

Submission No: 74

16 June 2004

Sent via email transmission: laca.Reps@aph.gov.au

The Secretary
House of Representative Standing Committee
On Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

RECORDED
22 JUN 2004

BY: *Gillian Gould*

Dear Madam

Re: Submissions concerning the Bankruptcy Legislation Amendment (Anti-Avoidance & Other Measures) Bill 2004 ("the Exposure Draft")

I refer to the Exposure Draft announced by the Attorney General on 14 May 2004. Please find attached my detailed comments and submissions concerning the proposed amendments to the Bankruptcy Act 1966 ("the Act").

I consent to the submission being placed on the public register.

As indicated in my submission, should the Committee require further information or explanations concerning my submission or any other matter, please do not hesitate to contact me.

Yours faithfully

Norman K Jones FCA
Registered Trustee

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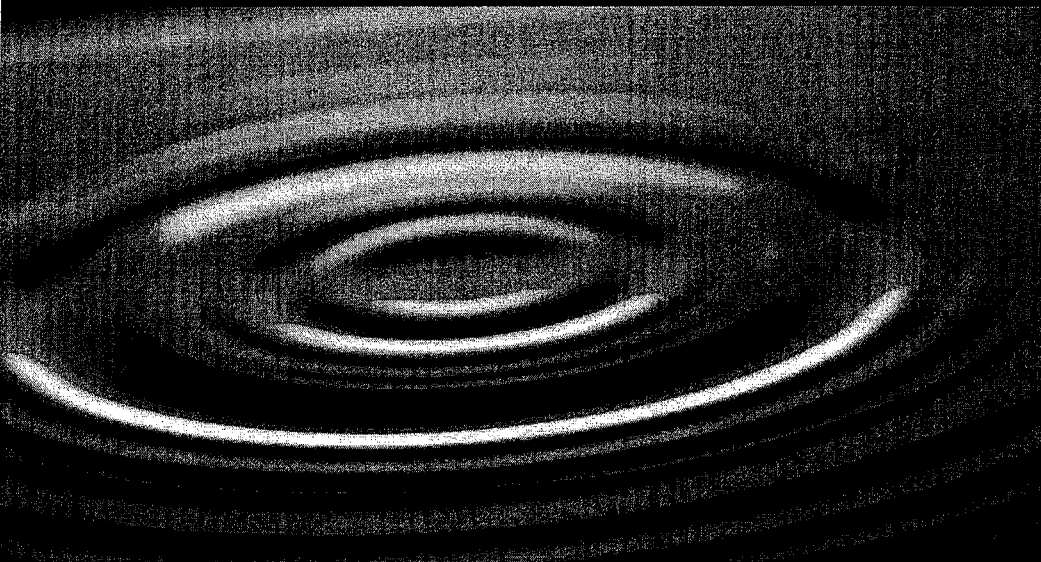
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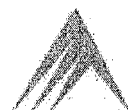
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Horwath Melbourne



***Bankruptcy Legislation Amendment
(Anti-Avoidance & Other Measures) Bill 2004***
Detailed Submission Concerning the Proposed Amendments
16 June, 2004



Horwath

This proposal is submitted by

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1. INTRODUCTION

Terms of Reference

- 1.1 The Exposure Draft released on 14 May 2004 by the Attorney General is to be read in conjunction with an explanatory memorandum. Both documents have been obtained from the Attorney General's Website – www.ag.gov.au
- 1.2 The proposed amendments in the Exposure Draft are prepared in the format of a draft Bill for purposes of referral to the Standing Committee of Legal and Constitutional Affairs with a report due to Parliament by 16 July 2004.
- 1.3 Submissions to the Committee have been requested and close on 18 June 2004.
- 1.4 I humbly request the Committee give consideration to my submissions, and should the Committee require further explanation or information, I would be pleased to assist.

Outline and Objectives of Exposure Draft

- 1.5 The Exposure Draft has, I understand, been prepared for the purposes of preventing high income professionals using bankruptcy to avoid their taxation and other obligations, and is intended to provide creditors with improved access to assets, where the property of the bankrupt is held in the name of other entities
- 1.6 In the context of the above, the objectives of the Exposure Draft are to:
 - 1.6.1 Improve the ability of trustees to recover assets
 - 1.6.2 Provide an effective means for collecting income contributions
 - 1.6.3 Prevent misuse of financial agreements as a method of avoiding payment to creditors
 - 1.6.4 Address issues concerning the interaction between family law and bankruptcy
- 1.7 The Exposure Draft has three distinct areas where the Act is proposed to be amended:
 - 1.7.1 Replacement of the existing Division 4A with a new Division that introduces change to the manners in which trustees are able to recover property from third parties where:
 - The property was acquired by that third party using funds or property provided by the bankrupt
 - The purpose of the transfer was to ensure that the funds or property would not be available to pay creditors
 - The bankrupt derived benefit or has used the property

The above provisions will not apply where there is a market value consideration, and where the transfer occurred 10 years prior to bankruptcy. The provisions are intended to apply to existing bankruptcies at the time of introduction.
 - 1.7.2 Amendments are proposed that enable trustees to have standing in family law proceedings.
 - 1.7.3 Finally, amendments are proposed that enable a trustee, where income contributions assessments are issued, to access the bankrupt's income before it reaches the bankrupt.

Scope

- 1.8 The scope of this submission is drafted in the context of a Registered Trustee in Bankruptcy and Forensic Accountant.

As a professional it is difficult to shed the claim of vested business interests competing with the role of the trustee. The analysis in the submission attempts to balance the two interests.

On the one hand, as a Trustee in Bankruptcy, any additional powers that improve my ability to perform my tasks make for the conduct of more efficient and effective administration and therefore, potentially a greater return to creditors.

Notwithstanding as a business operator where I have a considerable degree of personal exposure, the expansion of areas of risk as a consequence of the introduction of the anti-avoidance measures are of concern to me and will require me to reconsider my position.

- 1.9 The analysis of the reference material is intended to be confined to matters specific to the Exposure Draft, however, wider reference may be required in order to place comments and suggestions in context. Particulars as to references are included with this submission for more detailed analysis as required.

2. EXECUTIVE SUMMARY

Summary and Purpose of the Proposed Amendments

- 2.1 The proposed measures arise as a consequence of the *Cummins* case. Certainly these proceedings were brought by a Trustee in Bankruptcy, however, the fundamental issue involved is concerning the failure of the bankrupt to lodge personal income tax returns for a period of 39 years, and the use of bankruptcy as a means to avoid paying debts.
- 2.2 The proposed measures introduce change as a consequence of the above in the following areas:
 - Replacement of Division 4A with new provisions concerning anti-avoidance
 - Ensuring there is an interface between Family Law and Bankruptcy Law
 - Improving the enforcement provisions of the Income Contribution Regime

General Impact of the Proposed Amendments

- 2.3 The proposed measures introduce significant changes to the current principles of bankruptcy, and indeed alter the method of ensuring the bankrupt's compliance with the purpose and intent of the Act.
- 2.4 The effect of the anti-avoidance measures casts a shadow across the breadth of the business community and any individual who has incurred debt or acted as a guarantor.
- 2.5 Strategies will be implemented with immediate effect, with the specific purpose in mind of seeking to protect assets from the possible grasp of the Anti-Avoidance measures.

Specific Impact of the Proposed Amendments

Anti-Avoidance

- 2.6 A detailed review of the Exposure Draft indicates that there are a number of constitutional issues to be addressed. Others are more qualified to comment on these matters but issues identified include:
 - The definition of bankrupt's creditors
 - The ability to compel third party restitution in the circumstance as characterised by the "tainted property" provisions
 - The retrospectivity of the measures.

These issues coupled with the contradictions with the antecedent recovery provisions that apply under the Corporations Act will, in my view, create a legislative environment that is illogical and unworkable.

- 2.7 The emergence of the culture of "asset protection" is of concern, as it has thrived and created an environment where it is assumed that employing such strategies enables the ability to enjoy the use and benefit, despite bankruptcy. An unacceptable trend - however, this trend would appear to have been created of necessity in view of the inadequacy of Professional Indemnity insurance, the absence of limited liability for professionals. The "asset protection" strategies arise from a legitimate purpose and protection from risks associated with doing business and the consequent potential loss of accumulated wealth when things go badly.

- 2.8 Professionals do not conduct their business affairs with the intention of going bankrupt. Asset structuring by professionals varies considerably, and there will be any number of reasons for structuring in a particular manner, where the underlying reason is for asset protection this would of itself, under the proposed measures, have a “tainted purpose”. The measures as proposed accordingly would mean a swing-shift of attitudes that will impact on the level of business and economic activity. The flow-on effect, as suggested, will cause a re-appraisal of the risk of doing business. Certainly there will continue to be risk takers, however, the exposure of the “family assets” in such a profound manner will cause a fundamental shift in the decisions that are taken.
- 2.9 The changes will act as a disincentive to saving and wealth creation - a matter that I consider would have been very relevant to the Government considering the requirement for self funded retirement.
- 2.10 At the macro level, clearly the measures target a much wider group than the NSW barristers who have used the process of bankruptcy to avoid paying creditors. The measures will create renewed interest in the methods of structuring business and personal affairs despite this of itself may be considered a “tainted purpose”.
- 2.11 In my estimation, with the introduction of these measures as legislation there will be greater number of legal proceedings being brought, as litigants will be conscious that the respondents will have accessible assets. The outcome of this increased activity may translate into an increase in bankruptcies. It will certainly translate into an increase of revenue for the legal profession. Curiously this will include the NSW Barristers who have not been disbarred from practice despite their bankruptcy.
- 2.12 The proposed amendments lack objective tests of proof, and their very application will require the Court to be involved in the process. It is also curious that this occurs at a time when the Attorney General is calling for less matters to be brought before the Courts.
- 2.13 I comment specifically in the submission on the “knock-on effect” where spouses become the unwitting underwriters to the bankrupt’s business dealings prior to bankruptcy. Equally the “knock-on effect” applies to the various stakeholders in the business, being fellow partners, financiers, creditors, parties relying on guarantees etc. Perhaps an unintended consequence, but in the context of a transfer of assets occurring at a time when the debtor was solvent, and there was no “tainted purpose, property or money” was involved would appear to be incomprehensible.
- 2.14 This “knock-on effect” will have significant economic and social consequences, and there may be constitutional issues arising concerning the nexus of unwitting parties underwriting the bankrupt’s business dealings, when at the time the dealing was conducted on the basis of perfectly legitimate reasons, save for the introduction of the Anti-Avoidance measures.
- 2.15 I also comment on the relation back period wherein the Exposure Draft refers to the amendments applying in respect of all existing bankruptcy and future administrations where an exemption applies in respect of transfers 10 years prior to bankruptcy. That is the amendments give rise to a relation back-period 10 years from now! Aside from “tainted purpose” tests, the effect of the proposed amendment is that it is retrospective.
- 2.16 My comments then focus on some of the practical issues concerning the investigations where the statute of limitations for retention of records varies anywhere from 3 to 7 years - considerably short of the 10-year relation back period of the amendments. The expectations of the trustee to readily discover property held by third parties, where the bankrupt has continued access and obtains a benefit of the property, is unrealistic. The amendments assume that bankrupts are honest and that third parties are co-operative; it is my experience that the contrary is the case and the discovery process ultimately relies on mistakes being made by the bankrupt and third parties in identifying a line of enquiry.

- 2.17 To be successful, the proposed measures will rely heavily on the processes of Section 81 examinations.

Interaction with Family Law

- 2.18 The proposed amendments cast doubt over the trustee in taking possession of assets where the non-bankrupt spouse has a potential interest. The effect of this is that *carte blanc* it places the interests of the non-bankrupt spouse ahead of creditors. The non-bankrupt spouse's claims arising in Family Law would not arise but for the bankruptcy.
- 2.19 The trustee will be concerned not to incur expense against the administration where the asset is to be transferred to the non-bankrupt spouse.
- 2.20 The vesting provisions of Section 58 of the Act apply to property of the bankrupt only. Where the Trustee in bankruptcy asserts any claim against property held by the non-bankrupt spouse, pursuant to the antecedent provisions of the Act, such proceedings are at the direction of the Family Court. The Family Court will apply its rules concerning division of the property in question, which again places the interests of the non-bankrupt spouse ahead of creditors. This is irrespective of the beneficial use enjoyed by the bankrupt.
- 2.21 The above may also apply to property interest held by the bankrupt in any third party entity.
- 2.22 The application of the interests of non-bankrupt spouses in priority to creditors' interests in my view is simply quite wrong.
- 2.23 The proposed amendments grant power to the Family Court to require that the trustee be compelled to transfer property to the non-bankrupt spouse.
- 2.24 The proposed amendments grant power for restraint to be placed on the trustee in respect of the payment of dividends.
- 2.25 In my opinion sufficient recognition of Family Law already exist under the current Act

Amendments relating to Income Contributions

- 2.26 The proposed amendments introduce a new level of control capable of being enforced on the bankrupt where the trustee considers the application of stringent controls appropriate in the endeavour of assessing the bankrupt's income and collection of the assessed amount.
- 2.27 The strengthening of controls on one hand is meritorious, however, the cost associated with the supervision process will, in my opinion, considerably outweigh the benefits of the improved collection regime.
- 2.28 Further the trustee is in effect being asked to attend to matters concerning the authorisation of disbursements that are otherwise outside the primary purpose of the role of the Trustee in Bankruptcy.
- 2.29 The proposed amendments will enable the trustee to assess the value of the bankrupt's constructive income and require such an amount to be accounted for through the supervised account.
- 2.30 These powers concerning assessment currently exist.

Amendments Concerning Superannuation

- 2.31 The proposed amendments as I understand, are that any contribution by the bankrupt in excess of \$5,000 per annum is to be subject to claw back provisions.

- 2.32 The above appears to be irrespective of the age based limits that apply for tax purposes.
- 2.33 Further it is unclear how the proposed claw back is to be treated in terms of the taxation and surcharge paid also in respect of contributions where a taxation deduction is claimed.
- 2.34 Further it is unclear as to the legislative mechanisms that are to be put in place for the trustees of the Superannuation Funds.

Other General Comment

- 2.35 With the commencement of the legislation it is unclear as to what is the relation back period of the proposed amendment, in view of the content of Section 139AFA relating to transfers that took place more than 10 years before bankruptcy, and Section 139A concerning the trustee electing to take action within 6 years after the date of bankruptcy.
- 2.36 The mechanics of the measures leave much to be desired. Analysis of the measures forms the substance of this submission.
- 2.37 The events arising in the *Cummins* case are in themselves extraordinary, but prima facie the failure of administrative procedures in the application of the taxation legislation, and as such generally matters that are not required to be considered in the context of the Bankruptcy Act.
- 2.38 The proposed measures contain a number of provisions that will be costly and impractical to implement.
- 2.39 The proposed measures are at odds with the antecedent recovery provisions of the Corporation Act 2001.

Suggested Changes to the Amendments

- 2.40 The current antecedent provisions are noted as being successful in effecting a recovery in the *Cummins* case. Accordingly, one is at liberty to conclude that where there was a tainted purpose, Section 121 of the Act provides sufficient ambit for recovery. As such no change is required, and given the case law established this indeed strengthens the provision. The penalty as applied in the decision is reflective of social trends.
- 2.41 The observation concerning the weaknesses within the existing Division 4A could easily be proposed as an effective substitute to the Anti-Avoidance measures. My detailed submission comments on the issues arising to be addressed concerning this.
- 2.42 The fact that such suggested measures have already initiated investigation of "asset protection" strategies and structures will challenge the Trustee in Bankruptcy's existing armoury of investigative powers. The powers of the Trustee, as a consequence, are required to be strengthened irrespective of the introduction of these Anti-Avoidance measures.
- 2.43 The prescriptive approach in the current legislation provides an objective assessment of transactions, for those transactions that fall within the parameters of the operation of the Act. The proposed amendments do not provide the Trustee in Bankruptcy with that certainty, and are suggested that if they are to be amended, then they should provide objective assessment as to that which forms part of the bankrupt estate.
- 2.44 The proposed measures should not be retrospective so that the majority of constitutional issues are eliminated. That is, the application of "tainted purpose" to transactions that were perfectly legitimate at the time, the application of the provisions when the debtor was solvent at the time of the supposed tainted transaction etc.

3. BACKGROUND

Purpose of Bankruptcy

- 3.1 In order to obtain an understanding of the concepts being proposed in the Exposure Draft, it is important that there is an understanding of the underlying principles of bankruptcy. Firstly, the purpose of bankruptcy is to provide the means at law that enable a debtor's property to be taken and used to pay creditors in accordance with priorities as established in the Act. The Act establishes an estate, which the Trustee in Bankruptcy administers; creditors claims are made against the estate. The reason for this is at law the debtor is divested of the accumulated debts that have arisen (because of the poor financial management on the part of the debtor) and for the debtor to have the ability for a fresh start.
- 3.2 As part of that process the property of the debtor 'vests'¹ in a Trustee² who is charged with certain duties³ concerning the estate including identification, securing, realisation and distribution of the estate.
- 3.3 The Act provides detailed definitions of that which constitutes property of an estate⁴, transactions that may be subject to recovery⁵ by a trustee and the trustee's ability to issue income contribution assessments⁶. It is these three areas that are the subject of amendment in the anti-avoidance provisions.

Evolution of the Bankruptcy Act

- 3.4 The Act has evolved considerably since its introduction in 1966, with amendments being made progressively since that time, which may generally be described as reflecting social trends. I note with interest the 1987 amendments that gave rise to Division 4A, the subject of repeal of in the proposed amendments. Also in 1993 and 1996 the introduction and strengthening of the Income Contribution Assessment regime occurred, subject to the proposed amendments in the Other Measures introduced in the Exposure Draft.
- 3.5 Bankruptcy in Australia has of course evolved over a greater period than since 1966. The original precepts being derived from the Act of Elizabeth in the 16th Century; some of the principles that flowed from that legislation survive today. Of note, is that the 1924 Australian Bankruptcy Act that contained provisions concerning Reputed Ownership. The doctrine established that the trustee was empowered with the ability to recover property from third parties, where the benefit was for the bankrupt, or where the bankrupt exercised a degree of control. This legislation was repealed sometime prior to 1953 and ultimately substituted by the current antecedent provisions.

Reputed Ownership of Property

- 3.6 Arising from the 1898 NSW Bankruptcy Act "*goods which, with the consent of the true owner, come into the possession of the bankrupt after he commits the act of bankruptcy upon which the sequestration order is made have been held to be excluded from the operation of the reputed ownership clause*".

¹ Section 58 of the Act

² Part VIII of the Act

³ Section 19 of the Act

⁴ Section 116 of the Act

⁵ Refers antecedent transactions and includes Section 120, 121 and 122 of the Act

⁶ Refers Division 4B – Section 139] and following of the Act [Includes Section 139ZQ – a Section that deserves further review as to its effectiveness]

- 3.7 Close analysis of this extract from Section 90 of the then Act determines the principle to be similar to the “tainted purpose” measures. The language expressed above is of a different generation however a concept that had been tried over a century ago and yet dropped by the time the 1966 Act was enacted.
- 3.8 It is noted with interest that Section 85 of the then act placed restrictions on wife’s right of proof and other restrictions were placed on the wife concerning claims as reputed owner.
- 3.9 In considering some of the points raised concerning this very early legislation, the “true owner” appeared to have a requirement to assert ownership, to deal with the goods and hence the term “reputed ownership” of another. Issues of partnerships, trusts and warehouseman’s liens were considered in detail.
- 3.10 The “doctrine of reputed ownership” was claimed to be a state of knowledge either of the creditors or the outside world and that this was enough! At this point we start to come to grips with the difference of perception and reality. What is fact, as opposed to what has been put perhaps a perception of the bankrupt.
- 3.11 It is noted with interest but not researched for purposes of this submission that the current English Bankruptcy Law adopts some of the principles of reputed ownership.

Antecedent Provisions - 1966 Bankruptcy Act (Current)

- 3.12 The main sections of the Act that give the Trustee in Bankruptcy the ability to attack antecedent transactions are as follows:
- 3.12.1 Section 120: Where a transaction is considered at undervalue. The relation back period is two, four and five years dependent on varying circumstance
- 3.12.2 Section 121: Where the intention of the transaction is to defeat creditors – relation back period is indefinite
- 3.12.3 Section 122: Where the transaction has the effect of giving a creditor a preference or priority over other creditors – relation back period is six months.
- 3.12.4 Other Antecedent Sections include:
- Section 118;
 - Division 4A – Sections 139A – 139H; and
 - Subdivision J – Section 139ZQ - 139ZT
- 3.13 It is intended that the above provisions, save Division 4A, would operate in conjunction with the anti-avoidance measures in the Exposure Draft.

Antecedent Transactions – the UK Experience

- 3.14 The Insolvency Act 1986 currently is under review however generally incorporates provisions that are as reflected above.
- 3.15 I note with interest that the legislation comprise similar relation back periods of 2 –5 years.
- 3.16 The above information is readily available at webpage www.insolvency.co.uk/legal.

Antecedent Transactions – the USA Experience

- 3.17 Federal Bankruptcy Law in the United States of America is currently set down as Title 11 of the U.S. Code. The Legislation is divided into several Chapters; Chapter 11 being the most publicised in Australia.
- 3.18 The lesser known Chapter 5 deals with personal bankruptcy. This Chapter is further broken down and comprises a series comprises of “Sub-Chapters”. Sub-Chapter 111 and in particular Sections 541 through 560 describes property that forms the bankrupt estate.
- 3.19 It appears that the Relation-Back period in the U.S. Federal Bankruptcy Law is far less stringent than the Australian or U.K. experience referring to 90 days and 12 months.

Antecedent Provisions – Corporations Act 2001

- 3.20 Reference to the corporate sector is an important cross-reference point, as traditionally avoidable transactions have their genesis as antecedent transactions under the Act.
- 3.21 The same case law is used in defining the elements of antecedent transactions.
- 3.22 The Corporations Act does contain provisions concerning ‘Insolvent Trading,’ where pursuant to Section 588G of the Corporations Act, the directors will be held liable for the incurrence of any debts and is at risk of both Civil and Penalty Orders. Refer to the Water Wheel decision⁷.
- 3.23 A further difference arises in respect of Section 197 of the Corporations Act where the director of a corporate trustee of a unit trust has been held personally liable for debts incurred, where the right of indemnity from the trust is insufficient to fully indemnify the corporate trustee. This is a recent decision of the full bench of the Supreme Court of South Australia⁸.
- 3.24 An objective view of the above, questions whatever happened to Limited Liability⁹ in companies although it is recognised that this concept applies to shareholders as opposed to directors.
- 3.25 The Corporations Act generally supports the notion that the assets of a company are at the discretion of the directors operating pursuant to the powers of the company’s constitution, and provided the company is solvent and conducted for lawful purposes may conduct its business accordingly.
- 3.26 Where the company is placed in liquidation; the liquidator assesses the transactions from the perspective of voidable transactions recoverable pursuant to Part 5.7B of the Corporations Act, dispositions pursuant to Section 468 of the Corporations Act and other contributory measures.
- 3.27 Where transactions take place outside the relation back period in a company, and the company has not been trading whilst insolvent at the time will mean that the liquidator is confronted with fallow ground in terms of recovery of such transactions.

UK – Corporate Insolvency Experience

- 3.28 I note with interest that the legislation governing Corporate Insolvency in the UK is the same as for personal insolvency, that is, The Insolvency Act 1986.
- 3.29 The provisions concerning antecedent transactions applying to corporate insolvency have a similar relation-back period as previously described.

⁷ ASIC v Plymin, Elliot & Harrison [2003] VSC 123 (5 May 2003) and appeal in Elliott v ASIC [2004] VSCA 54 (7 April 2004).

⁸ Kerry Stirling Hanel & Anor v John O’Neill No. SCCIV –03-143 [2003] SASC 409 (11 December 2003)

⁹ Limited Liability refers to the basis on which a company is incorporated. The reference to limited applies to the fully paid value of shares held.

Existing Division 4A – Orders in Relation to Property of an Entity Controlled by the Bankrupt

- 3.30 The existing Division 4A was intended to provide the trustee with the ability to obtain property in certain circumstances, from any entity that was controlled by the bankrupt and benefited from his personal services, during a period that commenced up to four years before the commencement of bankruptcy.
- 3.31 The Court was required to be satisfied as to a number of matters including:
- 3.31.1 The “examinable period” before bankruptcy the bankrupt provided “personal services” to or for an entity when the bankrupt controlled the entity; and
 - 3.31.2 The bankrupt received no remuneration or inadequate remuneration; and
 - 3.31.3 The entity acquired property as a direct or indirect result of the bankrupt’s efforts; and
 - 3.31.4 The bankrupt used or derived benefit; and
 - 3.31.5 The entity’s net worth was substantially more than it would have been had the bankrupt not supplied the services.
- 3.32 There have only been a handful of decisions under this Division, and analysis would suggest that the reason for this is that the drafting has been too prescriptive, and hence the avoidance of use of these provisions for prosecution purposes.
- 3.33 The most significant of these decisions would appear to be *Birdseye*,¹⁰ wherein the trustee successfully obtained orders of the Court for the trustee to collect awarded monies represented by an interest in a property held by a third party.
- 3.34 Even so, the *Birdseye* decision was restricted, and reinforced the rule in *Cherry and Boulton*¹¹ concerning net worth. Further restriction applied in terms of the identification of the benefit received by the bankrupt.

Existing Division 4B – Contributions from Income after the Bankruptcy

- 3.35 The compulsory income contribution provisions of the Act became effective in July 1992 and were intended to provide a rebuttal approach for income retention by the bankrupt, but where income is above a specified (indexed) amount and subject to the number of dependents, the bankrupt was required to make compulsory contributions to his estate.
- 3.36 Prior to the introduction of the Income Contribution Scheme in 1992 a bankrupt was entitled to retain the income for his own benefit.
- 3.37 The Bond administration single-handedly demonstrated the ability for a high-income bankrupt to navigate the Income Contribution Regime, without being required to make contributions to his estate, and as a consequence amendments were introduced in 1996 that tightened up the definition of income.
- 3.38 In summary an income assessment is best summarised as an example and may be characterised as follows:

¹⁰ Sheahan v Birdseye [2002] FMCA 41 (22 March 2002)

¹¹ Cherry and Boulton [1839] 4 MY & CR 443

Structure of Compulsory Income Contributions Assessments

Particulars	Comments
Total Income	Sum of all types of income as defined
Less Income Tax Paid or Payable	Based on Assessable Income for Income Tax Purposes
Less Medicare Levy	As above
Less Child Support Paid or Payable	Available where dependents <u>not residing</u> with bankrupt
Add Income Tax Refunds	
= Assessed Income	Sum of Total Income plus or minus tax requirements
Less Actual Income Threshold Amount (AITA)	Calculation see below
$\text{AITA} = \text{Base Income Threshold Amount (BITA)} + (\text{BITA} \times \text{Number of Dependent \% factor})$	
Dependant deduction only available where residing with bankrupt	
= Excess or (Deficiency)	Assessed income less AITA
= Contribution Payable	50% of Excess Income

NB Current Base Income Threshold Amount is \$35,271.60¹²

Dependant % factors range from 18% for the first dependant to 36% for four plus dependants¹³

Existing Provisions in the Bankruptcy Act concerning the interaction with Family Law

- 3.39 In would appear that the interests of the non-bankrupt spouse are recognised without distinction from that of creditors; that is, to the extent that the non-bankrupt spouse is able to prove that a debt exists in the context of Section 82 of the Act, the non-bankrupt spouse will be able to participate in any distributions.
- 3.40 To the extent that the amount of the claim is in the form of a maintenance order; the claim survives bankruptcy and the bankrupt is not released upon discharge from bankruptcy.
- 3.41 To the extent that the non-bankrupt spouse asserts an interest in property, the non-bankrupt spouse is unable to commence property proceedings against the bankrupt because of the vesting provisions of the Act. The Courts may be asked to determine the veracity of this claim as against the Trustee in Bankruptcy.
- 3.42 Where property is held by the non-bankrupt spouse, the Trustee in Bankruptcy is able to commence proceedings in the Federal Court to affect recovery pursuant to the antecedent provisions of the Act where the claim is sustainable.
- 3.43 Where Family Court matters are on foot, a Section 79A settlement has been made. or maintenance order made. the Trustee in Bankruptcy is required to make application to the Family Court as opposed to the Federal Court.

¹² Threshold amount pursuant to S139K of the Act as indexed as 20 March 2004. See ITSA Webpage [www.itsa.gov.au] for updates as of 20 March and 20 September each year

¹³ Refers S139K of the Act – Definition of Actual Income Threshold Amount

Existing Provisions Concerning Superannuation

- 3.44 Section 116 of the Act provides for the bankrupt's interests in a superannuation fund to be excluded from property that is divisible amongst creditors. For the exemption to apply the fund is required to be a regulated fund within the meaning of the Superannuation Industry (Supervision) Act 1993.
- 3.45 The above exemption does not apply where the bankrupt's entitlement exceeds the Reasonable Benefits Limit.

Reasonable Benefits Limits

	Amount	Reduction if aged under 55
Lump Sum RBL	542,195	2.5% per year
Pension RBL	1,124,384	Nil

Source: ATP Australian Tax Handbook 2003

Profile of a Debtor

- 3.46 A summary of key findings¹⁴ of debtors who become bankrupt in Australia is as follows:

Key Findings - 2003

Total Bankruptcies	22,636 (2003)		[24,109 (2002)]	
Gender	45% - Female	55% - Male		
Income	23% - income of less than \$10k	36% - income in the range \$10k - \$19k	19% - income in the range \$20k - \$29k	22% - income greater than \$30k +
Age	22% - Under 30 yrs	30% - 30 - 40 yrs	26% - 40 - 50 Yrs	22% - 50 yrs +
Debt	27% - Debt under \$10k	23% - debt \$10k - \$20k	28% - Debt \$20k - 50k	11% - Debt \$50k - \$100k 11% - Debt \$100k plus
Assets	87% - Nil Assets	5% - Assets under \$5k	3% - Assets \$5k - \$20K	2% - Assets \$20k - \$50k 3% - Assets \$50k +

Source: ITSA profile of a Debtor

Occupational Groups - 2003

	Business	Non Business
Managers & Administrators	346	443
Professionals	441	838
Associate Professional	473	804
Trade & Related	835	1,239
Advanced Clerical & Service	53	209
Int. Clerical, Sales & Service	356	2,204
Int. Production & Transport	443	1,313
Elem. Clerical, Sales & Service	206	1,086
Labours & Related	327	1,670
Students	13	138
Pensioners	130	2,688
Home Duties	108	1,234
Retired	16	110
Unemployed	566	4,058
Other	98	915
Total - 23,360 (people)	4,411	18,949

Source: IG Annual Report 2002-2003

¹⁴ Source - ITSA Profile of Debtors 2003

Superannuation & Taxation

- 3.47 It is also worth noting that the introduction of a superannuation guarantee system in the 1990's was designed to encourage a minimum level of superannuation support and saving for retirement. This was introduced at the same time as the modification of the safety net of social security where the cut-off date for support occurs for those with a date of birth that occurs after 1962.
- 3.48 Superannuation contributions are provided with taxation concessions, co-contributions and surcharges:

Self Employed or Substantially Self Employed

Contribution	Maximum Deduction
0 - \$5,000	Actual Contribution
\$5,000 +	\$5,000 + 75% of excess

Source: ATP Australian Tax Handbook 2003

Age Based Limits – Self Employed

Age	Deduction Limit	Contribution Limit
0 - 34	12,651	15,201
35 - 49	35,138	45,184
50 - 70	87,141	114,521

Source: ATP Australian Tax Handbook 2003

Age Based Limits – Employed – Complying or Retirement Saving Account (RSA)

Age	Deduction Limit
0 - 34	12,651
35 - 49	35,138
50 - 70	87,141

Source: ATP Australian Tax Handbook 2003

Co-Contribution for Low Income Earners – Employed

Income	Govt Contribution
0 - \$20,000	\$1,000
\$20,001 – \$32,499	\$1,000 – 75% of AI exceeding \$20000
50 - 70	87,141

Source: ATP Australian Tax Handbook 2003

Surcharge - High Income Earner

	Surcharge
0 - \$90,526	Nil
\$90,527 - \$109,923	(AI - \$90,527)/1,295
\$109,924 +	15%

Source: ATP Australian Tax Handbook 2003

Superannuation Guarantee Scheme (Since 1996) - % Contribution

1996/7	6	2000/01	8
1997/8	6	2001/02	8
1998/9	7	2002/03	9
1999/2000	7		

Source: ATP Australian Tax Handbook 2003

Cases in Question

Prentice v Cummins

- 3.49 I December 2002 a NSW Barrister filed his Debtor's Petition in Bankruptcy. I am unaware of the circumstances that rise to the petition, but arising from the Trustee's investigations a series of matters were brought to the Court's attention and battled out in no less than seven cases¹⁵.
- 3.50 The following is the summary provided by the Court¹⁶ to assist an understanding of the principle conclusions:

"In these proceedings, the trustees of the bankrupt estate of Mr J D Cummins seek to recover certain property or funds said to have been transferred by Mr Cummins to his wife and to the trustee of the Cummins Family Trust.

Mr Cummins became bankrupt on his own petition in December 2000. At that time he was a Queen's Counsel, in practice at the Sydney bar.

Between 1955 and early 2000, Mr Cummins failed to lodge any income tax returns. In early 2000, he filed returns for the taxation years 1992 to 1999. On the basis of those returns the Commissioner of Taxation issued assessments. The Commissioner is the largest creditor of Mr Cummins' estate, being owed \$955,672.92.

This part of the case principley involves the trustees' claim that two transfers of property made by Mr Cummins in 1987, thirteen years before his bankruptcy, are void as against them. The two transactions were these:

- A transfer by Mr Cummins to his wife of his half interest in the matrimonial home at Hunters Hill, for an expressed price of \$205,250; and
- A transfer of Mr Cummins' shares in Counsel's Chambers Ltd (entitling him to occupation of barrister's chambers) to Aymcopic Pty Ltd, the trustee of the Cummins Family Trust, for an expressed price of \$360,000.

Despite the fact that each transfer was expressed to be for monetary consideration, neither Mrs Cummins nor Aymcopic paid anything for the property transferred.

Under s 121 of the *Bankruptcy Act 1966* (Cth) a transfer of property by a person who later becomes bankrupt is void against the trustee in bankruptcy if (among other things) the transferor's "main purpose" in making the transfer was to prevent the transferred property from becoming divisible among his or her creditors. The Trustees' case is that Mr Cummins' main purpose in making the transfers in 1987 was to prevent the transferred property being divided among his creditors, specifically the Commissioner of Taxation.

The case has some unusual procedural features, arising from the fact that the parties attempted to gain forensic advantages by tactical manoeuvring. The respondents (Mrs Cummins and Aymcopic) made what is usually called a "no-case submission". That is, they argued that the evidence relied on by the trustees was insufficient to make out the case that Mr Cummins' "main purpose" was to defeat his creditors. The Court required the respondents, as the price for being permitted to put this

¹⁵ Cases refer: Prentice v Cummins [2002] FCA 1140 (13 September 2002),
Prentice v Cummins [2002] FCA 1165 (19 September 2002),
Prentice v Cummins [2002] FCA 1172 (19 September 2002),
Prentice v Cummins (No. 4) [2002] FCA 1215 (2 October 2002),
Prentice v Cummins (No. 5) [2002] FCA 1503 (5 December 2002) (Includes summary),
Prentice v Cummins (No. 6) [2003] FCA 1002 (24 September 2003),
Prentice v Cummins (No. 7) [2003] FCA 1162 (24 October 2003)

¹⁶ Summary as contained in Prentice v Cummins (No. 5) [2002] FCA 1503 (5 December 2002)

submission, to “elect” to call no evidence themselves in relation to the two transfers. So they have chosen, in effect, to stand or fall on the strength (or otherwise) of the trustees’ evidence.

The Court has concluded that, despite some gaps in the trustees’ evidence, they have established, to the required standard of proof, that Mr Cummins’ main purpose in making the transfers was to prevent the transferred property from becoming divisible among his creditors. The Court has made specific findings that support this conclusion, as follows:

- Mr Cummins was well aware in August 1987 that he had incurred very substantial liabilities to the Commissioner, contingent only on the Commissioner issuing assessments in respect of past income years;
- Mr Cummins was well aware at that time that the Commissioner would issue assessments once Mr Cummins’ longstanding tax delinquency became known, an event that could occur at any time;
- Mr Cummins divested himself voluntarily of virtually all his substantial assets in August 1987;
- the assets retained by Mr Cummins were not sufficient to meet his taxation liabilities, if the Commissioner decided to issue assessments; and
- Mr Cummins saw the transfers as increasing the chances that his assets would be protected from any claims made by the Commissioner.

Accordingly, the Court has rejected the respondents’ “no case submission” in relation to the two transfers. The proceedings will therefore continue, but the respondents will be bound by their election to call no evidence concerning those transfers.

The trustees also claim, in this part of the case, that certain payments made by Mr Cummins to his wife, totalling about \$195,000, are void against them.

The Court has, however, upheld the respondents’ no case submission in relation to these payments. It has done so on the basis of certain concessions made by the trustees and a finding that the evidence is consistent with certain of the payments being loans or for household expenses. These claims must therefore fail. A separate issue remains as to whether a loan of approximately \$138,000 by Mr Cummins to Mrs Cummins has been repaid. That issue will be addressed at the next hearing”

- 3.51 The summary points in particular to the debt owing to the Australian Taxation Office; the profile of the case is elevated due to the non-filing of income tax returns for an extended period of time.
- 3.52 Of note in the decisions was that the trustee was successful with his recovery actions however the time and cost taken to achieve the outcome remains to be measured in terms of return to creditors.

Official Trustee v Mateo

- 3.53 This decision in this case¹⁷ held that the operation of Section 120 had no application where property transfers were made under Section 79 of the Family Law Act. The transfer of property pursuant to orders of the Court is therefore not an antecedent transaction.
- 3.54 Had the trustee made application to have the Section 79 Orders reviewed in the Family Court the outcome may have been different and this is my experience in at least two matters where the transfer pursuant to Family Court Orders prior to bankruptcy was deemed an abuse of process.

¹⁷ Official Trustee in Bankruptcy v Mateo [2003] FCAFC 26 (28 February 2003)

Cook v Benson

- 3.55 The High Court held in this case¹⁸ that payments made to a (complying) superannuation fund were not void as against the trustee under Section 120 of the Act on the basis that the relevant Superannuation Fund had provided valuable consideration.
- 3.56 This applied irrespective that the funds otherwise would have been divisible property in the bankrupt estate.

¹⁸ Cook v Benson [2003] HCA 36 (19 June 2003)

4. EXISTING ISSUES WITH CURRENT LEGISLATION

- 4.1 In the broadest context, social values are ever evolving and accordingly legislation that involves the community should be under review to ensure compliance with social standards. The process is not necessarily a reflection of “fashionable” trends; more based on detailed analysis, research and an understanding of the principles involved.
- 4.2 Clearly other factors can and are taken into account by the governing bodies such as a “wrong” occurring, whether the matter is of public interest and often these cases then provide the standard or perhaps a prescriptive approach which in turn removes elements of subjectivity or uncertainty.
- 4.3 The measure of paucity in drafting legislation is not necessarily a reflection of the volume of cases brought before the Courts.
- 4.4 Matters such as in the *Cummins* case should be a reflection on the principles associated with enforcement and not act as a watershed for change of the Act for matters that are associated with Income Tax Legislation.
- 4.5 The measure of effectiveness of the legislation often is the true indicator of whether legislative change is required.
- 4.6 The Annual Report of the Inspector-General 2002 – 2003 provides useful analysis of reviews undertaken, referrals to the AAT and critical decisions in the past 12 months. Such cases may be indicative of issues arising but may also be bankrupts exercising equitable rights.
- 4.7 A further source may be found in reference to the “Australian Insolvency Journal”, a quarterly journal published by the Insolvency Practitioners Association of Australia (“IPAA”) where commentary is made on matters arising of note.
- 4.8 As an overriding observation Trustees in Bankruptcy encounter perennial difficulties in the following areas which may feature in the legislation that is the subject of the current review:
 - Impact of Privacy Legislation when conducting an investigation;
 - Recognition of the Trustee in Bankruptcy across other legislative domains where an investigation is being conducted, for example access to records of Cash Transactions etc...;
 - Property that is held remotely from the bankrupt but ultimately for the bankrupt’s benefit; and
 - Off-shore investigations.

Existing Division 4A – Orders in Relation to Property of an Entity Controlled by the Bankrupt

- 4.9 The difficulties with the operation of this division generally relates to the concepts of “examinable period”, “controlled entity” and “personal services”. When this section is read down to this level of detail, this partly answers why there have only been a handful of cases using these existing provisions.
- 4.10 The requirement that the third party entity remains as the owner of the property, allows for the passing off of property to a fourth party entity, where application personal services rules permit avoidance of the application of Division 4A. It is noted that the proposed amendments incorporate this improvement – Section 139AF although this proposed amendment would appear to be confined to transfer of property, as opposed to the broader definition of considering off-sets for services provided etc...
- 4.11 The events that occurred in the *Cummins* matter are to some extent extraordinary; the timeline in this case is otherwise outside the scope of the existing Division 4A and hence the trustee in this case was required to rely on Section 121 of the Act which ultimately was successful however this of itself highlights a further weakness in the existing Division 4A.

- 4.12 The fact that the events took place at a time when perceptively the debtor was solvent also required the trustee to look to the Section 121 concerning fraudulent intent.
- 4.13 It is recognised that there are a number of issues with the existing legislation in that it is not as effective as desired to enable recovery of property for the benefit of creditors in a cost effective manner. These include *inter alia* the following:
- Property held in trust by related entities or associated persons
 - Property held remote from the debtor by third parties
 - Property held off shore
- 4.14 It is acknowledged that the existing legislation provides neither a cost effective nor efficient method that enables the trustee to break down the barriers where ownership is held remotely from the debtor. The process of “trust busting” has been very costly and outcomes have been somewhat inconsistent. It is understood that the community is somewhat frustrated with the outcomes. The Bond and Skase administrations are examples in point.
- 4.15 The problem with “trust busting” as indicated is a very costly process, and should as a matter of caution include a public examination pursuant to Section 81 of the Act, to establish or determine the level of interest in the trust, extent to which the bankrupt retains control and identify the benefit to the bankrupt.
- 4.16 The form and structure of these entities varies in each matter and hence the need for the facts to be tabled prior to any action being undertaken.
- 4.17 The decision in the matter of *Sheahan v Birdseye*¹⁹ tests the elements of Division 4A where the bankrupt continued to enjoy the wealth and earn income disguised as a trust. This decision was reversed on appeal²⁰ but of note are the comments of Mr Justice Carr where he concurred with the underlying principle of the division.
- 4.18 Whilst not a decision that directly involved the testing of the provisions of the Act, in the matter of *Darktone*²¹ the Court was asked to determine ownership of a business. The elements of this decision and issues associated with the determination of the facts point to key fundamentals required in Division 4A.
- 4.19 The liquidator of *Darktone* claimed that a business was the property of the company. The directors argued in the alternative stating that the business was owned and operated by their adult children. The directors conceded that the business had drawn on the financial resources of the company. Because of issues associated with a lease, the transfer of property from a finance company, operation of a trust and license, the liquidator failed in his recover action.

¹⁹ *Sheahan v Birdseye* [2002] FMCA 41

²⁰ *Sheahan v Birdseye* [2002] FCA 1319

²¹ *Darktone Pty Ltd (In Liquidation) v Bates & Anor* [2003] QSC 189 (25 June 2003)

Interaction between Family Law & Bankruptcy

- 4.20 The respective jurisdictions of Family Law and Bankruptcy currently appear to intersect in the Court, and often there appears to be a race in the sense of Family Court Orders that are established prior to the commencement of the relation back period and will defeat the interests of a Trustee in Bankruptcy. Indeed this is the very essence of the Anti-Avoidance measures proposed.
- 4.21 As a general rule the non-bankrupt spouse is unable to commence property proceedings against the bankrupt because of the vesting provisions of the Act. However, where the non-bankrupt spouse is able to assert claims that property is held on trust, it is not uncommon for such claims to be brought. Such claims do not include claims that arise as a consequence of the marriage.
- 4.22 Where property is held by the non-bankrupt spouse, the Trustee in Bankruptcy is able to commence proceedings in the Federal Court to affect recovery pursuant to the antecedent provisions of the Act where the claim is sustainable.
- 4.23 Where Family Court matters are on foot, a Section 79A settlement has been made or maintenance order made the Trustee in Bankruptcy is required to make application to the Family Court as opposed to the Federal Court.
- 4.24 From the trustee's perspective, it would appear that the Family Court in some instances are making orders without regard to the full financial position of the debtor prior to bankruptcy. This coupled with the difficulty in accessing the Form 17 statement as to financial affairs requires the trustee to undertake a costly process in accessing Court files. The parties to the Family Court action traditionally view any enquiry by a trustee as hostile and in my experience at least one party will not consent and this necessitates the process of Court applications. Fortunately the decision in *Lancelly*²² makes it clear that the Court does not accede to declarations when debts are not disclosed or there is collusion²³.
- 4.25 The principles established in the *Mateo*²⁴ case are a salient lesson for the trustee concerned.
- 4.26 Further difficulties were experienced in *Parianos v Meluish*,²⁵ where the Court held that property was not divisible among creditors upon the death of the bankrupt. The Court held that the whole of the property passed to the wife by a right of survivorship.
- 4.27 There are further decisions²⁶ from the Family Court that establish constructive trust arguments that appear to withstand the onset of bankruptcy.
- 4.28 Family Law provides support for the payment of Child Support Payments. The Bankruptcy Act affords priority for the obligation to pay support payments as part of the Income Contribution Assessment Regime.
- 4.29 Further the debtor is not released from maintenance payments.

Existing Division 4B – Contributions from Income after the Bankruptcy

- 4.30 The difficulties with the operation of this division have been refined with the various tests that have been applied over the past 10 years.

²² *Lancelly v Lancelly* [1994] FLC 91-491

²³ Also refer *Gerbert* [1990] FCL and *Clifton & Stuart* [1990] FCL 92-194

²⁴ *Official Trustee in Bankruptcy v Mateo* [2003] FLC 93-128

²⁵ *Parianos v Meluish* [2003] FLC 93-130

²⁶ *Official Trustee in Bankruptcy v Lopatinsky* [2003] FLC 93-129

Re Sabri; Ex Parte Brien & ANZ Bank [1997] FLC 92-732

- 4.31 Specific issues in principle involve the collection of monies due pursuant to assessments. The trustee is armed with the measure of objection to discharge, and as a last resort may be able to enforce payment, but fundamentally it is the trustee's duty to affect recovery where it is commercial to do so. The failure to pay income contributions generally does not fit this criteria.

Superannuation – Valuable Consideration

- 4.32 The process of conversion of assets that are otherwise divisible in the event of bankruptcy to a character that is non-divisible clearly is an abuse of process and as I now understand from *Cook v Benson* a transaction that stands against Section 120 of the Act.

5. THE PROPOSED LEGISLATION

- 5.1 I do not propose to detail the proposed changes save to provide a useful summary and listing of the key amendments.

Replacement Division 4A

- 5.2 Attached as **Appendix A** is a template that summarises application of the proposed division.
- 5.3 The new Division 4A is claimed will improve the ability of trustees to recover property held by third parties where:
- 5.3.1 The property was acquired by that third party using funds or property of the bankrupt;
- 5.3.2 The bankrupt's purpose in making the transfer was to ensure that the funds would not be available to creditors; and
- 5.3.3 The bankrupt derives benefit from the property now in the hands of the third-party.
- 5.4 Section 139AAA sets out in simple terms the key concepts of "tainting":

This Division enables the Court to make an order for the recovery of the whole or part of tainted property, or tainted money, held by an entity other than the bankrupt.

Tainted property is:

- (a) property wholly or partly funded by money paid to the entity by the bankrupt before the date of the bankruptcy, where the bankrupt had a tainted purpose in paying the money and the bankrupt used or derived a benefit from the property; or
- (b) property transferred to the entity by the bankrupt had a tainted purpose in transferring the property, the transfer was not made for full value and the bankrupt used or derived a benefit from the property; or
- (c) property or money held by the entity as a result of personal services supplied by the bankrupt to or on behalf of the entity, where the bankrupt did not receive arm's length remuneration for those services and (in the case of property) the bankrupt used or derived a benefit from the property; or
- (d) property or money held by the entity as a result of the scheme entered into or carried out for a tainted purpose, where (in the case of property) the property was not acquired for full value and the bankrupt used or derived a benefit from the property.

Tainted money is:

- (a) money paid to the entity by the bankrupt before the date of bankruptcy, where the bankrupt had a tainted purpose in paying the money; or
- (b) money that represents the proceeds of the disposal of tainted property

Each of the following is a tainted purpose:

- (a) to prevent the property or money from becoming divisible among the bankrupts creditors; or
- (b) to hinder or delay the process of making the property or money available for division among the bankrupt's creditors.

In considering whether to make an order for the recovery of whole or part of tainted property or tainted money, the Court must regard the following matters, including:

- (a) the contribution (whether financial or non financial) of the bankrupt and the entity; and
- (b) in the case of property – the extent to which the bankrupt used or derived a benefit from property.

- 5.5 Exemptions are proposed in respect of market value consideration, the original transfer occurring more than 10 years prior to bankruptcy and the transferee being unaware of the bankrupt's purpose in making the transfer.

Interaction between Family Law and Bankruptcy

- 5.6 Because of the special interest of the non-bankrupt spouse and often the non-financial contribution of parties, the proposed amendment recognises the need for Family Law and Bankruptcy to be dealt with concurrently.
- 5.7 The proposed amendments will confirm the jurisdiction of the Family Court on bankruptcy matters. The other amendments include:
- 5.7.1 Vesting of property has effect subject the Orders of the Family Court;
 - 5.7.2 Property will not be divisible amongst creditors of the bankrupt where the trustee is required to transfer such property under Orders of the Family Court;
 - 5.7.3 Dividends will be subject to any interlocutory injunction

Amendments relating to Income Contributions

- 5.8 The proposed amendments to the Income Contribution Assessment Regime add a supervised account for bankrupts to pay income contributions.
- 5.9 The amendments introduce the ability for trustees to assess income through a managed account and where necessary collect assessed income contributions. The trustee will be provided with the ability to require the bankrupt to deposit all his income into a new account that is supervised by the trustee.
- 5.10 The above is to be known as the "supervised account regime".
- 5.11 Special notice for this regime to operate will be required, and upon the opening of the supervised account, the trustee will be provided with the power to prohibit withdrawals by the bankrupt.
- 5.12 The trustee will also be provided with powers concerning "constructive income receipt arrangements", that is, in respect of income that not actually received. The bankrupt in such circumstances can be compelled to cease such arrangements by being required to make account for the income through the supervised account.
- 5.13 Similar powers are proposed to be introduced where the bankrupt's income is received in the form of cash.

Amendments Concerning Superannuation

- 5.14 In the proposed Anti-Avoidance & Other Measures Exposure Draft (3 May 2004) superannuation as such does not feature. However it is understood that as a consequence of the decision in *Cook v Benson* that measures are proposed that will provide trustees with the power to recover contributions that convert cash for the purpose of defeating creditors.
- 5.15 The new measures I understand will introduce a limit of the protected personal superannuation contributions of \$5,000 per annum and allow the trustee to claw back amounts in excess of this.

6. ISSUES ARISING WITH PROPOSED LEGISLATION

- 6.1 Consideration of the issues arising constitutes a fundamental part of this submission and as appropriate reference is made to examples by way of explanation. Parallels to other legislations may also be drawn or reference to practical considerations.

General

- 6.2 Every amendment that is made to the Act is a measure that has an effect on current bankruptcies and future bankruptcies. The measures that have been introduced in the past because of the abuses of the exceptions such as: Ansett – Income Contributions & Div 4A, Bond – Income Contributions & Gifting, Skase – Off-Shore, have impacted significantly on the ordinary people who have become bankrupt. The Anti-Avoidance and other measures are to be considered in terms of their impact on the ordinary people who become bankrupt.
- 6.3 The proposed measures introduce significant changes to the current principles of bankruptcy and indeed alter the method of ensuring the bankrupt's compliance with the purpose and intent of the Act.
- 6.4 The effect of the Anti-Avoidance measures casts a shadow across the breadth of the business community and any individual who has incurred debt or acted as a guarantor.
- 6.5 Arising from the increased activity of debt recovery will be an increase in the number of bankruptcies and investigations that follow, pursuing assets in the hands of third parties. To the extent that the third party is the non-bankrupt spouse the jurisdiction of any such action will be pushed into the Family Court where creditors' interests will be secondary.
- 6.6 The events arising in the *Cummins* case are in themselves extraordinary but prima facie the failure is of the administrative procedures in the application of the taxation legislation, and as such are not required to be considered in the context of the Bankruptcy Act.
- 6.7 At a macro level, the measures clearly target a much wider group than the NSW barristers who have used the process of bankruptcy to avoid paying creditors. The measures will create renewed interest in the methods of structuring business and personal affairs (irrespective of the "tainted purpose" of the restructuring).
- 6.8 The above in essence will mean that potential bankrupts will proceed to greater lengths to disguise and hide property. This of itself will include moving interests in property off-shore and this as already stated is an area where the trustee's armoury of investigation is at its weakest. Such other shelters that the trustee may refer to could include cash, trusts, private bankers etc...
- 6.9 The proposed measures contain a number of provisions that will be costly to implement and impractical.
- 6.10 The proposed measures are at odds with the antecedent recovery provisions of the Corporation Act 2001.
- 6.11 A detailed review of the Exposure Draft indicates that there are a number of constitutional issues that others are more qualified to comment on, but include: the definition of bankrupt's creditors, the ability to compel third party restitution in the circumstance as characterised by the "tainted property" provisions and the retrospectivity of the measures.

- 6.12 The emergence of the culture of “asset protection” is of concern as it has thrived and created an environment where it is assumed that by employing such strategies enable the ability to enjoy the use and benefit of the property despite bankruptcy.

An unacceptable trend, however, this trend would appear to have been created of necessity in view of the risks associated with doing business and the consequent potential loss of accumulated wealth when things go badly.

- 6.13 Professional life is already confronted with a more litigious society and as a consequence will be exposed to an even greater risk. The inadequacy of Professional Indemnity insurance, the absence of Limited Liability already providing a high degree of exposure.
- 6.14 The Insolvency Professional, in particular, is already in a highly exposed area with the very nature of each engagement being to take on matters where a director or debtor has been unable to find the road to success. Professional Indemnity insurance cover is provided with an upper limit and there is a usual excess of \$50,000. Further the statutory provisions of the Corporations Act and the Act afford little protection.
- 6.15 Similar experiences have recently become apparent for the medical profession.
- 6.16 Professionals do not conduct their businesses affairs with the intention of going bankrupt. Asset structuring by professionals varies considerably and there will be any number of reasons for structuring in a particular manner; where the underlying reason is for asset protection this would of itself, under the proposed measures, have a “tainted purpose”.
- 6.17 The measures as proposed accordingly would mean a swing-shift of attitudes that will impact on the level of business and economic activity.
- 6.18 The flow-on effect, as suggested, will cause a re-appraisal of the risk of doing business; certainly there will continue to be risk takers however given the exposure of the “family assets” in such a profound manner will cause a fundamental shift in the decisions that are taken.
- 6.19 The changes will act as a disincentive to saving and wealth creation a matter that I consider would have been very relevant to the Government considering the requirement for self funded retirement.
- 6.20 The flow-on effect as described above will apply to any bankrupt at the time of the commencement of the legislation and any bankrupt in the future who has accumulated wealth and where that wealth is held by others. Obviously certain exemptions apply but prima facie this potential for exposure is required to be made apparent.
- 6.21 In my estimation, with the introduction of these measures as legislation there will be a greater number of legal proceedings being brought as litigants will be conscious that the respondents will have accessible assets. The outcome of this increased activity may translate into an increase in bankruptcies; it will certainly translate into an increase of revenue for the legal profession. Curiously, this increased revenue will also flow through to the NSW Barristers because, as I understand it, they are not disbarred from practice by bankruptcy.
- 6.22 The proposed amendments lack objective tests of proof and their very application will require the Court to be involved in the process. It is curious that this occurs at a time when the Attorney General is calling for less matters to be brought before the Courts.
- 6.23 To be successful, the proposed measures will rely heavily on the processes of Section 81 examinations.

Interaction with Family Law

- 6.24 The proposed changes concerning the interaction with Family Law are in essence a confirmation of the decision in *Mateo*.
- 6.25 What is of concern is that an amendment is proposed that states “*property will not be divisible amongst creditors of the bankrupt where the trustee is required to transfer such property to the spouse of the bankrupt under an order...of the Family Court...*”. To the extent that a spouse is given a priority over creditors I object to the proposed amendments.

Other General Comments

- 6.26 The mechanics of the measures leave much to be desired; analysis of the measures forms the substance of this submission.

Specific Comments***Replacement Division 4A*****6.27 The Unwitting Underwriters**

- 6.27.1 The Anti-Avoidance measures permit the Trustee in Bankruptcy to apply to the Court in circumstances where the trustee seeks to recover property held by third parties.
- 6.27.2 The following example is drawn:

Typical Example

A married couple have worked as public servants for twenty years. Over this period they have bought a house in the wife's name, perhaps with a deposit proffered by one of their parents, or from a deceased estate. A joint mortgage has substantially been reduced with the joint contributions of the husband and wife. The value of the matrimonial home has increased over time and with the recent property trends there is substantial equity on the property but in the wife's name.

The husband is introduced to a promoter of inner city property developments and is duped into believing that he can own 10 developments without providing equity and the family's wealth will be increased on the successful sale of the plan.

The husband took out deposit bonds leveraged financed and intended to sell his respective interest in the properties prior to the certificates of occupancy being granted.

Completion of construction occurred at the same time as a slump in the property market occurred and the husband was unable to sell the properties.

The husband failed to settle his obligations for the acquisition of the properties because his financiers were concerned at the level of security offered.

The developer calls up the insurance on the deposit bonds and proceeds to sell the properties suffering a loss as compared to the initial sale and seeks judgement in conjunction with the insurer of the loss and damage suffered.

The husband is made bankrupt as a consequence.

Source: Developed from the Melbourne Forum Inc. letter to the Attorney General dated 19 March 2004 and discussions with Garry Bigmore QC

- 6.27.3 Pursuant to the proposed Section 139A provides the trustee with the ability to apply to the Court in relation to the property held by the wife in the above example.

- 6.27.4 On advice prior to 14 May 2004 the wife had no issues with the husband embarking on the property venture, however, that position would have been totally different being conscious of the Anti-Avoidance measures.
- 6.27.5 Irrespective of whether the wife's position had knowledge or not of the husband's property venture – the wife is an unwitting underwriter. Were the husband in partnership with others the same unwitting consequence occurs, and the prospects of knock-on to the respective existing creditors of each.
- 6.27.6 This “knock-on effect” where spouses become the unwitting underwriters to the bankrupt's business dealings prior to bankruptcy suggests a spouse's rights retreat to attitudes adopted from previous generations of the Act when voting was not permitted, property not held and other second class values.
- This concept is noted as being in conflict with the proposed interaction of Family Law and Bankruptcy
- 6.27.7 Equally the “knock-on effect” applies to the other stakeholders in the business being fellow partners, financiers, creditors, parties relying on guarantees etc... in a draconian way.
- 6.27.8 Perhaps an unintended consequence; but in the context of a transfer of assets occurring at a time when the debtor was solvent and there was not “tainted purpose, property or money” involved would appear to be incomprehensible.
- 6.27.9 This “knock-on effect” also has significant economic and social consequences, and there may be constitutional issues arising concerning the nexus of unwitting parties underwriting the bankrupt's business dealings, when at the time the dealing was conducted on the basis of perfectly legitimate reasons, save for the introduction of the Anti-Avoidance measures subsequently.
- 6.27.10 It is uncertain as to the effect of the claimed restraint of the Court in Section 139F where hardship is to be considered.
- 6.27.11 Clearly the above are unintended consequences of the proposed Anti-Avoidance measures.
- 6.27.12 In the above example, at the time that the husband unwittingly entered into the property deal he was “technically solvent” but following the signing up of all matters may have been “insolvent”. The planned trading of the properties arguably limited the husband's exposure, but it would appear that a true appraisal of the down side was not carried out and as a consequence the husband is confronted with bankruptcy for his sins.
- 6.27.13 This “technical insolvency” position has previously been rejected as a viable concept as an enforcement measure in Bankruptcy by Mr Bergman's²⁷ predecessor.
- 6.27.14 The example contains unfortunate circumstances that in principle are not uncommon and that are adequately dealt with under the existing provisions of the Act.
- 6.27.15 The existing provisions of Division 4A and Section 120 adequately deal with the above circumstance and to the extent that a deliberate intent was involved the Section 121 may be applied as was prosecuted in the *Cummins* case.

²⁷ ITSA Advisor, Policy & Legislation

6.28 Competition between a Tainted Purpose and a Dominant Purpose

- 6.28.1 As an extension of the above where a debtor enters into an arrangement where the dominant purpose is not “asset protection” (a tainted purpose), however the circumstances are such that a side benefit of “asset protection” is affected, to what extent is competition between the two purposes allowed to prevail.
- 6.28.2 An example of the above could be where a business operator seeks to ensure there is continuity of the business for purposes of succession planning. Common sense will tell the new partner to ensure that he is not exposed to any of the liabilities of the existing business operator, and as a consequence there is the conclusion of the existing business structure and a new entity created. An insolvency event could occur which challenge the steps taken for continuity purposes.
- 6.28.3 In the above example the steps were taken for the dominant purpose of continuity yet it would appear the consequent asset protection steps are a tainted purpose.
- 6.28.4 I contend that there is a clash of competing purposes that the proposed amendments do not make clear as to the outcomes for the Trustee in Bankruptcy to be able to properly interpret.

6.29 The Retrospective Nature

- 6.29.1 I note that the commencement of the legislation is to be the day on which the Bill receives Royal Assent or a day to be fixed by proclamation;
- 6.29.2 The amendments are proposed to have application “to all bankruptcies current on or after the commencement of this item” – Item 5;
- 6.29.3 Further, Section 139AI(1)(a)²⁸ as amended “applies to money paid before, or at the commencement of this item”;
- 6.29.4 The effect of the above is that the “tainting” provisions will apply retrospectively in accordance with Section 139AFB for the period of 10 years; greater where there was determined to be a tainted purpose;
- 6.29.5 The proposed amendments in applying to all existing bankruptcy and future administrations with an exemption applying in respect of transfers 10 years prior to bankruptcy. That is the amendments give rise to a relation back-period 10 years from now! Aside from “tainted purpose” tests, the effect of the proposed amendment is that it is retrospective.
- The reasonableness of contemplating future creditors in such circumstances is incomprehensible.
- 6.29.6 Transaction entered into prior to the introduction of this legislation whilst for a legitimate purpose become tainted when at the time the debtor was solvent and did not and could not contemplate the future creditors as in the above example.
- 6.29.7 How the application of the 10 year rule for “existing bankruptcies” is to apply in the context of Section 139A where the trustee is required to apply to the Court within 6 years is unclear and inconsistent.

²⁸ Also refers Sections 139AJ(1)(a), 139AK(1), 139AL(1)(a) & 139AM(1)

- 6.29.8 The practical issues concerning the investigations of records and the integrity of parties are commented on later in this submission.
- 6.29.9 The proposed application of the amendments irrespective of the status of solvency at the time of the transaction and retrospectivity are, in my opinion, illogical, incomprehensible and possibly unconstitutional.

6.30 The Conflict with Corporations Act

- 6.30.1 Section 588E of the Corporations Act provides objective tests as to whether a company is insolvent or may be presumed to be insolvent;
- 6.30.2 The effect on a transaction conducted whilst the company is deemed “insolvent” is then subject to attack by the liquidator pursuant to the provisions of Part 5.7B of the Corporations Act;
- 6.30.3 In the alternative where the transaction is conducted whilst the company is “solvent” is not subject to attack; this is irrespective of the source of property or money applied in the transaction;
- 6.30.4 The proposed Anti-Avoidance measures are totally contrary to the above principles and challenge the veracity of a transaction conducted whilst the debtor was solvent as a consequence of the “tainting” provisions;
- 6.30.5 My observation is that the dichotomy that will be created between the Corporations Act and the Bankruptcy Act is illogical. The common links between the two pieces of legislation should be maintained for purposes of continuity and practice matters.

6.31 The Absence of a Paper Trail

- 6.31.1 The proposed measures at Section 139AFB comment that an exemption in certain circumstances prevails where the transfer of property occurred 10 years before the date of bankruptcy;
- 6.31.2 The statutory period for record keeping varies as follows:
- Individuals
 - Personal Income Tax Returns – 2 years
 - General Business Records – ATO requirement – 5 Years
 - General Business Records – Statute of limitations - 7 years
 - Banking Records – 4 Years
 - Insurance Records – 7 year run off
 - CGT Assets – Records of acquisition to be retained until 7 years after disposal
 - Companies/Trusts/Partnerships
 - Income Tax Returns – 5 years
 - General Business Records – ATO requirement – 5 Years
 - General Business Records – ASIC requirement - 6 Years
 - Banking Records – 4 Years
 - Insurance Records – 7 year run off
 - CGT Assets – Records of acquisition to be retained until 7 years after disposal
- There will be exceptions to the above rules in respect of special circumstances - compliance with the above is of course another matter;
- 6.31.3 In the meantime the records required to be retained for varying time frames and not necessarily with a “tainted purpose” in mind;

- 6.31.4 The presumption that a bankrupt would retain such records assumes an “honest” bankrupt;
- 6.31.5 The presumption concerning that the third party would retain such records against assumes an “co-operative” third party and is presumptive concerning the “tainted purpose” and compliance with retention of records for statutory periods;
- 6.31.6 My observation is that very simply the paper trail is seldom readily available. The above rules concerning the period of time that records are legitimately available and for a relation back period that exceeds these statutory requirements will provide the trustee with unworkable legislation.

6.32 Realistic Prospects of Discovery of Tainted Transactions

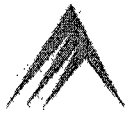
- 6.32.1 The Explanatory Memorandum to the exposure draft provides a number of examples by way of explanation of “tainted property” or “tainted money” however the underlying premise is that the trustee is able to identify such transactions as being involved with bankrupt’s affairs.
- 6.32.2 It is my estimation that with the disincentives created by the proposed amendments, strategies will be employed that further hide assets making the Trustee in Bankruptcy’s task even more difficult and costly.
- 6.32.3 I have commented above concerning the requirement for the retention of books and records; the lack of records will dramatically inhibit the Trustee in Bankruptcy’s investigation. This coupled with the Privacy Legislation require the trustee to consider extensive investigations to be conducted the commencement point for which are largely the Statement of Affairs as filed by the bankrupt and his responses to detailed questionnaires.
- 6.32.4 The above assumes the honest bankrupt and the co-operation of third parties; such an assumption is unrealistic and at the very least if the relevant parties took legal advice they would be instructed to be silent or their responses would be channelled through legal counsel.
- 6.32.5 The trustee would be compelled to consider Section 81 public examinations which, are a costly exercise and the point of the examination may be undermined by the trustee not being aware of the relevant party to examine.

6.33 The Inadequacy of certain Definitions

- 6.33.1 Section 139AAA:
- Tainted Purpose – Restrictive definition that introduces unexplained concepts
 - Tainted Property – Restrictive definition that introduces unexplained concepts
 - Tainted Money – Restrictive definition that introduces unexplained concepts
 - Derived a benefit – Unexplained concept
 - Scheme – Restrictive definition that introduces unexplained concepts
 - The bankrupt’s creditors – Unexplained concept

This section represents a simplified outline of the amended division otherwise it does not provide a specific purpose in the legislation.

- 6.33.2 Section 139AA:
- Absence of a definition of the term “bankruptcy”



6.33.3 Section 139AB

- Disposal of Property – Restricted definition of property and tracing provisions.

6.33.4 Section 139AE:

- Money, shares, units in a unit trust – Unexplained concepts, completeness of concept, sustainable application of tracing provisions.

6.33.5 Section 139AG:

- This section states that the bankrupt is taken to have derived a benefit from income derived from property, whether the benefit is direct or indirect, however, the section does not otherwise appear to be linked into the operational part of the amended division.

6.33.6 Section 139AH:

- This section states that the bankrupt is taken to have derived a benefit from loans borrowed whether the benefit is direct or indirect, however, the section does not otherwise appear to be linked into the operational part of the amended division.

6.33.7 Section 139AFA:

- Knowledge of tainted purpose - Unexplained concept

6.33.8 Section 139F:

- Hardship – Unexplained concept

6.34 The Court is Required – Inability of the Court to Apply any Discretion

6.34.1 Section 139F: I refer to the attached **Appendix A** that provides a simple summary of the matters that the Court is required to take account of.

6.34.2 The proposed measures stipulate that the “Court must not take account of any other matters” – Section 139F (1) & (2). The effect of this legislative prescription removes the power of the Court to make any decision it may consider appropriate.

6.34.3 Whilst I recognise that the Court makes determinations and I may not concur with these in every case, however, it is my view the Courts should retain powers that enable orders to be made that are just and equitable in each circumstance. Whether the proposed Section 139F provides the Court with such discretion I am unsure.

6.35 Reverse Onus of Proof

6.35.1 Within the provisions of Sections 120 & 122 of the Act there is precedence for the principle of reverse onus of proof, however, there appears to be a general expression of concern as to Section 139AFA (2) & (4) of the proposed amendments that the power of the Trustee in Bankruptcy to make a declaration as to “tainted purpose” may be a power that is unconstitutional.

6.35.2 The Trustee in Bankruptcy is an officer of the Court and is expected to exercise his duties of a standard appropriate; the proposed amendments do not provide any objective tests for the Trustee to rely upon.

6.36 Possible Duplication of Claims

- 6.36.1 Where a transaction during the period whilst the bankrupt is undischarged is considered tainted, a potential “double jeopardy” situation may arise, in that the Trustee in Bankruptcy is permitted to issue income contribution assessments at market value of services rendered, and recover property pursuant the proposed amendments to Division 4A.

6.37 Possible Double Chance of Litigation

- 6.37.1 Where the Anti-Avoidance measures are introduced the possibility of a “Double Chance” at prosecuting the same set of facts may arise.
- 6.37.2 Take for example a set of facts that were previously prosecuted under the existing Division 4A or antecedent provisions however unsuccessfully; given the right facts situation the possibility as to the prosecution occurring applying the provisions of the amended Division 4A is in my view a live issue.

Interaction between Family Law and Bankruptcy

6.38 Vesting of Property

- 6.38.1 The proposed amendments cast doubt over the trustee in taking possession of assets where the non-bankrupt spouse has a potential interest. The effect of this is that *carte blanc* it places the interests of the non-bankrupt spouse ahead of creditors.
- 6.38.2 The trustee will be concerned not to incur expense against the administration where the asset is to be transferred to the non-bankrupt spouse.
- 6.38.3 The vesting provisions of Section 58 of the Act applies to property of the bankrupt. Where the Trustee in bankruptcy asserts any claim pursuant to the antecedent provisions of the Act such proceedings are at the direction of the Family Court. The Family Court will apply its rules concerning division of the property in question, which again places the interests of the non-bankrupt spouse ahead of creditors; this is irrespective of the beneficial use enjoyed by the bankrupt. It is unclear as to the extent of which other interests of the family will be considered by the Family Court.
- 6.38.4 Indeed the above may also apply to property interests held by the bankrupt in any third party entity.
- 6.38.5 The application of the interests of non-bankrupt spouses in priority to creditors’ interests in my view is simply quite wrong.

6.39 The Trustee being required to Transfer Property to the Non-Bankrupt Spouse

- 6.39.1 The proposed amendments grant power to the Court to require that the trustee be compelled to transfer property to the non-bankrupt spouse.
- 6.39.2 This amendment, in one context, has the effect of elevating the non-bankrupt spouse’s entitlement above creditors’ claims yet the non-bankrupt spouses claim is not established until after the fact of bankruptcy.
- 6.39.3 The non-bankrupt spouse’s claims arising in family law and were it not for bankruptcy such orders would not have been sought.

- 6.39.4 Further the trustee will be compelled to give notice to the non-bankrupt spouse of the intention to declare a dividend and seek a determination of the non-bankrupt spouse as to any interests; this will delay the declaration and payment of dividends.

6.40 The Restraint on Dividends

- 6.40.1 The proposed amendments grant power for restraint to be placed on the trustee in respect of the payment of dividends.
- 6.40.2 The restraint may be seen as cautious in respect of the foregoing however in respect of the duty on the trustee in bankruptcy to expeditiously distribute realisations a looming conflict is apparent.
- 6.40.3 In my opinion such powers already exist under the current Act

Amendments relating to Income Contributions

6.41 The Supervised Accounts Regime

- 6.41.1 The proposed amendments introduce a new level of control capable of being enforced on the bankrupt where the trustee consider the application of stringent controls appropriate in the endeavour of assessing the bankrupt's income and collection of the assessed amount.
- 6.41.2 The strengthening of controls on one hand are meritorious however the cost associated with the supervision process in my opinion will considerably outweigh the benefits of the improved collection regime.
- 6.41.3 Further the trustee in effect is being asked to attend to matters concerning the authorisation of disbursements that are otherwise outside the primary purpose of the role of the trustee in bankruptcy.

6.42 Constructive Income

- 6.42.1 The proposed amendments will enable the trustee to assess the value of the bankrupt's constructive income and require such amount to be accounted for through the supervised account.
- 6.42.2 These powers concerning assessment currently exist.

Amendments Concerning Superannuation**6.43 Dichotomy between Age Based Limits and Proposal**

- 6.43.1 The proposed amendments as I understand are that any contribution by the bankrupt in excess of \$5,000 per annum is to be subject to claw back provisions.
- 6.43.2 The above appears to be irrespective of the age based limits that apply for tax purposes.

6.44 Other Issues

- 6.44.1 It is unclear as what is the relation back period of the proposed amendment.
- 6.44.2 Further it is unclear as to the legislative mechanisms that are to be put in place for the trustees of the Superannuation Funds.
- 6.44.3 Further it is unclear how the proposed claw back is to be treated in terms of the taxation and surcharge that applies to contributions where a taxation deduction is claimed.

7. SUGGESTED CHANGES

Anti-Avoidance Measures

- 7.1 The current antecedent provisions are noted as being successful in effecting a recovery in the *Cummins* case; accordingly one is at liberty to conclude that where there was a tainted purpose, Section 121 of the Act provides sufficient ambit for recovery. As such no change is required and given the case law established this indeed strengthens the provision. The penalty as applied in the decision is reflective of social trends.
- 7.2 The fact that such measures have suggested has already initiated investigation of “asset protection” strategies and structures that will challenge the Trustee in Bankruptcy’s existing armoury of investigative powers. The powers of the Trustee, as a consequence, are required to be strengthened irrespective of the introduction of these Anti-Avoidance measures.
- 7.3 The prescriptive approach in the current legislation provides an objective assessment of those transactions that fall within the parameters of the operation of the Act. The proposed amendments do not provide the Trustee in Bankruptcy with that certainty and are suggested that if they are to be amended then should provide objective assessment as to that which forms part of the bankrupt estate.
- 7.4 The proposed measures should not be retrospective so that the majority of constitutional issues eliminated. That is, the application of “tainted purpose” to transactions that were perfectly legitimate at the time, the application of the provisions when the debtor was solvent at the time of the supposed tainted transaction etc...
- 7.5 It is possible for the existing Division 4A to be retained with the modification as contained in the proposed Section 139AF.

Income Contribution Assessments - Supervised Accounts & Non-Cash Regimes

- 7.6 As commented on in this submission, the existing provisions of the Income Contribution Assessment Regime provide the trustee with powers to assess bankrupts for non-cash income. The problem in the past has been the assessment of hidden income and then on a general level collection of the compulsory income contribution assessments.
- 7.7 The creation of the regime of supervised accounts in my view merely adds to the cost of administration. The existing power of objection to discharge for bankruptcy in my view is likely to provide sufficient incentive for the bankrupt to comply and as such the changes are not warranted.
- 7.8 The introduction of the regime of the supervised bank account may invoke comment from civil libertarians and may be unconstitutional.

Interaction with Family Law

- 7.9 Finally, as commented on in this submission, the deferral of creditors’ priorities to the non-bankrupt spouse is in my view quite wrong. The establishment of principle as to the interests of both the trustee and the non-bankrupt spouse have been determined in case law to date are principles that are being readily adopted.
- 7.10 The belaying of creditors rights to a dividend in respect of the non-bankrupt spouse’s interests is contrary to the stated duty to the trustee and a conflict that is required to be resolved if the proposed legislation is to proceed.
- 7.11 Equally the uncertainty that is created by the proposed amendments as to a trustee’s rights to property is a conflict that should also be resolved if the proposed legislation is to proceed.

Bankruptcy Legislation (Anti-avoidance and other Measures) Bill 2004 - Exposure Draft

Refers to circumstance where a bankrupt transferred property or enjoys benefits or use and property/money held by others

