

23 January 2003

Dr Kathleen Dermody
Secretary
Senate Economics Legislation Committee
Parliament House
Canberra ACT 2600



**Corporations Amendment (Repayment of
Directors' Bonuses) Bill 2002**

Dear Dr Dermody

The Australian Chamber of Commerce and Industry (ACCI) welcomes the invitation to make a submission to the inquiry by the Senate Economics Legislation Committee into the abovementioned Bill.

The ACCI represents over 350,000 businesses through Chambers of Commerce in each State and Territory, and a nationwide network of industry associations, making us the largest and most representative business association in Australia. Issues of corporate governance, such as those raised in this Bill, are important to our constituency.

Taken as a whole, the Chamber considers the Bill to be a focused and proportional approach to dealing with a fairly infrequent issue in corporate governance in Australia.

In this regard, we consider appropriate:

the general definition of "unreasonable" (in effect, would a "reasonable person in the company's circumstances" have entered into the transaction, taking into account the benefits and costs to the company of doing so: ss 588FDA);

certain of the circumstances of its application (where a company is being wound-up: ss588FE(1) and (6)); and,

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the nature of the remedy (the transaction may be voidable by a Court (ss 588 FE (1)), to the extent that it is unreasonable, the latter being the difference between that which is reasonable and the total amount (ss 588 FF(6)).

The Chamber, however, would propose two amendments to the Bill, the first concerning the definition of "circumstances" and the second relating to the "reasonable person" test.

Commerce and industry considers as inappropriate the concept of "circumstances" set down in the Bill (ss 588FDA(2)(b)): "applies to the transaction taking into account the circumstances as they exist at the time when the transaction is entered into (rather than as they existed at the time when the obligation was incurred)."

Such an approach, to our mind, is itself unreasonable, as it gives undue weight to developments which can take place up to four years (ss 588FE (6A)) after the obligation was incurred, and would appear to discount with the passage of time the context within which the undertaking was made.

In short, 'what was reasonable then may, with the passage of time and changes in context, not appear reasonable or as reasonable as it did then'. Alternately, commitments made in good faith at one point in time could be overturned, in part or in full, by developments outside of the control of the parties to that agreement.

The Chamber would propose ss 588FDA(2)(b) be amended to delete the term "(rather than as they existed at the time when the obligation was incurred)", thus defining "circumstances" as "they exist at the time when the transaction is entered into".

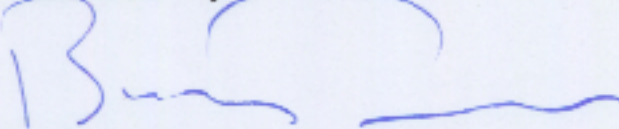
Commerce and industry would also seek an amendment to the proposed Section 588FDA, to give some context to the key concept of reasonableness, beyond the "reasonable person in the company's circumstances" set down in the Bill.

In this regard, we would like to see a new sub-section ((ss 588FDA(4)) requiring the Court to take into account any resolution by members of the company in general meeting regarding the payment(s) under review.

Potential text for a ss 588FDA(4) could be: "the Court shall take into account any resolution(s) by the members of the company in general meeting as to the reasonableness of specific director-related transactions."

Against this background, the Chamber would welcome the opportunity to meet and discuss with the Committee any of the matters raised in this submission, or any other matter of interest to them, related to the current inquiry.

Yours sincerely



Brent Davis

Directors, Trade and International Affairs