002? The report stated:

It is recommended that the ATO and the Attorney-General's Department cooperate in developing guidance ... for ATO decision makers to ensure that a decision to disclose information to a trustee in bankruptcy or liquidator is made:

- at an appropriately senior level; and
- in accordance with the requirements of both the Income Tax Assessment Act and the Privacy Act.

Mrs Yong—The tax office did hold workshops both with relevant tax office stakeholders and with the Attorney-General's Department in the first half of the 2003 calendar year. We issued what we call a practice note to staff around 30 June 2003 to advise staff working in the insolvency and debt collection areas of the office of the circumstances in which the provision of information to insolvency practitioners is permitted under those various privacy and secrecy provisions. We issued that advice to staff internally last year.

Mr MURPHY—What has the outcome been?

Mrs Yong—I am not able to comment on the particular outcome in terms of cases, but the advice is there for staff to take and they are encouraged to provide information to insolvency practitioners in the appropriate circumstance as outlined, which essentially is where the provision of that information would maximise or further the return to the tax office as a creditor in the particular circumstances of the case.

Mr MURPHY—Finally, on the task force report, recommendation 12 suggested:

> ... the penalties for key offences in the Taxation Administration Act be reviewed in accordance with advice to be provided by the Criminal Justice Division of the Attorney-General's Department with a view to enhancing their deterrent effect upon high income professionals avoiding payment of their income tax liabilities.

Would you like to comment on that recommendation and what has happened subsequent to the recommendation being made?

Mrs Yong—The Department of the Treasury consulted with the tax office during 2003. In relation to that recommendation, we held discussions with them and provided some comments. The matter has been with them since 2003, and I do not believe they have made any particular further recommendations at this time.

Mr MURPHY—Are you anticipating some response to that or are they just going to let it lapse?

Mr Farr—We would certainly be hopeful of a response. We would be supportive of that but, ultimately, that is a matter for Treasury to advise government on, not for the tax office.

Mr MURPHY—Perhaps you could give them a prod.

Mr Farr—Yes, we could do that.

Mr MURPHY—Thank you all. I have finished my questions for today, and I appreciate the information that you have provided me, because, at the risk of repeating myself, this is far more useful than getting an answer from the Treasurer—or whoever is responsible for that—saying, 'Go away and read the annual report,' when it tells you nothing. This is constructive; we can actually do something about it, and I appreciate that.

CHAIR—I do not think it is unfair that the Treasurer should tell you to read the ATO annual report; I think that is perfectly reasonable. And I would disagree that it is full of no information. My reading of the report shows that it contains information that is useful and pertinent to what we are doing. Nonetheless—

Mr MURPHY—I will have to respond to that, Madam Chair, because I think I am being verballed there. Of course the annual report provides a lot of useful information.

CHAIR—Good—I am glad you realise that.

Mr MURPHY—We rely on that information, but—

CHAIR—That is very good.

Mr MURPHY—Madam Chair, in relation to my specific questions: when you read the annual report, as suggested by the Treasurer, the information sought by the member is not there. What I put to Mr Farr, in good faith, was that having to wait a long time for an answer to a question like that is absolutely hopeless. I suggest, as you suggested in relation to the question that I asked about solicitors, judges and magistrates failing to lodge tax returns, that you give a brief explanation of why it is too difficult or why the information is not available. I would then want to think about what we may be able to do so that that information is easily accessible.

CHAIR—It shows how useful committees are when you can investigate questions in depth as distinct from the very pro forma manner of putting questions on notice. I do not think the two are comparable.

Mr MURPHY—Mere backbenchers like me unfortunately do not get many opportunities to ask questions during the theatre of parliament.

CHAIR—You are very fortunate today.

Mr MURPHY—That is why I put so many questions on the *Notice Paper* in the interests of my constituents.

CHAIR—It just shows that we use these committees more, doesn't it?

Mr MURPHY—I agree.

CHAIR—Thank you very much for your evidence today, Mr Farr, Mrs Yong and Ms Lind.

[10.47 a.m.]

HARRISON, Mr Ian Gordon, SC, President, Australian Bar Association; and President, New South Wales Bar Association

SELTH, Mr Philip Alan, Executive Director, New South Wales Bar Association

CHAIR—Welcome. To date I do not think the committee has received a submission from you, but you may like to make some opening remarks.

Mr Harrison—I am indebted to this inquiry for the opportunity to make any comments at all. I suspect that my remarks need principally to be limited to a concern on behalf of barristers generally that remarks that preceded the exposure draft and that to some extent perhaps had been aired during evidence before this inquiry suggested that as a general population barristers were tax defaulters and that this legislation was driven in some respects by reference to a perception in the past and an anticipation in the future that that would continue. My major concern is to draw it to the attention of the inquiry, if it has not been already been drawn, that the defalcations that became notorious at the end of the nineties and the early part of 2000 had not, prior to that, come to the attention of the Bar Association as a body or barristers as a group, nor did we have legislative or regulatory powers to anticipate that these defalcations might occur. Any suggestions, therefore, that the Bar Association as a representative body had in some sense failed in an obligation it had or failed to take an opportunity which it had to anticipate these bankruptcies or to take steps against barristers so that they did not occur are misconceived.

I am indebted to Mr Farr for the evidence he has given, at least today, which clearly corrects the record. The New South Wales Bar Association has acted assiduously from the very first moment that any material has been drawn to its attention. As the chronology that Mr Murphy has referred to—prepared in detail by Mr Selth and his assistants—demonstrates, we have worked consistently and in a timely way to make sure that any defaulting barristers were dealt with promptly and, to the limited extent that we have the power to do so, that it does not occur again.

On that last point, can I say that I was in this room when some discussion was had between the chair and Mr Farr in relation to section 16 and attempts to amend or replace it. I do not, on behalf of the Bar Association, want to have an input into the specifics of how it might be amended, but I should draw to the attention of the committee that to some extent the only way in which the Bar Association can respond to the possibility that a barrister is likely to default in her or his income tax affairs is in relation to a formal complaint. My anticipation is that, if the Australian Taxation Office were in a position to make formal complaints in a timely way, we could, with the legislation that is now in place, respond to them in a timely way.

The relationship between the ability of the Taxation Office to make a formal complaint to us to which we can respond and the operation of section 16 does not seem to have been explored. If section 16 were amended or replaced and the Australian Taxation Office were free at an early time to make a complaint to us, we would correspondingly be able, at a very early time, to respond to those complaints. I hasten to say that, in light of the notification requirements that attend barristers in applications these days for practising certificates, bankruptcies or bankruptcy

and revenue offences are required to be notified to us. Obviously we respond promptly to those notifications.

Finally, I might say that I noticed, Madam Chair, your reference earlier this morning to the exposure draft of the legislation as 'highly oppressive'. I have no argument with that description of the legislation. Those are the only preliminary remarks I wish to make.

CHAIR—One question comes right to mind: as a member of parliament, if I become bankrupt I lose my job. I am also a practising solicitor. I would also lose my job if I became bankrupt. Why does that not apply and why has it not applied to barristers?

Mr Harrison—It has applied to those barristers whose affairs were examined under the legislation and who were found to be not fit and proper persons. As a result—as you would no doubt be aware, Madam Chair—about eight have been removed from the roll, had their practising certificates cancelled, which I think is the issue that you are concerned about—their removal from the role of course carries the same effect—or, in the case of a QC or senior counsel, had their commission revoked or their entitlement to refer to themselves as senior counsel withdrawn. So the answer is that, if they fall foul of the bankruptcy legislation in circumstances where, according to the legislation we administer, that amounts to professional misconduct, their right to practice is removed. I hasten to say that if a barrister becomes a bankrupt, for example in the way that Sir Garfield Barwick became a bankrupt, having genuinely adjusted his affairs in favour of offering a guarantee to someone who defaulted, that does not amount to professional misconduct in a way that leads to a disentitlement to practise the profession, nor should it, with great respect.

CHAIR—The problem is that in this day and age those sorts of niceties do not apply. They do not apply to us, for instance.

Mr Harrison—When you say—

CHAIR—I mean that you cannot be a member of parliament if you are an undischarged bankrupt.

Mr Harrison—I cannot speak for parliamentarians. Maybe there is room for some amendment to the provisions that apply. We administer a system which looks at the circumstances in which a barrister becomes a bankrupt. With respect, the provisions have some intelligent insight in the sense that they do not penalise somebody whose bankruptcy arises out of circumstances over which they have no control. No right thinking person would take an objection to the removal of the right to practise as a barrister or solicitor if the bankruptcy occurred in circumstances which revealed that at the time it occurred the person was not a fit and proper person to hold a certificate—for example, someone who intentionally put their assets beyond the reach of creditors and then became bankrupt. I do not have a difficulty with that.

CHAIR—Who makes the determination as to who is a fit and proper person?

Mr Harrison—Under the legislation, in the first instance on receipt of a complaint, the Council of the Bar Association or Law Society make that decision at a prima facie level. If at a prima facie level they are of the view that the person became bankrupt, to speak in general

terms, in circumstances that show they are not a fit and proper person then that matter is referred to a state tribunal set up under the legislation, which would then deal with it. So we have a fact-finding exercise. A number of the barristers we have referred to were referred to the Administrative Decisions Tribunal. We have a collateral role, even outside the circumstances where the tribunal makes a finding unfavourable to a barrister, to move the Supreme Court for the removal of the name of a practitioner from the roll.

CHAIR—Do you say that the reason you did not remove people's practising certificates or have them removed from the roll is that only the court can remove them from the roll?

Mr Harrison—The court does, but it would do so, not necessarily exclusively but in most circumstances, on a motion by the Bar Council or the Council of the Law Society.

CHAIR—The reason you say you did not do it earlier is that you were not aware.

Mr Harrison—Absolutely, and I have to reiterate that. The tone of Mr Barry's article and the pejorative references that have fed off it ever since carry with them the implication that we had some supervisory, overseeing, all-knowing role and that we sat on our hands, notwithstanding. Firstly, these revelations came as much of a shock to the Bar Association and I suspect barristers generally as they did to the public at large. But, secondly, the suggestion that we ought to have been acting sooner operated upon a mistaken belief about our powers to do anything in those days had we known but more importantly on a mistaken belief about our ability to find out. It would have been helpful if the barristers who had failed to put in tax returns for the excessive numbers of years that the most notorious had failed to put in tax returns for had been drawn to our attention. Without mentioning the names of two practitioners whose taxation affairs prior to the Barry article came to our attention, I will say that we moved promptly against them. One of them was removed from the roll. The other was referred to the tribunal, which dealt with that matter accordingly.

CHAIR—The problem with the statement that, if the Taxation Office had told you, you would have done something about it is that the fact of the matter is that they did not know. They had not done their own work. They did not have anything to tell you at all, because if they had done their own work they had the power within their own act to act upon it without telling you anything.

Mr Harrison—As regrettable as that fact is, I embrace it as only emphasising that we were one step further removed from the type of information that we needed. I say again that articles by Mr Barry and those who have fed off that sort of pejorative comment ever since—and in saying that you will see it time and time again in articles that refer to barristers—make a sniping reference to bankruptcies as something that is lurking in the background, and I take particular exception to that. If we had had that information earlier we could have acted. But we did not have it and, as you correctly point out, Madam Chair, those you would expect to have the information to tell us either did not have it or were constrained by the terms, or the interpretation of the terms, of section 16 that we have heard so much about.

CHAIR—Do you have a view about the interpretation of section 16 as we dealt with it this morning?

Mr Harrison—I would have to confess that it is open to two views. But with great respect that is arguing about deckchairs on the *Titanic*. Four years ago through Mr Selth we commenced agitation with the Taxation Office and with the Attorney-General for amendment to the section. We do not care if the section is amended; we do not care if it is repealed; we do not care if an amendment is made to the schedule of persons who are authorised persons to be notified. The sooner something happens which permits us to receive information which we can act on in a timely way, the better. However, because of the notification system that operates so effectively at the moment—and if there is any wood around, I will touch it—we do not presently have any expectation from the state of notifications before us that there are people likely to fall foul of the bankruptcy requirements that became so notorious at the end of the 1990s.

CHAIR—When did you introduce the notification provision?

Mr Harrison—It was introduced by the state parliament—

Mr Selth—About three months after Mr Barry's article there was a regulation brought through and then there was subsequent legislation. The chronology that Mr Murphy referred to earlier, which I understand is before the committee, set out all those particular dates—

Mr Harrison—The regulations came in very promptly after the Barry article.

Mr Selth—The Legal Profession Amendment (Notification) Regulation 2001 was gazetted on 9 March 2001. Mr Barry's article was on 26 and 27 February.

CHAIR—And you say that basically you did not see the need for the notification prior to the incidents coming to light because you thought everyone was behaving properly.

Mr Harrison—It is a fair assumption to make if no information of any sort comes to your attention. I suppose we did think that everyone was behaving properly and the agony of the realisation that they were not is only enhanced by the surprise attached to it.

CHAIR—If my memory serves me, there used to be published regularly a list of people who were made bankrupt. Isn't that so?

Mr Harrison—I cannot comment on that. It would certainly be in the public domain. I suppose what you are adverting to is that if there were some form of black list of defaulting practitioners it would serve constantly to remind those still in practice of the need to comply with their obligations. That may well be true, but I cannot comment about whether or not there was a black list or a list of defaulters regularly published.

Mr MURPHY—Would that information have been available in the Attorney-General's annual report?

Mr Selth—I am not aware of whether the information relating to bankruptcy was in the Attorney-General's Department's annual report. Of course there was information in those reports relating to some matters in this whole unfortunate episode about who was being employed by the Taxation Office. When the Barry articles were published we went to ITSA and asked whether they could tell us the names of all the barristers concerned. They could not, because it depended,

for the person going bankrupt, on what category code or what occupation they had. For instance, if you declared under 'company director', that was not showing as 'barrister'. We now have an arrangement with the Commonwealth DPP and ITSA to tell us when matters come to their attention—they are not constrained by the same provisions as the ATO. But, again, we still have the concern that, if the bankruptcy comes under some other category code such as company director, we might not know about it. As Mr Harrison said, as far as we can tell and given that we are so sensitive to this issue, there is not currently a problem, though there was a major problem in the past.

CHAIR—I think the best news in this area is the fact that the introduction of tax reform and the introduction of the GST—having an ABN and having to put in a BAS—means that you cannot get away without filing a tax return anymore because you will get picked up.

Mr Harrison—And you are lucky if you have enough time to conduct your practice! But that is true. There are collateral levels of reporting obligation which heighten the level of information that the commissioner receives and, I suppose, in the day of computers, energise the ways in which he can continue to operate. Interestingly enough, one of the most notorious of the defaulting barristers had managed for something approaching four decades never to put in a tax return.

CHAIR—That was the case with Mr Cummins, who finally got picked up because people were claiming the GST on his fees and suddenly it was found he was not paying tax.

Mr Harrison—I—and I think I speak on behalf of every single barrister practising then and now—could not believe that that could occur. You can appreciate that those who criticise the Bar Association—erroneously, as I have said—for failing to head this off at the pass, as it were, were completely gobsmacked by the notion that the Australian Taxation Office should not itself have been able to detect somebody who had not put in a tax return for nearly four decades.

CHAIR—I think we made that point to the tax office fairly succinctly.

Mr Harrison—Indeed, and I cannot be critical of it because it is not my role and I am not here to give evidence against the Taxation Office. But I am here in defence of the Bar Association and, if the Taxation Office were not able to do it, then clearly enough we were not able to do it. But we are now able to react to information that comes to us, and the purpose of my appearance today is to defend the association's role and to urge those who can—and you, Madam Chair, through this committee, if you can—to put in place such amendments as will facilitate the timely reporting of tax offences of those for whom we have some responsibility.

CHAIR—I suppose my concerns with section 16 were twofold: firstly, the inability to communicate, I suppose, with association bodies—

Mr MURPHY—Share information.

CHAIR—but, more particularly, the idea that the commissioner is unable to use information he gleans in the administration of his office for the purposes of compliance. I find that an absolute nonsense. I suppose it is one of the reasons why, as minister, I always sought my legal advice outside the system.

Mr MURPHY—Mr Harrison, thank you for your opening statement. As I tried to say from the outset, I appreciate the response of Bret Walker and Philip Selth in coming to my office at the first opportunity. As you would be aware, I have made a lot of noise about this in parliament, but I too want to put on the record that my criticism has never been of the New South Wales Bar Association, and I hope that you do not think that what I have done has in any way reflected on the Bar Association, because I have only spoken positively about the response of the Bar Association in my trying to get the facts following that scandal. I appreciated the fact that Mr Walker and Mr Selth came to see me straightaway and provided me with the information. In relation to my own bona fides on this as they relate to the Bar Association, I think that tabling this letter and the chronology this morning has led to an apology from the tax office in relation to statements that might have been made by the tax office that reflected adversely on the Bar Association. I want to put on record that I am more than reasonably satisfied that the Bar Association has done everything to enhance the reputation of its role, and I appreciate that.

Mr Harrison—Could I respond by saying that the Bar Association accepts and appreciates that and I thank you for your interest in this matter and for your comments today. Can I say in passing that I am particularly delighted to have been present when the apology that you have referred to was made. No doubt Mr Selth will provide to me tomorrow a transcript of these proceedings. I am only troubled that the type of intelligent comments that have fallen from the chair and from you, and indeed from Mr Farr in the comments you referred to, do not receive the type of widespread publicity that the ill-informed comments that often appear in the media receive.

Mr MURPHY—We as members of parliament suffer the same fate and we have absolutely no control over the media and the way they report. As we all understand, they are trying to maintain an audience, whether it is an electronic audience or a print audience, and to keep the advertising revenue coming in. It is a tragedy in relation to the New South Wales Bar Association that the media has tainted the Bar Association. I also want to say that I do not resile from anything I have said inside and outside the parliament in relation to those 60 or 70 charlatans who have brought the good name of the Bar Association into disrepute.

Mr Harrison—I think there are only 20, but at all events I agree with you, and it is a pity that the media that you are referring to do not find the truth interesting.

Mr MURPHY—I hope you can also take that message back to members of the Bar Association. I have not been on a mission to destroy the Bar Association; I have certainly been on a mission to get some justice here in response to the criminal behaviour of a very small proportion of members of your profession. I can also see some evidence, because of other questions I have put on the *Notice Paper*, that it extends to some members of the medical profession and other professions. I dare say, as we all learned many years ago, there are always a few rotten apples in the basket.

Mr Harrison—Indeed. I suppose I am beating the same drum, but in the Attorney's speech to the Insolvency Trustee Service Australia's Fifth National Bankruptcy Congress he referred to the expression 'high-income professionals', an expression that gets consistent reference in the exposure draft comments and the like, but he referred specifically in that speech to barristers. I may be sensitive about it for the reasons that will be obvious to you, but what happened in the past I would like to think is in the past and that the legislative regime under which we operate

will prevent that. But I should say that your concerns to have this matter exposed and dealt with to the ultimate exposure of the good reputation of barristers generally is recognised and appreciated.

CHAIR—I have a couple of general questions about the way in which you view the exposure draft. You said that you would not disagree with the description I made of the draft, particularly the concept of tainted property. With regard to the amendments to affect the family law court and the bestowing of jurisdictions on family law judges to deal in part with bankruptcy matters, do you have a view about that?

Mr Harrison—I do not have a particular view, to the extent that Family Court judges exercise a federal jurisdiction at the moment and I am not troubled by the notion that legislation, if appropriate, from the outset should be administered by Family Court judges, the reason for which is obvious. Any streamlining of procedures which prevents reference from one court to another in order to resolve the problem is to be avoided at all cost, with 'cost' of being the operative term.

My major concern, I suppose, is more fundamental. This is a slight diversion from your question, Madam Chair. My major concern since I saw this legislation has been that there seems to be some disproportionate concern to favour the interests of creditors over the interests of people who might genuinely and honestly have arranged their financial affairs. The response, for example from the Attorney and those who have propounded the exposure draft, has been that professionals who conduct their affairs in a way that leads them to be sued can always rely upon professional indemnity insurance, as it were, to pick up the tab. Recent experience with the HIH company has demonstrated that that is not necessarily a wise view. My personal view, and I suspect it would be the view of barristers generally, is that those who conduct their affairs in a way that is aimed at defrauding creditors deserve whatever impact legislative provisions can have upon them, but those who conduct their affairs in a cautious way and ultimately become bankrupt and are sued by creditors who dealt with them honestly at the time, knowing that they were not a guarantor of their own solvency, from my position, ought not to be put in a better position than the present law puts them in.

CHAIR—You almost might have been reading some of my statements from earlier hearings. I made the point that, in business, if you become a creditor you must assume risk.

Mr Harrison—Indeed.

CHAIR—Indeed the very nature of business in a free enterprise society is that you must assume risk. It would be greater or lesser according to the judgment you make, and then you lay off some of your risk in the way that you do the rest of your business.

Mr Harrison—Quite so.

CHAIR—It did not seem to me to be a reasonable matter for public policy to attempt to quarantine creditors from risk.

Mr Harrison—Indeed.

CHAIR—Nor did it seem to me to be good public policy to place a creditor on the same or better footing than the family of the bankrupt.

Mr Harrison—I can do no more than endorse those comments absolutely.

CHAIR—Are there any other questions?

Mr MURPHY—I am very happy with that.

Mr Harrison—Thank you, Madam Chair, and Mr Murphy, for the opportunity for us to publicly complain, I suppose, about the treatment that we have received. I pay due recognition to the intelligent and reasoned comments that have passed between the chair and this side of the table today. Obviously we are very concerned to correct anything incorrect in the past on the record. The opportunity today has been a fine example of your having given us that opportunity. I am indebted to this subcommittee for that opportunity.

CHAIR—Thank you very much, and thank you for your evidence today.

[11.18 a.m.]

ZWIER, Mr Leon, Partner, Arnold Bloch Leibler, Lawyers

CHAIR—Welcome.

Mr Zwier—I am an insolvency practitioner.

CHAIR—We have received quite a substantial submission from you. Would you like to make an opening statement?

Mr Zwier—Yes. I expect that much of what I have to say is in the submission but, from my perspective, the proposed amendments to the legislation represent the most draconian attempt to deal with what is, in relative terms, a minor problem—which will worsen the quality of life for all Australians. I regard it as a proposed piece of legislation which will, for the first time, if enacted, favour the families of broken homes over the families that stay together, because those who have legitimately and bona fide been divorced might discover that those families have assets which are removed from the scope and reach of this legislation. The proposed legislation in relation to the disposition of property and potential tainted property is so broad as to potentially catch dispositions and gifts made 20, 30 or 40 years earlier. It represents a grave infringement on the rights of ordinary Australians. Obviously, it is our very strong submission that it ought not to be enacted.

CHAIR—With regard to that last point you made—that it can attack settlements that were made 20, 30, 40 or 50 years ago—the fact of the matter is that that does not really stand at odds with your statement that it would mean that broken families are better off than families that are intact. The proposed tainting provisions can reach into the broken families just as easily as they can into the families that are intact.

Mr Zwier—That is theoretically so, though I suspect that if there is a family law settlement, which is bona fide and at arms length, which is approved by the court, the court would be less inclined to do so in relation to those dispositions.

CHAIR—Except that since 2000 the courts no longer oversight financial agreements that are entered into voluntarily. So there is no court imprimatur for those agreements. Indeed, the proposed legislation exempts the definition of those agreements from the definition of maintenance agreements, so that section 120 of the existing legislation would apply. There is absolutely no basis that anyone can have that any court would not set aside a settlement that was entered into 20 years ago. You can hope that would be the case but there is no way that you would have of knowing it. As well as that, the person who has been a recipient under such an agreement would have to find the wherewithal to go before the court to fight to retain what they have. I think it is a dilemma for both sets of families.

I would now like to go to some specific things in your submission. Chapter 6 of your submission is ‘Tainted purpose—the impossibility of rebutting the presumption’. I was

wondering whether you would like to talk about that—of course, that being the reversal of the onus of proof?

Mr Zwier—Certainly. First, if a trustee in bankruptcy makes a presumption about the purpose of the bankrupt in relation to a disposition, that becomes a presumption which is required to be rebutted by the bankrupt and perhaps by others. That is an entirely subjective assessment. What occurs in practice, of course, is that one has different types of trustees. There are those who are regarded as creditor trustees and those who are regarded as debtor trustees. There is a real risk that, if you happen to have a trustee who is regarded as a zealot, aggressive and difficult, you may well find that the determination of the bankruptcy is very much affected by the choice of the trustee, which is undesirable.

That said, to rebut a presumption like that is extraordinarily difficult. As I have tried to set out in our submission, the best evidence of purpose will emanate from the bankrupt—presuming the bankrupt is still alive. The difficulty for the bankrupt of course is that the bankrupt's standing before the court is already tainted by the fact that he or she is bankrupted. So it will make it almost impossible to give evidence of purpose from a person who is creditable and reputable. These proposed, what I would call, draconian provisions, will make it so difficult for a bona fide, legitimate disposition—given perhaps for the benefit of a family—to be protected.

CHAIR—We had some evidence given to us stating that it could actually work in the reverse way: that where, perhaps—and it usually is the case—a husband had a settlement forced upon him which he regards as unfair, he could go out and say, 'Right. I'm going to fix you. I am going to say this was all a tainted purpose and the whole thing should go to the creditors.' He could destroy the partner simply out of malice.

Mr Zwier—I can understand that in family law matters one might get vindictive spouses who behave that way.

CHAIR—Plenty of them.

Mr Zwier—But I suspect they will run into exactly the same problem, which is that they are not going to be believed on purpose. They are not going to be able to rebut the presumption.

CHAIR—They do not want to rebut it. They want it to happen.

Mr Zwier—It may be a problem, and it may be capable of being dealt with by the spouses innocently affected by that proposed conduct. In other words, the taint on that spouse who is already bankrupted might be sufficient to enable the person who is not bankrupted to deal with the problem. But I still think that the legislation is flawed and ought not to proceed in that form.

CHAIR—I wonder whether you can tell me a little more about debtor trustees and creditor trustees.

Mr Zwier—Certainly. I tend to do more work in corporate insolvency than personal insolvency, but the issue arises here as it does in every jurisdiction around the world. The trustees or liquidators generally break up into representatives of financiers and creditors, and representatives of debtors—and that is so everywhere—so that amongst the groups of trustees in

bankruptcy there are some who are renowned to be aggressive in the pursuit of the recovery of funds for creditors, and others who take a more palliative and soft role protecting, perhaps, debtors in relation to transactions. The choice of the trustee will become a very critical aspect if this legislation goes through. There is also a perception in the industry that, at times, the official trustee might be less zealous than a private trustee. So the outcome will very much be affected by determinations made by a trustee, which leads to uncertainty, and uncertainty is not desirable in this area of law.

CHAIR—So what you are saying is that the question of malice could even become more important in the choice of the trustee and how hard they go.

Mr Zwier—Absolutely. There are trustees whose business is developed on promoting themselves to financiers, bankers and lenders, saying that their role is to pursue vigorously—and, at times, viciously—the recovery of assets for the benefit of creditors. They may be more punitive in style than others, and there are some who are more passive. Depending upon whom one is acting for, one acting properly would make recommendations as to who might be the appropriate trustee. That is undesirable, particularly in relation to this presumption issue, because it is so powerful, so difficult to rebut and so costly to rebut.

CHAIR—The point I was going to make following along here was that I was reading the paper, I think in the last couple of days, that because the economy has been running so well, there has been a bit of paucity of work around for insolvency practitioners. Is that true?

Mr Zwier—It is true. You are certainly prescient when you make that observation about insolvency practitioners. I should say this: probably one of the more high profile administrations I was involved in was with Mark Korda of Korda Mentha in the Ansett administration. I was speaking to him this morning about it and he said to me, 'There is a view in the profession that perhaps these proposed amendments would be a good thing, because it is going to generate a lot of work for lawyers and potentially a lot of work for trustees.' He did say, and I agree with his observation, that it is not a good thing for the profession either. It is not a good thing for the profession to have uncertainty, to potentially have a plethora of legal proceedings, to have a plethora of expensive administrations—it is not a good thing. Perhaps with paucity of work and legislation like this, if enacted, it may lead to a fillip for those practitioners who are not otherwise gainfully employed.

CHAIR—That is exactly what occurred to me when I read the article. I thought, 'This might be like a thunderstorm or a hailstorm for the panel beaters.'

Mr Zwier—I cannot but agree with those observations. There will be those who will see this as an opportunity and they will no doubt support the proposition, but it is, as I said at the outset, an incredible overreaction to a problem in relation to a limited number of high-earning professionals.

CHAIR—Of the 180-odd submissions we have received, only one has supported the concept of tainted property and that part of the exposure draft which everybody else has criticised. I might take this opportunity to accept that submission as well as others. Is it the wish of the committee to accept submission Nos 81.1, 102.1, 123.1 and 137 to 177 inclusive and authorise them for publication? There being no objection, it is so ordered. I want to refer to submission

number 123.1 from Mr David Kerr, who says he supports the legislation personally. He is a chartered accountant, a CPA, a member of the Insolvency Practitioners Association and a registered trustee. He sent us, as part of his submission, an article that he wrote. He says:

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.

Basically he says he approves of retrospectivity because without it, as is explained in the explanatory memorandum, the bill would fail to work. He approves of the reversal of onus of proof, he draws on the ancient law of reputed ownership—a concept that existed in the bankruptcy law prior to 1966, when it was dropped as a concept—and he applauds the bill. I was wondering if you have any thoughts on those three points—particularly on the question of reputed ownership, which is something I dredged out from my own law school days?

Mr Zwier—I am not sure whether we are talking at cross purposes, but I assume the notion of imputed ownership ties into what is referred to in other submissions as sham; that is, if there is a sham transaction, then one should lift the veil—I know that ordinarily applies to corporate structures—and have a look at where the assets really are. There are authorities where courts have determined that the structures involved are shams. From memory—and again I am happy to provide the committee with a copy of the case if I can get hold of it—there is a case which is loosely referred to as Vereker's case where the structure that that particular bankrupt put in place was deemed by the court to be a sham and the property of that structure, whether it be a trust or a company, was deemed to form part of the divisible property, and the court had the power in that unusual circumstance to make such a ruling. I certainly think that the court has the power to deal with fraudulent schemes of people who embark upon plans to defraud creditors. Whilst the notion of imputed ownership might pre-date the 1980s, the notion of defrauding creditors and giving powers to the court to upset those transactions stems back to 1571 and the statute of Elizabeth. The statute of Elizabeth of 1571 can be found in most state enactments, and in the enactments of the various territories, and it still remains. Since 1571, debtors who divest themselves of assets for the purposes of defrauding creditors are subject to suit. In my view, the existing structure and the existing common law are sufficient to deal with this problem.

CHAIR—Would you recommend any strengthening of the existing legislation?

Mr Zwier—I do not recommend strengthening of the existing legislation. I think the real issue in relation to fraudulent activity of bankrupts is funding the litigation to pursue them. More often than not, there will be a solution to the problem. If a person is fraudulent—and I know this sounds very broad brush in response—I am confident that the court system, the common law and the legislation will allow that fraudulent conduct to be set aside for the benefit of creditors. The difficulty is that there are not the funds available to the trustees in relation to personal insolvency and to liquidators in relation to corporate insolvency to pursue recovery. I would expect the tax office to be in a position to fund the recovery of proceedings against persons who, they believe, have been fraudulent. They are in a position to do so, and the courts have broad discretions in terms of remunerating those creditors who fund those proceedings. The problem is funding rather than the legislative structure or the common law.

CHAIR—Whereas there is certainly funding by the tax office. I think they gave us evidence that they spend $1 million a year on funding the recovery of assets. If there is a reversal of proof, there is absolutely no funding available for the person who is adversely affected and who could be totally innocent but who has the onus placed upon them to prove so. Some of the people who gave evidence before us suggested that when we are dealing in the area of tax, where a debtor fails to lodge a tax return, a special act of bankruptcy could be deemed to have occurred with that failure, and therefore the recovery or clawback provisions could act from that date of failure to file. Do you have a view about that?

Mr Zwier—That type of proposal is a sensible response to the problem and is proportional to the problem. I would have no difficulty with that kind of limited amendment to enable the clawback timing to run from that time. I also understand that there are some weaknesses in relation to lodged returns, as opposed to lodging returns which have incorrect income disclosed. I am not a tax lawyer, so I may stand corrected, but my recollection is that the penalties in relation to failure to lodge returns are disproportionate to the consequences that might flow from the failure, so that the first penalty is relatively small.

CHAIR—You should ask the commissioner, because if you are assessed on the amount of the years of failure to return, does the general interest charge apply from the date of the failure when you ought to have lodged, and what do they do? Assume an assessment? You should ask that question.

Mr Zwier—I think the problem is a little different. I think that when you do not lodge a return, a first offence is a relatively small fine. It is the second and subsequent offences which become more serious. But the problem is that if a person has not lodged a return for a long period of time they are a first offender. I suspect that might be why some people have avoided lodging returns rather than lodging returns understating income if they had a fraudulent intent. I am not suggesting most people do.

CHAIR—The tax reform of 2000 has cleaned up a lot of this, because they can now be fined—and the commissioner has powers to proceed. Indeed, the letter that I read out that was written to Mr Keating back in the late 1980s—I might make that an exhibit for the hearing—showed that the commissioner was fairly selective about who we went after. Over 10,000 people got prosecuted, but if you were mighty in the land you got a nice letter.

Mr MURPHY—May I make a point. I did not return to this with Mr Farr but, in relation to the worst offender in this matter, Mr Cummins, who did not lodge a tax return for something like 45 years, the tax office only went back seven years with him. I asked earlier about why he got free ride for those other 38 years. I know you keep making the point about the case of Mr Keating, but I would submit that Mr Cummins has got off very lightly.

CHAIR—I reckon Mr Keating got off the lightest. He was the Treasurer of the land at the time.

Mr MURPHY—We will agree to disagree on that.

CHAIR—You approved, did you?

Mr MURPHY—I did not approve. Of course I did not approve; we all have a duty to lodge our tax returns.

CHAIR—I would like to go back to this presumption of insolvency as at a particular time if you fail to lodge. It could still be that innocent parties could be affected if they went back 40 years for instance?

Mr Zwier—Of course that is so. It would need to be the subject of further examination and caucusing of interest groups to see how it might operate before one could leap to the conclusion that it is a ready solution. The only reason I was attracted to it was that it is clearly proportionate to the problem in relation to high-income earners not lodging tax returns, and there seems to be some proportionality between the problem and that conduct. One of the points made in our submission is that there is no differentiation between an innocent bankrupt—what I call a negligent bankrupt—and a dishonest bankrupt. Perhaps someone who fails to lodge returns over an extended period of time could fall into the category of a deemed dishonest bankrupt, which would have different consequences to those for an innocent bankrupt or a negligent bankrupt.

CHAIR—I can see a whole lot of things that might flow from that concept.

Mr MURPHY—In relation to your recommendation that the government should contribute a significant amount to a fighting fund for bankruptcy trustees so that they can fully pursue their claims within the current legal framework, how would you see that working?

Mr Zwier—I am not an expert on the workings of government, and my dealings with the government over the years have demonstrated that I have little understanding of government. But the background of the problem is this: the trustees of bankrupt estates and the liquidators of companies come and take possession of the books, records and assets of the person or the company and use those assets for the purposes of whatever steps they ultimately take. If a person is bereft of cash assets or of real assets, and all that resides in the administration are claims against third parties and related parties and claims arising out of fraudulent conduct, there is no available cash for a trustee to pursue them. The more sophisticated dishonest bankrupts will make sure that there is nothing readily available to fund a trustee to enable them to be pursued.

I do not know whether it would be by application to, for example, ITSA, but if ITSA were provided with significant resourcing and there were defined parameters by which trustees could apply for funding, then that might enable estates which have no cash and no real assets in them to be pursued for the benefit of the creditors. I envisage the funding of ITSA and applications being made to them for additional funding. I understand ITSA has that capacity now but my limited experience with it is that it is limited funding, generally not enabling the best representation to be obtained. For example, there is a reluctance to retain Queen's Counsel, or Senior Counsel as the case may be, to pursue people. But my experience as a practitioner is that if you have the best advice and the best people retained to pursue these things, you will get a better result. Therefore, providing very limited funds is like being half pregnant—that is, you cannot do the job properly. My submission is very much directed to finding a way to put some real money and real grunt into those cases.

Mr MURPHY—I understand.

CHAIR—Doesn't that amount to a sort of insurance for creditors to take less risk because they expect the taxpayer to come in and pursue their debts?

Mr Zwier—In some respects. There are public policy arguments both ways. The other way is that many creditors have been burnt already. They have lost their money. They are disappointed. They will probably move on to their next loss.

CHAIR—Isn't that the nature of business?

Mr Zwier—Of course it is.

CHAIR—You must have a risk.

Mr Zwier—In Christopher Skase's case, for example, significant resources were made available for that particular job and the lawyers acting for the trustee in bankruptcy were pre-eminent lawyers, superspecialists, in the area of insolvency and recovery. That occurred because funding was made available—there were many reasons for it; I do not need to go into them—but it demonstrated in one particular case that there were more things that could be done if there was greater funding.

CHAIR—But it all came to nothing.

Mr Zwier—It came to nothing in the end but a job was done reasonably well from an insolvency practitioner's perspective.

Mr MURPHY—Another recommendation that you made was:

If the Committee takes the view that the Bill should be enacted in a modified form, the presumption of tainted purpose should only apply to dispositions within 12 months of the commencement of bankruptcy.

My question is: why?

Mr Zwier—The existing framework allows dispositions over a longer period of time to still be attacked. The statute of Elizabeth, which is found in the state enactments, allows dispositions of a fraudulent intent to be attacked forever. This was really a lawyer's response not knowing which way the committee might go. Frankly, we are saying if this committee is inclined to recommend anything it ought to be in varying degrees the least invasive and the least draconian amendments, but our overriding submission is that the legislation does not require amendment. This was really advocacy, frankly.

Mr MURPHY—The purpose of my question obviously is: in your professional opinion is 12 months sufficient time? People are very concerned about the consequences for innocents parties if one were to go back two, three or four decades.

Mr Zwier—If there was an inclination to go with a period of time then 12 months to me is a reasonably short period of time to deal with it in terms of the reverse of the onus.

Mr MURPHY—You wouldn't suggest maybe two years.

CHAIR—He does not want any. He is just putting it in there.

Mr MURPHY—I know that.

Mr Zwier—I do not think that it is required. As I have said, the problem is that if you have got dishonest bankrupts you need to fund the trustees to enable proper pursuit of them within the framework of the existing judicial authority and existing statutory framework.

Mr MURPHY—And that flows from your other recommendation which says:

Alternatively, the proposed Division ... regime should only apply to bankrupts against whom a finding of dishonesty has been made in a superior court.

Do you think that a superior court will always be able to make a finding of dishonesty?

Mr Zwier—No, but in the more high profile bankruptcies, you may well find that a superior court has some involvement in relation to it to make such a determination. Then at least there is some objective person having heard evidence on oath who has made a determination, and the people who are dishonest would suffer the consequences of their own dishonest conduct.

CHAIR—This is why nobody gets found guilty of dishonesty; they get found guilty of some particular crime. Are you taking about indictable offences? Are you talking about something that carries a sentence or whatever? You do not get convicted of having been a dishonest person.

Mr Zwier—No, the issue I was referring to was, for example, in directors' duties you aware that they divide up into two fundamental groups: you have got the due care and diligence duties which are negligence duties and you have got the good faith duties which are dishonesty breaches. So, if in the context of a corporate collapse a judge had found there had been a breach of a duty dealing with dishonest conduct—that was really what I was referring to—that is a dishonesty finding. If, for example, in the conduct of a trial where the bankrupt had given evidence, the court rejected the evidence and said I think 'X lied on this oath,' that might satisfy the dishonesty finding.

CHAIR—You are saying you would like to lift the corporate veil a bit more.

Mr Zwier—No, I am not saying that; what I am saying is if —

CHAIR—Yes, you are. You are saying that if they are found to have committed a dishonest offence then the corporate veil should be lifted and you can go back further.

Mr Zwier—My primary submission is that it is not necessary. But again, this was advocacy saying that if this committee were inclined to recommend anything, it ought not to affect what I think, Madam Chair, you have described as ordinary punters—people who might go bankrupt because they had a car accident and they were not insured properly.

Mr MURPHY—We agree with that.

CHAIR—I want to ask you about schedule 3 of the exposure draft, which is the schedule which attempts to provide a notification process similar to section 139 with regard to people who are wage earners and garnishees and so on for people who are not employed but have wealth. Do you have a view about schedule 3?

Mr Zwier—I have not focused in the submission on schedule 3, but the concept of requiring people to positively disclose is probably a good concept, not a bad concept.

Mr MURPHY—Mr Zwier, I have one final question, which relates to your recommendation that the problem addressed by the task force is one which may be better solved by creating 'bankruptcy in perpetuity' for persistent debtors who appear to have an ability to pay their debts, for example, because they continue to work and earn an income. Could you tell the committee how you envisage that would work?

Mr Zwier—I have not looked at this in great detail recently, but my understanding is that the requirements to contribute to a bankrupt estate by the bankrupt presently are based upon benefits derived by the bankrupt which would be akin to fringe benefits if that bankrupt got those benefits from an employer. If, for example, a bankrupt were residing in palatial quarters provided by a trust, for example, at no cost, there would be a deemed value, which would create an obligation to keep contributing. If the bankrupt does not keep contributing, there are after-acquired debts that are being incurred for noncompliance which might create a regime which would enable them to be bankrupted again for failure to comply with the after-acquired debts. So that might in theory create a rolling bankruptcy for someone who was clearly flaunting the system. That is what that was directed towards.

CHAIR—With regard to schedule 4 of the act and maintenance agreements and other proposed amendments relating to concepts in the family law, do you have a view about that?

Mr Zwier—Save to say that, again, I think that stamping out of the fraudulent use of family court orders and separation agreements is a good thing, but I am not an expert in family law and I have not examined the schedule in detail.

CHAIR—Do you have a view about giving the jurisdiction to Family Court judges to deal in part with bankruptcy matters?

Mr Zwier—My limited experience in family law suggests that it is a highly specialised jurisdiction. Bankruptcy is, of course, equally a highly specialised jurisdiction. I am aware that the Family Court already has a bankruptcy jurisdiction which it could invoke if it wanted to do so. My only concern would be that you might find that judges who have little experience in bankruptcy would be dealing with things by reference to a family law perspective which may not necessarily be a perspective that has regard to the interests of creditors and third parties. You might find there is a mismatch of expertise within that court.

CHAIR—There we have a dilemma, which I have expressed before. As a matter of public policy we established the Family Court to look after children primarily—families. We established bankruptcy legislation to look after creditors. As a matter of public policy, is it right to elevate creditors to a position that is as good as or better than the families of debtors?

Mr Zwier—I could express the personal view that I think the interests of children are paramount, but I am not sure that that would reflect the public policy of any particular government. My only apprehension about having—

CHAIR—We are talking about good public policy now—not political policy, public policy.

Mr Zwier—I understand. I certainly think that very often the families of the bankrupt are innocent victims of the conduct of the bankrupt and that it is very important that the families can have some recognised protection of their position. Frankly, one of my concerns about the proposed amendments—which I think you maybe said in a slightly different way by virtue of your initial questions, Madam Chair—was that the balance was wrong. I had always thought that if you are going to bring in this sort of legislation the one thing that you would want to make sure is that the families are protected. I had always thought that one of the options, if you were ever minded to recommend legislation like that, was to have a notional separate family law separation as at the date of the bankruptcy so that the family would get at least whatever they would have got if the parties had been divorced. But that creates another problem as to what would happen if you are not married and you do not have—

CHAIR—That also creates some constitutional problems. I was interested to see that you called one of your chapters 'The Dickensian Effect'.

Mr Zwier—It is punitive. This is seriously punitive legislation. This is about punishing people for going bankrupt. This is about punishing people who might have been in a car accident or had domestic help and not been insured properly. This is so punitive as to drive us back almost to the days of debtors prison.

CHAIR—The view has been expressed that perhaps it is about the way in which professionals who cannot incorporate and therefore have some protection tend to arrange their affairs by having their house in their partner's or spouse's name. The answer that has been given is that, rather than accept that as proper practice, there should be a total reliance on insurance. Would you have a view about that?

Mr Zwier—It is unsatisfactory. The previous witness pointed out that one collapsed. There are problems now with finding insurance. It is prohibitively expensive. The world has changed in the last five to 10 years and, frankly, some professionals are involved in transactions where the insurable limit is just insufficient to cover them in relation to their transactions. I am aware of one case where 'the rounding-off for the purposes of this transaction is to the nearest $50 million', which means that the amount of money that is concerned in the transaction is an uninsurable risk from a practitioner's point of view. In any event, this is not about professionals and the way they conduct themselves. In my view, these amendments go so far as to affect what was previously described as ordinary punters, and that is so. It is not just about professionals; it is about everyone.

CHAIR—Yes, I have made that point pretty strongly right throughout this.

Mr MURPHY—We believe that is absurd.

CHAIR—We believe that is the case. So the main thrust of your submission is to deal with the tainting provisions, which is a concept unknown in any other part of the world?

Mr Zwier—Yes, as far as we know at this time. We are happy to do more research on that if that would be of assistance.

CHAIR—We did hear testimony from Attorney-General's that it does not exist anywhere else in the world and that indeed they were the authors of it.

Mr Zwier—I should add one thing which is interesting about bankruptcy. There are jurisdictions in the United States in which certain homes, defined in a particularly odd way—those with gutterings and things—are actually property exempt from bankruptcy for the specific reason that entrepreneurial activity is to be encouraged and therefore people should not ever be at risk of losing their home because they have taken a legitimate and bona fide business risk. I am not suggesting we go that far. I am saying the existing legislation works just fine but I certainly would abhor these proposed amendments ever being enacted.

CHAIR—You probably heard me say that one thing that concerns me is that it does seem to aim to quarantine creditors from risk and yet the very nature of being in business is to take risk and the size of your risk will determine the rate of your return.

Mr Zwier—It emanates from one area principally. To me, that is the tax office. As I understand it, the creditor bodies are not coming along and saying they want all of these things. This emanates because there is a problem by the tax office in relation to the collection of tax which, by and large, has been fixed by virtue of recent amendment. It does not call for a massive change to our insolvency regime which will affect everyone because of a problem with a relatively few number of high-income earning professionals.

CHAIR—In fairness, we did go through the chronology. It was the failure of the tax office to pick up the defaulting barristers which caused the Attorney-General's Department to look at the legislation and define what appeared to be a loophole and then to fix the loophole. The first task force findings and recommendations were to find a solution that imported family law operations into the bankruptcy jurisdiction. But that has a constitutional problem. Therefore the concept of tainted property was created. That was not part of the original task force findings. That is the chronology. It has grown from identifying a would-be loophole. In fact, one of the things that seems to have developed in the way we write legislation is that we now seem to attempt to anticipate loopholes and write legislation in such a way as to try to stop them being utilised. The result is legislation that is almost unreadable. But that is a problem for a different day.

Mr Zwier—I agree with that. Some of it is quite unbelievable. By the way, some of the examples which are used in the explanatory paper are remarkable: that a bankrupt seven years before bankruptcy would have plans, or that a bankrupt 11 years before bankruptcy would have plans. These bankrupts would have to be geniuses to know seven years before they were going to go bankrupt what they were doing. If they could actually know seven years out from the bankruptcy where they were at, they would be making a fortune in business because no-one in business can predict with any degree of accuracy where they are going over seven years or 11 years or five years. Some of what was in there in my view was entirely pejorative.

Mr MURPHY—I would like to thank you, Mr Zwier, for your oral testimony this morning.

CHAIR—Thank you very much. We appreciate your coming.

Resolved (on motion by **Mr Murphy**):

That this committee authorises publication of the proof transcript of the evidence given before it at public hearing this day.

Subcommittee adjourned at 12.02 p.m.