

Submission No:106.....

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10 Playford Street
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24 June 2004

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

Dear Sir,

BANKRUPTCY LEGISLATION AMENDMENT (ANTI AVOIDANCE AND
OTHER MEASURES) BILL 2004

While I understand that certain persons may have been abusing existing bankruptcy legislation in order to deliberately avoid paying taxation and other creditors while maintaining an extravagant lifestyle, in my view the proposed amendments go far beyond what is necessary to prevent this.

My objections to the bill are twofold:

- It takes the position of the spouse of a bankrupt back to where it was in the Nineteenth Century, effectively stating that a married woman has no property independent of her spouse. I believe this to be unjust.
- It significantly increases the risk (or perceived risk) of anyone in a profession or position such as a listed company director who might be the object of an action for negligence. I believe that this is injurious to the common good since, while it might not deter people from entering risky professions, it will certainly hasten their early retirement - obstetric surgeons are a well publicised example, but there are many others.

Specific matters which I would like to bring to the attention of the committee are as follows:

- s139AFA places the burden on the spouse to prove that the bankrupt did not have a tainted purpose in making a transfer, against a mere allegation by the trustee of a bankrupt estate. Since there is no limit to the length of time a trustee can go back, any documentary evidence could well have been lost and recollections of the circumstances in which funding decisions were made could be very vague. Since the Explanatory Memorandum is full of convincing examples of wicked bankrupts who have provided their spouses with luxury cars and motor yachts, perhaps I can give an example from my own past: In 1987, my wife and I jointly funded the purchase of an 185 square metre flat in Hong Kong. At the time I was a mere employee of an accounting firm and would claim that the funding was a matter of expediency and that I had no thought of asset protection. The trustee could claim that I was anticipating my becoming a partner the following year (as I did.) What

proof could I adduce against that assertion? If the court accepted the trustee's allegation, my wife would be robbed of her life savings, which she put into the purchase.

- **s139AFB** states that property will be considered tainted even if transferred for full market value unless 10 years has elapsed. What possible justification is there for this? If the spouse gave full consideration from his or her own funds, then the bankrupt's estate was not diminished by the transaction and the rights of creditors have not been diminished. To seize the property from a spouse who gave full consideration at the time of purchase is legalised robbery.
- **s139AI** applies the tainted property provisions to any replacement property or the proceeds, even if the bankrupt has ceased to derive any benefit from the property. For example, if I gave my wife funds to buy shares and she kept the dividends in an account to which I had no access and did not spend any of her money on household items, then she can keep the shares. However, if I gave her part of the funds to buy the matrimonial home in her name and she subsequently sold the property and used the proceeds to buy shares, the shares would be forfeit to my trustee, even if I had long since ceased to derive any benefit. Is there any logic in this?
- **s139F** purports to address some of the problems raised above when both spouses have contributed to the tainted property, but it leaves any apportionment entirely at the discretion of the court. In practice this will give rise to a considerable degree of uncertainty as well as an unnecessary expenditure on legal fees which might be better applied to paying creditors.

I believe I have dealt adequately with the position of spouses by my comments on the detail above. The remaining question is whether any asset protection should be allowed to professionals.

The issue is not one of individuals knowingly incurring debts which they have no intention of discharging (which appears to have been the case in the instances which sparked the enquiry which resulted in this draft bill.) Such activity is fraudulent and I have no qualms at all about such individuals being pursued with the full force of the law.

It is not even about people who take risks in starting a business. It is rather about the fear that all professionals have of the unexpected negligence claim that might be of such a magnitude that it exhausts the available insurance cover. As a partner in an accounting firm, I had this concern at the back of my mind all the time until my retirement six years ago. Of course we had insurance cover, but one is always worried as to whether it will be sufficient, particularly with the recent growth in the size of claims and the increasing propensity of "injured" parties to sue. Of particular concern are two principles of tort law - joint and several, rather than proportional, liability and the principle that a master is liable for the torts of his servant. These principles mean that however careful individuals are, they may still be sued successfully for someone else's wrongdoing.

I accept that the Government might respond that the proper solution to inadequacies in tort law is tort law reform rather than allowing professionals to put their assets

beyond the reach of creditors; however I can say, both from report and my own experience, that the current situation is causing professionals to retire earlier than they otherwise would and the trend will certainly continue if this legislation is adopted. Why continue to slave away after earning enough for a comfortable retirement if continuing means that you run the risk of losing everything that you have saved over the last 20 or 30 years?

I would therefore suggest the following amendments to the draft bill:

- Retain the concept of the "examinable period". If two years is too short for the ATO, make it five or even ten years. This would give some certainty to spouses and also reduce the incentive for professionals to retire early. Creditors entering into a transaction with an individual today will surely rely on his or her assets today - how can they imagine that they should have a claim on assets disposed of ten years ago?
- Delete subsection 1(b) of section 139AFB, so that all transfers for full consideration are exempt.
- Provide that property or replacement property will cease to be tainted if the bankrupt has not had use of it for a defined period, say five years, prior to the bankruptcy.

Yours faithfully

A handwritten signature in black ink, appearing to read "R. J. Kenrick". The signature is written in a cursive style with a large, sweeping flourish at the end.

Robert Kenrick