Submission No: 103

21 JUN 2004

Gillian Gould

16 June 2004

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

Dear Sir or Madam

Submission concerning proposed changes to bankruptcy legislation

I am a director of a number of companies, all of them employing Australians.

Let me begin by saying that I applaud the objective of going after people like the Sydney barristers who cynically used the bankruptcy laws to evade their lawful debts and thus cheat their creditors.

However, the proposed legislation, if enacted, will have consequences which go well beyond achievement of that objective. The purpose of this submission is to make the Committee aware of some of those consequences, so that this legislation is not enacted in its current form.

Extinction of Limited Liability

Intended or not, this legislation (coupled with recent Court decisions such as Hanel v O'Neill, which seek to extend directors' personal liability) will effectively mean that any shareholder of a company who also acts as a director of that company no longer has the benefit of limited liability.

The concept of limited liability established over a hundred years ago is of fundamental importance to developing and maintaining a commercial environment in which risks can be taken, and wealth. This must be protected at all cost.

This legislation would substantially erode the operation of limited liability, with potentially dire implications for people's willingness to take risks and generate wealth.

These changes will have equal application to all small business as well as those high earning professionals such as barristers. Any tradesperson or farmer or shopkeeper who operates through a corporate structure – and their families - are potential victims of this legislation.

Who would want to be a non-executive director?

The importance of effective non-executive directors in achieving good corporate governance – in companies large and small - is an issue which has received much publicity in recent times.

While I accept that there are a few exceptions, the great majority of company directors seek to be responsible and prudent directors. However, it is a fact of business life that not all risks can be foreseen and mitigated, and acting as a company director exposes one to potential claims. Directors and officers insurance does not, and never will, offer a perfect safety net against such claims.

Many company directors, especially independent non-executive directors, will no longer be willing to serve should it become possible for them to lose all of their families' assets as a result of a claim made against them in that capacity.

Boxton Developments Projects Pty.
acn 104 892 873

10 Wellington Street
St Kilda Victoria Australia 3182
T 61 3 9526 5151 F 61 3 9526 5150
www.bdp-aust.com

Why would anyone risk the fruits of a lifetime's work for some directors' fees?

No Required Nexus between Assets and Creditor's Claim

The key mischief this legislation claims to seek to address is that of "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 names of third parties". In the case of the Sydney barristers, they failed to pay tax and squirrelled the unpaid tax (and other funds) away in the names of family members and other entities.

In other words, there was a direct linkage between funds owed to the creditor and the funds salted away. At the time of the so call tainting of property the barristers would have been aware of the tax liability on the pre tax income transferred.
This proposed legislation imposes no such test, and means that an individual can face a ruinous claim despite the fact that he or she has earned little or no income from the activity that gave rise to the claim.

To expose all of a family's assets to claims which are totally unrelated to the way in which those assets were accumulated is ridiculous and repugnant to any sense of fairness or proportionality.

Retrospective Operation and Shifting the Burden of Proof

This legislation applies not just to family arrangements put in place after a certain date, but to all current and future situations. I had – clearly mistakenly - thought it was now accepted in Australia that legislation should not have retrospective application.

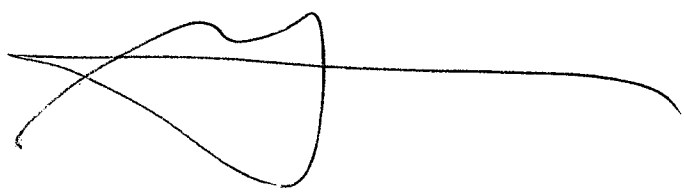
Worse, it is for the party being pursued to prove that the purpose of the arrangement was not to remove assets from the reach of creditors. How can this be done, when this legislation did not exist at the time, and no-one would have thought to document all the reasoning behind a particular decision?

A Loaded Gun in the hands of an aggressive litigant
Make no mistake this is not an anti avoidance or compliance proposal to enforce the law. It is instead providing an aggressive litigant a loaded gun to threaten people as they see fit. The Government or Courts will have no control over the way these provisions can use to extract what is regarded as extortion from parties related to the bankrupt in order to avoid the outrageous cost of defending their position in court.

Conclusion

This legislation has a commendable objective, but it also would have horrendous (albeit, I am sure, unintended) consequences. The current proposed legislation needs to be torn up, and started again from scratch with a closer eye on both the mischief to be thwarted and its likely broader effect.

Yours sincerely



Steve Buxton
Director

E steve@bdp-aust.com
D 03 9526 5152
M 0412 178 948