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 18 JUN 2004

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18 June 2004

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

By fax 02 6277 4773 (3 pages)

Dear Senator

BANKRUPTCY LEGISLATION AMENDMENT (ANTI AVOIDANCE & OTHER MEASURES) BILL 2004

McCullough Robertson Lawyers wishes to express deepest concern as to the impact of the proposed amendments to the *Bankruptcy Act* contained in the recent Exposure Draft. The new rules would have a significant adverse impact on all professionals, however, as they are currently drafted, the effect is far more wide-reaching and, in fact, will radically change the landscape for anyone in business.

The Explanatory Memorandum to the Exposure Draft states that the policy objective of the new legislation is to target *'the problem of a small but significant number of high-income debtors, typically high earning fee-for-service professionals, who use bankruptcy to avoid paying their taxation and other debts'*.

It is difficult to argue with such a policy objective, and the often quoted reason for the amendments – the 50 or so (mainly) Sydney barristers who didn't lodge tax returns for many years and then merely went bankrupt rather than pay the tax which they clearly owed, once the ATO finally caught up with them – is clearly an abuse of the system.

The difficulty however, as is often the case, is that the draft legislation uses the sledgehammer approach. We have a real concern that the amendments go far beyond what might be necessary to address this mischief and amount to a massive overreaction to the behaviour of a small number of Sydney barristers.

Professionals, businessmen and company directors are all in the firing line of these amendments. Any incentive for entrepreneurial spirit in small and large business is stifled.

There has always been a provision in the bankruptcy legislation to enable trustees in bankruptcy to recover property from related parties and entities where the money or assets have been paid or transferred by a bankrupt with the intention of defeating foreseeable creditors.

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Senator Bronwyn Bishop
Chairman

This legislation goes much further. It attacks every movement of money or property from a person who later becomes bankrupt (even though there was no foreseeability of bankruptcy at the time) unless the recipient can prove that the bankrupt did not pay the money or transfer the property with the main intention to keep the money or property from creditors (even if the identity and claims of those creditors were unforeseeable).

Whilst there are elements of the new arrangements that seem to sensibly deal with some of the relevant mischiefs (in particular, the changes to the Family Law legislation which seek to prevent bankrupts using marriage breakdown as a means to avoid creditors), the vast majority of the changes are misdirected. In particular:

1. The new rules are completely retrospective. Historically, the Government has only utilised retrospective legislation where there is a fundamental and serious issue being addressed. Given that, there are only a very small number of barristers who were abusing the current rules, as opposed to professionals and business owners as a whole, there can be no justification for retrospective legislation.
2. A fundamental principle of our legal system is a presumption of innocence. The new rules actually reverse this presumption and assume that anything a bankrupt does or did at any time before becoming bankrupt, will be done with the tainted purpose of preventing payments to their creditors. Under the new legislation it will be necessary for the recipient of the bankrupt's property to rebut this presumption.
3. The rules give the trustee in bankruptcy extremely wide powers to trace the 'tainted' property through several changes of owner and subsequent sale and replacement of the property. The legislation does not make clear what portion of the replacement property is caught. For example:

Dr and Mrs Smith purchase a house jointly.

In 1984 they sell the house for \$40,000

A new house is purchased by Mrs Smith for \$70,000

Dr Smith is sued in 2004 and goes bankrupt

The new house is now worth \$1,000,000

Was there a tainted purpose when Dr Smith's share of the proceeds of the 1984 sale was used by Mrs Smith to purchase the new house? The onus of proof is on Mrs Smith to show that there was not a tainted purpose.

If it can not be rebutted, the entire new house is 'tainted property'. What will the quantum of the court order be?

- \$20,000?

- \$35,000?

- \$500,000?

There are no useful guidelines as to how a Court would exercise its very wide powers in a case such as this.

4. A pivotal concept within the new rules is what are referred to as 'indirect benefits' that may be derived by the bankrupt. There are no guidelines at all as to what will amount to an indirect benefit.

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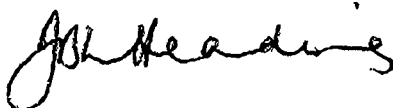
5. As discussed above, the recipient of a tainted property must rebut the presumption that the bankrupt's main purpose was to prevent the property being divisible amongst the bankrupt's creditors. The new rules do not provide any guidance as to 'main purpose'. This further compounds on the hardship created by the presumption of guilt.

Ultimately the legislation is so wide as to be virtually unworkable. The existing provisions in the Bankruptcy Act are largely adequate to meet community needs. If changes are needed, then they should be specific changes and the changes should be justified to the community. There is no justification for confiscatory retrospective legislation.

We urge you to fully review the policy decisions underlying the proposed changes.

I would be happy to appear before the committee to discuss the matters addressed in this letter and the proposed amendments generally.

Yours faithfully
McCullough Robertson



Brett Heading
Partner

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