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Submission No:///.....

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BY: Gillian Gould

18 June 2004

Ms Gillian Gould
Secretary
House of Representatives Standing Committee
on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Ms Gould

Re: Inquiry into the Bankruptcy Legislation Amendment (Anti-Avoidance and other Measures) Bill 2004

The Victorian Employers' Chamber of Commerce and Industry (VECCI) welcomes the opportunity to make a submission to the Committee for its Inquiry into the Bankruptcy Legislation Amendment (Anti-Avoidance and other Measures) Bill of 2004.

VECCI recognises that the amendments proposed by the draft Bill are aimed at preventing high income professionals from using bankruptcy as a means of avoiding their taxation and other obligations.

We do not condone such actions and in this sense acknowledge there may be a case to strengthen aspects of the asset recovery powers of bankruptcy trustees in instances where bankrupts are *clearly acting to defraud creditors*.

However, we are concerned that the draft Bill seeks to apply blanket legislation to a problem that, by the Government's own admission, has been associated with 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"¹.

In our view, the legislation should be better designed to capture those people who act in bad faith, or with knowledge of impending debts, not those who have acted in good faith and with no intention to defraud their creditors.

In the absence of modification, we consider the proposed legislation would have a much greater than intended – and adverse – impact on business practices, particularly small business.

In particular, the proposed legislation would likely create a significant disincentive to risk taking and entrepreneurial activity, especially among small business and the professions.

¹ Media Release by the Hon. Bronwyn Bishop MP, Chairman, House of Representatives Standing Committee on Legal and Constitutional Affairs, 21 May 2004.



That the Bill is less than precise in respect of important definitions within its scope, such as 'high income' and 'professional', highlights the extensive potential reach of the proposed new laws.

Indeed, it represents a significant departure from the protection afforded to many Australians – small businesses and professionals alike – who have diligently and responsibly sought to organise their affairs under the existing Bankruptcy Act.

We note the Bill seeks to empower the Court to make orders for the recovery of what it calls 'tainted money' or 'tainted property', with the onus of proof to show the transfer (of assets to a third party) was not tainted falling on the bankrupt.

Such an approach would seem to reflect a (erroneous) presumption by the legislative drafters that bankrupts have as a main intent the desire to prevent, hinder or delay the claims of creditors. We would therefore prefer to see the onus of proof reside with the trustee.

Again, that the draft Bill sets no time limits for such asset transfers is unreasonable and would mean the legislation would be indefinitely retrospective, throwing into doubt arrangements made in good faith years ago under the present legislative regime. In our view, extending the existing two year horizon to five years (rather than indefinitely) would be a much more reasonable approach in this regard.

That the proposed legislation confers a heavy weighting in favour of trustees is demonstrated by the fact that no regard is had in respect of the magnitude of debt, its duration, or the type of debtor, for example.

We also concur with the views of other stakeholders² that the draft Bill has significant potential for adverse unintended consequences as a result of the wide reaching 'unravelling' powers that are proposed for trustees.

Among these consequences are the advent of new uncertainties and disputes over conflicting or competing claims in respect of taxation and property right interests. Such uncertainty could well add further upward pressure on professional indemnity insurance premiums, further damaging business competitiveness.

In light of these concerns, we cannot support the draft Bill in its current form and would like to see the issues we have raised addressed as a matter of priority. The central task must be to ensure the operation of Australia's bankruptcy laws sensibly balances the need to protect the interests of creditors without damaging the environment for risk-taking and genuine entrepreneurship.

Yours sincerely

Neil Coulson
Chief Executive Officer

² See for example, CPA Australia, Discussion Paper – June 2004 (Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004)), page 3.