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AUSTRALIAN INDUSTRY  
GROUP

*Bankruptcy.*  
Submission No: ...62...

The Secretary  
House of Representatives Standing Committee  
on Legal and Constitutional Affairs  
Parliament House  
Canberra ACT 2600

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

Dear Secretary

I am writing in relation to your Committee's Inquiry into the Bankruptcy Legislation Amendment Bill 2004.

The Australian Industry Group, representing a membership of over 10,000 employers mainly in the manufacturing, manufacturing associated services and the construction sectors, is deeply concerned about the implications of some provisions contained in this Bill.

We are particularly concerned with the strong possibility of severe unintended consequences; the high likelihood that many small and medium sized businesses will face a period of disruptive uncertainty and, what we perceive to be an inadequate consideration given to the costs to business (and ultimately to consumers).

Our members have expressed these concerns very strongly. In the past two weeks in particular, these concerns have become much more widespread.

We submit to the Inquiry that the Bill should not be passed in its present form until business concerns have been examined fully and satisfactory solutions have been developed to avoid the problems with the approach proposed in the Bill.

Ai Group agrees that abuse of the bankruptcy protections needs to be addressed, as stated in the Bill's objectives. Nevertheless, we are advised that the approach proposed in the Bill is very likely to have a much wider commercial impact than the desirable prevention of recognized abuses.

At the very least, the contemplated changes to the bankruptcy provisions will create confusion for businesses of all sizes, most particularly those smaller businesses comprised of individual partnerships, where the development of trusts, for example, has long been an acceptable and demonstrably pragmatic response to changing

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business environments. There is likely to be also extensive disruption to the usual business arrangements put in place as a matter of commerciality - this is especially so given the extended retrospective effect of the changes. Questions of how best to go forward are also causing concern and unnecessary pressure on our members. This has been very forcefully expressed to Ai Group by a number of our members to date, and we expect that when the full extent of the ramifications of the Bill are digested, there will be even greater outcry from business.

We understand the conceptual argument that some uncertainties should be able to be addressed through the insurance market. We do not, however, have confidence in the ability of the insurance market to come to optimum pricing and coverage arrangements in a short space of time. Indeed, current experience of the insurance market's readiness to extend its coverage to such areas is not encouraging. It would also be interesting to explore the legal basis for such insurance if the wrongful act contemplated in the Bill (the tainted purpose) is one for which traditionally no insurance has been available. The costs of cover would be excessive. There is also the issue of retrospective "cover". We could also raise the obvious issue of the prohibitive costs of 'de-structuring' existing arrangements to avoid the perception of a tainted purpose emerging with hindsight.

Even if there were good information about risks, and particularly about the differential risks faced by various prospective purchasers of insurance, the initial uncertainty about the coverage and full implications of the legislation will inhibit the emergence of efficient market solutions. This period of uncertainty would be expected to last for quite some time until major questions surrounding legal interpretation had been resolved.

In reality, of course, there is not currently good information about the differential level of risk faced by various prospective purchasers of insurance. This is likely to support a risk averse response on the part of insurers resulting in high premiums and high cross subsidies between low and high risk insurers.

We submit that it is naive to translate a conceptual argument about the role that could be played by the insurance market in the context of complete and unambiguous information into the argument that there is a practical, ready-made and efficiently priced solution awaiting the change in property rights envisaged in the Bill.

Ai Group sees the potential impacts falling on the very large number of Australian unincorporated businesses. Typically these are small and medium sized businesses. The impact on these businesses is particularly difficult because financial (and insurance) markets appear to suffer from a general lack of adequate information upon which to base pricing and coverage solutions.

The concentrated impact of these measures on small and medium sized unincorporated businesses is likely to prompt changes in business structure as alternative solutions are sought in the absence of an adequate insurance market. If, as we expect, these businesses receive advice to incorporate, they will also have to consider differences in taxation treatment and possibly stamp duty impositions.

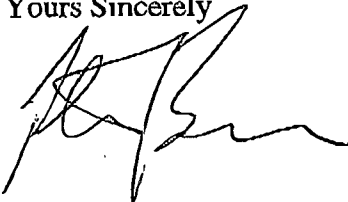
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Against this background, we regard the Bill's assessment of a negligible financial impact as grossly inadequate. Businesses face the prospect of higher insurance costs, costs associated with the operation of a different business structure and costs associated with the transition to a new business structure. Legitimate arrangements for the effective conduct of business are at risk.

In short, we urge the Inquiry

- to recommend that the Bill not proceed until the significant uncertainties associated with the changes are resolved satisfactorily;
- propose a thorough investigation of the range of unintended consequences arising from the approach adopted in the Bill; and,
- to emphasise the need to put in place adequate transitional arrangements for a wide cross-section of the business community if the current – or a similar approach – is taken to address practices of the very few.

Yours Sincerely



HEATHER RIDOUT  
Chief Executive

