

BANKRUPTCY LEGISLATION AMENDMENT (ANTI-AVOIDANCE) ACT 2006

On 31 May 2006 the Federal Government pass the Bankruptcy Legislation Amendment (Anti-Avoidance) Act.

For those of you who have in the past undertaken risk management by transferring property to your spouse, there are now implications to be considered as follows:

The claw back provision previously of 2 years has been extended to 4 years where a transfer takes place between related entities (s120(3)).

A new provision was introduced whereby there is a presumption (which can be rebutted) that a transferor was insolvent at the time of the transfer if the transferor did not keep/preserve proper accounts (S.120(3A)).

1. The examinable period which the trustee can review transfers has been extended to 4 years before commencement of the bankruptcy for transfers between related parties (which can be further extended to 5 years in certain circumstances).
2. Orders can now be made by a Court against a person where:
 - (a) during the 4 year period before the bankruptcy that person acquired an interest in property as a direct or indirect result of financial contributions made by the bankrupt during that period; and
 - (b) the bankrupt derived a direct or indirect benefit from the property during that period; and
 - (c) that person still has the property whether or not the bankrupt ever had an interest in the property.
3. Orders can now be made by the Court against a person relating to the increase in the value of the property where:
 - (a) during the 4 year period before the bankruptcy in the value of that person's interest in a property increased as a direct or indirect result of financial contribution made by the bankrupt during that period; and
 - (b) the bankrupt derived whether directly or indirectly a benefit from the property during that period.

3, 4 and 5 only apply in relation to an examination period that commenced on or after 31 May 2006.

What will be a direct or indirect financial contribution?

As there are no examples given one must take it literally to mean:

- contribution to purchase price
- contribution to mortgage
- contribution to extension/renovation
- contribution by supporting mortgage or guarantee

What is meaning of used or derived whether directly or indirectly) a benefit?

- living at the property

How does this impact on you?

Example 1

Property acquired by spouse of bankrupt from 1 July 1999

Bankrupt occurred on 1 July 2007

S.120(3) claw back provision applies on 2 years (as transfer completed pre-31 May 2006) , therefore there is no claw back.

S.139(DA) does not apply as property was not acquired within 4 years of bankruptcy.

BUT

S.139DA will apply in relation to any increase in the value of the property during the examination period (ie. 4 years) in the case 1/7/2003 to 1/7/2004 if the property increased as a direct or indirect result of financial contribution by the bankrupt

AND

the bankrupt used or derived a direct or indirect benefit from the property during the examination period

For further details please contact Frank Lamari in Carlton on 9344 1700 and Alana Gorton in Lilydale on 9739 7377.

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