

Don Munro FCA

22 JUN 2004

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<i>Bankrupt/Hoy</i>
Submission No: <i>146</i>

19 June 2004

Hon M.R. Brough
110 Morayfield Road
CABOOLTURE Q4510

RECEIVED
18 JUL 2004

BY:

Dear Mal

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

I wish to register my deepest concern that the legislative changes referred to above could be enacted in a form represented by the recent Exposure Draft.

I am 64 years of age, in business as an Accountant and I have always taken a prudent and conservative approach to the conduct of both my business career and my personal financial position, and to accede to my clients requirements in accordance with the prevailing law.

Your Government's proposed legislative changes in Clause 49 of the Exposure Draft EM states "...while asset protection arrangements are not uncommon the Government considers that they should not continue..."

The corner stone of the private enterprise system is the survival of limited liability.

In recent years, those in business have sought to protect their personal assets by placing them in the name of their spouse or a discretionary family trust. My understanding of the law that was to be considered, is that it was to be based on the joint task force report "Use of Bankruptcy & Family Law to Avoid Tax."

The draft of the proposed legislation makes no mention of tax avoidance and has the effect of being retrospective legislation that attacks the related assets of every person who becomes bankrupt for whatever reason.

The Attorney-General has apparently stated that professionals should have insurance cover and thus the legislation should not affect them. I would remind you of three issues.

1. Not everyone is a professional person; the proposed law covers any person who becomes bankrupt including those in business taking risks the same as every other professional person.

2. Insurance is not always available, and even if it is, there is no guarantee it will cover the risks encountered. There is also the issue of HIH Insurance that failed not so long ago and left people with exposures. In fact with my recent arrangements for disposal of my practice assets, my Broker really has to pursue insurers to obtain professional indemnity cover for me – even after 36 years in practice with no claims experience.
3. Most people who go bankrupt do so to avoid tax – those persons who use Bankruptcy to avoid tax are in a minority.

It appears that inadequate consideration has been given to the following consequences of this legislation.

- A person in business who has a “no fault bankruptcy” such as due to a bad debt or inability to insure is being penalized for trying to protect their personal assets for their family.
- Single people would get no relief from any seizure orders as they have no other parties to consider for hardship.
- “Long tail” legislation could be uninsurable for doctors and other essential professional persons who may get sued long after an insolvency event happens and any assets held would be at risk. For example a doctor who is sued 10 plus years after negligence takes place.
- Professionals and business people who take risks are likely to reduce their exposure to risk and this will have a direct impact on those prepared to go into business and employ people. This will have direct impact on employment and GDP over time.
- Banks and other lenders will be forced to take further security to counteract the effect of the legislation which will reduce returns to unsecured creditors, thus defeating the objective of the proposed legislation.
- People close to retirement who lose access to assets held in related entities will become a burden on the social security system and the health system, as they will never recover financially or mentally from losing everything.

I support legislation that stops tax avoidance through bankruptcy, however it needs safeguards that;

- Allow people who legally have assets in related entities and who become bankrupt – to retain assets that have not been deliberately diverted JUST PRIOR to bankruptcy to avoid their tax or other responsibilities. This is relatively easy for a bankruptcy trustee to determine.
- Keep the existing limits of relation back periods.
- Modify the legislation to specifically make it applicable to tax avoidance.

- Remove the onus of proof on the bankrupt – the current legislation effectively means a bankrupt is guilty until he or she proves themselves innocent.
- Restrict access to assets by a Trustee, regardless of how held but external to the bankrupt, tied to the age of the tax debt.

I am advised that the reason for the amendments – is the breaches promulgated by a small number of Barristers, who have not paid their tax commitments and the ATO recovery process has faltered through bankruptcy of those concerned. If the ATO was more diligent in pursuing lodgement and payment compliance, then this situation may not have developed.

Why should I gamble with my family's future every time I take a business risk?

In future if a negligence claim arises or is threatened, the plaintiff's advisers will know that as well as pursuing my insurance cover they can now threaten to seek assets held by my family created more than 10 to 20 years ago as a result of prudent and conservative planning.

My intention has always to be self sufficient in my retirement and not to depend on Government Social Security in my retirement years. Your proposals now put this at risk.

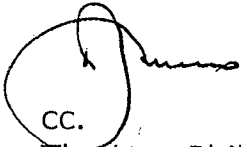
This legislation does not just apply to professionals; it applies equally to any contractor conducting their business through a corporate entity.

I intend to raise the profile of this issue in the public arena to highlight the inappropriateness of this legislation, and I understand that many of my colleagues will be taking the same approach.

I would be pleased to discuss this matter further with you or one of your staff, should that be appropriate. My phone number is **0417 079 740**

Please consider the content of this submission carefully, and if appropriate give carefull consideration to this matter if raised in Cabinet Meetings.

Yours sincerely
DON MUNRO FCA
Chartered Accountant



cc.
The Hon Phillip Ruddock MP
Attorney General
House of Representatives
Parliament House
Canberra act 2600

ASSET PROTECTION EXAMPLES

1. From Central Queensland, more than 40 years ago:
 - 1.1 A grazing family with significantly sized operations had its own livestock transport fleet. One laden semi trailer collided with a train at a railway crossing, causing significant damage to the train, because of derailment. The railway department sued the grazier for very significant damages. The event caused massive financial hurt to the family and the loss of the property.
 - 1.2 Properly advised, the family would have had the transport operations in a separate entity, preferably a discretionary trust. Even more preferably, they would have had their other operations, livestock operations and farm ownership in at least one other discretionary trust.
 - 1.3 If that approach had been taken, the impact on the grazing family would have been limited to the assets held in the trust which conducted the transport operations, ie, the truck fleet.
 - 1.4 For reasons unknown, insurance was not available to meet the claim against the family. Certainly, in modern times, if the driver has partaken of alcohol above the prescribed limit, insurance coverage will be denied.
2. Brisbane, a little over ten years ago:
 - 2.1 A professional practice had insurance coverage with FAI, a then large Australian insurer. Action was taken against them, including a senior employee, as a result of what was claimed to be deficiencies in specifications/estimates. The action was taken by a public company.
 - 2.2 FAI reserved its rights, which really meant that it would not grant cover to the clients but would watch the clients endeavour to defend themselves and then decide whether to grant cover. The clients could not afford this. One of the parties was forced into bankruptcy. Fortunately, the family house was not in his name.
 - 2.3 Again, the financial calamity which occurred was not through any mal-intent on behalf of the bankrupt. It may well be that the bankrupt was not even negligent. However, he did not have the opportunity to prove otherwise.
3. Queensland, late 1980s:
 - 3.1 A client owned a state franchise system in a discretionary trust. The same client had a number of other businesses, each in separate trusts. The general manager of the state franchising business defrauded that business. Towards the end, he was placing \$2,000.00 each way on each horse at Eagle Farm Racecourse every Wednesday and Saturday.

This resulted in a loss of \$500,000.00 to the client. However, the other assets, being held in separate trusts, were not at risk.

3.2 What in fact happened was that the client's bank requested that he provide them with additional security over the other trust assets and, as a matter of honour, the client did – ultimately to his own very significant disadvantage. Nonetheless, this is another instance where financial calamity was visited upon a client without any mal-intent on behalf of the client.

4. Sub contractors – everywhere, anytime:

4.1 It is a notorious fact that many well intentioned sub-contractors encounter financial calamity because the head contractor cannot, or will not, pay the sub-contractor. It has become common usage in the sub-contracting industry, because of these uncontrollable circumstances, for sub-contractors to have their houses owned either in their spouses name or in the name of a trust.

4.2 In future, sub-contractors will not be able to protect their basic assets against the action of head contractors, quite often, fraudulent action.

5. Estate Planning – everywhere, anytime:

5.1 Mum and Dad, in their 60's, have accumulated reasonable wealth, from many years of hard work. They have four adult children, all married with children. They wish to leave their estate for the children and their families, but with the desire to protect what they leave from any financial calamity which might befall their children.

5.2 To achieve this, they set up four discretionary trusts in their Wills, one "earmarked" for each child.

5.3 Mum and Dad die. Later one of the sons becomes bankrupt.

5.4 Because Mum and Dad had an intention to protect the assets they were leaving to the trusts, the trust assets will be available to the son's trustee in bankruptcy (New Section 139AM).