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Gillian Gould

Submission No: 86

Australian Financial Counselling & Credit Reform Association Incorporated

Chairperson: Jan Pentland

Secretary: Rosemary Warren

18 June 2004

Gillian Gould
Committee Secretary
House of Representatives Standing Committee on Legal and Constitutional Affairs
Parliament House
Canberra 2600

Dear Ms. Gould,

Thank you for the opportunity to comment on the exposure draft of the *Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004*. The Australian Financial Counselling and Credit Reform Association (AFCCRA) is the peak body for financial counsellors in Australia. The Chairperson of AFCCRA, Jan Pentland represents AFCCRA and the financial counselling sector on the Attorney General's Bankruptcy Reform Consultative Forum. The client group of financial counsellors across Australia is low income and vulnerable consumers.

AFCCRA strongly supports the Attorney's intention in this Bill to address the issue of high income professionals using bankruptcy to avoid taxation and other obligations. We believe that any abuse or perceived abuse of bankruptcy brings it into disrepute and makes its appropriate use as a last resort for indebted Australians more difficult. Our view is that the Australian bankruptcy regime generally works well, taking into account the needs of all stakeholders – creditors, debtors and Australian society broadly.

In making this submission, AFCCRA would like to draw to the attention of the Committee the bankruptcy statistics which clearly demonstrate that bankruptcy is mainly utilised by low income/low asset debtors who do not employ the rorting tactics this Bill seeks to address (ITSA Profiles of Debtors 2003). Given that this Bill is rightly intended to address abuse of the bankruptcy system, we urge the Committee, the Attorney, ITSA and the Bankruptcy Reform Consultative Forum to ensure that low income/low asset bankrupts are not negatively impacted.

AFCCRA supports the Attorney's intention of clarifying longstanding issues in the interaction between family law and bankruptcy. We acknowledge that the large majority of our clients and their families have no assets or levels of income which are likely to be in contention as a result of these proposed amendments. However, we do have some concerns that a small number of our clients and their families may unintentionally be impacted negatively by the amendments, and raise the following matters for your consideration:

1. While the policy objectives of the Bill as stated in media releases from the Attorney and in the explanatory memorandum, are to address issues with high income professionals, nothing in the Bill prevents the amendments impacting on low income/low asset bankrupts and their families.
2. As with the abuses the Bill is intending to address, those bankrupts with access to professional advice from lawyers, financial advisors and accountants, and the resources to arrange their affairs may be able to avoid the impact of the amendments while our clients with minimal resources are more likely to be unintentionally caught.
3. The requirement for the third party in whose name alleged 'tainted property' may be held, to prove to the contrary may be very difficult for that third party in terms of access to legal resources to make the rebuttal.
4. We are concerned that low value assets may be of interest to trustees. We recommend that low value assets legitimately held in a family member's name such as motor vehicles under \$40,000 or family homes to the value of the average house in any area, should not be affected by these amendments. Assets are transferred within families for very good reason, such as to provide protection for children when an addiction to overspending, gambling or drugs may put assets such as the family home at risk. Often at the time of transfer, the transferor has already used their share of family assets and the transfer acknowledges this.
5. In s.139AAA where it is stated that the Court must take into account the contribution (whether financial or non-financial) of the entity, we recommend that this be defined to include the non-financial contribution of the spouse as homemaker and carer for children. The Committee should consider that the Bill may have the presumably unintended consequence of making it easier to protect assets by separation or divorce, thereby potentially increasing the level of family breakdown.

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6. We draw the Committee's attention to s.139 which restricts the hardship criteria to be considered by the Court to persons who have a legal estate or interest in the particular property which would generally exclude children. We believe that hardship caused to children by the potential loss of family assets such as a home or motor vehicle should be included in the criteria for the Court to consider.

Thank you for your consideration of these matters. Again, we congratulate the Attorney on his intention to address misuse of bankruptcy by high income debtors. Please contact me on 0407 042 483 if you require further information or clarification.

Yours faithfully,

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