



# NEWS WITH CLOUT

Chartered Accountants for Business Recovery & Insolvency Services  
March 2005

## BANKRUPTCY ANTI-AVOIDANCE

It's on again! The Government are determined to do something to address what was perceived as a public outcry in the wake of a spate of high profile professionals using bankruptcy to avoid paying tax, but still maintaining a lifestyle which would not have been possible had they paid their taxes.

Enter the latest discussion paper.

You may recall that in a previous attempt the proposed anti-avoidance legislation contained an immediate presumption that any defensive structuring was for a tainted purpose. Accordingly under the previous proposal any defensive structure on a bankruptcy was vulnerable to the clutches of the Trustee. Enough noise was made and this became politically unpalatable.

This discussion paper focuses on Sections 120 and 121 being, apart from preferences, the key clawback provisions. Under Section 121 there is the opportunity to clawback assets if the main purpose of the transfer was to defeat creditors. There is a provision for an inference as to the main purpose but the discussion paper makes mention of the practical difficulties this entails.

Some suggestions they raise are rather interesting but one might suggest a little one sided. They are:-

- ◆ To create a rebuttable presumption of insolvency where the bankrupt had failed to lodge a tax return;

- ◆ To create a rebuttable presumption of insolvency where the bankrupt has failed to keep proper books and records when required by law to do so; and
- ◆ To make failure to lodge a tax return an act of bankruptcy.

Similarly, they have addressed the issue of entities controlled by the Bankrupt and where the entity benefits from the services and not the bankrupt.

Here are some suggestions included:-

- ◆ Removing the need for bankrupt to have 'controlled' the entity;
- ◆ Extending the 'examinable period' to bring it into line with Section 120; and
- ◆ Extending the provisions to include where the bankrupt receives an 'indirect benefit' from the relevant property (a 'direct benefit' is currently required).

Whatever eventuates, they are on the warpath still but walking the usual political tight rope.

If you are interested, whilst summarised here the whole discussion paper can be found on the following site [www.itsa.gov.au](http://www.itsa.gov.au).

If you feel the need to make a submission you better be quick as the closing date is 31 March 2005.



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