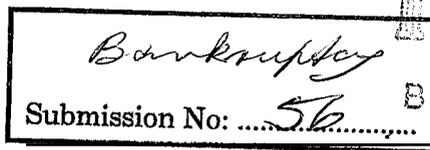


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Senator Bronwyn Bishop
Chairman
House of Representatives Standing Committee on Legal and Constitutional Affairs
Parliament House
Canberra ACT 2600

Dear Senator

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

We wish to register our deepest concern that the legislative changes referred to above could be enacted in a form represented by the recent Exposure Draft.

As we understand the background to this proposed legislation it came into being due to the activities of a very small group of people who have abused the system.

Whilst revision of legislation is necessary to overcome some of the inadequacies of the current bankruptcy act we have serious concerns about the retrospectively of this. Unlike most other changes to legislation there is no "sunset" clause to protect all those people who have legitimate tax and other structures that have never been stated by government as being illegal or not approved.

The thrust of the proposed legislation is to "outlaw" existing asset protection methods used by all those persons who take risks, whereas it is stated as targeted at certain professionals who have abused the system.

Most professionals however do not engage in such activities to defraud the revenue or creditors; however they do have asset separation structures in place as Government has refused to enact any capping of negligence claims or allow them to incorporate.

The task force was to have focused on **deliberate** abuse of the Bankruptcy Act and associated Acts, and the resulting legislation should have been directed at this area.

The main problem of the proposed legislation is that it has ignored the original aims and now has proposed to apply retrospective legislation to the whole of society. There are no safeguards for legitimate taxation and other structures that have been put in place in previous years. Such structures are now likely to be put in question.

There are also taxation consequences of any recoveries which have not been addressed; that is if a divestment of assets was made to a bankrupt from a company, a deemed dividend may

be triggered after the bankruptcy. As a result a second bankruptcy could take place due to the unpaid resulting tax liability.

Our experience is that whilst there have been some abuses of the system by a very narrow section of society, most people in business will not set themselves up for bankruptcy due to its consequences, both financial and social.

No social consequences of the implications of the implementation of this legislation have been considered in detail. They are not considered in the explanatory memorandum and at the end it will be up to Courts to decide in an area that very few judges understand bankruptcy law

It appears from our discussions with business people that this law will cause them to reduce their levels of risk taking and plans for growth, if there is in any a comeback on assets which were acquired a long while ago. In other words this will in time cause a reduction in growth.

It will also mean that new schemes will be set up by the very people who you are targeting by using offshore structures which trustees cannot gain access to. This is generally because those people usually better informed than most.

The business people who are not professionals and cannot obtain insurance cover will thus bear the brunt of the legislation. It will cause additional hardship for many families in the event of a bankruptcy than already exists.

We are not advocating acceptance of tax avoidance or abuse of the Bankruptcy Act; it is just that the proposed law needs better safeguards to protect the rights of those people who have existing structures, which have never been illegal.

The proposed law does not also take into account that many business bankruptcies are "no fault" bankruptcies of small business proprietors who cannot insure their risk and who become bankrupt as a result of a bad debts or failures of companies they are trading with, over which they have no control.

The preamble of the Information Memorandum states that there will be no financial implications; however we do believe this is correct when the effects of this are viewed in the wider context.

For example the effect of the loss of family home (which without being stated, seems to be the prime target) will mean the following

- Higher divorce rates – This happens with the loss of the family home in a very high percentage of cases.
- Additional dependence on the social security system
- Reduced private medical coverage due to lack of income
- Some essential professionals such as doctors may decline to take risks in certain areas of their practice, and given the problems with medical insurance and the long tail claims that result from their areas of practice, services may be reduced.

Some of the issues above have been addressed by Mr Ruddock in his speech of 14 May 2004, and it is appropriate to make comment on some of the parts of that speech.

Statements he made are in italics

- *in a prosperous and growing economy, which encourages risk taking and innovation, some financial failure is inevitable.*

We agree with this, and it is a fundamental part of the growth pattern of this country. We believe that a balance needs to be achieved between encouraging risk and penalising blatant abuses of the bankruptcy system. Thus some restriction on the length of time a trustee can go back to recover assets from related entities needs to be incorporated. This time period should be linked to the age of the debts AND any divestment of assets, with a fixed limit of time similar to existing relation back provisions. (Current maximum 5 years)

- *debtors need to have access to facilities to ensure they will recover from their financial difficulties.*

Under the existing proposal this is not going to be achieved as it is left to the Courts rather than statute and the outcome is unknown.

- *we sought to strike the appropriate balance between the interests of debtors and creditors.*

We agree that such a balance should be considered, however creditors are getting access to assets that will have been created a long time prior to debts being incurred. Few bankruptcy systems (if any) in the world provide for this.

- *the instances of rogue debtors may be isolated but their actions undermine the integrity of the entire system. They also highlight deficiencies and loopholes which others may choose to exploit*

We disagree with this, experience has shown that very few people will go to the lengths that the "rogue" debtors did to avoid paying their taxes, mainly due to the occupations people have. Put simply most people do not have the opportunity to engage in such practices and more importantly most people don't want to, as they are unlikely to be able to engage in their chosen occupation if they become bankrupt.

we have considered the report of the joint taskforce on the use of bankruptcy and family law to avoid payment of tax.

This report and the legislation appears to have been prepared with limited consultation with business and those people affected.

- *I also understand that some will feel aggrieved that numerous asset protection arrangements which are currently seen as legitimate will no longer be effective.*

We agree with this, most of our small to medium business clients do as well (Feel aggrieved).

- *some people hold the view that these asset protection strategies are a legitimate way of insuring against professional negligence or misconduct actions.*

In many cases such structuring is the only way that some businesses can effectively reduce their risk, as they cannot obtain insurance for the industries they are in, or if they can, it is so expensive that their business becomes uncompetitive.

- *it is the role of professional indemnity insurance – not the bankruptcy system – to deal with these sorts of risks.*

This is not correct on two levels

- the legislation does not just apply to professionals, small to medium businesses do not have cover insurance for failures, nor is it available.
- Levels of cover have now been reduced, and with the increase in litigation costs and levels of claims, and inability of professionals and others to incorporate their exposure is increased.

- *. I know the reforms have been criticized on the basis that they represent a disproportionate response to the actions of a small number of barristers*

This statement is not a justification of enacting legislation that will have a profound impact on failures of people who have not entered into schemes to avoid paying their taxation and other debts, as opposed to those who have deliberately set themselves up to fail and avoid paying their debts.

- *our duty is to ensure the rights of creditors are protected and the bankruptcy system is not misused.*

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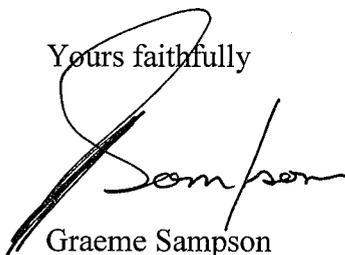
We agree, however you also have a duty to ensure that any legislation is not oppressive and unjust on the rest of society

- *In all conscience we could not sit back to allow some bankrupts to 'live the high life' while creditors remain unpaid.*

We agree with this but not at expense and ruin of thousands of innocent other people who will be affected by the legislation and the other flow on effects to the economy.

In the event you wish further information on this issue please feel free to have someone contact this office.

Yours faithfully



Graeme Sampson
Managing Partner