

Bankruptcy Act
Submission No:119.....



Australian Government

Insolvency and Trustee Service Australia
Office of the Chief Executive and
Inspector-General

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BY: *[Signature]*

The Hon Bronwyn Bishop MP
Chair
House of Representatives Standing Committee
on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2601

Dear Mrs Bishop

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

I am writing to provide some further comments to you concerning the operation of the amendments proposed in the exposure draft of the Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004. I hope these comments will assist your committee in its current inquiry into this exposure draft. I note there has been considerable press coverage of the exposure draft and I am concerned that the way in which the proposed amendments will operate has been misrepresented or misunderstood by some commentators.

Property available to the bankruptcy trustee

There appears to be significant opposition to the amendments on the basis that ALL property held by a bankrupt's family will be taken by a trustee in bankruptcy where the bankrupt contributed to the acquisition of that property by the family member no matter how long ago that person acquired the property. It has also been suggested that the provisions may extend to gifts made by the bankrupt to family members many years prior to bankruptcy. These suggestions are not borne out by the provisions as drafted.

Property or money will be 'tainted' where:

- it was acquired using property or money provided by the bankrupt;
- the bankrupt provided that money or property with the intention that it not be available to creditors; and
- the bankrupt has used or derived a benefit from that property.

It is important to note that the fact that property or money is 'tainted' does not automatically result in it becoming available to the bankruptcy trustee. The provisions describing 'tainted property' and 'tainted money' merely bring such property or money within the scope a potential application to Court. Where the trustee decides to bring this application, the Court will be required to consider a range of factors relevant to current ownership and value of the property. These factors include:

- the extent to which the current value of the property reflects contributions (both financial and non-financial) made by the bankrupt and any other entity (including the owner);
- the extent to which both the bankrupt and the owner used or derived a benefit from the property; and
- the nature and extent of any estate or interest that any other person or entity has in the property and any hardship that the order might cause that other person or entity.

These considerations are designed to allow the trustee to recover only that part of the property or money which is properly attributable to the bankrupt and to protect the interest of the non-bankrupt owner. For example, where the trustee is seeking to recover part of the matrimonial home (which is owned entirely by the non-bankrupt spouse), the Court will have to consider the extent to which the current value of that home reflects the financial and non-contributions made by the non-bankrupt spouse.

The provisions are not intended to allow a trustee to recover genuine gifts as it would not be expected that the bankrupt used or derived a benefit from such money or property.

Exempt full value transfers

Certain transfers (to be known as 'exempt full value transfers') will be excluded from the operation of the provisions. This exclusion will mean the bankruptcy trustee will not be able to recover property acquired using money or property transferred by the bankrupt where:

- the transferee gave consideration of at least market value for the transfer; and
- either:
 - the transfer took place more than 10 years before the date of the bankruptcy;
 - or
 - the transferee did not know that the bankrupt had a tainted purpose in making the transfer.

I note there appears to be a misconception that this provision will protect transfers made more than 10 years prior to bankruptcy. This will only be the case where the transferee provided market-value consideration for the transfer.

Tax avoidance

A number of commentators have suggested that the changes go too far in addressing the problem of high-income professionals using bankruptcy to avoid paying tax. Although the problems which the Bill seeks to address were originally identified by a Taskforce

examining the cases of a number of barristers who went bankrupt without paying tax and without owning assets in their own names, this simply exposed deficiencies in bankruptcy laws which are not limited to tax avoidance. The provisions in the exposure draft have been drafted to provide a benefit to creditors generally and are not specifically aimed at improving the position of the Commissioner of Taxation.

The provisions also ensure that a debtor who is able to structure their affairs in such a way that they don't own assets personally is no better off following bankruptcy than a debtor who does not have that option.

Capacity to incorporate

Concerns have been raised about the limited scope for legal practices and other professionals to incorporate, and the disadvantages this creates for practitioners in facing personal liability. The Attorney-General's Department has advised that on 4 May 2004, the Secretariat to the Standing Committee of Attorneys-General (SCAG) issued a Communiqué from SCAG Ministers announcing the release of the National Legal Profession Model Bill. The Bill has been endorsed by Ministers as the basis for consistent regulation of Australia's legal profession. Part 13 of the Bill contains provisions that once implemented will allow lawyers to practice through corporations and in partnership with other professionals. In those jurisdictions that implement Part 13, there will be scope for lawyers to practice through corporations, providing an additional option for addressing liability issues.

I trust this information is of assistance to you and your committee in considering this exposure draft. I would be pleased to provide any further information or explanation you require during the course of your inquiry.

Yours sincerely



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Inspector-General in Bankruptcy

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