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Bankruptcy
Submission No: *60*

The Secretary
House of Representative Standing Committee
on Legal and Constitution Affairs
Parliament House
CANBERRA ACT 2600

BY: *Gulbia Gould*

Dear Sir/Madam

re: ***Inquiry into the Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004***

I note the Attorney-General has referred an exposure draft of this Bill to the Committee, which has sought submissions concerning the proposed changes to the law.

As a person operating a small business I wish to comment on the proposed Anti-avoidance provisions.

I am a professional engaged in private practise, and the changes proposed in the Bill, if passed and made law, will likely have an immediate impact on the future of that business. The committee may care to note that the employment of 10 - 12 persons in that business may be jeopardised and the prospect of the Commonwealth earning income tax and GST as a result of my endeavours will diminish markedly, if not cease altogether.

It seems to me that the amendments are a vindictive response by an Executive whose members and advisors have long since forgotten what it is like to survive in business, if in fact they have ever worked for themselves in private enterprise. More likely such advisors have never risked their own capital in order to operate a business and provide for their family, nor contributed to the wealth of the country by employing others.

The amendments are aimed at closing a perceived loophole that the ATO claims has led to it being unable to recover unpaid taxes. However in trying to crack this relatively insignificant nut, the Bill will impose an enormous burden on professionals who have no anti-social and selfish attitude regarding taxes.

Presently, a professional person prevented from operating in business via a corporation can establish a legitimate business structure that has the effect of protecting assets from an adverse third party claim. Such a claim may arise from any number of reasons, including circumstances where insurance cover is available but not sufficient.

The amendments propose to change that. It appears that whether or not any deliberate intent exists to defeat creditors, any assets which may have been acquired by an entity associated with the bankrupt to which in some way (minor or major) the bankrupt has contributed, may be claimed by the trustee in bankruptcy.

The changes will not only affect professionals. It appears anyone in business who is forced (for any reason) into bankruptcy will have honestly acquired assets at risk. Consequently, while the Executive claims to be cracking down on feral high income professionals, these changes may affect everyone not operating a business via a corporation, including farmers, truck drivers, grocers, manufacturers and shop-keepers.

If these people have no suitable insurance, or have no ability to pay premiums required for insurance cover, then they will have no alternative other than to cease their business activities. Many will simply retire and take money from the government; others (fortunate to live in a large centre where there are appropriate opportunities) may seek paid employment so that their protected status as an employee means their assets are not at risk. Either way a large number of people who are employed by these businesses may lose their jobs.

The solution to this ought to be simple. The Executive must accept an onus to prove that any arrangement alleged to have been established to defeat creditors was established solely or primarily for that purpose **and** at a time when it was more likely than not that the bankrupt faced insolvency.

An alternate solution may be to force legislative changes at Commonwealth and State level, to allow anyone in business to operate a business via a corporation and take advantage of a limited liability arrangement. Such changes should be made possible without triggering penalty consequences such as stamp duty on the creation of a new business unit. Without such changes in other laws, perhaps the amendments proposed in the Bill are in fact discriminatory and run foul of existing law.

Take a simple example of how this discrimination may arise under the proposed changes -

1. Rogue is the director/employee of a company that runs a dry cleaning business. The company has different classes of shares including AM@ class shares, all of which are owned by Haven Pty Ltd, another family company. Income from the dry cleaning business is paid as dividends to Haven Pty Ltd, which acquires assets for the benefit of Rogue and his family. Rogue's business falls on hard times and is wound up on the application of the ATO. The assets of Haven Pty Ltd are saved from the creditors for the benefit of Rogue.
2. Earnest is an accountant operating an unincorporated business. The accountancy practice is supported by Resort Pty Ltd, trustee of a Service Trust that supplies staff and services to the practice. Fees are paid by Earnest to Resort Pty Ltd, which acquires assets for the benefit of Earnest and his family. Earnest's practice falls on hard times and he is chased into bankruptcy on the application of the ATO. The trustee in bankruptcy may seize the assets of Resort Pty Ltd for the benefit of creditors.

If the circumstances illustrated above are approved by the Committee as good policy, then I consider it likely that many affected business operators will be forced to consider the arrangements to be made so that staff may be retrenched, and advantage taken of Centrelink handouts until superannuation benefits become available. However, I submit it would be better for the Committee to reject the proposed changes, and have the Executive come up with a better idea to collect taxes out of which it considers it may be cheated.

Further, I suggest the Committee take account of two factors. Firstly it ought not to approve of changes in law which have the potential to further reduce the availability of professional services to members of the public in regional and country areas. Secondly it ought not to approve of changes in law which discriminate against people engaged in a particular area of commerce, i.e. professional services.

I look forward to hearing of the decision of the Committee.

Yours faithfully

D P Quinn