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INSTITUTE OF
COMPANY
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Professionalism in Directorship

National Office

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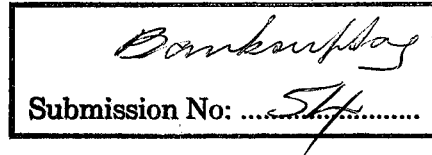
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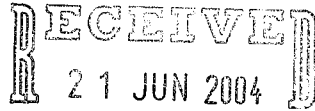
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18 June 2004



BY:.....

The Secretary

Gillian Gould

House of Representatives Standing Committee on Legal and Constitutional Affairs

Parliament House

Canberra ACT 2600

Email: laca.reps@aph.gov.au

Dear Ms Gould

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

We refer to the invitation for submissions to the Committee in relation to the proposed changes to the Bankruptcy Act. Thank you for the opportunity to comment on the Bill.

Australian Institute of Company Directors (AICD) is the peak organisation representing the interests of company directors in Australia. Our current membership is over 18,000, drawn from large and small organisations, across all industries, and from private, public and the not-for-profit sectors. Our members are predominantly from small and medium enterprises, with 50% of our members from organizations with less than 100 employees.

Disproportionate Response

AICD strongly supports the stated policy objectives of the Bill set out in the Explanatory Memorandum, namely, to address the issue of high income professionals using bankruptcy as a means of avoiding their taxation and other obligations. AICD also supports solutions aimed at addressing the identified 'problem' of 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.

However, the Bill is a disproportionate response to the concern identified and has serious unintended consequences for free enterprise and, therefore, for Australia's future economic prosperity. Active support of the Australian Tax Office undertaking more effective enforcement of existing provisions of the Income Tax Assessment Act could go some considerable way to addressing the concern, as could bolstering the Office's resources dedicated to enforcement. It may also assist if additional funding from the Australian Tax

Office was made available to Bankruptcy Trustees to facilitate enforcement of the Bankruptcy Act.

Disincentive for Business and Not for Profits

The free enterprise system that Australia has fostered seeks to encourage individuals to take calculated risks for reward. However, the Bill will act as a strong disincentive to such activity. The Bill is far too broad in its application and will unfairly impact proprietors of small and medium enterprises and directors of companies, especially those of small companies.

The risks involved in a business must be identified and, to the greatest extent possible, mitigated. The economic reality is, however, that risk cannot be eliminated. Given our dynamic economy, it is inevitable that during the course of any year, businesses will fail. In certain cases, that failure will be attributable to negligence or dishonesty, and the Corporations Act contains comprehensive provisions to address negligence or dishonesty. In many other cases, businesses fail without either negligence or dishonesty. The proprietors of such failed businesses will thereby suffer significant financial loss. The consequences of the proposed legislation may lead to the imposition of financial loss to the families of such proprietors extending well beyond that which has previously been contemplated.

The principle that has applied to date with respect to individuals and corporate entities has been that both individuals and corporate entities are free to deal with their assets except in circumstances where to do so would impact upon their ability to meet their obligations to creditors or in circumstances where insolvency was possible. AICD considers that this principle represents a fair and appropriate balance between our basic freedom to deal with our assets as we see fit and the legitimate interests of creditors. The proposed legislation represents a serious and fundamental movement away from that principle.

By way of an example, a small businessman, acting as a direct proprietor or as a company director is often required by banks and financial institutions to provide a supporting guarantee. He must recognise that failure of his business may occur at some future time, with consequential disastrous personal financial implications. It is entirely legitimate that he should seek to transfer certain of his assets to provide for the future well-being and welfare of his family against such a potential future eventuality. Any dealings undertaken by him in connection with his business thereafter would be upon the basis of the assets then held by him. It must be stressed that any such transfer, if made at a time when insolvency was imminent or in circumstances which would materially affect his ability to pay his then creditors, would be in breach of existing legislation. With the benefit of existing legislation, AICD strongly believes that any such arrangements are entirely reasonable and legitimate. Those arrangements would be rendered ineffective by the Bill.

If small businessmen cannot organise their affairs to provide some level of security for their families, the question must be asked as to why they should expose themselves to any level of risk or financial exposure. Not only have the potential personal exposure of directors increased at law over time, but insurance is not always available to them to mitigate against these risks. Even if insurance is available, it is often prohibitively expensive for small companies and there are often gaps in the coverage on offer relative to the potential exposure. In short, the directors least able to mitigate the risk of conducting business are the ones most

negatively affected by the Bill. The overall implication of the proposed legislation is to inhibit further the entrepreneurial spirit that has been the driving force of this country.

Impact on Charities & Not for Profits

Directors of charities and not for profits may also reconsider their involvement in such organizations if the Bill becomes law. Their positions are often unremunerated and yet some organisations rely heavily on their non-executive directors for pro-bono advice and fundraising activities. If the potential personal exposure of these directors and their families is increased in the way proposed by the Bill, the available pool of directors for these positions will decrease.

Legal Principles Ignored

AICD has concerns regarding the drafting of the Bill, particularly its broad application. The combination of the breadth of the concepts of "tainted" and "intention", together with the reversal of the onus of proof will potentially catch innocent conduct. This means that the innocent party will then have to go to the expense of proving their innocent intent. The fact that there is no 'safe harbour' offered is of grave concern, as is the fact that the Bill will operate retrospectively. We are also troubled that some of the fundamental tenets of property law appear to have been ignored. We are happy to identify these issues in more detail should you so require.

Widely-held Industry Concerns

We understand that other organizations are concerned about the far reaching implications of the Bill. These organizations including the Institute of Chartered Accountants in Australia, Certified Practising Accountants in Australia and the Coalition of Small Business Organisations in Australia, will be writing to you separately. This indicates that there are a number of widely held concerns in the business community that should not be ignored.

We would appreciate the opportunity to meet with the Parliamentary Committee to further discuss our concerns. If you have any questions in the meantime I can be contacted on (02) 8248 6602.

Yours sincerely



for
Ralph Evans
CEO

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