MINORITY REPORT

CONCLUSIONS AND RECOMMENDATIONS

We have also considered carefully the Corporations Law Amendment (Employee Entitlements) Bill 2000, the submissions to the Committee, and the evidence heard from the witnesses.

We also agree that the submissions and evidence reflect wide and diverse views on the Bill. We consider that these views present a strong case for making amendments to the Bill.

Chapter 2 of this report states that the second reading speech for the Corporations Law Amendment (Employee Entitlements) Bill 2000 advised that the purpose of the Bill was to amend the Corporations Law to increase protection for employee entitlements.

Many of the submissions state that the Bill is aimed at deterring directors and other persons from acting to jeopardise employee entitlements. The NSW Attorney-General and Minister for Industrial Relations, the Hon J.W. Shaw, QC MLC submitted that the section 588G amendments was not a specific measure to address employee entitlements, because it only extended the scope of an existing provision which provides general protection to creditors. Another submission stated that applying sanctions to impecunious directors would do little or nothing to increase the funds available in a company failure.

These submissions suggest strongly that the Bill's direct focus is not on reassuring employees that the entitlements due to them as employees are guaranteed, but on penalising directors in the hope this will create incentives for directors and other persons to not defray or put in jeopardy the entitlements of employees. We would suggest that this is not a sufficient means for protecting employee entitlements and does not address adequately the position of employee entitlements that have been lost and which employees now need to recover. As was stated in the submission from Mr Noakes:

> "[t]he problem with this ex post facto approach is that the company is already insolvent, and the prospects for recovering unpaid wages and entitlements do not improve markedly with this punishment".

Accordingly, a number of submissions suggest additional measures which would more directly assist employees to obtain their entitlements.

Several submissions suggested extending "employer" liabilities for entitlements to related companies by enabling an application to be made to Court for a related corporation to pay the debts of an insolvent company. Both the ACTU and the TCFUA stated that in recent years there has been a proliferation of deliberate restructuring of companies.

Other submissions suggested changing the priority accorded to employee entitlements. The Department of Treasury submitted there may be considerable problems with this approach. We understand that the AICD has offered to provide further information to the Committee on dealing with some of the transitional problems which may arise if this approach was adopted.

The Committee also heard evidence in relation to an insurance scheme, under which employers would be obliged to obtain and maintain insurance covering entitlements owed to employees. Both the AICD and the ACTU suggested this approach and both called for flexibility in the arrangements which would govern the insurance scheme.

Evidence from the TCFUA also revealed that companies were failing to make regular superannuation contributions and that companies were going insolvent owing employees a year or two years superannuation payments.

These suggestions lead us to conclude that there are more adequate ways of dealing with the issue of employee entitlements than is contemplated by the Bill.

The Committee also heard submissions and evidence in relation to the specific provisions of the Bill.

Several submissions expressed concern with the need the prove the intention in order to establish the new offence in Part 5.8A. Many submissions suggested this would be difficult to prove or such a test could be easily frustrated. An alternate test of the effect of the transaction or arrangement was proposed. This would be balanced by a range of defences such as where it could be shown that there was a process of due diligence or an inability to influence the conduct that led to the failure to pay entitlements. These defences would need to be considered carefully in order to ensure that the persons and transactions caught by this offence did not curtail legitimate economic activity. There is also an issue of seeing that fairness is done to all parties.

The Committee also heard evidence from Mr Wilton of the Law Council of Australia that section 596AB was a fairly blunt instrument because it requires an intention to prevent, as opposed to dissipate, the recovery of employee entitlements.

Several submissions also expressed concern that the Bill only dealt with the situation of insolvency. The Committee heard evidence that companies were increasingly using deeds of arrangements but under the Bill employees could only recover compensation when the company was wound up..

The Committee also received submissions and heard evidence that the costs of bringing legal action to seek compensation was generally prohibitive and may make the provisions proposed in the Bill ineffectual. It was proposed that a "small-claims" tribunal in relation to employee entitlements might address these issues.

These submissions again suggest that the Bill is not an adequate solution to a pressing and important problem.

Recommendation

We do not believe that the Bill adequately addresses the protection of employee entitlements, instead focusing on penalising directors.

We recommend that the amendments and other proposals suggested above be given further consideration.

We recommend that the Bill not be opposed but reviewed in 12 months to ascertain what actions have been taken under the provisions proposed in the Bill.

Mr Bob Sercombe, MP	Senator Stephen Conroy
Senator Barney Cooney	Mr Kevin Rudd, MP