

**Wilson, Frances (REPS)**

29 JUN 2004

Submission No: 107

**From:** simon.aitken@rsmi.com.au *Simon Gould*  
**Sent:** Monday, 28 June 2004 10:21 AM  
**To:** Committee, LACA (REPS)  
**Subject:** Exposure Draft Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004 {Scanned by RSMi}

I have read and been disturbed by the potential breadth of the proposed amendments to the bankruptcy legislation as outlined in the Exposure Draft Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004 (hereinafter referred to as the "Exposure Draft").

The object of the proposed amendments is to inter alia improve the ability of trustees of bankrupt estates to recover assets from persons funded and enjoyed (at some point) by the bankrupt. I understand that the genesis of the need for the Exposure Draft arose from "crony" solicitors based in NSW who were deliberately using the bankruptcy laws to avoid paying income tax. The Exposure Draft goes far beyond the arrangements used by these solicitors.

I am an accountant and tax adviser with over 15 years experience in public practice. It is common practice of small and medium size businesses (and indeed I always advise) to separate the family's assets from the business assets (and contingent liabilities). This is normally achieved by transferring the family home and liquid assets (cash and shares) into the name of one spouse with the other spouse owning and being subject to the risks of the family business. At the time of the transfer, no existing creditor of the business is effected. No (business) person intends to go bankrupt, indeed it is still a stigma in our society. But bankruptcy is an important element of our capitalist system. It encourages entrepreneurial by enabling a bankrupt to "wipe the slate" and recommence business after a required period of absence. The Exposure Draft will discourage people to go into business.

The problem with the Exposure Draft is its breadth and the onus placed on the bankrupt to prove it did not have a "tainted purpose" in transferring value to another person. There would be extreme difficulty in a bankrupt being able to prove their dominant motive for transferring an asset, to a level of satisfaction required by the Courts, where the asset transfer occurs many years prior to the bankruptcy.

This legislation (if enacted) will undoubtedly lead to greater litigation and costs in winding up bankrupt estates. The meaning of many of the terms (including "tainted property", "tainted purpose", "arm's length remuneration", "extent to which the bankrupt used or derived a benefit") used within the Exposure Draft are subjective which will only result in costly and protracted litigation. In most cases, I would expect that the trustee of a bankrupt estate will have greater financial resources than the bankrupt. This will undoubtedly cause many bankrupts to try and settle out of court, notwithstanding they may believe in themselves that they did not have a tainted purpose. The burden of proving the tainted purpose should be put back on the trustee of the bankrupt estate if the Exposure Draft is not going to catch many innocent persons. Further, the Exposure Draft (if enacted) should not operate retrospectively to deal with those property transfers occurring prior to its Royal Assent.

The cause of many service businesses to go into bankruptcy is due to negligent cases awarded against the business. Statistics show that our society is becoming more acceptable to litigation to pursue damages for cases of negligence. Professional indemnity insurance costs have escalated exponentially over the past ten years and obtaining "full cover" at an acceptable cost is now impossible. The risk of operating a service practice has been mitigated by segregating the family assets from the business risks. The Exposure Draft legislation (if enacted) will undoubtedly cause many service providers to take out a higher level of professional indemnity cover and this cost will inevitably be passed back to the consumer as higher costs.

Creditors should not lend money or provide goods and services to businesses without conducting some due diligence beforehand. Perhaps creditors should have a legal right to receive financial statements of

their debtors on an annual basis once the credit exceeds say \$100,000. Banks insist on regular financial statements of persons to whom they lend money. Other (non bank) creditors should have similar rights and engage in similar practices to be properly informed on whether or not they provide or extend their credit terms.

In summary, the Exposure Draft needs to be replaced with legislation that will operate in circumstances where a bankrupt executes a "scheme" to blatantly defeat creditors existing at the time the scheme was entered into. Further, I agree with the principle that creditors need to be protected where a bankrupt trades whilst the business they are operating is insolvent. However, the Exposure Draft will discourage many entrepreneurs and have a dire consequence on the innocent family members associated with the bankrupt. The main beneficiaries from the Exposure draft will not be creditors but rather legal advisers and liquidators.

Simon Aitken  
62 Alfred Street  
Kew 3101  
Direct: (03) 9286 1848

This Communication is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential or copyright. You are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited without the authority of the sender. If you have received this e-mail message in error or are not the intended recipient, please delete and destroy all copies and notify us immediately by return mail. Any views expressed in this communication are those of the individual sender, except where the sender specifically states otherwise. If you no longer want to receive notification simply reply to this e-mail.