82236828

Richard A. Bobb
CHARTERED ACCOUNTANTS

BRINGING BUSINESS TOGETHER

TELEPHONE: (612) 8223 6888
Level 9, 23-25 O'Connell Street, Sydney
G.P.O. Box 7012, Sydney 2001
DX No. 1063 Sydney
Fax No. (612) 9232 8577

RB:CL

Bankruptcy
Submission No: 120

5 July 2004

The Secretary
House of Representatives Standing Committee
on Legal and Constitutional Affairs
Parliament House
Canberra ACT 2600

Dear Sir/Madam

ENQUIRY INTO THE BANKRUPTCY LEGISLATION AMENDMENT (ANTI-AVOIDANCE AND OTHER MEASURES) BILL, 2004

I note the Committee has requested submissions to be lodged by Friday, 18th June 2004. Whilst this submission is made slightly out-of-time I trust that it will still be accepted by the Committee, given I have given the current terms of reference much and considered thought.

I note the Committee will enquire into the provisions of the *Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004* (hereinafter referred to as the "draft Bill"), to determine whether the draft Bill adequately deals with the problems identified by the *Taskforce Report*.

As a member of the accounting and legal professions, and having spent a considerable part of professional life in both reviewing and applying Commonwealth Law[1] and State legislation, it seems to me that the current draft bill, embodying the *Taskforce Report's* proposals, are not only misconceived, but fail to properly consider appropriate remedies, which are presently available within a plethora of state based and federal law.

AVAILABLE EXISTING REMEDIES

By way of example, Section 37A of the *Conveyancing Act,(NSW) 1919* applies to set aside an alienation of property which has as its primary motivation, the intention to defeat the claim of the creditor.[2]

Other state and territory jurisdictions also provide comparative provisions to Section 37A, and these are set out in the following table:-

[1] Examples include, but are not limited to, the *Income Tax Assessment Act, 1936,* the *Income Tax Assessment Act, 1997,* the *Taxation Administration Act, 1953,* the *Bankruptcy Act, 1966, the Corporations Act, 2001.*

[2] In the NSW Supreme Court decision of *Langdon v Gruber* (2001) NSWSC 276 *Austin* J was able to elucidate that the application of Section 37A extended well beyond the relationship of a creditor and debtor. Indeed, his Honour expressed the view that Section 37A provided protection to a person who is not yet a creditor when he said, at paragraph 58:

> **"It is enough, in other words, that the intention is to defraud a person whose claim is likely to mature into a debt in the immediate or foreseeable future".**

STATE/TERRITORY	STATUTORY REFERENCE
Victoria	Section 172 of the *Property Law Act, (Vic) 1958*
Western Australia	Section 89 of the *Property Law Act, (WA) 1969*
South Australia	Section 86 of the *Law of Property Act, (SA) 1936*
Queensland	Section 228 of the *Property Law Act, (Qld) 1974*
Tasmania	Section 40 of the *Conveyancing and Law of Property Act, (Tas) 1884*
ACT	Section 42 of the *Law Reform (Miscellaneous Provisions) Act, (ACT) 1955*
Northern Territory	Section 208 of the *Law of Property (NT) Act*

Interestingly, in the *Langdon v Gruber* decision *Austin* J had to consider not only the issue (raised above), that is to say whether the plaintiff, not being a creditor at the time of the impugned transaction, could still avail herself of the statutory remedy embodied in Section 37A, but at the time the property was alienated (by the second defendant to the first defendant), his Honour noted the alienation had occurred by relying on provisions contained in the *Family Law Act, 1975*. His Honour also indicated, notwithstanding there were elements of valuable consideration supplied by the transferee (Mrs Gruber) to the transferor (Mr Gruber), ultimately the Local Court's orders (re the family law settlement) were capable of being set aside and in doing so, his Honour utilised the rules set out in *Silvera v Savic* (1999) 46 NSWLR 124 in order to work out the appropriate remedy available to the aggrieved plaintiff.

The *Bankruptcy Act, 1966* also provides many forms of protection for aggrieved creditors who wish to overturn any one or more transactions which a creditor believes to be impugned. In this respect, Section 121 of the *Bankruptcy Act, 1966* takes over where Section 37A completes its service of operation for an aggrieved creditor.[3]

The interplay between Section 37A and Section 121 was recently considered in the NSW Supreme Court decision of *Huynh v Helleh Holdings Pty Ltd* (2001) NSWSC 1162, a decision of *Hamilton* J, brought down on 14th December 2001. *Hamilton* J found the interplay did not abrogate the rights of the plaintiff, although in that case the defendant succeeded before his Honour.

BASIC RIGHTS IN A FREE ENTERPRISE SYSTEM

In a free enterprise system a basic tenet of business life is that an entrepreneur is entitled, at the time of commencing the enterprise, to organise his/her affairs in a way that provides the most appropriate commercial shield in all of the circumstances. This has given rise to the use of the limited liability company for small business operators who choose to ensure that their family assets are shielded in the event of a failed

[3] In the Federal Court decision of *Prentice v Cummins* (No. 5) 2002 FCA 1503 *Sackville* J declared a 26th August 1987 transfer of property by a barrister (Mr Cummins) to his wife, (Mrs Cummins) to be void as against Mr Cummins' trustee-in-bankruptcy, by reason of Section 121. The barrister had presented his own petition on 13th December 2000 – some thirteen (13) years after the impugned transaction.

enterprise.[4] Organising one's affairs, in this fashion, has not brought (nor should it bring) shame or scorn on the entrepreneur who has so fashioned his/her affairs to limit the liability of an incorporated failed enterprise to the amount contributed as paid-up capital.

There are other classes of entrepreneurs (namely: professional persons) who for a variety of reasons are either unable or unwilling to incorporate and (in my respectful submission) this position should not, however, give rise to a differential treatment of such persons (who usually adhere to higher norms of chivalry and civility).[5] Given most professionals practise their profession in the form of general law partnerships, giving rise to the application of joint and several liability, it is noted that the personal assets of a non-defaulting partner could have his/her assets exposed to the creditor of the defaulting partner through the concept of applying the doctrine of joint and several liability.[6]

[4] Indeed, the then Federal Government by introducing the *First Corporate Law Simplification Act, 1995* intended to streamline and enshrine the notion of "limited liability".
[5] Codes of Professional Conduct usually apply to a person practising a profession, applying a higher standard of public service, ultimately serving the public interest.
[6] See Sections 9 and 10 of the *Partnership Act (NSW, 1892* (and the other state territory equivalent provisions).

If a professional person's affairs are organised to limit liability, at the outset or upon the commencement of his/her practice (read: enterprise) then, again, such preliminary activity ought not give rise to any misconceived feelings of shame or be the subject of scorn or ridicule. Such activity, in my humble estimation, is that the affairs of all entrepreneurs are placed on a "level playing field."

The proposed legislative amendments, in my view, would give rise to overturning transactions involving legitimate asset protection of professional persons. Furthermore, the draft bill does not differentiate between those persons who undertook the necessary activity to shield their personal assets from outside attack and those who having become the subject of a prospective claim and thereby undertake steps to strip themselves of assets. Such is apparent from the *Cummins (No. 5)* case, referred to above.

OVERTURNING ESTABLISHED LEGAL DOCTRINES

One great difficulty, as it would appear, is that Commonwealth parliamentary draftsmen has failed to consider the general law doctrine of "Presumption of Advancement". There have been a number of High Court[7] decisions which have considered the notion of "Presumption of Advancement", which is a rebuttable presumption.

The presumption of advancement (which I have stated already, is rebuttable) generally only applies to gifts made by husbands to wives, or parents to children[8]. The draftsman has not, in my opinion, advanced the prospect that the Doctrine has been abolished, although the intended effect of the draft Bill is to engender a belief that that might indeed be the case.

The proposed legislative amendments would, in my view, create an extraordinary *mish mash* between long-standing doctrines and the new amendments and would provide litigation lawyers with "hand-rubbing" opportunities to "ply their trade".

[7] *Calverly v Green* (1984) 155 CLR 242, a seminal decision on the doctrine.
[8] *Yoshino v Niddrie* (2003) NSWSC 57.

Richard A. Bobb

It is my view that the general law doctrines, which have been developed over many, many years should not be the subject of a contemporary whim, based an ill-thought (and with the greatest respect) illogical, practical application of the Taskforce's Report.

CONCLUSION

In my professional experience the current miscellany of newly defined terms to be inserted into a new Division 4A of Part VI of the *Bankruptcy Act, 1966* will give rise to the same useless *hodge podge* that currently applies when attempting to decipher income tax definitions in either the *Income Tax Assessment Act, 1936* or the purported plain English version, (i.e. the *Income Tax Assessment Act, 1997).*

The current attempts to confound a small number of NSW barristers with the proposed amendments, as set out in the draft Bill, unfortunately will do more harm than good!

Yours faithfully
RICHARD A BOBB

Richard Bobb
Partner