

THE LAW SOCIETY  
OF NEW SOUTH WALES

Our Ref: JC:AW

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31 July 2009

The Secretary  
Senate Economics Legislation Committee  
P.O. Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Sir,

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

The Law Society of New South Wales welcomes the opportunity of making comments on the above Bill.

The Bill has been reviewed by the Law Society's Business Law Committee ("Committee") and the views expressed are those of the Committee.

The Committee substantially supports the provisions of the Bill and makes the following observations:

**Payment of premiums for directors and officers' liability insurance cover ("D&O insurance")**

Schedule 3, Part 2, Item 9 of the Bill inserts a new section 12GBD(1) into the *Australian Securities and Investment Commission Act 2001 (ASIC Act)*.

Based on a literal reading of section 12GBD(1), a body corporate would be prohibited from paying premiums to an insurance company, which would cover directors and officers from the pecuniary penalties that are considered to be "Prohibited Liabilities".

Alternatively, if the term "interposed entity" were to be given a limited view, then it would appear that it would be permissible for payments to be made to insurers to cover the prohibited D&O liabilities.

The Committee generally supports the application of the literal approach regarding the interpretation of section 12GBD(1) of the Bill. A form of indemnity or insurance which shelters directors and officers from the consequences of a breach of section 12GBD(1) is inconsistent with the rationale of "Prohibited Liabilities". These liabilities are for categories of unconscionable conduct, where it is desirable for the consequences to be felt at an individual rather than a corporate level.


It may be possible to bring legislative clarity to this area by adopting language similar to that of the *Corporations Act 2001* in section 199B(1), which provides:

A Company or a related body corporate must not pay, or agree to pay, a premium for a contract insuring a person who is or has been an officer or auditor of the company against a liability (other than one for legal costs) arising out of...

An explicit reference to premiums in a contract of insurance would clarify the state of the law in section 12GBD(1).

If you have any questions, please contact Andrew Wilson, Executive Member of the Business Law Committee by phone on (02) 9926 0256 or by email to [andrew.wilson@lawsocnsw.asn.au](mailto:andrew.wilson@lawsocnsw.asn.au) .

Yours sincerely,



Joe

**Joseph Catanzariti**  
President