THE LAW SOCIETY
OF NEW SOUTH WALES

29 July 2009

Attention: The Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

ALSO BY EMAIL

Dear Sirs,

Re: Trade Practices Amendment (Australian Consumer Law) Bill 2009

I am writing to you at the request of the Law Society's Corporate Lawyers Committee ("**Committee**"). The Committee has asked me to draw to your attention their concerns regarding the application of the Bill to the payment of premiums by companies for Directors & Officers Insurance Policies ("**D&O policies**").

Basis of Submission

The Committee's comments focus on Schedule 3, Part 2, Item 9 of the Bill which inserts a new s12GBD(1) into the Australian Securities and Investment Act 2001:

> *(1) A body corporate (the **first body**), or a body corporate related to the first body, must not indemnify a person (whether by agreement or by making a payment and whether directly or through an interposed entity) against any of the following liabilities incurred as an officer of the first body:*
> *(a) a liability to pay a pecuniary penalty under section 12GBA;*
> *(b) legal costs incurred in defending or resisting proceedings in which the person is found to have such a liability.*

Specific Concern

The Committee believes that the proposed s12GBD(1) creates ambiguity as to whether the payment of premiums for D&O policies by companies to insurers on an arms length basis falls under this provision. D&O policies cover the risk of wrongful acts committed by a person in their capacity as an officer or director. Such policies can also reimburse the policyholder for payments made by a company to its directors and officers for liabilities incurred whilst in that position.

Proposed section 12GBD(1) mirrors s77A of the Trade Practices Act and s199A of the Corporations Act. However, whereas s199B of the Corporations Act specifically states the liabilities for which a company cannot pay a premium for insuring an officer or director, s12GBD(1) and s77A do not do so. Therefore it is uncertain whether s12GBD(1) prohibits entirely the payment of an insurance premium which covers the prohibited liabilities by a company. There has been no case law on the interpretation of s77A to provide guidance on how proposed s12GBD(1) would be interpreted.

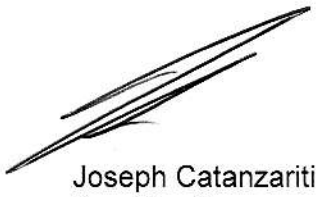
Committee's View

The Committee considers that an arms length insurer charging a commercial premium and not controlled by the company should not be considered to be an "interposed entity".

As such, the Committee considers that clarity is required as to the meaning of "interposed entity". If an insurer is considered to be an "interposed entity" for the purpose of s12GBD(1), then the company paying the premium for the D&O policy will be indemnifying a director or officer and will be in breach of the Act unless the policy excludes the prohibited liabilities.

If you wish to discuss the matters raised in this submission, please contact Ms Alexandra Rose, the Chair of the Corporate Lawyers Committee by telephone on (02) 9234 6760.

Yours faithfully,



Joseph Catanzariti
President