28 February 2003

The Secretary  
Parliamentary Joint Committee on Corporations and Financial Services  
Room SG.64  
Parliament House  
Canberra ACT 2600  
Fax – 6277 5719

Dear Sir/Madam

SUBMISSION TO THE INQUIRY INTO AUSTRALIA’S INSOLVENCY LAWS ("INQUIRY")

The Australian Institute of Company Directors (AICD) welcomes the opportunity to make a submission to the Inquiry. Thank you for granting us one month’s extension to lodge our submission.

Over the last several years, AICD has submitted a number of submissions on aspects of the insolvency regime. In summary, AICD supports an insolvency review that is broad-based and takes into account the overall scheme of Australian insolvency law, rather than a review on selective insolvency issues.

Inquiry terms of reference – paragraphs a, d & g

The ACID participated in the preparation of the Voluntary Administration Law Reform Committee report to the Companies and Securities Advisory Committee ("CASAC") produced in May 1997. We continue to support the recommendations made in the above report and we rely on them for the purposes of the Inquiry.
Inquiry terms of reference – duties of directors

The AICD maintains its previously stated position that it is opposed to insolvency law reform which erodes the limited liability principle and penalises legitimate but unsuccessful commercial activity. The AICD looks forward to discussing specific reforms on this term of reference with the Inquiry.

Inquiry terms of reference - the treatment of employee entitlements

By letter dated 30 August 2002, the AICD lodged a submission to the Department of the Treasury in response to the Treasury's "invitation to comment" published on 30 July 2002 regarding proposed amendments to the Corporations Act 2001 (Cth) to introduce a "maximum priority" for employee entitlements. The AICD refers to that submission (enclosed) and relies on it for the purposes of the Inquiry. In short, the AICD expressed a number of reservations in relation to the proposed introduction of a "maximum priority" for employee entitlements. The AICD supports reforms on this aspect of insolvency law in terms of its previous submission to the Treasury.

Inquiry terms of reference - the reporting and consequences of suspected breaches of the Corporations Act 2001

The AICD refers to its submission (enclosed) in respect of the Corporations Amendment (Repayment of Directors’ Bonuses) Bill 2002 to the Secretary of the Senate Economics Committee dated 14 January 2003 and relies on it for the purposes of the Inquiry. In summary, the AICD submitted that the Bill ought to be amended as follows:

- substitute “extortionate” for “unreasonable” as the test, which would reflect the definition of unfair loan.
- exclude from the operation of the Bill:
  - remuneration paid to a director in accordance with the relevant company’s constitution;
  - a payment made to a director with members’ approval as required by s200B or Part 2E or under a contract so approved;
  - a payment exempted from the requirement for members’ approval under s200B or Part 2E;
  - a payment under an indemnity which does not contravene s199A.
- alter the “reasonableness” test in s588FDA(1)(c) to provide that:

  "(c) the transaction is so manifestly unreasonable having regard to:
    
    (i) the benefits (if any) to the company of entering into the transaction; and
    
    (ii) the detriment to the company of entering into the transaction; and
    
    (iii) the respective benefits to other parties to the transaction of entering into it; and
    
    (iv) any other relevant matter."
that no reasonable person in the company’s circumstances could have entered into it.”

Should you have any questions concerning our views on any of these matters, please do not hesitate to contact me on (02) 8248 6630 or Gabrielle Upton, Senior Policy Officer, on (02) 8248 6638.

Yours faithfully

Rob Elliott
National Policy Manager