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RECEIVED
18 JUN 2004

BY: *Matthew*

Bankruptcy
Submission No: *59*

17 June 2004

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

Attention: Gillian Gould

By Facsimile: 02 6277 4773

Dear Madam

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

1. We refer to the Bankruptcy Legislation Amendment (Anti Avoidance and Other Measures) Bill 2004 (referred to as "the Proposed Amendments"), exposure draft and explanatory memorandum circulated by the authority of the Attorney General, the Honourable Phillip Ruddock MP.
2. We also refer to the Media Release issued from the office of Senator Bronwyn Bishop dated 21 May 2004, noting that the House of Representatives Standing Committee on Legal and Constitutional Affairs will examine proposed changes to the bankruptcy laws, aimed at stopping bankrupts from using existing legislation to continually evade debts and that submissions have been called for in response to the Proposed Amendments.
3. In this regard, Moore Stephens BG Chartered Accountants now wishes to provide its submission in response to the Proposed Amendments.
4. By way of background, Moore Stephens BG is a Chartered Accounting firm, based in Perth, Western Australia, which provides multi disciplined services, in business consulting, insolvency, audit, accounting and taxation advice. The firm is an independent member of Moore Stephens International Limited, which is a network of accounting and financial advisors spread across the world.
5. The partners at Moore Stephens BG each have in excess of twenty year advising clients, mainly in the small to medium business sector and have concerns regarding the impact of the proposed legislation on the broader business community and wish to provide a submission to the Inquiry.
6. If there are any queries, regarding this submission, these should be addressed to, Mr Dino Travaglini, Corporate Recovery, Moore Stephens BG.

Response to the Provisions Contained at Schedule 1 of the Proposed Amendments

7. This submission mainly deals with Schedule 1 of the Bankruptcy Legislation Amendments (Anti Avoidance and Other Measures) Bill 2004.

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Concerns Arising from the Joint Taskforce Report

8. Under the original Joint Task Force report, the report focused on a small number of barristers in New South Wales who had used bankruptcy as a means to avoid paying their income tax obligations. The report notes there were 56 barristers over a period of five years, owing the Commonwealth approximately \$20 million in unpaid taxes.
9. We confirm our support to any measures that need to be taken to prevent any abuse of payment of revenue to the Commonwealth or State Governments and support any legislative amendments to prevent similar situations arising in the future.
10. However, we are concerned at the impact which the Proposed Amendments may have and specifically those provisions contained within Schedule 1 of the Proposed Amendments relating to tainted transactions. We consider that these amendments have far reaching and unintended consequences, for the broader business community, which includes small business proprietors, contractors, professional service providers and company directors.
11. We consider that the changes as proposed under Schedule 1 have the potential to have a significant and unintended impact in business and commerce generally, particularly smaller businesses and may cause unintended damage to businesses and individuals involved in commerce.

Definition of Tainted Purpose

12. The main cause for concern arises from the very broad scope of transactions and financial arrangements which the proposed Amendments cover, specifically within the definition of "Tainted Purpose".
13. Under this definition of Tainted Purpose which, take the case of the "Tainted Money" for example, refers to where the main purpose was:

"...(a) to prevent the money or property from becoming divisible amongst the bankrupt's creditors; or (b) to hinder or delay the process of making the money available for division among the bankrupt's creditors. ..."

It is considered that this definition will cover a very broad range of transactions which have been entered into in good faith and will impact on the ability of business proprietors to effectively manage the risk of continuing or entering into a business enterprise.

14. All manner of enterprise, whether it is large public companies or individual sole traders, have a requirement to be able to manage risk and return on an appropriate level. In the case of risk it has been accepted that businesses should be able to use limited liability protection with a view to managing any risk of loss to their core business assets. This fundamental arises from English company law and largely forms the basis of contemporary corporate law in Australia.
15. In the majority of cases, parties entering into a commercial enterprise will require some form of limited liability or asset protection before embarking on such enterprise. This is typical in the case of many family owned small businesses throughout Australia.
16. Without the availability of limited liability or asset protection, a significant disincentive may be created for family owned small businesses from entering into or continuing with a commercial enterprise, due to the realisation that their life savings may now be at risk of being lost, in the event of the business falling.

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Insolvency Due to Unforeseen Circumstances

17. In this regard, it has been our experience that business failure can often be unforeseen and are caused by factors outside of the control of business proprietors, which may ultimately force them to become bankrupt, or in the case of companies, force them into some form of insolvency administration.
18. Take for example, the building and construction industry, and a recent case in Western Australia, where a large building and construction company collapsed and was placed into external administration. This caused a flow on effect, due to contractors who were owed money by the building company now having their cash flow cut off, due to debts owed to them being unrecoverable. This has the effect of forcing some of these contractors being placed into some form of formal insolvency administration.
19. Another example is the impact which the SARS virus had on the travel and hospitality industry which would have forced businesses in this industry sector having to close and perhaps being placed under some form of insolvency administration.
20. These are not cases where business proprietors intentionally structured their affairs to defeat creditors with a view to hiding their assets, but rather their financial demise was due to unforeseen circumstances, outside of their control.

Professional Service Providers

21. It is noted the professional service providers have a unique situation in that many are restricted from having any form of limited liability. This therefore would make professional service providers somewhat exposed, compared to businesses which can operate with a corporate structure, with limited liability.
22. It has been argued that insurance should be available to cover risks associated with business, specifically professional service advisors.
23. In this regard it is noted that insurance is not available for all types of business risks. Namely in the case of bad debts, insurance cover may not be available or is uneconomic to secure, whether it be for professional services providers or other businesses.
24. Furthermore, in regard to professional indemnity insurance cover, where it is available, it will often be restricted and will have a number of exclusion clauses. This therefore exposes business and professional providers to risks associated with their own individual disciplines which are uninsurable.
25. Without the availability of some form of asset protection, a significant disincentive for professional service providers to remain in practice is created, whether it be for accountants, lawyers or medical practitioners.

Retrospectivity

26. One of the other issues which is also of concern is the retrospective nature of the legislation.
27. Under the proposed legislation arrangements designed to provide some form of asset protection or limited liability and which have been in place based upon existing government statute and common law may well be capable of being overturned.
28. We consider this has the potential to create significant distress for businesses, as in many cases these assets may represent a retirement fund for business proprietors. Accordingly, it may well be that the risk of losing their life savings may be too great to either continue in business or to commence a new venture under the Proposed Amendments.

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RECOMMENDED CHANGES TO THE PROPOSED AMENDMENTS**Legislation to Prevent Abuse of Payment of Debts Owing to the Australian Taxation Office**

29. In the first instance, we recommend that due to the main targets of legislation being offenders for non-payment of income tax to the Australian Taxation Office, that consideration be given to making amendments to relevant taxation legislation to capture those offending tax payers and potential and actual bankrupts.

30. This could also possibly be extended to include punitive provisions where schemes are entered into to avoid payment akin to the nature of legislation which is contained within Part IVA of the Income Taxation Assessment Act, 1976.

Definition of Tainted Purpose

31. We consider that if it is decided to proceed with the amendments, the definition of Tainted Purpose should be very specific where at the time of the Tainted Transaction the bankrupt was or was about to become insolvent. This will then capture those transactions that were made with the intention of defeating creditors as opposed to transactions which are undertaken in good faith in order to mitigate any risk in the conduct of a business venture without any knowledge or intention of bankruptcy or without the intention of defeating claims by creditors.

Retroactivity

32. If the amendments are to be pursued then we would recommend that the legislation is not retrospective but captures those transactions which have been entered into after the commencement of the legislation.

Yours faithfully


Dino Travaglio
Partner
Moore Stephens BG