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

Dear Secretary

Inquiry into the Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004
Submission by National Tax & Accountants' Association Ltd

Thank you for the opportunity to comment on the Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004.

The National Tax & Accountants' Association (NTAA) is a tax accounting association with more than 6,000 member firms representing over 30,000 accountants whose clients are mainly individual taxpayers, small family businesses and medium sized enterprises.

Paragraph 9 of the Exposure Draft Explanatory Memorandum (EM) states that one of the policy objectives of the bill is "to address the issue of high income professionals using bankruptcy as a mean of avoiding their taxation and other obligations". The NTAA is extremely concerned that in trying to achieve this policy objective the bill:

- neglects and erodes the rights of individuals;
- will create uncertainty among small and medium sized businesses;
- will increase the cost of doing business for small businesses;
- will hinder, and increase the cost for, families passing assets from one generation to the next.

The NTAA acknowledges that there have been a few high income professionals using bankruptcy as a means of avoiding their taxation and other obligations and as such steps should be undertaken to prevent this from occurring. The NTAA understands that the Sydney Bar and other similar professional governing bodies have already undertaken steps to address this issue. Such specific targeting and placement of sanctions (such as the removal of the professional's "work ticket") may address the perceived problems without causing new unintended problems as a result. The NTAA acknowledges that amendments to the Bankruptcy Act are warranted however, the NTAA is extremely concerned that it appears "a steamroller is being used to crack a nut".

Many people structure their affairs to protect their assets for the benefit of their family against the wrongdoing of others. These are people who operate in partnership and therefore are jointly and severally liable for their partner's activities. If their partner is held to be negligent they will also be liable even though they have not been personally negligent or even knew of their partner's negligent activities. In order to protect their family assets against such claims the assets are often not held in the individual's name.

It is no argument to say these people can achieve the same result by operating through a company because in many instances they are legally required to operate in partnership and not a company. The fact that the bill is to apply retrospectively, with no retrospective time limit, significantly compounds the issue.

Tainted purpose

The NTAA is concerned that the tainted purpose requirement in S.139AFA is satisfied if it is the bankrupt's **main purpose**. What does "main purpose" mean? A person may have a number of different purposes for making a payment or transferring a property, one of which may be general asset protection. For example, if a person has five equal different reasons for transferring a property to a child would the asset protection reason be classified as the main purpose? Arguably all the purposes are main purposes.

The NTAA is concerned that where a person transfers a property or pays money to someone else for a number of different purposes, of which avoiding creditors is not the dominant purpose, the provisions can still apply. This will require individuals and small businesses to always incur costs in seeking legal advice when wishing to transfer assets or money to relatives and associated entities even though the transfer is not being made to avoid creditors.

The NTAA submits that references to "main purpose" in S.139AFA should be replaced with "dominant purpose".

Presumed tainted purpose

The most concerning paragraphs of the proposed legislation are paragraphs 139AFA(2), (4) and (6). The NTAA is extremely concerned that the trustee of a bankrupt's estate can merely allege that the bankrupt had a tainted purpose and under the proposed legislation the bankrupt will be presumed to have had that purpose. The NTAA strongly condemns this reversing of the onus of proof and urges the committee to recommend that paragraphs (2), (4) and (6) be deleted.

The NTAA is extremely concerned that a trustee of a bankrupt's estate can simply allege that all payments of money, transfers of property and entering into a scheme were done with a tainted purpose. The trustee need not have any evidence that the bankrupt had a tainted purpose. Thus the bankrupt, who may not have had a tainted purpose in making the payment or transfer, will incur significant legal and other costs proving their innocence. Given that a bankrupt has little or no funds they are at a distinct disadvantage and may not be able to afford proper legal representation to prove their innocence. The onus of proof should be on the person making the allegation, namely the trustee of the bankrupt's estate.

A recent example of the significant damage that can be caused to people by these types of provisions is the long running, and ultimately unsuccessful, case by the Australian Customs Service against Peter Tomson. Recently a House of Representatives Committee chaired by Ms Bronwyn Bishop MP recommended that similar type provisions in the Customs Act be amended.

It is no argument for the retention of paragraphs (2), (4) and (6) to say that a trustee of a bankrupt's estate will only use those powers where they do have reasonable evidence that the bankrupt had a tainted purpose at the time of making the payment or transfer. Experience in the customs area shows that this is not always the case. A trustee of a bankrupt's estate should not be able to use the provisions as a substitute for evidence.

As currently drafted if a parent makes a gift of an asset to a child, for example a parent gives a child a car when they turn 21, and that parent becomes a bankrupt many years later, the trustee of the parent's bankrupt estate can simply allege that the parent had a tainted purpose in making the gift of the car many years earlier. As the onus of proof is now on the parent how can they prove otherwise? Parents will now need to seek legal advice before making gifts to children or other relatives.

Indirect derivation of a benefit

There is little guidance on the meaning of indirect benefit in S.139AI, S.139AJ and S.139AM. This term is very broad and will apply to many situations. The example in paragraph 59 of the EM seems to confirm that if a parent gives a present to a child, or other relative, such as a birthday or Christmas present, and the parent occasionally uses that present then the provisions can apply if that parent is bankrupted many years later.

For example, a parent gives a child a car for the child's 21st birthday and the parent occasionally uses the car (for example it is parked behind the parent's car in the driveway or the parent is given a lift) then if that parent is made bankrupt many years later the car is tainted property. All the trustee need do under S.139AFA is allege that the parent had a tainted purpose in making the gift of the car to their child.

This is an example of a direct benefit, but what is an indirect benefit? In the above example if the parent never used the child's car but the fact that the child used the car to drive other children of the parent around is that the provision of an indirect benefit? The provisions are extremely broad and are likely to catch many ordinary family situations where there is no intention to defraud creditors.

Court to take account of certain matters

The NTAA submits that subsection 139F(1) should be amended to include a paragraph similar to paragraph 139F(2)(d).

There are many families in which only one of the parent's works. The couple have agreed that one parent shall raise the children while the other shall work. As a result the income earning parent will often give money to the non-income earning parent to pay expenses, acquire assets etc. The assets of the marriage are jointly owned. Currently subsection 139F(1) does not allow a court to take the non-income earning spouse's contribution to the marriage into account whereas this contribution may be taken into account under paragraph 139F(2)(d).

Without the appropriate amendment families will be required to enter into employment or contractual relationships with each other so that the income earner can pay a salary to the non-income earner for the "work" the non-income earner contributes. This would cause an unnecessary expense to families.

Even with such an amendment, the proposed provisions discriminate against the interests of the home-maker and in a large way are contradictory to the intention of the Family Law Act, which has the premise that if anything, any asset allocation is skewed to the home-maker with child rearing responsibilities.

Retrospective nature of the new laws

The NTAA is extremely concerned about the retrospective application of proposed Division 4A. It is extremely unfair for a new law to apply for actions taken by people many years ago who, when undertaking those actions, were complying with Australia's laws. Retrospective application of laws should be avoided at all costs even where the legislators have the best intentions. Particularly where the laws, such as proposed Division 4A, are giving significant power to one person (in this case the trustee of a

bankrupt's estate) which can be used without that person having any evidence of any wrong doing by the bankrupt.

Many people will have structured their businesses and affairs, at great expense, for a number of reasons including asset protection and, at the time of structuring, in full compliance of Australia's tax laws. To now introduce such draconian legislation for the purpose of catching a few recalcitrant people which can have such an affect on so many others should be avoided at all costs.

Professionals compared with other debtors

A distinction should be made between professional persons who may become liable in tort, and what can loosely be determined "trade debtors".

A professional providing services or advice may find themselves negligent in the provision of that service or advice (either directly or through the actions of another). One such single act may wipe out forty years of exemplary service and a lifetime of providing and preparing for their retirement.

The argument that professionals can and should rely on their PI insurance in such a situation is absolutely flawed. The recent High Court decision in *FCT v Hart* is a case in point. The High Court in that case found that Part IVA of the ITAA 1936 applied to deny the relevant deductions sought by the taxpayers. To our knowledge, all PI policies have an exclusion clause removing any liability the insurer may have where the claim results from the ATO applying Part IVA. Many professionals who gave negligent advice in respect to split loan facilities may find they are not covered by their PI insurance. Please note that the Full Federal Court had unanimously held in favour of the taxpayers, so it was not a clear cut case of Part IVA applying.

On the other hand, trade debtors have either borrowed money and/or have been provided goods on credit. There are greater grounds to argue that any "shoring up" of the Bankruptcy Act 1966 be more specifically targeted to such persons.

A professional structuring their affairs so that they are separated or protected from a negligence claim is fundamentally different to a trade debtor who has borrowed money and is attempting not to repay those amounts, especially if the benefit of those borrowed amounts has been transferred somewhere else.

Where a professional has structured their affairs in the absence of any expected, pending, actual (or in some case contingent) claims, no argument should be made that a creditor is being avoided.

Where such an argument is warranted, existing provisions of the Bankruptcy Act 1966 (especially S.120 and S.121 and the existing Division 4A) supported by relevant case law, would rightly work to reverse or claw back such transactions.

The introduction of the proposed legislation will create huge uncertainty to professionals, and potentially to the business community generally (especially to lenders who may be taking security over property available to creditors). It is also expected that the change will act as a major disincentive to attracting and retaining persons in the profession.

Any queries regarding this submission or requests for further information should be directed to Robert Warnock, Acting President, National Tax & Accountants' Association Ltd on 03 9862 7777 or by email robw@ntaa.com.au.

Yours faithfully,

Robert Warnock
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