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- 9 JUN 2004

Bankruptcy Submission No:6.....
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9th June 2004

BY:.....

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

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2 Linnet Ct
CALAMVALE QLD
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Dear Sir/Madam,

Inquiry into the Bankruptcy Legislation Amendment (Anti Avoidance and Other Measures) Bill 2004.

I have read with some concern the Exposure Draft Legislation Package to Amend the Bankruptcy Act.

I am aware that the taskforce "identified a small but significant number of high income debtors, typically high earning fee-for-service professionals, who use bankruptcy to avoid paying their taxation and other debts."

I am not one such person. However, I am concerned with proposed changes to the legislation as I believe that if these proposals are enacted in their present form that there will be unintended consequences for all small business people that choose to protect their sacred assets such as the family home via family trusts. Discretionary trusts have been used to protect assets for over 400 years. As a small business owner and professional person I am attempting to limit my personal liability by excluding my sacred assets from any future action. I am currently solvent and it is not my intent to fraudulently withhold assets from creditors.

The risks associated with establishing and succeeding in a small business is already great enough. As a professional person I am unable to rely on limited liability and therefore my personal assets are at risk. It has been suggested by the Attorney General that professional people should protect their position by taking out adequate insurance. I had fees this year of \$60,000 gross and was quoted an annual premium of \$25,000 for Professional Indemnity Insurance. Clearly this is exorbitant and not affordable. The insurance only covers me in the year a claim is made so even if I stop practicing (and stopped paying insurance premiums), in five ten or more years my assets could come under attack. Even when people have taken out insurance it is well documented that many insurers often refuse to defend their clients' position. Further the Government has failed to introduce legislation that would limit liability and reduce insurance premiums.

To this end I have chosen to protect my family home utilising a discretionary family trust structure. I believe that this protection is now under threat because of the proposed legislative amendments.

Regardless of the already significant powers available to trustees in bankruptcy, extraordinary changes to the existing laws are proposed.

- Any entity (whether related or not) which has acquired an asset from a person who later becomes bankrupt will have to prove that, when the entity acquired the asset, the bankrupt did not have a tainted purpose.
- A tainted purpose is the desire to protect assets from the exigencies of business which can befall innocent persons (as distinct from fraudulent attempts to defeat creditors).
- If the entity (spouse or trust) is unable to prove the absence of a tainted purpose, a Court will be compelled to make orders in relation to those assets with a view to transferring them to the trustee in bankruptcy.
- Application is retrospective

Clearly the proposed changes places my personal assets in jeopardy!

Existing Alternatives

The Commonwealth Bankruptcy Act and various States Legislation allows payments of money or transfers of property with the intent to defraud creditors to be overturned by the Court on application of a trustee in bankruptcy. (No time limit). It appears to me that any reasonable person could conclude that the prominent Barristers referred to have intended to defraud a creditor i.e. the Commissioner of Taxation.

There are also provisions to enable the trustee in bankruptcy to clawback assets within specified times before bankruptcy (2-5 years) depending on solvency at the time of transfer. Part VI of Division 4A enables the trustee in bankruptcy to apply to have trust assets appropriated to satisfy Creditors where a bankrupt is providing services to a trust for inadequate remuneration.

Surely these alternatives could be applied to recover the monies in question?

I request you consider these issues with a view to

- Limit the application of the proposed provisions where there is in fact a tainted purpose i.e. an intention to defeat reasonably foreseeable creditors rather than presuming a tainted purpose.
- Proof of intent to defraud should lie with those who seek to confiscate property.
- Limit the definition of Bankrupt so as to exclude future bankrupts
- Remove any and all hint of retrospectivity of the proposed provisions.

Should you wish to discuss any aspect of this submission I am available on telephone 07 32721471.

Yours faithfully



Benjamin A Trim
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