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BY LACA

**GOVERNMENT RESPONSE TO THE
REPORT OF THE HOUSE OF
REPRESENTATIVES STANDING
COMMITTEE ON LEGAL AND
CONSTITUTIONAL AFFAIRS:**

*INQUIRY INTO THE EXPOSURE DRAFT OF
THE BANKRUPTCY LEGISLATION
AMENDMENT (ANTI-AVOIDANCE AND
OTHER MEASURES) BILL 2004*

Background

The Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Inquiry into the Exposure Draft of the Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004', was released on 23 July 2004. The Report was in response to a reference dated 13 May 2004 from the Attorney-General, the Hon Philip Ruddock MP.

The terms of reference for this Inquiry were based on problems identified by the Joint Taskforce on the Use of Bankruptcy and Family Law to Avoid Payment of Tax (January 2002). The Attorney-General asked the Committee to consider whether the draft Bill adequately addressed problems identified in the Taskforce Report, including:

- (a) high income earners using bankruptcy to avoid paying debts that they can afford to pay, while continuing to enjoy a lifestyle made possible through the build up of assets in the name of third parties
- (b) the uncertainty arising from the interaction between family law and bankruptcy
- (c) the inadequacy of the current income contributions scheme in circumstances where a bankrupt chooses not to comply, and
- (d) the use of financial agreements to defeat the claims of creditors.

A range of submissions received by the Committee were critical of the amendments which would have allowed the bankruptcy trustee to recover property which the bankrupt used or derived a benefit from but which was held in the names of third parties.

On 23 July 2004, the Government announced that it would withdraw the exposure draft and revise it to address three specific issues:

- The provisions which reverse the onus of proof that the bankrupt had a 'tainted purpose' in making the original transfer of assets;
- Introducing realistic time limits to determine how far back bankruptcy trustees could look in seeking to recover transferred property; and
- Ensuring the provisions do not have unintended consequences in cases where bankruptcy results from business or professional failure.

The Government is currently revising the recovery of property amendments in accordance with the undertakings set out above. This process will involve further consultation with relevant stakeholders.

A revised version of the Bill was passed in March 2005 as the *Bankruptcy and Family Law Legislation Amendment Act 2005*. This Act contains measures to:

- clarify the interaction between family law and bankruptcy;
- improve the trustee's ability to collect assessed income contribution; and
- prevent the use of financial agreements under Part VIIIA of the *Bankruptcy Act 1966* to defeat the claims of creditors.

The detail of the Government's response to the Committee's recommendations follows.

COMMITTEE RECOMMENDATIONS

Recommendation 1

The Committee recommended that financial agreements revert to the pre-2000 amendments to the *Family Law Act 1975* and be subject to confirmation by the court which shall take into account bankruptcy ramifications.

Response

The Government does not propose to adopt this recommendation.

The Government is of the view that the binding financial agreement provisions of the *Family Law Act 1975* (Family Law Act) offer significant benefits to parties arranging their financial affairs, and reasonable protections for third party creditors seeking to recover their debts against a party to a binding financial agreement.

Part VIIIA of the Family Law Act was inserted by the *Family Law Amendment Act 2000*. This Part contains provisions for the making of binding financial agreements (BFAs), allowing people to make written agreements about how, in the event of the breakdown of their marriage, all or any of the property or financial resources of either or both of them is to be dealt with. These agreements can be made before marriage (by people who are contemplating entering into a marriage with each other), during the marriage or after the dissolution of marriage.

The intention of the amendments was to provide greater choice for parties in property settlements and maintenance, and to provide a more efficient and less costly means of dispute resolution than what was previously available under the Family Law Act. The changes were to bring the legislation into line with prevailing community attitudes and needs, and to be of particular benefit for those people who are entering subsequent marriages, as well as to people on the land and those who own family businesses.

So far as bankruptcy issues are concerned, the Government has amended the BFA provisions in the Family Law Act in response to the recommendations of the Joint Taskforce on the Use of Bankruptcy and Family Law Schemes to Avoid Tax (Joint Taskforce).

The *Family Law Amendment Act 2003* came into effect on 17 December 2003, and expanded the jurisdiction of a court under the Family Law Act to deal with applications by third party creditors to set aside BFAs. A financial agreement can now be set aside if it has been entered into for the purpose of defeating or defrauding a creditor of either party, or with reckless disregard for the interests of a creditor of a party to family property proceedings.

The *Bankruptcy and Family Law Legislation Amendment Act 2005* was passed in March 2005. Schedule 4 of this Act contains amendments to the *Bankruptcy Act 1966* to ensure that a bankrupt cannot use BFAs to defeat the claims of creditors. Schedule 4 was formerly Schedule 5 of the earlier exposure draft Bill considered by the Committee. The Government notes that the Committee endorsed these provisions in its Report (see recommendation 6).

In July 2004, the Attorney-General appointed the Family Law Council to conduct a review of the BFA provisions in the Family Law Act. The primary purpose of the review is to ascertain if the intention of those provisions is being fulfilled. The Family Law Council reported on its review on 5 November 2004.

The Family Law Council concluded that the BFA provisions as they currently are should be retained, as there were benefits for people using the agreements to be able to deal with their property issues without the intervention of a court, and there were appropriate checks and balances in place or soon to be implemented to deal with cases where third party interests were affected.

The Attorney-General is considering the Council's recommendations.

Recommendation 2

The Committee recommended that:

- the amendments contained in Schedule 1 of the draft Bankruptcy Legislation Amendment (Anti-Avoidance and other Measures) Bill 2004 be abandoned; and**
- Insolvency and Trustee Service Australia and the Attorney-General's Department undertake fresh consultation with the Bankruptcy Reform Consultative Forum with a view to strengthening the current clawback provisions in the Act (sections 120 and 121 in particular).**

Response

The Government agrees with this recommendation.

As noted above, the Bill containing those amendments has been withdrawn and the Government has undertaken to revise those measures to address the concerns of stakeholders. Any revision will be undertaken with input from stakeholders including the Bankruptcy Reform Consultative Forum.

Recommendation 3

The Committee recommended that subsection 16(4) of the Income Tax Assessment Act 1936 and section 3C of the Taxation Administration Act 1953 be amended to:

- authorise the Commissioner of Taxation to provide publicly available information to prescribed industry or professional organisations; and**
- authorise the Commissioner of Taxation to utilise publicly available information for the purposes of the role of Chief Executive of the Australian Tax Office.**

Response

The Treasury, in consultation with the Attorney-General's Department, is currently weighing up the various considerations involved in providing publicly available information to prescribed industry and professional associations, including the rights of individuals concerning access to their taxation information as recommended in the report. Industry and professional associations can also consider the extent to which they may require the provision of such information directly from their members as a condition of their membership.

The Commissioner of Taxation is not precluded by any law from seeking or using publicly available information in carrying out his function of employer. The Commissioner can and does use public information in his role as the Chief Executive Officer of the Australian Taxation Office. As such, no legislative amendment is required.

Recommendation 4

The Committee recommended that the amendments proposed in Schedule 2 of the draft Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004 be implemented.

Response

The Government agrees with this recommendation.

These amendments are now contained in the *Bankruptcy and Family Law Legislation Amendment Act 2005*, which was passed in March 2005.

Recommendation 5

The Committee recommended that the amendments proposed in Schedule 3 of the draft Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004 be implemented.

Response

The Government agrees with this recommendation.

These amendments are now contained in the *Bankruptcy and Family Law Legislation Amendment Act 2005*, which was passed in March 2005.

Recommendation 6

The Committee recommended that the amendments proposed in Schedules 4 and 5 of the draft Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004 be implemented.

Response

The Government agrees with this recommendation.

These amendments are now contained in the *Bankruptcy and Family Law Legislation Amendment Act 2005*, which was passed in March 2005.