Senate Economics Legislation Committee

Inquiry into the Corporations Amendment (Repayment of Directors' Bonuses) Bill 2002

Submission No. 1

Submittor:

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Attachments? Attachment Included

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The Secretary Senate Economics Committee
Suite SG.64
Parliament House
Parkes ACT 2600

Dear Secretary

Corporations Amendment (Repayment of Directors' Bonuses) Bill 2002

We refer to your letter dated 16 December 2002 requesting submissions regarding the Corporations Amendment (Repayment of Directors' Bonuses) Bill 2002 ("Bill"). We are strongly opposed to the Bill.

Since the commencement of the Corporations Legislation Simplification process in 1993, and particularly under CLERP, all significant changes to the legislation have gone through an extensive public consultation process before a change is introduced into the Parliament in the form of a bill. That has not been the case with this Bill. AICD has unsuccessfully endeavoured to have our views heard on this subject for over twelve months. Indeed, it has been disappointing that our more recent requests to the Government for a copy of the Bill were rebuffed.

You will be aware that there have been a number of amendments made to the *Corporations Act* dealing with the rights of employees, especially in the context of insolvency in recent years. These amendments were introduced because there was a concern that employee's interests were not properly protected if a company went into liquidation and there were insufficient funds available to meet all creditors. Many of these changes have not yet been tested in the courts. The AICD made a number of submissions in relation to these earlier amendments. It believes that until the courts have been given an opportunity to assess that legislation, no further changes should be made to the *Corporations Act*. Such continued legislative tinkering has the chance of leading to inconsistencies arising in the interpretation of the legislation with the further prospect that other important provisions may be found to be inadequate.

Bearing this mind, AICD is keenly aware of the events of the last eighteen months, which have led to the intense public focus on a number of high profile company collapses. We recognise that it is imperative to respond to such public concern in a timely and constructive manner. However, by addressing such concern in a precipitous fashion in the form of the Bill, the Government has missed the opportunity of firstly promoting the full enforcement of existing law in the area. Extra resources should be provided to the Australian Securities and Investments Commission to investigate and, if appropriate, take action against such directors. Only if such existing law is found to be lacking, should there be legislative reform.

Moreover, the Bill in its current form focuses only on payments to directors, despite the fact that the current public controversy is centred on executive remuneration.

We also consider that the Bill could add considerable confusion, and litigation, to events surrounding company collapses. The difficulty of judging the 'unreasonableness' of a payment made up to four years earlier will probably lead to a proliferation of litigation. The Bill appears to require examination of the circumstances of the transaction through the eyes of a reasonable person at the time of the transaction. Will it be possible to disregard the benefit of hindsight in making this judgement? Most likely, the application of such a test will lead to arbitrary outcomes influenced by the fact that at some time within up to four years after the relevant transaction, the company went into liquidation. On this count, the Bill looks more like a means of punishing directors for the failure of their companies (irrespective of fault on their part) than a means of restoring value to creditors.

Although we are strongly opposed to the Bill in principle, we also recognise that it has momentum. We urge the Committee to address a number of aspects of the Bill that should be amended. Those matters are contained in schedule one to this letter.

Should you have any queries, please do not hesitate to contact me on (02) 8248 6630 or, Gabrielle Upton, Senior Policy Officer, on (02) 8248 6635.

Yours faithfully

Rob Elliott
Policy Manager

Schedule 1

- Substitute "extortiorate" for "unreasonable" as the test for a director-related transaction in s588FDA that is potentially subject to the new regime. The definition would then reflect the definition of *unfair loan* in s588FD.

- 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 to the effect 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".