**Submission to the Senate Economics Legislation Committee Inquiry into the *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017***

## My Background

I am a Chartered Accountant and former registered liquidator, with more than 25 years' experience in financial and professional services at Nab, ANZ Bank, and Ernst & Young.

In my current role I lead complex loan workouts across the Institutional and Corporate platforms at Nab, and I am member of the ARITA Vic./Tas. State Committee and ARITA National Board.

I very much appreciate the opportunity to provide a submission to the Inquiry into the *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017*, which for clarity represent my personal views, and is not made on behalf of either my employer, or ARITA.

## Summary

In my view those responsible for drafting the legislation should be commended for the care that they have taken to balance different policy objectives and minimise unintended consequences, resulting in a package of very meaningful and worthwhile reforms.

My submission has a single focus, the commencement of the *ipso facto* protections. The reforms are so beneficial that I believe we should move away from the proposed very gradual implementation, and implement them more quickly.

## Issue: that the *ipso facto* protections will be introduced only very gradually

The *ipso facto* protections will apply only in respect of rights under contracts entered on or after the commencement (refer Explanatory Memorandum 2.99).

That means that companies incorporated after the commencement will have comprehensive protection against *ipso facto* clauses. By contrast, companies in existence prior to the commencement will not receive the benefit of *ipso facto* protection, unless they enter into a completely new contract.

Many contractual counter-parties currently holding *ipso facto* termination rights will avoid entering into new contracts. Instead they will seek to vary existing contracts, to preserve those termination rights. Those with greater negotiating leverage are most likely to be successful, i.e. by definition, extension will be more likely to occur where there is an imbalance of power. There will be some cases where contracts with *ipso facto* termination rights continue in existence for many years - with variation after variation after variation - and for most businesses, in practical terms the implementation will therefore be gradual.

There may be some argument for maintaining the position of those who currently hold *ipso facto* termination rights, to recognise freedom to contract and avoid retrospectivity – but there can be no other policy reason to deny the very clear benefits of *ipso facto* protection to all businesses.

## The argument for limiting *ipso facto* protection

My understanding is that the limitation of *ipso facto* protection to only those contracts entered on or after the commencement date reflects a policy objective to avoid the retrospective removal of contractual rights that parties have independently negotiated.

## The argument against limiting *ipso facto* protection

There was no suggestion that the Safe Harbour reforms be only available to those directors appointed after the commencement date – even though the safe harbour regime impinges on an individual creditor's right to make an insolvent trading claim. I believe that reflects a clear recognition that the benefits of safe harbour are so significant that they should be universally available. Exactly the same argument applies in relation to *ipso facto* protection – the benefits are so significant that they should likewise be universally available.

If there is a residual concern about taking away rights that parties have independently negotiated, that should be balanced by consideration of three other issues:

- First, *ipso facto* termination rights are something that a well-informed party would avoid if possible. They are more likely to exist in a contract where one party is less well-informed as to the risks they engender, and/or where there is an imbalance in negotiating position - such that a party cannot refuse their inclusion.

  We should be cautious about protecting rights that may have been secured through knowledge imbalance or power imbalance.

- Secondly*, ipso facto* clauses provide a right to terminate where there is no other default. By definition therefore, they are only useful to a party that has suffered no loss or damage. There may be an argument to preserve the rights of a party that has suffered loss or damage - but it is harder to mount an argument to protect the rights of a party that has not suffered any loss at all, especially where the exercise of those rights may cause significant damage to the other party.

- Finally, it should be noted that there is no way for employees to understand whether an employer's contracts are protected against *ipso facto* termination. Similarly there is no way for those who trade with a company to understand whether their credit risk is exposed to *ipso facto* termination.

## Suggested solution

There are some circumstances where *ipso facto* termination rights should be maintained, and these have been recognised in the legislation. For those circumstances where it is appropriate to provide *ipso facto* protection, the legislation should be amended so that it applies to all contracts in existence *before*, on, or after the commencement.

If this is cannot be practically achieved, a compromise would be to follow the precedent in the Unfair Contracts legislation, and provide *ipso facto* protection to contracts entered into, *or renewed or modified,* after the commencement.