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Queensland Law Society

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Bankruptcy.
Submission No: 64

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Our Ref: GWF:BBOD:km:Insolvency

17 June 2004

**PRIVATE & CONFIDENTIAL**
The Committee Secretary
House of Representatives
Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

***Via Facsimile No: (02) 6277 4773***

Dear Secretary

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

The Queensland Law Society makes the following submission in respect of the *Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004.*
The Society supports the submission lodged on behalf of the Law Council of Australia in respect of the Bill.

In addition to the matters raised by the Law Council, the Society places on record the following objections:

**1 Lack of notice and consultation**

For the last few years, there has been in place a Consultative Forum attended by representatives of various interest and professional groups involved in this field. That forum has been quite useful in progressing discussions concerning possible changes to bankruptcy laws. However, the proposed changes that are sought to be introduced by this Bill have not had the benefit of thorough consultation through that process.
Further, the Standing Committee should appreciate that the changes that are sought to be introduced with this Bill represent a fundamental shift in the operation of anti-avoidance mechanisms to be employed in bankruptcy administration. The changes, if introduced, will impact upon a wide sector of the Australian economy and will not simply be changes affecting one profession or industry. As a result, the Standing Committee should appreciate that adequate consultation on the proposed changes could only be achieved if views are sought from as broad a cross section of industries and professions as possible. The amount of time that has been allowed for making submissions is clearly inadequate in these circumstances.

Our Society submits that the Bill should be held in abeyance and referred to the Bankruptcy Consultative Forum for further discussion.

## 2 Perceived inadequacy of anti-avoidance provisions in existing bankruptcy legislation

The Bill has been formulated in the erroneous belief that existing bankruptcy laws are inadequate. Support for such an erroneous contention may be drawn from the fact that some of the existing anti-avoidance provisions (particularly, sections 139D and 139E of the *Bankruptcy Act*) have not been used to any great extent. However, further consultation with experienced insolvency practitioners would highlight the following:

(a) Such provisions have in fact been used on numerous occasions. There may have only been a couple of reported decisions of the courts on sections 139D and 139E, but the lack of reported case law does not truly reflect the number of occasions that registered trustees in bankruptcy have referred to these particular provisions of the Act and settled claims based on those sections.

(b) Where such anti-avoidance provisions may not have been used in the past, one of the main contributing factors to that lack of use has been a lack of information and evidence available to a trustee in bankruptcy in respect of transactions which may be liable to challenge.

(c) Such is the nature of personal insolvency that often claims by trustees are not pursued in respect of voidable transactions because of a lack of funding for such matters. In recent years, lack of funding has in part been alleviated by litigation funders, but such funding can often be difficult to secure.

There has been substantial tinkering with anti-avoidance provisions of the *Bankruptcy Act* over the last 15 years. Many significant changes were introduced in respect of sections 120 and 121 of the Act in December 1996. There has not be enough time to adequately gauge how effective those changes have been, but cases that have been decided on the sections since that time have clearly illustrated that the current provisions do in fact give trustees a substantial advantage over the previous laws.
The Society submits that there is no further need for amendment in this area. Rather, legislative reform should be directed at the following issues which will be far more advantageous to trustees in bankruptcy when seeking to administer estates and recover the proceeds of voidable transactions:

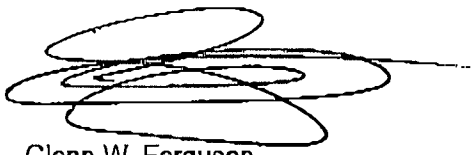
- Provisions should be introduced to improve the methods in which information and evidence can be collected by trustees. At the present time, the provisions allowing for private trustees in bankruptcy to collect information through section 77A and, with the assistance of the ITSA, section 77C, can be streamlined.
- The expense and delay currently encountered in the litigation processes for the recovery of the proceeds of voidable transactions are far greater impediments to providing an effective return to creditors than any perceived inadequacy in the anti-avoidance provisions. The introduction of the Federal Magistrates Court assisted in a small way in reducing the costs of litigation in this field. However, legal practitioners in this field have found that virtually all resources of the Federal Magistrates Court are devoted to family law related matters, resulting in alarming delays in obtaining decisions from the Court in bankruptcy matters. The Society is aware of some instances in which decisions of Federal Magistrates have been delayed by up to 17 months. When the objective of bankruptcy laws is to allow the realisation of assets and a return to creditors of bankrupts, such lengthy delays are inexcusable.

## 3 Policy considerations

The wide ambit of the proposed changes to the bankruptcy laws appears to be a knee jerk reaction to isolated insistences of assets being placed beyond the reach of creditors by a small number of bankrupts. The effect of the proposed changes, if introduced, will be felt by a far greater proportion of business people than the small number of possibly fraudulent bankrupts who are intended to be targeted. The proposed changes will eliminate legitimate asset protection at a time when professionals are often unable to obtain sufficient professional indemnity cover at reasonable cost.

The proposed changes will therefore provide a disincentive for people to go into business and, in particular, to take on high risk professional roles that are essential in the economy.
The Society therefore submits that before the proposed bankruptcy changes are introduced, the Standing Committee should investigate the economic ramifications that will certainly be felt if these changes are introduced.

Yours faithfully



Glenn W Ferguson
**President**