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Gillian Gould

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

Dear Ms Gould

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

Thank you for the opportunity to comment on this Bill.

Purpose of the Bill

We support the government's stated intention to prevent misuse of the Bankruptcy Act and Family Law Act by high income professionals and corporate high flyers. We accept that these people have access to the best legal and accounting advice when structuring their affairs to avoid their moral responsibilities to their creditors.

Our concern is that ordinary and lower income citizens are not excessively prejudiced by the robust powers granted to trustees by this Bill.

High income professionals

Statements made by the Attorney-General and others have constantly included reference to this Bill as targeting "high income professionals" who use bankruptcy as a means of avoiding their taxation and other obligations. This is stated at point 9 of the Explanatory Memorandum. However, the Bill itself is silent on the scope of its operation. There is nothing that restricts its operation.

We are concerned that creditors and zealous trustees in bankruptcy may be tempted to overlook the stated intention of the Bill and instead take a literal approach in its application. There is nothing in the Bill to prevent its application to middle-income, or even low-income Australians.

If the true intention is to restrict the operation of the Bill to "high income professionals" then a statement to that effect should be included in the Bill itself. We would like to see some specific minimum limits on the amounts and values of property that could be the subject to recovery action under this Bill. In particular,

we believe that the ordinary homes and cars of ordinary Australian families should not be placed at risk of seizure.

“Other obligations”

You will be aware of ongoing concerns raised by medical and other professionals about their potential personal exposure to negligence claims where there are gaps in professional indemnity insurance cover. There are many “high income professionals” who are lawfully paying their taxes, but are entering into arrangements to divest themselves of assets for fear that one day they may be personally liable for a large judgment for some negligent act where there was a gap in insurance. We remain uncertain about whether it is intended that this legislation prevent such professionals take pre-emptive steps to avoid liability to possible future creditors. It would be helpful if the Attorney-General comment on this issue as we are sure that this would be of interest to medical and other professionals.

Recovery of property from third parties

The Explanatory Memorandum sadly lacks an adequate explanation of the provisions relating to the recovery of property from third parties.

Definition of “tainted property”

“Tainted property” is a peculiar concept which raises a number of unanswered questions. The definition of “tainted property” includes a “tainted purpose” for points (a)-property wholly or partly funded by money, (b)-property transferred, and (d)-property or money held by an entity as a result of a scheme. However point (c)-property or money held as a result of personal services supplied makes no mention of the quaintly named “tainted purpose”. There does not appear to be any reason for this omission.

Requirement that the bankrupt “use or derive a benefit from the property”

The requirement that the bankrupt “used or derived a benefit from the property” is strange. The high income bankrupts who are supposed to be targeted by this legislation will find this requirement to be a major loophole. All they have to do is transfer income or property to a family member, friend or other entity and make sure they don’t use the property or derive a benefit from it. Of course there could be some unprovable expectation that one day the entity will make some generous gift back to the bankrupt.

In practice, the less the bankrupt has to transfer, the more likely the transfer will be caught by the Bill. An ordinary transfer of a house to a spouse would be caught by this Bill where the bankrupt continues to live in the house. By contrast, the provision of funds to buy an investment property by the spouse would be exempt.

Definition of “tainted purpose”

The definition of “tainted purpose” fails to clearly define who are considered to be the bankrupt’s creditors. Obviously creditors who are owed money at the time of the transfer or payment are included. But what about entities who may be owed nothing at the time of the transfer or payment, but may become creditors at some time in the future?

Potential for abuse by overvigilant trustees in bankruptcy

Trustees in bankruptcy are granted significant powers which have the potential for abuse. Obviously robust powers may be needed to recover assets from wealthy entities who have ample funds for expensive legal representation. But there is the potential for abuse in the case of ordinary people who may simply be targeted by an overvigilant trustee.

Where a trustee alleges a tainted purpose, there is a rebuttable presumption that the allegation is true. Such a presumption could be very expensive to disprove in a court.

In our work we see many instances of transfer of property or money by people who have gambling problems or other psychiatric disorders to their spouses or other family members. These transfers are facilitated for the purpose of providing ongoing financial security for the spouse, children and the person making the transfer. The transfers typically are made at a time when there are no debts, or debts are under control, but there is a real likelihood of fresh debts being incurred by the person who is unable to control their addiction, disorder or expenditure level.

The Explanatory Memorandum gives the example of the transfer of a \$70K car, but the law would apply equally to the transfer of a \$7K car. In that case, it may be impossible for the recipient to dispute a trustee's notice, as the cost of doing so would be prohibitive.

Non-financial contributions

In s.139AAA the Bill provides that the Court must have regard to the "contribution (whether financial or non-financial) of the bankrupt and the entity. It appears that non-financial contribution is intended to only cover contribution that adds value to an asset or financial resource. The Bill does not appear to take regard of important non-financial contributions such as child raising and homemaking. We believe that omission to be inequitable and out of touch with community values.

Consideration of the interests of children and others who benefit from transferred property

In many cases the primary purpose of the transfer of property is to provide accommodation (or transport, etc.) for children, elderly or other needy household members. In fact children and other third parties are apparently excluded from the closed group of persons referred to in s.139F and elsewhere.

We believe that s.139F should be broadened to include the interests of natural persons such as children who benefit from the transferred property without any title to it.

Interaction of bankruptcy and family law

We are concerned that one unintended result of the Bill will be an acceleration of the breakdown of shaky relationships to enable the process of property distribution under the Family Law and State de facto relationships proceed. Until now, the option of transfer of property from a problem gambler to a spouse was an attractive way of preventing the relationship from ending. As a result of the

passing of this Bill, we will no longer advise couples to do this, but recommend that they immediately proceed to a court-sanctioned property settlement. Whilst there may be some situations where a transfer from one partner to another will not be attacked by a trustee, the complexity and vagaries of the Bill are such that we could not provide any reassurance to parties willing to transfer property without the sanction of a court.

We hope this is of assistance to you.

Yours faithfully,

RICHARD BRADING
PRINCIPAL SOLICITOR

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