CLEARY HOARE
SOLICITORS

Our Ref: M HART

16 June 2004

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

Dear Sir

PROPOSED CHANGES TO THE BANKRUPTCY ACT – SUPPLEMENTARY SUBMISSION

This Submission is supplementary to the Submission by us dated 31 May 2004.

The thrust of that Submission was:

1. The more successful businesses there are in a country, the more prosperous the country will be. The more prosperous a country is, the better off, generally, the standards of living of its citizens will be.

2. New business starts should be encouraged. There is high risk in starting, or running, any business.

3. Balance needs to be found between encouraging "the risk takers" and the need to protect creditors of failed businesses. A balance is normally found if there are "claw back" provisions for a deliberate action intended to thwart reasonably foreseeable and reasonably identifiable creditors.

4. Outside of that, then, generally, "risk takers" ought be able to take precautions to protect sacred family assets in the event of business failure.

Such risks can only be managed through the *combined use* of two long standing mechanisms:

5. Limited liability;

6. Asset protection.

Limited liability protects shareholders from the risks of companies in which they invest – essential for the existence of public stock exchanges.

Asset protection involves holding assets in "safe havens", eg, the names of family members or in the name of a *passive* discretionary trust.

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The proposed changes attack asset protection. Contrary to what Mr Ruddock says (as quoted on page 29 of the Weekend Australian Financial Review June 12–14 2004), this legislation is not directed at removing limited liability: but is directed at removing asset protection.

In short, it is a *direct, retrospective* attack on small business, accompanied by a *reversal of the onus of proof.*

None of this is an attack on public business or "big business". It is, unwittingly, however, an attack upon the *directors* of all companies, big and small.

However, the main thrust of this supplementary submission revolves around the report by your committee into "Modern-day usage of averments in customs prosecutions", recently released.

The points made by the report include:

7. Averments have traditionally been a feature of Customs Legislation enabling the prosecutor to make a statement of fact which is taken to be evidence of those facts, unless the defendant produces evidence to the contrary. In other words, the averment raises a prima facie assumption of facts.

8. The historical reason for this is the difficulty in obtaining appropriate evidence, particularly from overseas.

9. Averments should only be used subject to strict conditions.

10. Incidents of abuse of the system were identified.

11. The guidelines for use of averments should:

    11.1 Clearly identify additional powers and approved techniques that are available to Customs officers when securing evidence.

    11.2 *State that only suitably trained delegates of the Chief Executive Officer of the Australian Customs Service should make averments.*

    11.3 Clearly define the limitations on the use of averments.

What is proposed by the draft legislation includes:

12. Enabling untrained persons in private practice to make assertions which are deemed to be correct unless the person against whom the assertion is made proves to the contrary.

13. This is worse than the averment process because the averment process simply produces prima facie evidence which is taken into account amongst all the other evidence available.

14. The proposal under the new bankruptcy legislation is to the effect that an assertion will be deemed to be proved unless the party against whom it is made can prove otherwise.

15. These assertions can, and will, be made by people unhindered by Government regulation or Government procedures and, in many cases, by people of little experience, either legal experience or experience of business.

16. Bankruptcy legislation is about finding a balance between the protection of those who encounter bankruptcy and the protection of creditors. Finding that balance hardly justifies legislation with a bigger impact than Customs legislation for prosecutions.

A comparison with your report on averments should illustrate the extremism embodied in the proposed Bankruptcy Legislation.

One other point:

- Proposed Section 139AFB (exempt full-value transfer of property) is designed to provide concessions in limited circumstances.

- The section should at least be changed so that the word "and" at the end of sub-paragraph (1) is changed to "or".

- Note that Section 139AFB is, in effect, subject to Section 139AM. That latter section will attack any scheme under which it could be concluded that anyone had, in relation to a prospective bankrupt, a tainted purpose. Thus, even if property was transferred for full value and the obligation to pay full value is later released, Section 139AM would apply and the benefit of Section 139AFA would be excluded.

- The result of this is that there is no time limit on the retrospectivity. In other words, the apparent post ten year protection scenario would not apply.

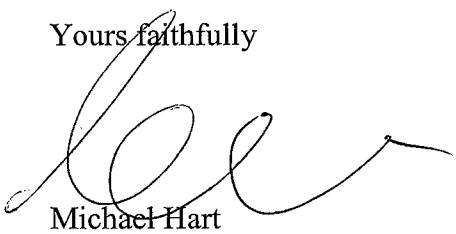
- However, it only provides the concession where there has been a transfer of property at full value *and* more than 10 years before bankruptcy, so far as "intra group" transfers are concerned.

- A transfer for value does not provide asset protection; it merely substitutes the asset for a right to be paid.

- In short, it is illusory.

- In the result, the proposed legislation is retrospective without any time limit.

Yours faithfully



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