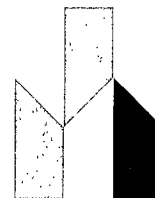


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BY *William Gould*



MASTER BUILDERS
AUSTRALIA

18 June 2004

Bankruptcy
Submission No: *58*

The Hon Bronwyn Bishop MP
Chair
House of Representatives Standing Committee
on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Senator

**BANKRUPTCY LEGISLATION AMENDMENT (ANTI-AVOIDANCE AND
OTHER MEASURES) BILL 2004: EXPOSURE DRAFT**

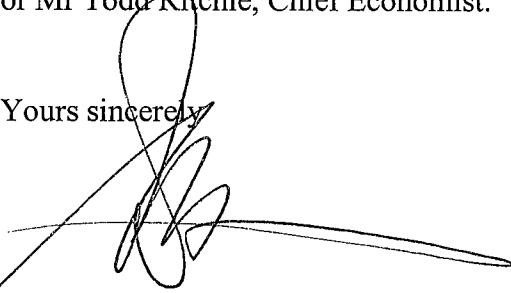
Master Builders Australia welcomes the opportunity to provide a submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs with regards to the abovementioned Bill.

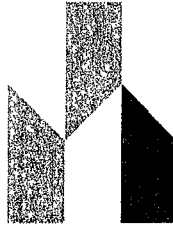
While Master Builders Australia fully supports strengthening of the law to prevent the abuse of bankruptcy and family law by high income individuals flouting their tax obligations, we do have a range of concerns with the Bill as it currently stands.

Our submission contains details of these concerns and suggests a number of alternative reforms which we urge the Committee to consider.

If you would like further information on issues raised in the submission, please contact Mr Richard Calver, National Director Industrial Relations and Legal Counsel, or Mr Todd Ritchie, Chief Economist.

Yours sincerely


Wilhelm Harnisch
Chief Executive Officer



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18 JUN 2004

BY: *Gillian Gould*

**MASTER BUILDERS
AUSTRALIA**

Submission to the

**House of Representatives Standing Committee
On Legal and Constitutional Affairs**

**Bankruptcy Legislation Amendment (Anti-Avoidance and Other
Measures) Bill 2004: Exposure Draft**

June 2004

Master Builders Australia Inc ABN 701 3422 100

1.0 INTRODUCTION

- 1.1. This submission is made by Master Builders Australia Inc (Master Builders).
- 1.2. Master Builders represents the interest of all sectors of the building and construction industry. The association consists of nine State and Territory builders' associations with over 25,000 members. The building and construction industry will contribute around \$80 billion of economic activity to the Australian economy in 2003-04.
- 1.3 The building and construction industry has a number of characteristics, including:
 - being a mature but competitive industry which exhibits intense pricing competition;
 - operating in a highly volatile economic environment with activity fluctuating widely around its average growth rate;
 - having regional rather than national markets because of the permanently fixed nature of the product;
 - having all levels of government as significant and repeat clients;
 - having few economies of scale (with the exception of building material manufacturers); and
 - financial susceptibility to delays and the imposition of liquidated damages.
- 1.4 Ninety-five percent of all businesses in the building and construction industry employ fewer than 5 people, while less than 1% have 20 or more employees. Many of the smaller businesses are family run (often a husband and wife partnership whether incorporated or not), through which the husband carries out his particular trade.

2.0 PURPOSE OF SUBMISSION

- 2.1 Master Builders is concerned that the *Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004* (the Bill) has implications well beyond the Government's purposes expressed in the Committee's terms of reference. Master Builders is of the view that the Bill in its current form will act as a disincentive to entrepreneurial risk and will add to the burden of small business, especially unincorporated businesses such as small sub-contracting partnerships.
- 2.2 This submission outlines Master Builders' broad concerns with the Bill, especially our concern that it is not sufficiently targeted at the high income professionals who are abusing the current law. We emphasise that we fully

support strengthening of the law to prevent the abuse of bankruptcy and family law that enables high income individuals to flout their obligation to pay tax. Whilst the Bill would achieve that objective, it does so at the expense of many small businesses who surely were not meant to be captured by changes to the legislation.

- 2.3 Master Builders is also concerned that the Bill appears to be founded on the mistaken presumption that prudent practices aimed at protecting family assets and increasing security in retirement are solely motivated by the desire to avoid taxation or the legitimate claims of creditors.
- 2.4 We would also note that the consultative process with groups such as ourselves with great interest in the proposed changes was minimal.

3.0 SCOPE OF THE BILL

- 3.1 As Master Builders understands it, the proposed changes to bankruptcy laws have the primary aim of preventing bankrupts, especially high income earners, from using existing legislation to evade debts.
- 3.2 In Master Builders view, the Bill would also have significant impact on the existing financial arrangements of small businesses, not just the 'high income professionals' against which its provisions are directed and which are singled out in the Task Force Report¹. The Bill would have the effect of placing in jeopardy legitimate financial planning initiatives made with the main aim of protecting family assets. This would be the case wherever those plans embrace asset transfers. In essence these difficulties arise because the Bill does not define the category of taxpayer against which its measures are directed. There is no specific targeting of the recalcitrant high income groups that have successfully used and abused the system in the past and hence the Bill's provisions affect widely used methods of separating family and private assets from business related personal liability. These financial planning devices are not confined to high wealth individuals and are commonly and legitimately used by small to medium business operators, especially following professional advice.

¹ Cth of Australia Attorney-General's Department, Australian Taxation Office, Insolvency and Trustee Service Australia and Treasury Joint Taskforce Report on The Use of Bankruptcy and Family Law Schemes to Avoid Payment of Tax January 2002
[http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/Reform->Reviews->Reviews%20Documents/\\$FILE/2FINAL%20REPORT%2002.02%20FOIXXX.pdf?OpenElement](http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/Reform->Reviews->Reviews%20Documents/$FILE/2FINAL%20REPORT%2002.02%20FOIXXX.pdf?OpenElement)

- 3.3 The operative parts of the Bill use the ideas of “tainted money”, tainted property” and “tainted purpose”. The latter concept encompasses the presumption that the bankrupt’s main purpose is to prevent, hinder or delay the claims of creditors determined at the allegation of the bankrupt’s trustee. Whilst the presumption is rebuttable, there appears to be little weighting to factors central to controlling the problem for which the legislation is brought forward eg a specific reference to debt owed to the Commissioner of Taxation or the proportion of debt owed to the Commissioner. The Bill appears to be an attempt to redress the inefficiencies of the taxation collection system through untargeted strengthening of the bankruptcy laws.
- 3.4 The Bill changes the prior law on asset transfers. The changes have the potential to damage entrepreneurial spirit as they extend to all sole-traders and partnerships and do so retrospectively. The Bill would catch an asset transfer to a family member or associated entity from a bankrupt up to 10 years from its commencement. This is the case even where the transfer has occurred at fair market value, unless the transferee can show that they were unaware of any ‘tainted’ purpose of the transfer: clause 139AFB(1)(b)(ii).
- 3.5 Not only are their assets threatened but the new record keeping obligations are a burden on small business that, to Master Builders’ knowledge, has not been costed. The trustee in bankruptcy can seek to have tainted property included in the money or property available to creditors without reasonable limitations. How are small business to cope with record keeping in such a legislative context? The legislation itself provides no answer to this question. As was indicated in a recent Australian Financial Review article,² “ the new net threatens to expose the assets not just of high-flying barristers, but also the humble chattels of law-abiding, tax-paying citizens who through no fault of their own have been rendered bankrupt.”³
- 3.6 Most small business owners in the building and construction industry have debt that is often the subject of personal guarantees executed by the proprietor. This is especially the case where the small business is an unincorporated entity. In the event that the guarantees were called upon where the regime established by the Bill was in force, no protection for the spouse or family of the bankrupt could be assured, including in respect of the family home. Irrespective of the legitimacy of a transaction undertaken on appropriate legal and financial advice years earlier, property legally belonging

² M Cave *The New Assault on Personal Assets* The Weekend Financial Review 12 June 2004

³ Id at p29

to a spouse or family member is potentially available to the trustee of a bankrupt. These consequences should not flow from legislation designed to catch a dishonest few.

- 3.7 The Bill is also anti-small business in that it erodes the limited protections of individuals and small businesses in bankruptcy while leaving unchanged the protections afforded to companies through the operation of limited liability.

4.0 UNCERTAINTY CREATED

- 4.1 The Bill engenders uncertainty in current business arrangements. It does so in two principal ways: by in effect operating retrospectively on transfers that have taken place prior to the enactment of the Bill and by providing such wide powers to the court that advance planning of issues is not possible and the discretion of the court is not properly fettered.
- 4.2 By unfairly reversing the onus of proof the Bill will add unnecessary costs and compliance burdens on businesses and bankrupt estates. Further, it is unclear that when a "tainted asset" is identified as such how the extent of its inclusion in a bankrupt's assets may be gauged. Clause 139F gives the court extraordinary discretion. Provisions such as Clause 139F(1)(bb) would exacerbate the issue of record-keeping mentioned in paragraph 3.5 of this submission. This is because "the extent (if any) to which the market value of the property reflects the ultimate contribution (whether financial or non-financial) of an entity or person other than the bankrupt" will require reference to records of the entity or third person which may not have been retained, there being no legal obligation, for example, beyond the periods required under the Income Tax Assessment Act.
- 4.3 As expressed earlier, Master Builders has considerable concerns with the retrospective nature of the new legislation. The present rules under which businesses are currently operating provide clarity to business people. However, under the proposed changes, business carried out within the current environment potentially can be undone under the proposed changes. For instance, asset transfers up to 10 years earlier can be attacked, unless the transferee can show that they were unaware of any "tainted" purpose of the transfer.

5.0 ALTERNATIVE REFORMS

- 5.1 As a first step, the provisions of the Bill must be tightened to ensure that it focuses only on removing incentives for deliberate bankruptcy. Assets that have been transferred at market value or for legitimate purposes must be completely protected unless their transfer offends the current law.
- 5.2 The legislation should revert to the original purpose of the inter departmental working group – stopping the avoidance or evasion of taxation. At the least, the access to assets should be restricted to the length of time over which the unpaid tax debt was incurred.
- 5.3 Master Builders suggests strengthening the taxation laws so that if monies are owed to the Commissioner of Taxation at the time when a person is not otherwise technically insolvent, the Commissioner of Taxation is able to “look through” transactions with the substantive effect of evading the payment of taxation inclusive of transfers to third parties not made at market value. In other words the monies owed to the Commissioner of Taxation would be a critical factor in piercing whatever legal veil the taxpayer had erected.

6.0 CONCLUSION

- 6.1 The Bill as it currently stands has several limitations:
- It is retrospective;
 - It imposes an onerous and unfair burden of proof;
 - It provides unfettered and unjustified powers to the trustee;
 - It creates uncertainty and will reduce risk taking;
 - It disadvantages small businesses and individuals relative to companies;
 - It requires records to be kept for a considerable period;
 - It will add to the cost of insurance; and
 - It will work against legitimate retirement planning and may ultimately add to the tax payer burden by increasing reliance on the federal pension system.
- 6.2 The legislation should be withdrawn and alternative reforms advanced.

* * * * *