

Submission No: .....5.....

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BY: *Gillian Gould*

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, or why you shouldn't use an atomic bomb to catch a thief**

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; consequences which would strike at the heart of wealth creation and corporate governance in our community. 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.

**The End 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 may no longer have the benefit of limited liability.

You don't need me to tell you about the history of limited liability and its fundamental importance to developing and maintaining an commercial environment in which risks can be taken, and wealth – from which the whole community benefits – can be generated.

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

And don't make the mistake of thinking it's just fat cats in Collins St and Pitt St who would suffer. 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.

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 squirreled the unpaid tax (and other funds) away in the names of family members and other entities. Indeed, at the time of the so called tainting of the property, the Sydney barristers either were aware or should have been aware that, as a result of their actions, a liability they owed in respect of their income would not be met.

In other words, there was a direct linkage between funds owed to the creditor seeking payment and the funds salted away. The "tainted property" was a product of failing to meet an obligation which existed at the time, or very soon thereafter. This proposed legislation imposes no such test, and means that an individual and his or her family can face a ruinous claim, covering assets lawfully accumulated years earlier, 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.

### **Conclusion**

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

Otherwise, you indeed will be using an atomic bomb to catch a thief and it will be no comfort to those innocent people you destroy for you to say after the event that you hadn't intended to hurt them.

Yours sincerely

R Backwell.

Rob Backwell