

Bankruptcy
Submission No: *66*

The Family Law Practitioners Association of Tasmania

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BY: *J. Green*

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

Dear Sir/Madam,

Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004

The Family Law Practitioners Association of Tasmania represents all of Tasmania's family lawyers who deal in the family law area. Members of the Association have daily contact with men, women and children involved in family breakdown.

The Association is not opposed to the general terms of schedules 2, 3 and 4 of the exposure draft. However, in the limited time which your Committee has made available for comment we have not been able to address the technical aspects of these proposed amendments.

The Association is strongly opposed to the proposed amendments in schedule 1. These proposals are very far-reaching and it is unfortunate that they will only be dealt with in the context of this exposure draft rather than through a full review of current insolvency laws and their effectiveness.

Our opposition to schedule 1 is for the following reasons:

- (a) Because of the way Section 139F is drafted a "respondent entity", who in practical terms will usually be a wife and mother, could generally be expected to retain far greater assets through a matrimonial settlement under the Family Law Act than she would after a claim against her under Section 139AFA. The reasons for this include the reversal of presumption (see Section 139AFA(2)), and the fact that under Section 139F the court cannot take into account the respondent entity's contribution to other family assets including the assets taken by the bankruptcy trustee nor the factors which the Family Law Act sets forth in Section 75(2). This will force couples to separate.

- (b) The reversal of onus in Section 139AFA(2) will put the respondent entity under a most unfair disadvantage.
- (c) The cost to the respondent entity of defending a claim by a bankruptcy trustee would be considerable, because the court is required to make findings about financial and non-financial contributions during the marriage. This would be an unfair burden on the spouse and children of bankrupts.
- (d) The bankrupt and his spouse will have to give evidence against each other. The bankruptcy trustee would presumably call the bankrupt to give evidence and the respondent entity (the bankrupt's wife) would have to give evidence to defend the claim. This is likely to put further unfair pressure on the bankrupt's spouse and his children and will also push families towards family breakdown.
- (e) The Section 139F factors which the court must take into account are so poorly defined that it is impossible to know how the court should take them into account and it is also difficult to know why such factors ought to be taken into account.

We understand that the motivation for schedule 1 is the Government's concern that certain bankrupts may avoid income tax liability. There is no evidence that the existing law is not working satisfactorily and the material with the exposure draft does not alter our view in this regard. If there is conclusive evidence that existing law is not working properly then any amendments should be targeted at the problem, rather than at bankrupts and their families.

Roger Murray
President
Family Law Practitioners Association of Tasmania